EMPLOYMENT TRIBUNALS

Claimant: **Mr Z**

Respondent: **Medway NHS Foundation Trust**

HELD AT: **London South (CVP)** **ON: 4-8 December 2023**
BEFORE: **Employment Judge Hart, Mr Sheath, Mr Huggins**

REPRESENTATION:
Claimant: **Ms Bennett (lay representative)**
Respondent: **Mr Jackson (counsel)**

The Tribunal Orders that:
1. the identity of patient A and the claimant be anonymised; and
2. the names of the wards that patient A stayed on and the identity of those who cared for her and / or those who worked with the claimant on those ward/s are also to be anonymised.

This information should not be disclosed to the public or included in any publication for the duration of the lifetime of patient A and the claimant. This order is made under Section 11(a) of the Employment Tribunals Act 1996 and Rule 50 of the Employment Tribunal Rules 2013.

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. **The claims for direct race discrimination do not succeed and are dismissed.**

2. **The claims for harassment related to race do not succeed and are dismissed.**

3. **The claim for indirect race discrimination does not succeed and is dismissed.**

4. **The claims for direct sex discrimination do not succeed and are dismissed.**

5. **The claims for harassment related to sex do not succeed and are dismissed.**

REASONS

INTRODUCTION

1. The claimant is a registered nurse who is male and of Asian Filipino background. He categorises himself as Black Asian and Minority Ethnic (BAME). In the course of his work a female patient (patient A) accused him of a serious sexual assault. The claimant's claim arises out of the respondent Trust's decision to report the claimant to the police, suspend him from work and refer him to the Nursing and Midwifery Council (NMC) (his professional body) and a claim that the respondent failed to progress his subsequent grievance. He claims that these decisions were direct race and / or sex discrimination / harassment or indirect race discrimination (referral to the NMC only).

2. It is important to state at the outset that whilst the allegation against the claimant was a serious one, he has not been charged with any criminal offence, the police investigation resulted in no charges against him and the internal investigation found no case to answer. He is now back at work. The case presented to us by both parties was on the basis that the claimant had been falsely accused and was therefore innocent. It was not disputed that this has understandably caused the claimant considerable distress and upset. Nothing in this judgment is intended to cause him further distress and upset. He came across at all times as an honest and open witness.

MATTERS ARISING DURING THE HEARING

3. The claimant was represented by Ms Bennett, a lay (non-legal) advocate. The respondent was represented Mr Jackson, counsel. The claimant only attended on days 1 and 2 of the hearing; this was his choice and his representative continued the hearing in his absence. The hearing was conducted by CVP.

4. We were provided with the following documents:
   - 4.1 An initial hearing bundles comprising of 431 pages. During the hearing additional pages were added to comprise a bundle of 468 pages. The references to page numbers in this judgement are to the pages in this bundle.
   - 4.2 Six witness statements.
   - 4.3 A respondent's chronology, cast list and reading list. The claimant confirmed that these had been agreed.

5. The claimant gave evidence on his on behalf and called Dr Emmanuel and Mr Fernando. The respondent called Ms Streatfield, Ms Fordham and Ms Wilson.

6. At the commencement of the hearing on day 1, we dealt with a number of preliminary issues including agreeing a hearing timetable, agreeing a list of issues and hearing submissions on whether to impose a restricted reporting or other privacy orders (see below).

7. Before we adjourned to read into the papers, we went through the documents

with the parties' representatives and confirmed that we all had the same documentation and could access it. We adjourned to read into the papers with the parties warned to attend at 2pm. The claimant was then called to give evidence and sworn in. On being asked whether he had the hearing bundle and statements in front of him, the claimant stated that in fact he had an older version of 385 pages. Ms Bennett then informed us that in fact she also only had an older version of the bundle. She confirmed that she had received the email from the respondent solicitors dated 29 November 2023 at 12:37 with the updated version but claimed that there was no attachment. We decided that the hearing should be adjourned to the next day, so that the claimant and his representative could obtain the up-to-date hearing bundle and familiarise themselves with the documentation. Further that the claimant should be taken off oath. The respondent raised no objection.

8. As part of the preliminary discussions on day 1 both parties were asked if any reasonable adjustments were required in relation to the conduct of the tribunal hearing; both representatives responded no. At the end of day 2 Ms Bennett raised that she had an unspecified disability and that that she had a personal assistant to help her navigate the documentation. She requested extra time to contact her assistant to help locate a document. She was given this extra time and was given further time during the rest of the hearing to locate documents.

9. On day 3 Ms Bennett failed to attend the afternoon hearing due to commence at 13:50, following the lunch adjournment. At 13:54 Ms Bennett sent an email to the respondent (which was then forwarded to the tribunal) stating "I have a family emergency. I had to leave my house immediately and cannot continue the hearing this afternoon. Im very sorry for inconveniences (sic)". We treated this as an application to postpone to the next day; the respondent raised no objection to the request being granted and we agreed to adjourn to 10am the next morning. The claimant was informed of this decision by email (copied to the respondent), and asked to confirm her attendance at 10am and the nature of the family emergency. She was also advised of the powers available to a tribunal if a party does not attend and is not represented. The next day Ms Bennett attended; she apologised stating it was a "dire emergency", but provided no further details. We decided to proceed without making any orders against the claimant, or his representative, on this occasion.

10. The evidence was completed at 16:05 on day 4. The representatives were asked as to their preference whether the tribunal should hear their submissions that day or at the beginning of day 5. Mr Jackson, on behalf of the respondent preferred to give oral submissions immediately. Ms Bennett, on behalf of the claimant, preferred to give her submissions the next day and Mr Jackson did not object to this. We agreed since this gave Ms Bennett the evening to consider her submissions. Following submissions, judgment was reserved, due to there being insufficient time to deliver an oral judgment.

11. During our deliberations Ms Bennett sent a document entitled "closing submissions". This had not been copied to the respondent. The tribunal forwarded the email to the respondent but received no response, and therefore we did not consider this document as part of our deliberations. Having

subsequently looked at this document we can confirm that it reflects the oral submissions made by Ms Bennett at the hearing, of which we had a full note.

MATTERS ARISING FOLLOWING THE HEARING

12. On 10 December 2023, following the conclusion of the hearing and our deliberations, Ms Bennett applied for the tribunal to consider some additional documents including a table compiled by Ms Bennett comparing the Chief Nurse table and HR table and 36 pages of documents "missing" from the hearing bundle. The tribunal were unable to open these documents, therefore on 13 December 2023 I ordered the claimant to resend the "missing" documents along with an explanation as to why they were relevant by 22 December 2023. The parties were informed that the tribunal had already compared the tables as part of its deliberations. The respondent was given a right of reply by the 13 January 2024. On 6 February 2024, the direction for the respondent's response was varied to 13 February 2024, because Ms Bennett had failed to copy in the respondent in her response dated 22 December 2023. On 19 February 2024, no response having been received from the respondent, I agreed that we would redeliberate to take into account the "missing" documents; no further hearing being required. We confirm that having considered these documents our decision remains as set out in this judgment. Whilst we accept these documents provide some background information they do not add anything to the central issues in dispute.

RESTRICTED REPORTING AND PRIVACY ORDERS

The Law

13. This case concerns an allegation by a patient A against the claimant of a sexual assault which is an offence under section 3 of the Sexual Offences Act 2003.

14. Section 1 of the Sexual Offences (Amendment) Act 1992 ("SOAA 1992") provides that:

> "*Where an allegation has been made that an offence to which this Act applies has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the person against whom the offence is alleged to have been committed".*

Sexual assault is one of the relevant offences to which the SOAA 1992 applies. Accordingly as the alleged victim of the offence of sexual assault patient A is entitled to anonymity for life There is no requirement under SOAA 1992 for the sexual offence to be proved; it is sufficient that an allegation has been made. Contravention of section 1 is a criminal offence: section 5(1). An employment tribunal judgment is considered to be a publication which must be anonymised: **A v X** [2019] IRLR 620 (EAT).

15. The tribunal's powers to order restricted reporting and / or other privacy orders are contained in Section 11 of the Employment Tribunals Act 1996 ("ETA 1996") and Rule 50 of the Employment Tribunal Rules 2013 ("ET Rules").

16. Section 11 of the ETA 1996 ("Restriction of publicity in cases involving sexual misconduct") provides that:

> *"(1) [Employment tribunal] procedure regulations may include provision—*
> *(a) for cases involving allegations of the commission of sexual offences, for securing that the registration or other making available of documents or decisions shall be so effected as to prevent the identification of any person affected by or making the allegation, and provision—*
> *(b) for cases involving allegations of sexual misconduct, enabling an [employment tribunal], on the application of any party to proceedings before it or of its own motion, to make a restricted reporting order having effect (if not revoked earlier) until the promulgation of the decision of the tribunal."*
>
> *(2) If any identifying matter is published or included in a relevant programme in contravention of a restricted reporting order—*
> *(a) in the case of publication in a newspaper or periodical, any proprietor, any editor and any publisher of the newspaper or periodical,*
> *(b) in the case of publication in any other form, the person publishing the matter, and*
> *(c) in the case of matter included in a relevant programme—*
> *(i) any body corporate engaged in providing the service in which the programme is included, and*
> *(ii) any person having functions in relation to the programme corresponding to those of an editor of a newspaper, shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.*
>
> *……*
> *(6) In this section— "identifying matter", in relation to a person, means any matter likely to lead members of the public to identify him as a person affected by, or as the person making, the allegation,*
> *……*
> *"restricted reporting order" means an order—*
> *(a) made in exercise of a power conferred by regulations made by virtue of this section, and*
> *(b) prohibiting the publication in Great Britain of identifying matter in a written publication available to the public or its inclusion in a relevant programme for reception in Great Britain, "sexual misconduct" means the commission of a sexual offence, sexual harassment or other adverse conduct (of whatever nature) related to sex, and conduct is related to sex whether the relationship with sex lies in the character of the conduct or in its having reference to the sex or sexual orientation of the person at whom the conduct is directed, "sexual offence" means any offence to which section 4 of the Sexual Offences (Amendment) Act 1976, the Sexual Offences (Amendment) Act 1992 or section 274(2) of the Criminal Procedure (Scotland) Act 1995 applies (offences under the Sexual Offences Act 1956, Part I of the Criminal Law (Consolidation) (Scotland) Act 1995 and certain other enactments), and "written publication" has the same meaning as in the Sexual Offences (Amendment) Act 1992."*

17. Rule 50 of the ET Rules ("Privacy and restrictions on disclosure") provides that:

> *"(1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public*

disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.

(2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.

(3) Such orders may include—

…..

(b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record;

…..

(d) a restricted reporting order within the terms of section 11 or 12 of the Employment Tribunals Act.

(4) Any party, or other person with a legitimate interest, who has not had a reasonable opportunity to make representations before an order under this rule is made may apply to the Tribunal in writing for the order to be revoked or discharged, either on the basis of written representations or, if requested, at a hearing.

(5) Where an order is made under paragraph (3)(d) above—

(a) it shall specify the person whose identity is protected; and may specify particular matters of which publication is prohibited as likely to lead to that person's identification;

(b) it shall specify the duration of the order;

….."

18. There is no requirement under Section 11 for the allegations of a sexual offence or misconduct to be proved. Section 11(1)(a), dealing with sexual offences, is expressed in mandatory terms and without a time limit on preventing identification, but only in respect of tribunal documentation. Section 11(1)(b) is broader since it also includes sexual misconduct, but unlike section 11(1)(a) is discretionary and limits the duration of any order to the promulgation of the judgment. Whilst not all sexual misconduct would amount to a sexual offence, all sexual offences would be considered sexual misconduct: **A v Choice Support Ltd & Oth** [2023] EAT 18. These provisions extend section 1 of the SOAA 1992, since the prevention of identification applies to any person "affected by" the allegation not just the person making the allegation: **A v X** [2019] IRLR 620 EAT. Where section 11(1) applies tribunals should also take care to prevent jigsaw identification under section 11(6); i.e. publication of matters that could lead to the person being identified.

19. Rule 50 is broader still; and there is arguably no limit on the orders that can be made under this rule: **A v Choice Support Ltd**. However an order may only be made where it is considered necessary in the interests of justice, to protect a convention right, or to protect confidential information (not in issue in this case). Further, when considering whether or not to make an order the tribunal

is required to give "full weight" to the principle of open justice and the convention right of freedom of expression. In other words rule 50 is seen as a derogation from the fundamental principle of open justice and the general rule is that hearings and judgments are public: see for example **Clifford v Millicom Service** [2023] EWCA Civ 50. It therefore should only be made in exceptional circumstances and should be limited to what is strictly necessary. The burden of establishing necessity lies on the person seeking the order and an order should only be made where there is clear and cogent evidence that such an order is necessary: **Fallows & Oth v News Group Newspapers Ltd** [2016] ICR 801 (EAT). Where it is proposed that the order be made in relation to a person who is not a party or a witness to proceedings, this is a relevant factor to take into account: **TYU v ILA Spa Ltd** [2022] ICR 287.

Orders made at the Commencement of the Hearing

20. At the commencement of the hearing we invited the parties to address us on whether we should impose an anonymity and / or restricted reporting order in relation to patient A. Neither party raised any objection and we decided to impose the following orders. The orders were:
    20.1 A permanent anonymity order under section 11(1)(a) to anonymise Patient's A's name and the wards in which she stayed in the tribunal's documentation and decisions. This was because patient A had alleged that she has been sexually assaulted, which was a sexual offence and therefore falls under the provisions of section 11(1)(a) (and SSOA 1992). The hearing bundle and witness statements were redacted by the parties and re-served on the tribunal.
    20.2 A restricted reporting order under section 11(1)(b), to remain in place until the promulgation of the judgment. The order was to restrict reporting of patient A's identity and the wards on which she stayed. This was in order to prevent the identification of patient A orally during the hearing. All those attending the hearing were informed of the order.
    20.3 A permanent anonymity order under rule 50 in respect to patient A on the grounds that it was necessary to protect a convention right, namely Article 8, the right to private and family life. This was clearly engaged since patient A was the alleged victim of a sexual assault, which would need to be referred to as it formed a background issue in this case. Since we were provided with no evidence that it was necessary to impose an order in the interests of justice, therefore no order was made under that ground. In balancing the privacy rights of patient A against the fundamental principle of open justice we took into account that two statutes expressly restrict the publication of the identity of a victim of a sexual offence: section 1 of the SSOA 1992 and section 11 of the ETA 1996. Further that patient A was not a party or witness to these proceedings and that her identity was a peripheral matter in this case. We considered that these matters significantly outweighed the public interest in her identity being known during the hearing or thereafter. Further we considered that the derogation from the principle of open justice was proportionate, being limited to the identity of patient A and the wards on which she stayed.

21. Neither party had applied to anonymise the claimant's name, or any other person's name, or any other identifying factor either during the hearing or at all. The parties were asked to address us by the close of the hearing as to whether the tribunal should impose any further orders; either in order to protect the identity of the claimant as being a person affected by the allegation or in order to prevent jigsaw identification of patient A.

Post-Hearing Orders

22. In relation to patient A, whose name and the wards on which she stayed was already anonymised under section 11(1)(a) of the ETA 1996 and rule 50, we have decided to extend the permanent anonymity order to include persons who cared for her on the ward/s. This is in order to prevent jigsaw identification of her identity. Accordingly we order that the nurse be referred to as nurse B, the matron as matron C, and the claimant as Mr Z. This means that any documents entered onto the Register or otherwise forming part of the public record should be anonymised, and the identity of patient A, the wards she stayed in and the identity of those who cared for her on that ward should not be included in any publication or referred to, for the duration of the lifetime of that person. The parties did not consider that it was necessary to extend the order to the respondent's identity or the identity of the witnesses in this hearing.

23. In relation to the claimant, Ms Bennett sought anonymisation of his name and those with whom he worked on patient A's ward. The respondent did not oppose this application and stated that its position was neutral. We have decided that the identity of the claimant should also be anonymised in his own right under section 11(1)(a) as a person "affected" by the allegation. This provides him with life-long anonymity.

24. Further or alternatively, we have decided that the claimant's identify should be anonymised under Rule 50. In reaching this decision we took into account the following factors:
    - 24.1 The claimant had chosen to bring the claim and was not an uninterested third party.
    - 24.2 The fundamental principle of open justice includes hearings, judgment and orders being public and being able to report on the identity of those involved.
    - 24.3 On the other hand, the subject matter of this case engaged the claimant's Article 8 rights (right to privacy and private life), since it concerned an allegation of sexual assault. This is a serious allegation and has the potential to significantly damage the claimant's reputation, personal and professional relationships.
    - 24.4 The claimant was an open and honest witness and told us of his "severe embarrassment and shame" on being arrested and falsely accused and the impact on his mental health.
    - 24.5 The allegation of sexual assault was dismissed as unproven following an extensive police investigation and internal investigation by the respondent.
    - 24.6 Statute expressly gives us the power to restrict publication of the identity of a "person affected" by an allegation of sexual offence (ETA

1996 Section 11).

Taking all the above into account, we considered that the convention rights of a person falsely accused of a sexual assault, outweighed the public interest in knowing his identity. Accordingly, we decided that a limited derogation to the principle of open justice to protect the claimant's convention rights was necessary. This could be done through an anonymity order prohibiting the publication of the claimant's name, the ward on which he worked, the identity of the patient that he cared for (patient A) and the identity of those who worked with him on the ward, namely nurse B and matron C. Such a derogation would still enable the case to be reported.

25. Ms Bennett did not seek anonymity of the respondent's identity or the identity of witnesses in this hearing, and we were provided with no evidence to suggest that this was necessary to prevent jigsaw identification. We accept that there is a public interest in naming a respondent in a discrimination case. If the allegations are proven then the respondent can be held to account. If the allegations are unproven then it enables the respondent to refer staff and members of the public to the reasons why the claim did not succeed. We took into account that the respondent was a large employer and that the persons whose names are not anonymised were senior personnel with wide briefs and therefore would not be associated with the claimant.

THE CLAIMS AND ISSUES

26. Following discussion with the parties the agreed list of issues was as follows:

"The Claimant is of Asian Filipino background and categorises himself as BAME.

1 Indirect Race Discrimination

1.1 Did the Respondent have the following provision, criterion or practice (PCP) in place?

1.1.1 Practice of referring nurses to the Nursing and Midwifery Council (NMC) for matters of misconduct.

1.2 Did the Respondent apply that PCP to the Claimant?

1.3 Did the Respondent apply that PCP to persons with whom the Claimant does not share the characteristic?

1.4 Did that PCP put, or would it put, other people with whom the Claimant shares the characteristic of being of BAME origin at a particular disadvantage compared to people without that characteristic?

1.5 If so, what was / would be the disadvantage?

1.5.1 Putting their nursing licenses at risk.

1.5.2 His nursing licence was put at risk (His license was suspended for 18 months);

1.5.3 Not being able to work during the suspension period;

1.5.4 The shame and embarrassment of having his license suspended.

1.6 If so, did that PCP put the Claimant at a particular disadvantage?

1.7 If so, can the Respondent show that the application of the PCP was a proportionate means of achieving a legitimate aim? The Respondent will say the legitimate aim was:

1.7.1 Ensuring its nursing staff upholds the professional standards of practice and behaviour that is required of them by the NMC;

1.7.2 Safeguarding patients and ensuring quality of care.

2 Direct Race Discrimination

2.1 Has the Respondent treated the Claimant less favourably than it treated or would treat others? The Claimant alleges that the following acts or omissions of the Respondent constitute discrimination on the grounds of race:

2.1.1 Suspending the Claimant from work on 7 October 2021;

2.1.2 Reporting the alleged incident on 4 October 2021 to the police;

2.1.3 Referring the Claimant to the NMC;

2.1.4 Not progressing the Claimant's grievance.

2.2 If there has been less favourable treatment, was the reason for such treatment the protected characteristic of race?

2.3 In respect of the allegations of discrimination on the grounds of the Claimant's race, the claimant relies on a hypothetical comparator of a white nurse with an immaculate working history who has worked for the same time and would not have been suspended, reported to the police and subsequently referred to the NMC.

3 Harassment related to Race

3.1 Did the Respondent act as follows:

3.1.1 Suspending the Claimant from work on 7 October 2021;

3.1.2 Reporting the alleged incident on 4 October 2021 to the police;

3.1.3 Referring the Claimant to the NMC;

3.1.4 Not progressing the Claimant's grievance.

3.2 If the Respondent did any or all of those things, did such action or inaction amount to unwanted conduct related to the claimant's race?

3.3 If so, did the conduct have the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, having regard to all the circumstances and whether it is reasonable for it to have that effect?

4 Direct Sex Discrimination

4.1 Has the Respondent treated the claimant less favourably than it treated or would treat others? The Claimant alleges that the following acts or omissions of the Respondent constitute discrimination on the grounds of sex:

4.1.1 Suspending the Claimant from work on 7 October 2021;

4.1.2 Reporting the alleged incident on 4 October 2021 to the police;

5.1.3 Referring the Claimant to the NMC;

4.1.4 Not progressing the Claimant's grievance.

4.2 If there has been less favourable treatment, was the reason for such treatment the protected characteristic of sex?

4.3 In respect of the allegations of discrimination on the grounds of the Claimant's sex, the Claimant relies on a hypothetical comparator of a female nurse with an immaculate working history who has worked for the same time and would not have been suspended, reported to the police and subsequently referred to the NMC.

5 Harassment related to Sex

5.1 Did the Respondent act as follows:

5.1.1 Suspending the Claimant from work on 7 October 2021;

5.1.2 Reporting the alleged incident on 4 October 2021 to the police;

5.1.3 Referring the Claimant to the NMC;

5.1.4 Not progressing the Claimant's grievance.

5.2 If the Respondent did any or all of those things, did such action or inaction amount to unwanted conduct related to the Claimant's sex?

5.3 If so, did the conduct have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, having regard to all the circumstances and whether it is reasonable for it to have that effect?

6 Remedy

6.1 Is the Claimant entitled to an award for injury to feelings and, if so, at what level?"

FACTUAL FINDINGS

27. We have only made findings of fact in relation to those matters relevant to the issues to be determined. The facts are largely not in dispute. Where there were facts in dispute, we have made findings on the balance of probabilities. We confirm that we have taken into account all the documentation and evidence before us, and if something is not specifically mentioned, that does not mean that we have not considered it as part of our deliberations.

Introduction

28. The claimant defines himself as a male Asian Philippino and he categorises himself as Black Asian and Minority Ethnic (BAME). He had worked as a nurse in the Philippines for 7 years before he came to the UK in April 2021 having been directly recruited.

29. On 2 April 2021 the claimant commenced employment with the respondent, a large NHS trust, as a nurse on a substantive contract.

Policies and Codes of Practice

30. The respondent has a Managing Safeguarding Allegations against Staff Policy (Safeguarding Policy) (**pg 341-353)** which provided that:
    30.1 Para 1.2: "*The purpose of this Policy is to provide a framework for managing cases where allegations are made about NHS staff that indicate that children, young people or adults at risk are believed to have suffered, or are likely to suffer, significant harm".*
    30.2 Para 1.3: The definition of abuse includes "sexual abuse" and identified 3 possible responses to an allegation including a police investigation and an internal disciplinary investigation. It further provided that the police investigation is to be prioritised.
    30.3 Para 2.5: "*Serious allegations may need to be reported by the manager/Matron/Safeguarding Lead directly to the Police and Social Services".*
    30.4 Under the heading "The Allegations Management Procedure" para 2.8: "*When safeguarding allegations about Trust staff are raised, a local investigation should not take place before discussing with the Head of Safeguarding or relevant safeguarding lead as this might conflict with any wider investigation that is required involving external agencies."*
    30.5 Para 2.12: *"The possible risk of harm to patients, posed by the individual staff member in question needs to be evaluated and managed effectively. In some cases this requires the employer to consider*

suspending the person. Suspension should be considered in any case where there is cause to suspect a child or an adult is at risk of harm, or the allegation warrants investigation by the Police. However under 2.13 the police cannot require that a member of staff be suspended, although their view can inform the decision."

30.6 Para 2.13: *"Neither the Police nor Social Care can require an employer to suspend a member of staff. Where however, Social Care are involved or there is an investigation by the Police, their views should inform the employer with regard to that decision."*

30.7 Para 2.14: "*Where the allegation concerns physical harm consideration should also be given to preserving evidence".*

30.8 Para 2.21: "*If a police investigation is required the Head of Safeguarding and the appropriate Safeguarding Lead will work closely with the police to ensure that the investigation is undertaken in a timely manner. If it is decided that a possible crime may have taken place, a decision to report the incident to the police will be agreed between the Head of Safeguarding and Safeguarding Lead. The incident will then be referred to the multiagency procedures for allegations concerning adults or children at risk via Social Care. The investigation will then be led by the Police who will work closely with the Safeguarding Lead and Employee Relations team. In addition to police investigation, an internal investigation will also need to be completed."*

31. The respondent also has a Patient Complaint and Feedback Management Policy (Patient Complaint Policy) (**pg 375–400)** which provided that:

31.1 Section 13: "*Whilst the Trust operates a no blame culture to ensure effective and continuous quality improvement, during the course of a complaint investigation it may be necessary to consider Human Resources (HR) processes such as Disciplinary Action. Where this is required, information gathered during the complaint investigation may be made available to the HR process.*

…..

Where a complaint indicates the need for a referral to the disciplinary procedure or one of the professional regulatory bodies such as the NMC or GMC, or has the potential to be a criminal offence, the Chief Nursing Officer and Chief Medical Officer must be notified.

The Complaints procedure will only commence where the investigation will not compromise or prejudice a concurrent HR or police investigation and will have been considered by the Head of Corporate Governance, Legal and Information Governance".

32. The respondent has a Disciplinary Policy (**pg 299-340**) which provided that:

32.1 Para 5.5: "*In serious cases, the Trust may have a responsibility to inform external bodies such as the police, GMC, HCPC and NMC….";*

32.2 Para 5.6: an allegation that an employee "*possibly committed a criminal offence against or related to a child or adult*" should be referred to the Head of Safeguarding, and other senior personnel who will notify external parties "as appropriate".

32.3 Para 9.1: "*Suspension from duty may be necessary while an*

investigation is carried out, e.g. where:

- *there is alleged gross misconduct,*
- *serious criminal charges have been brought against the employee, or there are allegations of criminal activity,*

…

- *interests of the employee, patients, colleagues, the public or the Trust are at risk".*

32.4 Para 9.6: "*Suspension should only be used after careful consideration and should be reviewed to ensure it is not prolonged unnecessarily. It should be made clear that the suspension is temporary, not an assumption of guilt and not a disciplinary sanction".*

32.5 Para 9.7: *"Consideration should be given to whether alternatives to suspension, such as different duties, restrictions on clinical practice, or a change in work location or shift pattern, would be appropriate".*

32.6 Para 9.13: *"If the suspension relates to a registered clinical professional, the employee will be required to self-refer as necessary to the appropriate professional governing body, informing them of the allegation. The suspending manager will inform the employee to refrain from clinical responsibilities outside the Trust. If any employee fails to self-refer as required, the Trust may make the referral on their behalf."*

33. We were also referred to the NMC Code of Practice (**pg 401-426**), which is the professional code of conduct setting out the standards that registrants required to comply with. The Code required registrants to self-refer where they have been subject to a caution or charge, received a conditional discharge or been found guilty of a criminal offence: **pg 424**. That this was mandatory requirement was confirmed in an email to the claimant's representative dated 23 August 2023: **pg 433-434.**

34. Finally, an NMC leaflet for employers entitled "Our services for employers" stated that "*we don't need to be involved every time you have a concern about a nurse…… you must always report a case to us if you believe the conduct, competence, health or character of a nurse of midwife presents a risk to patient safety*": **pg 438**

Chronology of Events

35. Around 28/29 September 2021 patient A, a white adult female, was admitted to the respondent's hospital presenting with non-epileptic seizures. These are seizures with a psychological rather than physical cause. She was prescribed medication including Lorazepam which has the known side effects of drowsiness and "can" cause hallucinations. There is no evidence that patient A did in fact suffer any hallucination.

36. On 5 October 2021 the claimant was allocated to care for patient A.

37. At 12:00 patient A's stepmother raised a concern that patient A was not getting adequate care as she was at the back of the ward: **pg 81**. There is no suggestion that this was in relation to the care that the claimant was providing, that it was directed at the claimant or anything that the claimant had done.

38. In the afternoon patient A had a prolonged seizure. At 16:00 the senior house officer attended and prescribed patient A with Lorazepam. The incident report recorded that patient A was "*alert and has no post-ictal [post-seizure] phase. Conscious and orientated*": **pg 81**. Around 17:00 patient A informed a clinical support worker (CSW) that "the male nurse" had molested her. The CSW informed nurse B, who then spoke to patient A. Patient A told nurse B, in the presence of her boyfriend, that the male nurse who was looking after her had sexually assaulted her by "*groping her left breast and putting his hand down her trousers touching her private part"*: **pg 81 and 167**. Patient A informed nurse B that she has awareness when she has her seizures: **pg 167**.

39. The only male nurse who had looked after patient A that afternoon was the claimant. Nurse B informed the claimant that the patient had accused him of touching her inappropriately but provided no further details. He responded, *"why would she say something like that".* We accept the claimant's evidence that he was in shock and could not believe what he was hearing.

40. At 18:02 nurse B reported the incident to matron C who in turn reported it to Ms Streatfield (Head of Nursing for the Therapy and Older Persons Care Group). Ms Streatfield was on her way home and advised that matron C contact Ms Beth Williams (Divisional Director of Nursing) who was on site. The complaint and extracts from the patient's notes, along with a note of action taken, were recorded on an Incident Report (referred to by the witnesses as Situational Background Actions and Recommendations ("SBAR")): **pg 80-81**. Ms Streatfield, in evidence stated that patient A had written a "note", however she had not read this note and thought that this information had come from nurse B. We find that Ms Streatfield has misremembered the existence of a note; there is no reference to any note from patient A in the documentation nor in Nurse's B's or matron C's investigation interviews: **pg 157-161; 165-169.**

41. Ms Williams attended the ward and told the claimant to go home. She advised him to write a statement to give to the police and NMC, but did not provide him with any further information about the allegation or ask him any questions. An email dated 6 October 2021 records a comment by matron C that "we are unsure as to what can be shared with the claimant": **pg 84**. We find that this was the reason the claimant was not asked any questions at this meeting. The claimant's recollection was that Ms Streatfield was present at this meeting, but Ms Streatfield's evidence was that she was on her way home. Neither party was cross examined on this discrepancy and we were not addressed on this in closing submissions. We find that Ms Streatfield was not present at the meeting on the 5 October 2021 since there is nothing in the documentation to suggest that she was.

42. Sometime between 5 October 2021 at 18:02 and 6 October 2021 at 12:35, Kent police attended the hospital and interviewed patient A: **pg 84.** It is not known who made the decision to refer the matter to the police. Ms Streatfield thought it was matron C or Ms Williams. Ms Fordham also thought it was matron C, but was not sure. Ms Fordham's evidence was that the decision to refer to the police was a standard requirement under the Care Act 2014, and was in line

with the respondent's safeguarding policies since this was an allegation of both abuse by a person in a position of trust and a potential crime. It was also an allegation that could require the removal of physical evidence for forensic analysis e.g. bed sheets, gloves etc. Her view was that the claimant should not have been sent home since this could have compromised forensic evidence, and instead he should have been asked to remain on the premises until the police arrived. Ms Streatfield accepted that not all allegations made by patients were automatically referred to the police, stating it would depend on the seriousness of the allegation. She gave an example of a complaint made by two staff against a female BAME nurse that she had slapped the leg of an elderly patient under a deprivation of liberty order (**comparator 1**). We accept that this allegation was less serious than that against the claimant. In that case the nurse was not suspended but instead moved to a non-clinical role. The police were informed following a multi professional meeting but were happy for the respondent to conduct their own internal investigation.

43. On 6 October 2021, matron C spoke to Ms Shears (Safeguarding Practitioner) about the allegation. She reported that patient A had told her boyfriend that the nurse "*grabbed her boobs and inserted a gloved finger into her vagina*": **pg 84**. Ms Shears sent an email of her conversation with matron C to Ms Fordham (Head of Safeguarding) copied to Ms Streatfield and others**.** Ms Fordham advised that CCG and CQC be informed and that *"the suspension checklist should be undertaken and the staff member in question prevented from working until a full investigation is undertaken":* **pg 91.**

44. The same day the claimant was arrested from home and interviewed by the police, following which he was bailed with conditions including "*not to contact or interfere with, either directly or indirectly, any prosecution witnesses namely [redacted] for any reason"*: **pg 86.** We accept his evidence that he found this to be distressing and humiliating.

45. On 7 October 2021, Ms Fordham, Ms Williams and Ms Streatfield met to discuss patient A's complaint, referred to as a multi-professional meeting or a "huddle": **pg 90.** There are no notes of this meeting. Ms Streatfield's evidence was that notes were not normally taken at such meetings, since the actions would be recorded on SBAR. It was decided that the claimant be suspended on full pay pending investigation with immediate effect and that a referral should be made to the NMC due to the serious nature of the allegation. The claimant had not been spoken to, nor had the respondent conducted its own investigation, prior to this decision being made. Both Ms Fordham and Ms Streatfield informed us that it was not their decision to make and stated that the decision was made by Ms Williams.

46. Following this meeting the claimant was informed by Ms Streatfield that he was to be suspended. The claimant was informed that suspension was a neutral act. He was advised to consult a trade union and to refer himself to the NMC: **pg 95-96.** The same day the claimant self-referred himself to the NMC: **pg 93.**

47. On 8 October 2021, matron C gave patient A an apology and informed her that an investigation would take place, in accordance with the respondent's "Duty of

Candour": **pg 97**. She completed the Duty of Candour Form ticking the box for "appropriate apology / regret for harm caused". Ms Streatfield explained to us that under the duty of candour all patients who make a complaint are given an automatic apology and told it would be investigated. Matron C then completed a Rapid Review Form: **pg 98.**

48. On 11 October 2021 the police emailed Ms Williams to request documentation relating to the incident: **pg 103-104**.

49. On 15 October 2021, Ms Streatfield completed an NMC referral form: **pg 442-451.** Under the heading "About the working environment at the time" she was asked "would another nurse ….. in the same situation, have done the same thing". She responded "no" and then in the next box to explain her answer she put "not relevant question". Ms Streatfield in cross examination explained that "no" should have been "not applicable", but she could not recall whether that was an option.

50. On 26 October 2021, the claimant informed Ms Macey (Employment Relations) during a telephone conversation that his bail conditions had been lifted but he remained under police investigation**.** Ms Macey informed him that his suspension from work remained in place until the respondent was able to conduct its own investigation. Ms Macey then emailed Ms Watson (Senior Sister) (copied to Ms Streatfield and Ms Fordham) to inform her of this conversation and commented that the claimant understood this process **pg 107**.

51. The same day the claimant telephoned Mr Francis Fernando, Founding Director of the Filipino Nurses Association UK, in a distraught state. Mr Fernando agreed to contact the Philippine Embassy about his immigration status if he was not able to work.

52. On 2 November 2021, the NMC Investigating Committee imposed an 18-month interim suspension order on the claimant in order to protect the public and maintain the reputation of the profession: **pg 113.** In its reasons the NMC referred to the allegation as being "extremely serious" since it "*related to a sexual assault of a female and otherwise vulnerable patient that was having a seizure"*: **pg 117**

53. On 3 November 2021, Ms Streatfield, Ms Macey and Ms Shears attended a review meeting: **pg 122.** It was agreed to email the police for an update. The police informed the respondent that the investigation was ongoing: **pg 122.**

54. On 11 November 2021 the claimant appointed Ms Neomi Bennett, founder and CEO of Equality 4 Black Nurses (E4BN), to represent him: **pg 129.**

55. On 8 November Ms Macey conducted a welfare catch-up call with the claimant. He confirmed that he was "OK" and had a support network in place.

56. Following the 17 November 2021 review meeting, Ms Shears again emailed Kent police for an update stating that the respondent was "keen" to undertake

its own investigation "as soon as possible": **pg 123 and 202**. Kent police responded that they were still awaiting material and did not have an update: **pg 202**. The police response was forwarded to Ms Streatfield, Ms Macey and Ms Spencer.

57. On 19 November 2021 Ms Macey sought legal advice as to whether the respondent could commence its internal investigation in parallel with the police, stating that historically the respondent had not done so: **pg 130**. Ms Macey was advised that an internal investigation was "different to the police investigation" and therefore the respondent could commence to take a statement from the claimant and collect facts and information "before memories fade further". On 30 November 2021 Ms Macey informed Ms Streatfield of this advice and proposed interviewing the claimant "over the next few days": **pg 201.** Ms Streatfield responded stating that this was not a decision that she could make and asked Ms Williams for her view. Ms Williams responded stating that this had been discussed with Ms Emma Wilson (Head of Employee Relations) and that: *"We need to check the progress of the police investigation before we proceed with any internal ER investigation. Although I agree the ER process is different from the police investigation, we need to be clear that we do not adversely affect the police and legal process. Emma [Ms Wilson] will liaise with the Safeguarding team to establish the progress of the police investigation. After this we will decide what our next steps are before beginning any internal investigation…":* **pg 200.** Ms Wilson took over responsibility for liaising with the police.

58. On 8 December 2021 the claimant was signed off sick with work related stress. He continued to be signed off sick until 8 February 2022: **pg 156.**

59. On 21 December 2021 a further review was conducted by Ms Shears, Ms Streatfield and Ms Macey. It was noted that Ms Sarah Llewellyn was having regular catchups with the claimant: **pg 140.** It was also noted that there was no police update, and it was agreed to contact the police: **pg 124.** The same day Ms Wilson emailed the police asking whether the respondent could commence its internal investigation process: **pg 144.**

60. On 21 December 2021, Ms Bennett from EQ4N emailed the respondent under the subject "Concerns [Mr Z]" stating that the claimant had asked her to represent and support him. She requested documentation include the disciplinary and grievance procedures, evidence relating to the complaint and an explanation as to why there had been a delay in the respondent's investigation. She stated that "*we are concerned to learn that you failed to carry out an investigation before taking action*" and stated that the decision "*to suspend [the claimant], report to the NMC and police might be racially motivated and that unconscious bias may have influenced the way he has been treated in the handling of the investigation*". She asked that her email be accepted as a "formal complaint" in relation to the treatment received by the claimant and "*we are hoping that this grievance will enable us to consider the evidence you have to fully substantiate the allegations against our Nurse and prevent us from having to take further steps (as mentioned above) to obtain Justice for our Nurse*": **pg 133.** This is the document that the claimant relies upon as his grievance.

61. On 24 December 2021, Ms Wilson acknowledged receipt of the complaint raised by EQ4N and stated that the respondent was seeking advice about the EQ4N's request for information: **pg 138**. No substantive response was provided to Ms Bennett, although it was to the claimant (see below). Ms Bennett did not pursue the matter.

62. The same day Ms Wilson chased the police for a response to her email of the 21 December 2021: **pg 143.** In addition, Ms Llewellyn wrote to the claimant to conduct a welfare check since she had been unable to contact him by telephone: **pg 140.**

63. On 29 December 2021, Kent police informed Ms Wilson that the criminal investigation was ongoing, that it was being discussed with the CPS with the potential that the claimant could face charges of sexual assault: **pg 143.** In response to Ms Wilson's request as to whether the respondent could commence its own internal disciplinary process, Kent police wrote: *"Your internal investigation can progress however I would be concerned that it could be finalised whilst he is still under investigation for a serious sexual offence. Would this mean that he would potentially resume work?"*

64. On 4 January 2022, Ms Wilson responded to Kent police stating that if the respondent conducted an internal investigation and concluded that there was no case to answer then the claimant would be allowed to return to work. Following a further chasing email on the 10 January 2022, Kent police replied stating that they cannot stop the respondent from conducting its own internal investigation but that "*until our investigation has been completed, Mr Z should not return to work*": **pg 142.**

65. On 10 January 2022, Ms Wilson wrote to the claimant to update him on the investigation process stating that the respondent's investigation could not commence whilst the police investigation was ongoing: **pg 146.** In this letter Ms Wilson informed the claimant that the respondent had received direct communication from an external organisation who was not recognised as a trade union (this is a reference to the E4BN). He was informed that "*we cannot discuss this matter with them on your behalf or share information with them, therefore should you have any queries or concerns at this time you will need to contact the trust directly*". He was advised to contact the local trade union or professional bodies for advice and given a list of more general support and contacts. The claimant did not respond to this letter. He admitted in evidence that he did not pursue his grievance personally at any point. In re-examination he said that this was because the respondent was going to take him back, but he was unable to remember who informed him of this.

66. On 21 January 2022, Ms Streatfield commissioned an investigation under the Trust's Disciplinary Policy. Ms Almarie Latibudiere (Frailty Nurse Specialist Lead) was appointed as the investigator: **pg 148.**

67. On 26 January 2022, Ms Latibudiere wrote to the claimant to invite him to an investigation interview and informed him of his right to be accompanied by a

trade union representative or work colleague not acting in a legal capacity: **pg 153.**

68. On 31 January 2022, Ms Bennett requested that the respondent use its discretion to permit the claimant to be represented by someone from E4BN, since he was an overseas nurse who had only been in the country for six months, he had not had an opportunity to join a recognised trade union, and his relationship with work colleagues had become fragmented and compromised due to the nature of the allegations against him.

69. On 4 February 2022, Ms Latibudiere interviewed the matron C and nurse B who both gave accounts of their contact with patient A: **pg 157-161; 165-169.** Matron

70. On 11 February 2022, after further representations by Ms Bennett, the respondent agreed that, due to exceptional circumstances, the claimant could be accompanied by E4BN in the same capacity as a work colleague: **pg 239.**

71. On 15 February 2022, Ms Latibudiere interviewed the claimant: **pg 243**. Following the meeting Ms Wilson emailed the claimant to provide him with the information received from the police by email on the 10 January 2022: **pg 240.** On the 18 February 2022 Ms Bennett responded asking the respondent to obtain an update from the police "in light of the new developments"; the last contact being 5 weeks ago: **pg 171.**

72. On 21 March 2022, Ms Wilson asked Kent police for an update stating that *"we are holding off concluding our internal investigation process, as per your last e-mail that [Mr Z] should not return to work until your investigation has been completed"*: **pg 176**. Kent police responded stating that the case had been discussed with the CPS the previous week and that the investigation was ongoing and that they were working to a deadline of 3 months: **pg 176.**

73. On 1 April 2022 Ms Spencer asked Kent police for an update: **pg 190.** Kent police responded on the 6 April 2022 stating that the matter was currently under investigation. Ms Spencer asked if the police were happy for the respondent to commence its internal investigation to which the response was the same as previously, that they could not stop the respondent conducting an investigation but that the claimant should not return to work until the police investigation had been completed: **pg 195.**

74. On 20 April 2022 Ms Wilson responded to the police asking for "*any further information to us regarding [Mr Z] not being able to return to work? Is this still your instruction?":* **pg 211.**

75. The same day the NMC Investigating Committee reviewed and continued the interim suspension order: **pg 181**

76. On 21 April 2022, Ms Wilson wrote to the claimant to confirm his suspension from work remained in place and stated*: "We continue at this stage to be unable to progress with our internal investigation process. As the police are investigating the allegations made against you, we require confirmation from*

the police that our process will not interfere with their own and they have no concerns with us proceeding": **pg 186.** The claimant was informed that the police had been asked for an update.

77. On 5 May 2022, Ms Wilson sought an update from Kent police. On 9 May 2022 Kent police replied informing her that the investigation was ongoing and that the police were still working towards the 3 month deadline. Ms Wilson again asked about the instruction that the claimant not return to work and was informed that "*our advice still stands the same"*: **pg 209-210.** Ms Wilson then emailed the claimant to inform him of the update provided by the police: **pg 249.**

78. On 4 July 2022, Ms Wilson sought a further update from Kent police referring to the 3-month timescale indicated in March: **pg 209**. On 7 July 2022 Ms Tamplin (Safeguarding Advisor) also sought an update from Kent police: **pg 189.** When no response was received, on 18 July 2022 Ms Spencer emailed the police stating that the respondent was "urgently awaiting" the outcome of the police investigation and asked for a prompt response: **pg 189.** Kent police responded the same day stating that the delay was due to awaiting a statement from a consultant at the hospital. Ms Spencer responded requesting details so that she could chase up internally: **pg 189.** On 19 July 2022 Kent police emailed Ms Fordham setting out the information that had been requested from the consultant which included information about the nature of patient A's seizures, the medication that she was prescribed, and whether these could have affected her perception of things or ability to recall events, in particular whether this could have caused patient A to hallucinate that she was being sexually assaulted: **pg 205.** The respondent took steps to provide this information to the police: **pg 204-205**.

79. On 22 September 2022 Kent police confirmed that they had received the consultant's statement but that they were still seeking a statement from nurse B: **pg 204.**

80. On 29 September 2022 Ms Wilson emailed the police stating that they now had the statement for the consultant and asking for further indication as to progress and time scale. Ms Wilson stated that "*we are very aware that this individual has now been suspended from the workplace for almost a year. With agreement, we commenced our internal investigation process but did not conclude under the instruction from yourselves that [Mr Z] could not return to the workplace. We do have a duty as an employer to conclude such matters within a reasonable time scale, and from our internal investigation the evidence has been limited and therefore we would be in a position of being challenged from an employment perspective as to having clear reasons for continuing this suspension, especially in consideration of the substantial amount of time this has been in place*": **pg 208.**

81. On 1 October 2022 Kent police responded that they are waiting for a statement from another consultant: **pg 206.**

82. On 3 October 2022 Ms Wilson sent a further e-mail with substantially the same request as that on the 29 September 2022: **pg 207.**

83. On 5 October 2022 Kent police apologised for the delay and stated that: "*I understand it is frustrating having a member of staff suspended, but he is under investigation for a really serious offence, and would be working with vulnerable people going forward, which is why our recommendation is for him to not go back to work":* **pg 207**

84. On 11 October 2022, the NMC Investigating Committee continued the interim suspension order: **pg 215.**

85. On 20 October 2022, Kent police informed Ms Spencer by email that the criminal investigation was still ongoing and continued to recommend that the claimant not return to work pending completion of the investigation: **pg 207.**

86. On 22 November 2022, Kent police informed Ms Spencer (copied to Ms Fordham) by email that the criminal investigation has concluded and that "*there will be no further action*": **pg 220.** This was forwarded by Ms Fordham to Ms Wilson and Ms Streatfield on the 23 November 2022: **pg 220.**

87. On 14 December 2022, Ms Latibudiere completed the Disciplinary Investigation Report: **pg 222.**

88. On 18 January 2023, Ms Streatfield wrote to the claimant to confirm the disciplinary investigation had concluded and that no further action will be taken: **pg 228.** The report outlined the following findings:
"You were the staff nurse that was assigned to [patient A] on 5th October 2021. At the time of the incident, [matron C] reported leaving you for a short period on your own with patient A, whilst she was having seizures so that [matron C] could go and get the doctor to come and review … the patient. There were no witnesses present at the time when [patient A] made the allegation that you had physically molested her. It was established that the curtains were closed. Evidence suggested that the patient had her eyes closed and was thrashing around when having seizures.
You denied the allegation made by [patient A], stating that you only put your hands on her shoulder whilst the doctor was examining her.
There was no further evidence to corroborate the allegations made.
Based on this evidence, I have determined that the process will not proceed to a disciplinary hearing, and I have concluded that in this instance there is no case to answer regarding the allegations made against you. This case will therefore be closed, and no further action will be taken against you."

89. On 6 February 2023, the claimant returned to work.

90. On 17 December 2021, the claimant commenced early conciliation. The early conciliation process concluded on 4 January 2022. On 26 January 2022, the claimant submitted his claim form.

Statistical / Comparator Evidence

91. We were provided with a table of nurses and midwives referred to the NMC by the Chief Nurse between 5 April 2019 and 8 July 2022: **pg 267** ("Chief Nurse

table"). This table was divided into 4 columns: "Date referral submitted", "Job title", "Ethnicity" and "Type of practice concern". Although the author of the table was not called as a witness, there was no evidence to suggest that this table was incorrect. We find that the "Date of referral" is the date of referral to the NMC, this is a natural reading of this heading and corresponds with the date that the claimant was referred to the NMC. The table records that over this three year period there were 13 referrals to the NMC, of which 7 were identified as "white – British", 3 were identified as either "Black or Black British – Caribbean" or "Black or Black British – African", 2 were identified as "Asian or Asian British – Any other Asian background" (the category applied to the claimant), and 1 was "unknown / not declared". In relation to "types of practice concern" the data was as follows:

91.1 3 cases of lapsed registration; two white and one BAME;

91.2 3 cases of general professional misconduct (a combination of professional behaviour, medicine breaches and falsification of patient records); two white and one BAME;

91.3 4 cases of criminal behaviour (fraud, physical assault, sexual abuse (the claimant) and taking drugs; 3 white and one BAME; and

91.4 3 other case: 3 for misconduct (unspecified) and 1 for safeguarding allegation (unspecified); 2 BAME and 1 unknown.

The claimant and Dr Emmanuel accepted in their evidence that there was no discernible pattern of disproportionality by race evidenced by this table.

92. We were also provided with a table of staff referred to HR for disciplinary investigations between a shorter period of 13 April 2021 and 21 November 2022: **pg 432** ("HR table"). The reason for this shorter period is that a new HR system was introduced in April 2021 and prior to that date cases had not been tracked. The data in 4 of the 5 columns: "Reference", "Type", "Role" and "Date referred to HR" were drawn from HR's central computer system. The 5th column "referral to NMC" had been added manually for the purposes of these proceedings. The table did not include the date of referral to the NMC, nor did it include ethnic data or practice concern and the descriptor for job role was different to job title. It was therefore not possible to correlate the information on the HR table with the Chief Nurse table. Ms Wilson stated in evidence that she would not know if a referral had been made to the NMC if that person had not been separately referred to HR to conduct an internal disciplinary process. An example given by Ms Wilson was a registrant who had let their licence lapse.

93. The HR table identified 3 referrals to HR that were also referred to the NMC between April 2021 and November 2022, these were:

93.1 on 10 May 2021 a nurse practitioner (reference number 29286);

93.2 on 22 September 2021, a staff nurse (reference number 29520); and

93.3 on 6 October 2021 a staff nurse (reference number 29532) (the claimant).

94. The Chief Nurse table identified 5 referrals to the NMC over an equivalent time period of 7 April 2021 and 8 July 2022; these were:

94.1 on 7 April 2021, a white-British staff nurse for acts of aggression including physical assault and verbal aggression (**comparator 2**);

94.2 on 26 May 2021 a white-British midwife for a lapsed license;
94.3 on 27 September 2021 a Black or Black British – Caribbean registered nurse for a safeguarding allegation (**comparator 3**);
94.4 on 15 October 2021 an Asian or Asian British – Any other Asian background staff nurse for an allegation of sexual abuse made by an in-patient (the claimant); and
94.5 on 8 July 2022 a White British clinical nurse for drug taking in Maidstone High Street involving a police investigation (**comparator 4**).

95. We accept that the tables could not be correlated. We note that in cross-examination Ms Wilson:
95.1 could not confirm that the nurse referred to the NMC on 7 April 2021 (Chief Nurse table) was the same as the staff nurse referred to HR on 13 April 2021 (HR table). We note that the HR table did not identify this nurse as being referred to the NMC. Without looking at the files Ms Wilson was unable to provide any evidence as to what happened to the nurse who had been referred to the NMC recorded on the Chief Nurse table;
95.2 could not confirm whether the midwife referred to the NMC on 26 May 2021 (Chief Nurse table) was the same as the nurse practitioner referred to HR on 10 May 2021 (HR table);
95.3 could confirm that the nurse referred to the NMC on 27 September 2021 (Chief Nurse table) was the same as the nurse referred to HR on 22 September 2021 (HR table). We note that the Chief Nurse table included the date "22/9/21"; and
95.4 could confirm that the nurse referred to the NMC on 15 October 2021 (Chief Nurse table) was the same as the staff nurse referred to HR on 6 October 2021 (HR table) (this being the claimant).

96. Ms Streatfield was not able to shed any light on the HR or Chief Nurse tables, commenting that as head of nursing in a particular area she does not deal with all referrals to the NMC. She stated that she had probably referred about 3 nurses to the NMC but that none of the cases in the Chief Nurse table had been ones that she had referred. She confirmed that the referrals she did make were of similar gravity.

97. Dr Anton Emmanuel, Head of Workforce Race Equality Standard (WRES), stated in evidence that "*5 of 13 of the nurse referred cases were Black or ethnic minority, which is 38.5%, so that is plainly 1.5 times greater likelihood of being referred to NMC for Black and ethnic minority staff*". This was the totality of his evidence in chief and falls way below the standard we would expect of an expert witness. In cross examination he explained that he based his calculation on the ethnic makeup of the respondent staff being 25% BAME; therefore 38.5% was 1.5 times greater than proportion of BAME employed by the respondent. Whilst he accepted that the number of referrals were small, he stated that this had been a pattern over 8 years. Further, since 1.5 times ratio was above the national average of 1.2, the respondent was a statistical outlier. He confirmed that the 25% BAME that he relied upon was the proportion of all the staff employed by the respondent, not just nurses, but explained the figures were still reliable since nurses comprise the largest component.

98. Following the conclusion of Dr Emmanuel's evidence the claimant applied to add to the hearing bundle the WRES 2022 data that Dr Emmanuel had referred to in evidence to support his conclusions: **pg 454-468**. This included a breakdown of the ethnic makeup of the respondent's workforce, separated into non-clinical workforce, clinical workforce (i.e. nurses) and medical and dental consultants (indicator 1). The total number of the clinical workforce was 2460 of which 1523 were "white", 937 were "BME" and 240 were "ethnicity unknown": **pg 465**. If the unknowns were taken out of the equation this meant that 38.1% of the clinical workforce was BME. We therefore find that the evidence of Dr Emmanuel that BAME were 1.5 times more likely to be referred to the NMC than their white colleagues to be based on a wrong premise, since a 38.5% referral rate correlates with 38.1% BAME nursing and midwifery workforce. Assuming this to be correct, rather than being an outlier the respondent is below the national average since the ratio was almost 1.0.

99. The WRES 2022 data also provided a breakdown of employees who had entered into a formal disciplinary process (indicator 3). This was for all staff employed by the respondent and does not provide a breakdown just for clinical staff (nurses and midwives). A ratio of 1.00 was equity; a score greater than 1.00 showed an advantage to white staff; a score less than 1.0 showed an advantage to BME staff. The data recorded that:
    99.1 for 2022 the data recorded that 23 people entered the formal disciplinary process; 15 white, 6 BME and 2 unknown. This provided a ratio of 0.8 (0.5% of white; 0.4% of BME);
    99.2 for 2021 the ratio was 1.03 (74% of white; 76% of BME);
    99.3 for 2020 the ratio was 0.59 (1.53% of white; 0.90% of BME); and
    99.4 for 2019 the ratio was 0.56 (2.23% of white; 1.25% of BME).

    Therefore, whilst the numbers are small the trend over 4 years shows a slight advantage to BME staff, in that proportionately fewer BME staff had entered into a formal disciplinary process than white staff.

100. The other indicator we were referred to was the staff perception indicators: **pg 457**. This recorded that:
    100.1 35% of BME staff reported harassment, bullying or abuse from patients, relatives or the public in the last 12 months compared to 31.2% of white staff;
    100.2 31.9% BME staff experienced harassment, bullying or abuse from staff in the last 12 months compared to 28.5% of white staff; and
    100.3 19% of BME experienced discrimination at work from management compared to 7.6% of white staff.

    It was reported that there was a "concerning" deterioration and widening of the differentials between BAME and white staff over the 4 year period to 2022. No explanation was provided for the apparent disconnect between these data and the actual data recorded by indicators 1 and 3.

101. Finally, Mr Fernando provided a statement stating that he had "*personally seen a difference in the way Filipino nurses were treated compared to white nurses".* In cross examination, he confirmed that his organisation only knows of those cases where nurses have already been suspended and referred to the NMC.

Mr Fernando also gave evidence in chief of the potential impact of a referral to the NMC on the claimant's immigration status; this evidence was not challenged by the respondent.

THE LAW

Direct Discrimination

102. Section 13 of the Equality Act 2010 (EA 2010) defines direct discrimination as where:

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

In this case the relevant protected characteristics are sex and race. Race includes colour, nationality and ethnic or national origins.

103. The concept of less favourable treatment presumes an actual or hypothetical comparator. The relevant circumstances of the comparator must be "the same, or not materially different": Section 23 EA 2010. The circumstances need not be precisely the same, provided they are close enough to enable an effective comparison: **Hewage v Grampian Health Board** [2012] UK SC 37.

104. In most cases a suitable actual comparator will not be available so a hypothetical comparator will need to be relied upon. Where there is no actual comparator, comparators may still provide an evidential tool which may enable an inference of discrimination to be drawn. The usefulness of the tool depends on the extent to which the circumstances are the same, the more significant the difference is the less cogent will be the case for drawing the requisite inference: **Shamoon v Royal Ulster Constabulary** [2003] UKHL 11. **Shamoon** is also authority that where a hypothetical comparator is relied upon, it is permitted for the tribunal to move to consider the reason for any less favourable treatment ("reason why"), rather than getting bogged down in the construction of the comparator.

105. When considering the reason for any less favourable treatment, the tribunal is considering the mental processes of the discriminator. Discrimination may be, and often is, unconscious and unintended, therefore the Tribunal's decision will often depend on what inference it is proper to draw from all the relevant surrounding circumstances: see **Qureshi v Victoria University of Manchester** [2001] ICR 863 EAT and **Anya v University of Oxford** [2001] EWCA Civ 405.

106. It is well established that it is not necessary for the prohibitive characteristic, in this case race and sex, to be the sole reason for the less favourable treatment, if it has significantly influenced the reason for the treatment, discrimination is made out: **Nagarajan v London Regional Transport** [1999] IRLR 572 (HL). Further, an employer can be well meaning but still discriminate: **Amnesty International v Ahmed** (UKEAT 0447/08).

107. In order to be liable an alleged discriminator must be aware of and adopt the

discrimination of others, and therefore will not be liable if they act on the reports of others without knowing their discriminatory motivation: **CLFIS (UK) Ltd v Reynolds** [2015] EWCA Civ 439.

108. Ms Bennett has drawn our attention to the case of **Cox v NHS Commissioning Board** (case number 2415350/2020), which concerned a successful claim for race discrimination. We considered this to be a useful summary of the law but as a first instance decision it is not binding on us; nor is it persuasive since it does not concern the same respondent, persons or same issues as this case.

Indirect Discrimination

109. Section 19 of the EA 2010 defines indirect discrimination as:

> "(*1*) *A person (A) discriminates against another (B) if A applies to B a provision, criterion or practise which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purpose of subsection (1), a provision, criterion or practise is discriminatory in relation to a relevant protected characteristic B's if –*
> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
> *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
> *(c) it puts, or would put, B at that disadvantage, and*
> *(d) A cannot show it to be a proportionate means of achieving a legitimate aim*."

110. The essence of indirect discrimination is where the employer does something which is neutral across the board, but which puts a particular group at a disadvantage. It is therefore the opposite of direct discrimination. Not every person with the protected characteristic has to experience the disadvantage.

111. Proportionality involves a balancing exercise, balancing the importance of the aim against the discriminatory impact of the PCP on the group. The clearer the disadvantage, the more compelling the justification will need to be. As part of its considerations the tribunal should consider whether the same aim could have been achieved by less discriminatory means.

Harassment

112. Section 26 of the EA 2010 defines harassment as where:

> *"(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."

.

113. "Unwanted" means essentially the same as "unwelcome" or "uninvited". It is well established that a single act, if sufficiently serious, may constitute harassment.

114. Purpose and effect are alternatives and should be considered separately. Purpose requires intention, whereas effect is unintentional. Effect requires consideration of a subjective question, whether the claimant perceives themselves to have suffered the effect in question and an objective question as to whether it was reasonable for the claimant to consider that the treatment had that effect: **Pemberton v Inwood** [2018] CR 1292**; Richmond Pharmacology v Dhaliwal** [2009] IRLR 336.

115. "Related to" is a broad term that does not require a direct causal link but only a connection or association: **R (EOC) v Secretary of Trade and Industry** [2007] ICR 1234.

Burden of Proof

116. Section 136 of the EA 2010 provides that:

"(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."

117. Thus the burden of proof is initially on the claimant to establish primary facts from which the tribunal could decide in the absence of any other explanation that discrimination took place (stage 1). The burden then shifts to the respondent to prove that the discrimination did not occur (stage 2). This provision was introduced because it was recognised that it is usual to find direct evidence of discrimination and that it was difficult for claimants to prove the employer's reason or motivation for doing something. Guidelines on the application of the burden of proof provisions is set out in **Igen Ltd (Formerly Leeds Career Guidance) and Oth v Wong** [2005] ICR 931. The EAT has recently confirmed its importance: see **Field v Pye & Co** [2022] EAT 68. These guidelines are as follows:

"(1) Pursuant to section 63A of the 1975 Act, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the claimant which is unlawful by virtue of Part 2, or which, by virtue of section 41 or section 42 of the 1975 Act, is to be treated as having been committed against the claimant. These

are referred to below as "such facts".

(2) If the claimant does not prove such facts he or she will fail. (3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word "could" in section 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the 1975 Act from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the 1975 Act.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining such facts pursuant to section 56A(10) of the 1975 Act. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the employer has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the employer.

(10) It is then for the employer to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

118. In order for the burden to shift to the respondent, it is not sufficient for the claimant merely to prove a difference in protected characteristic and a difference in treatment, something more is required: **Madarassy v Normura International Plc** [2007] EWCA Civ 33 (CA). Moreover, unfair and unreasonable treatment on its own not is enough to shift the burden of proof: **Glasgow City Council v Zafar** [1998] IRLR 26 (HL), although in certain circumstances it may be evidence from which an adverse inference can be drawn.

119. It is not always necessary to apply the two stage test, it is permissible for the tribunal to move to the stage 2 (reason why) question, however tribunals should do so with caution and explain its reason for doing so: **Field.** Where a tribunal does move straight to stage 2, it is assumed that the claimant has succeeded at the first stage and therefore the burden of proof shifts to the respondent.

Procedural Issue

120. It could be an error of law for a tribunal to take into account matters that have not been put to a witness to enable that witness to comment. However, not every failure to put every particular aspect of a case will amount to a serious procedural failure, it depends on the circumstances and whether it had resulted in unfairness: **Saiger & Oth v NHS Trust Development Authority & Oth** [2018] ICR 279 (EAT).

DISCUSSION AND CONCLUSIONS

Direct Race Discrimination

Was this a Detriment?

121. The respondent did not dispute that the decision to refer the claimant to the police, suspend him on the 7 October 2021 and refer him to the NMC constituted a detriment to him.

The Decision to Refer the Claimant to the Police

Was this less favorable treatment?

122. We considered that a comparator in this case was a white nurse with an exemplary record accused of an equally serious offence, not merely someone accused of misconduct. This is because not all misconduct would warrant a referral to the police.

123. In closing submissions, Ms Bennett suggested that comparator 2 (a white-British staff nurse accused of physical assault and verbal aggression) had not been referred to the police and therefore was treated more favourably than the claimant. We were provided with no information about this comparator other than what was recorded on the Chief Nurse table. Therefore we do not know if this person was referred to police or not. In the absence of any information that the white nurse was referred to the police, we could not rely on this comparator to draw an inference of race discrimination.

124. We considered whether there was evidence from which it could be inferred that a hypothetical comparator would have been treated more favourably than the claimant. We were not able to draw an inference from the Chief Nurse or HR tables since they only provided information about NMC referrals and not police referrals. We noted that a black female nurse accused of slapping a patient was referred to the police (comparator 1). However, there was no evidence to suggest that a white nurse would not have been referred in similar

circumstances. The black female nurse had been accused by two workers of slapping a patient, which was still potentially a criminal offence justifying a referral, therefore there was no evidence from which an adverse inference could be drawn.

125. We considered if there was any other evidence which suggested that discrimination had occurred, in the absence of any other explanation.

126. We were concerned that the respondent had not called as a witness the person who made the decision to refer the matter to the police. We heard no evidence as to why the decision maker had not been called and this was not a matter explored in cross examination by the claimant. However, we did not consider that this was a case where the respondent was seeking to avoid scrutiny since we saw and heard no evidence to suggest that the decision maker would give evidence that would be any different from the evidence already before us. Given the seriousness of the allegation we could envisage no circumstance where an immediate referral to the police would not have been made. Patient A had made a complaint of sexual assault which was not just criminal in nature but also potentially very serious since it included an allegation of sexual assault by a person in a position of trust on a vulnerable patient who was having a seizure. Therefore, we do not draw any inference of race discrimination from the non-attendance of this witness.

127. We also took into account contrary evidence that having referred the claimant to the police, the respondent then regularly sought updates from the police as to the progress of the police investigation and whether it could commence its own internal investigation. The claimant in his evidence accepted that the respondent was doing everything it reasonably could do to enable him to return to work but was being prevented from doing so by the police. The claimant's complaint was solely that the respondent should not have referred him to the police in the first place without first conducting its own internal investigation. He did not criticise the respondent for their actions once this referral had been made.

128. Ms Bennett in her submissions on behalf of the claimant questioned the motives of patient A and her family in making the complaint, relying on the fact that they were white. It was submitted that the step-mother had previously complained about the location of patient A on the ward. We were provided with no evidence to suggest that patient A's complaint was racially motivated, but even if it was, it is the motivation of the respondent not the complainant which is in issue. There is no evidence that the respondent was provided with any evidence to put them on notice that the allegation might be racially motivated and therefore false.

129. Ms Bennett also questioned the reliability of the allegation by patient A since at the time of the alleged sexual assault she was having pseudo seizures and was prescribed Lorazepam which has a known side effect of hallucinations. There is no evidence that patient A was hallucinating, indeed the patient notes refer to the patient being alert following the prescribing of Lorazepam, there being no postictal phase, and that she was "conscious and orientated". Further patient

A, when making the allegation, informed nurse B that she had awareness during her seizures.

130. In any event, even if there was evidence that patient A was hallucinating, this does not mean that she was not also a victim of a sexual assault. We accept Ms Streatfield's evidence that even where a patient lacks capacity, an allegation would still be treated seriously and referred to safeguarding and the necessary alerts raised. This is in accordance with the respondent's Safeguarding Policy para 2.2. We also accept Ms Fordham's evidence that she would refer a potentially criminal matter to the police even if the patient had dementia. We also note that where a criminal allegation has been made that may require obtaining forensic evidence (such as an allegation of touching of private parts) there is a short window for the police to be informed to enable them to seize physical evidence. It was for this reason that Ms Fordham would not have sent the claimant home on the 5 October 2022. Therefore, even if the respondent had reason to suspect that patient A's account was unreliable it is still our view that the police would need to be immediately informed to enable the necessary enquiries to be conducted and evidence obtained. Therefore we draw no inference from the mere fact that patient A's allegation may have been unreliable.

131. Ms Bennett further submitted that an inference of race discrimination should be drawn because the police were not informed until after 19 July 2022 that patient A was suffering seizures and / or on Lorazepam. This submission was based on the email from Kent police dated 19 July 2022 stating that they were awaiting a statement from patient A's consultant about her seizures, medication and whether this would have affected her perception or recall. Ms Bennett argued that had this information been provided at the outset by the respondent there would have been no need for a police investigation and / or that there would not have been such a delay. This submission is misconceived. The email of the 19 July 2022 refers to awaiting a statement from the consultant about the effect of the patient's presentation and medication, not that the police were unaware of or not informed of, her diagnosis and medication. We also note that on 11 October 2021 Kent police requested documentation including the incident log, SBAR and any further relevant information and the respondent agreed to provide this information on 12 October 2021. Therefore, the 19 July 2022 email is not evidence that the police had not been informed of patient A's medical condition prior to this date.

132. Ms Bennett further submitted that there was no evidence that patient A had made the allegation in the first place (based on there being no written complaint from patient A in the bundle) and / or that this had been something made up by her boyfriend. We consider that these submissions are also misconceived. We have been taken to contemporaneous documentation including an incident report, which contains extracts from the patient notes recording the allegation made and that it was reported at 18:02 on the 5 October 2021. This is supported by the evidence of nurse B and matron C who both confirmed in their investigatory interviews that they had spoken to patient A. We also draw no inference from the lack of any disclosure of a note or statement from patient A since we have found that patient A did not provide the respondent with a note

and that Ms Streatfield in her evidence has misremembered. Further, contrary to the submission made by Ms Bennett we find that patient A received an apology, this was done by matron C and is evidenced by the signed duty of candour form.

133. Ms Bennett submitted that an inference of race discrimination should be drawn from Ms Streatfield's completion of the NMC referral form. In particular, it was suggested that by answering "no" to the question "would another nurse ….. in the same situation, have done the same thing", indicated Ms Streatfield's internal bias and judgment since it was deeming the claimant as guilty without trial. We do not read the question or answer in that way, Ms Streatfield made it clear on the form that it was not a relevant question, and we agree.

134. Ms Bennett submitted that the Patient Complaint Policy should have been applied rather than the Safeguarding Policy. We note that the Patient Complaint Policy is a generic policy covering all complaints whereas the Safeguarding Policy specifically applies to allegations of abuse by a member of staff and that includes allegations of sexual abuse (para 1.2 and 1.3). Further Section 13 of the Patient Complaint Policy, which Ms Bennett relies on, specifically states that the complaint procedure will only commence where the investigation would not compromise or prejudice a concurrent HR or police investigation. Therefore, in our view the Safeguarding Policy takes precedence over the Patient Complaint Policy, and in any event is clearly the more appropriate policy to be applied given that it specifically addresses allegations such as the one made against the claimant. Therefore, we find that the application of the Safeguarding Policy does not give rise to any inference of race discrimination.

135. We accept, and it was not disputed, that referral to the police is not automatic under the respondent's policies; Ms Fordham and Ms Streatfield in their evidence both accepted that each case has to be considered individually and that it was a discretionary decision. We note that the Safeguarding Policy provided that a referral to the police was one of three possible responses, which included a referral to social services or conducting an internal investigation, and that serious allegations "may" rather than "must" be reported directly to the police and social services (para 2.5). The disciplinary policy contains a similar discretionary provision. We accept that where there is a discretion there is always a potential for bias on grounds of race. However, both policies suggest that the police be informed where a serious allegation has been made, which the allegation against the claimant undoubtedly was. Further we accept the evidence of Ms Fordham that the normal practice of the respondent is to refer to the police an allegation of abuse by a person in position of trust, where a potential crime has been committed, and that this was a standard requirement under the Care Act 2014.

136. We noted that the claimant in evidence accepted that the allegation against him should be treated seriously by the respondent, that it warranted a police investigation and that the respondent in referring the matter to the police were following their Safeguarding policies. His evidence was that in his case an internal investigation should have been conducted before the decision to refer

him to the police. We have considerable sympathy with the claimant given that he is of good character and was being accused of a serious offence. Nevertheless, in our view it is unrealistic to expect an employer, even one in a hospital setting, to conduct its own investigation as to the reliability of the complaint made before informing the police, with the potential risk to patient safety and loss of forensic evidence that such a delay could cause. In this case the seriousness of the allegation was such that it required that the police be informed at the earliest opportunity. Having been informed then under the respondent's Safeguarding Policy the police investigation was to be prioritised over any internal investigation (para 1.3).

137. We did not draw any adverse inference of discrimination from the statistical evidence provided to this hearing, since we have found that there was no evidence of disproportionality.

138. In the absence of any evidence to suggest that a white comparator facing similar allegations would not have been immediately referred to the police the claim for race discrimination must fail. Therefore, this claim falls at stage 1 and the burden of proof does not shift onto the respondent to provide a non-discriminatory explanation for any differential treatment. Whilst we are concerned that the decision maker was not called to give evidence, and the lack of documentary evidence as to the decision making process, this conduct is not *on its own* sufficient to shift the burden of proof.

What was the reason for the less favourable treatment?

139. In any event, we accept the respondent's non-discriminatory reason for referring the claimant to the police. This was due to the nature of the allegation, which concerned an allegation of a serious sexual assault on a vulnerable patient; in such circumstances the respondent had little choice but to immediately inform the police, and may have been criticised had they not done so (particularly if that put patients at risk of harm and / or compromised the obtaining of forensic evidence and the interviewing of witnesses).

The Decision to Suspend on the 7 October 2021

Was there less favorable treatment?

140. As set out above, we consider that the correct comparator in this case was a white nurse with an exemplary record accused of an equally serious offence.

141. No actual comparator was identified. Therefore, we considered whether there was evidence from which it could be inferred that a hypothetical comparator would have been treated more favourably than the claimant. We were not able to draw an inference from the Chief Nurse table since this only relates to NMC referrals, nor could we drawn an inference from the HR tables since they only provided information about referrals to HR not whether those referred had been suspended.

142. We considered whether an adverse inference should be drawn from the manner in which the decision was made. The decision was made at a multi-professional meeting, referred to by the respondent as a 'huddle" on the 7 October 2021

attended by Ms Fordham, Ms Williams and Ms Streatfield.

143. In their evidence, both Ms Fordham and Ms Streatfield stated that the decision to suspend the claimant was made by Ms Williams, who had not been called as a witness. Again, we considered whether any inference of race discrimination could be drawn from that fact. We concluded that we could not for similar reasons. Given the nature of the allegation we could envisage no circumstances where the claimant would not have been suspended pending investigation of such a serious complaint of sexual assault. We note that the police requested that the claimant did not return to work until their investigations were completed and that the NMC imposed an 18-month interim suspension order that prevented the claimant from working as a registered nurse. Therefore, we do not draw any adverse inference from the non-attendance of this witness, since the reason for the claimant's suspension is obvious.

144. We also considered whether an adverse inference should be drawn on the fact that there was no note or record of this meeting, and that a suspension form was not completed. We are concerned about the overall inadequacy of the record keeping in relation to the actions taken on the first two days leading up to the claimant's suspension. The SBAR Incident Report was cursory in its nature and did not provide a proper record of the decisions taken, when and by whom. Further, in relation to the 7 October 2021 meeting, referred to by the respondent as a "huddle", we are concerned about the ad hoc nature of this meeting, that it took place without the attendance of anyone from HR and without taking any notes, and consider this to be below the standards we would expect of a reasonable employer. In our view the respondent was not acting in accordance with their own internal policies which provided that a suspension should only be used after careful consideration and includes the completion of a suspension checklist. However, unfair or unreasonable treatment by an employer does not on its own give rise to an inference of race discrimination. In the claimant's case there was no evidence that the respondent was subjecting the claimant to any differential treatment since Ms Streatfield stated that they did not normally take notes at such meetings.

145. Whilst we accept that the respondent's disciplinary policy does not require automatic suspension, and that the decision to suspend is a discretionary one, it does state that a suspension may be necessary while an investigation is carried out where there is an allegation of gross misconduct, criminal activity, or the interest of a patient is at risk. We note that the Safeguarding Policy is more directive, in that it states that suspension should be considered in any case where there is a cause to suspect a child or an adult is at risk of harm or the allegation warrants investigation by the police (para 2.12). Whilst the policy states that the police cannot require that a member of staff be suspended, it does state that the views of the police can inform that decision.

146. In relation to his suspension the claimant accepted in his evidence that if the allegation was true then his presence at work would have been a risk to patients. Further in re-examination he confirmed that suspension would have alleviated the risk. Whilst he knew he was innocent the respondent of course did not, and therefore it was not unreasonable of them to suspend him pending

investigation.

What was the reason for the less favourable treatment?

147. In any event, we accept the respondent's non-discriminatory reason for suspending the claimant. This was due to the nature of the allegation, which concerned an allegation of a serious sexual assault on a vulnerable patient; in such circumstances the respondent had little choice but to suspend the claimant pending an internal investigation.

148. We also took into account the contrary evidence, that a black female nurse accused of slapping a patient had not been suspended but instead moved to a non-clinical role. Her case was less serious and therefore is a strong indicator that the reason for the claimant's suspension was the serious nature of the offence rather than his race.

The Decision to Refer to the NMC

Was there less favorable treatment?

149. As set out above, we consider that the correct comparator in this case was a white nurse with an exemplary record accused of an equally serious offence.

150. Ms Bennett, in her closing submissions, made a number of points relating to comparators that we consider were not supported by the evidence:

150.1 First that the three NMC referrals referred to in the HR table were the same three referrals that Ms Streatfield in her evidence stated she "probably" made. In evidence Ms Streatfield was merely asked about how many referrals she had made to the NMC, and was not asked any questions as to when she had made these referrals. Further whilst Ms Streatfield had been unable to comment on the HR table, she had been able to confirm, in response to a panel question, that none of the cases in the Chief Nurse table were hers. She gave clear evidence on this, and it was not challenged by the claimant; we have no basis for concluding that Ms Streatfield was an untruthful witness. We note that Ms Streatfield has been employed by the respondent since 2003, we therefore did not feel able to assume without any further evidence that all three referrals that she made were in the year 2021/22. We also noted that both the HR table and Chief Nurse table cover referrals across the whole of the respondent Trust, whereas Ms Streatfield was only head of nursing in a particular area. It was highly unlikely that all the 2021/22 referrals only came from the older persons care group. Therefore, we do not find that the three NMC referrals in the HR table in 2021/22 are the same that Ms Streatfield had made during the course of her employment.

150.2 That the black female nurse that Ms Streatfield had not suspended (Comparator 1) was the same as the BAME nurse referred to the NMC for a safeguarding allegation on 29 September 2021 in the Chief Nurse table (comparator 3). Ms Streatfield gave no evidence that the black female nurse had in fact been referred to the NMC or the date of that referral. She had only given this as an example of circumstances when

a decision was made not to immediately refer a case to the police. Ms Streatfield was specifically asked by a member of the panel whether any of the cases in the Chief Nurse table was hers and had stated that they were not. She gave clear evidence on this, and it was not challenged by the claimant; we have no basis for concluding that Ms Streatfield was being an untruthful witness. Therefore, we do not find that the BAME nurse referred to the NMC on 29 September 2021 was the same nurse.

150.3 That the white nurse accused of physical assault on the Chief Nurse table (comparator 2) was not in fact referred to the NMC, despite the table recording the date of referral as 7 April 2021. Ms Bennett relies on the entry on the HR table which records that a staff nurse was referred to HR on 13 April 2021 but not referred to the NMC. This requires two assumptions. First, that the two entries relate to the same person in the light of the evidence from Ms Wilson on behalf of the respondent that the two tables draw from different data and cannot be correlated. Second, if the entries do relate to the same person, that the Chief Nurse table entry is incorrect whereas the entry on the HR table is correct. We do consider that it was unhelpful of the respondent to provide two tables for this hearing which have not been, and cannot be, correlated. Further, it is particularly unhelpful for the respondent to adduce a table in a claim for race and sex discrimination that does not provide a breakdown by race or sex. This information is in their possession and given the numbers involved this could have been easily provided. We therefore have some sympathy with Ms Bennett's attempt to correlate and accept that it is possible that the entries relate to the same nurse. However, it is more likely that the HR table is wrong than the Chief Nurse table. The Chief Nurse table only records those cases referred to NMC, therefore this entry would not appear if no referral had been made. Further the entry is specific, referring not just to the date of the referral to the NMC but also the nature of the allegation. In contrast the NMC column on the HR table is a "yes / no" column with no other details. It is also a column not drawn from the computerised system but added manually for the purposes of this hearing. It is therefore far more likely that if there is an inputting error it is on the HR table than on the Chief Nurse table. Therefore, we do not conclude that the white nurse accused of physical assault was not referred to the NMC.

151. In the absence of an actual comparator, we considered whether there was evidence from which it could be inferred that a hypothetical comparator would have been treated more favourably than the claimant. We were unable to draw any inference from the statistics provided. In particular:

151.1 The number of referrals to the NMC provided by the respondent in the Chief Nurse table was too small for an inference to be drawn. Both Dr Emmanuel and the claimant agreed that on the basis of the data contained in these tables there was no discernible disproportionality on grounds of race. For the reasons set out in our findings of fact, Dr Emmanuel's evidence that BAME staff working for the respondent were 1.5 times more likely to be referred to the NMC was not supported by the WRES data, which showed there was no disproportionality. These data

are consistent with the proportion of BAME who have entered into a formal disciplinary process which was also almost equal in 2021.

151.2 We accept that the WRES staff perception data shows a worrying trend of disproportionality in experience of harassment, bullying and abuse, however we could not draw any inference of race discrimination from this data in the light of contrary data on the actual referral ratio to formal disciplinary processes and the NMC.

151.3 We also felt that we could not draw an inference of race discrimination from Mr Fernando's evidence, since it is (a) general in nature and not specific to the respondent (and the WRES data suggests that the respondent was better than the national average) and (b) Mr Fernando has no basis for comparison since he only knows of those cases that have been referred to him.

152. Further on 8 July 2022 a white British clinical nurse was referred to the NMC for drug taking in Maidstone High Street involving a police investigation (comparator 4). This is an example of a white nurse, arrested for a criminal offence involving a police investigation, being referred to the NMC and therefore is evidence that points away from drawing an inference of race discrimination.

153. Again we noted that the decision had been made at the 7 October 2021 meeting and that the decision-maker was Ms Williams. The points made above in relation to the failure to call the decision-maker as a witness and the failure to make a note of the meeting are repeated. However, for the same reasons as above we do not consider that these factors alone are sufficient to draw any adverse inference.

What was the reason for the less favourable treatment?

154. In any event, we accept the respondent's non-discriminatory reason for referring the claimant to the NMC. Due to the nature of the allegation, which concerned an allegation of a serious sexual assault on a vulnerable patient, in such circumstances the respondent had little choice but to refer the matter to the NMC.

155. We agree with Ms Bennett that the Code of Conduct only required a registrant to self-refer where they have been subject to a police caution or charge, and in the claimant's case he was never charged. However, the Code only relates to the requirement of a registrant to self-refer; it does not apply to employers. The NMC advice leaflet to employers stated that employers "must' report a case where the employer believed the conduct of the nurse presents a risk to patient safety. In circumstances where a patient had accused a nurse of sexual abuse, this clearly is an allegation which presents a risk to patient safety. Therefore the respondent was required to refer the matter to the NMC. That there was a risk to patient safety is supported by the decision of the NMC to impose an interim suspension order in order to protect the public and in so doing referred to the allegation as being "extremely serious".

Not Progressing the Claimant's Grievance

Was this a detriment?

156. The respondent submitted that on the facts there was no failure to progress the

claimant's grievance on the grounds that no grievance was submitted by the claimant. We agree. The claimant gave no evidence of submitting a grievance in his statement. What the claimant relies upon as a grievance is the formal complaint from E4BN on 21 December 2021. Whilst this was a letter sent on the claimant's behalf, and stated that it was a grievance, it was not treated as such by the respondent because E4BN was not recognised by the respondent to act on behalf of one of its employees. The claimant was informed of this in the letter dated 10 January 2022. Neither the claimant nor Ms Bennett responded to this letter or took any further steps to pursue the grievance. In evidence the claimant confirmed that he did not personally pursue any grievance because the respondent was willing to have him return to work. In such circumstances, we did not consider that the respondent was under any obligation to progress the E4BN letter as a grievance and therefore no detriment arises in respect of this factual allegation.

Was there less favourable treatment because of race?

157. We have been referred to no evidence to suggest that the respondent would have progressed a grievance received from an external organisation without confirmation from the employee concerned, had the claimant been of a different race. In any event we accept the respondent's non-discriminatory reason for failing to progress the grievance. It is clear from the text of the respondent's letter of 10 January 2022 that the reason the respondent did not progress the grievance was because it had been received from an external organisation.

Harassment Related to Race

Was this unwanted conduct?

158. The respondent did not dispute that the decision to refer the claimant to the police, suspend him on the 7 October 2021 and refer him to the NMC constituted unwanted conduct.

The Decision to Refer the Claimant to the Police

Did it have the intention or effect of creating an intimidating etc. environment?

159. We considered whether this conduct was intended to create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. We concluded that there was no evidence of any such intention. Whilst this was suggested by Ms Bennett in closing submissions this was not put to the respondent witnesses in cross examination and no evidence was adduced of any such intention.

160. We accept that referring the claimant to the police had the effect of creating an intimidating etc environment for the claimant. This is how the claimant perceived it and he provided cogent evidence that he found being arrested by the police, searched, questioned and locked in a cell for 9 hours to be embarrassing, upsetting and stressful. We find that it was objectively reasonable for the claimant to consider that this created a hostile environment.

Was the conduct related to his race?

161. However, for the same reasons as above there was no evidence from which it

could be inferred that the reason for the unwanted conduct was related to the claimant's race. We note that this is a looser connection than what is required for direct discrimination and that there is no need for a comparator. However, the treatment of comparators can still be useful evidentially. In this case there was no evidence before us that a white nurse facing a similar allegation of sexual abuse would not have been referred to the police. Therefore, we conclude that the reason why the claimant was referred to the police was due to the serious nature of the allegation, and not related to his race.

The Decision to Suspend on the 7 October 2021

162. For the same reasons as above, we did not conclude that there was an intention to create an intimidating environment etc. for the claimant, although we accept that it had that effect. However, for the same reasons as above we could not draw a conclusion that the decision to suspend related to the claimant's race.

The Decision to Refer to the NMC

163. For the same reasons as above, we did not conclude that there was an intention to create a hostile environment for the claimant, although we accept that it had that effect. However, for the same reasons as above we could not draw a conclusion that the decision to refer him to the NMC related to the claimant's race.

Not Progressing the Claimant's Grievance

164. For the reasons set out above we do not find on the facts that the claimant was subjected to this unwanted conduct.

165. Further and in any event, we do not conclude that there was an intention to create an intimidating etc. environment for the claimant nor do we conclude that it had this effect. The claimant gave no evidence of the effect on him of any failure to progress his grievance. Nor do we consider that it was objectively reasonable for him to consider that it had this effect in circumstances where he had been informed that the respondent did not recognise correspondence from external organisations and the claimant did not take any steps to raise any objections or to pursue his grievance. Indeed he accepted in evidence that the reason he did not pursue his grievance was because he was informed that the respondent would be willing for him to return to work.

166. Further, for the same reasons as above, we could not draw a conclusion that any failure related to the claimant's race.

Indirect Race Discrimination

167. Having found that the decision to refer to the NMC was not direct race discrimination since there was no differential treatment because of race, there remained an issue as to whether the referral could nevertheless constitute indirect discrimination.

168. The claimant relies on the PCP of referring nurses of the NMC for misconduct. Contrary to Mr Jackson's submissions we consider that this is capable of being

a PCP. According to the Chief Nurse table, 13 nurses and midwives have been referred by the respondent to the NMC in the years 2019 to 2022, and the reason for their referral was various forms of misconduct. The numbers may be small but are significant, and in our view, it is immaterial whether or not the referrals are connected to the respondent's disciplinary process. Indeed we heard evidence that a nurse may be referred to the NMC even if they were not subject to an internal disciplinary process.

169. For the reasons set out under direct discrimination, we consider that referral to the NMC for misconduct was a neutral provision in that it was applied both to the claimant and those sharing his protected characteristic (BAME) and was also applied to those whom the claimant did not share his protected characteristic (White). We therefore considered whether that PCP put BAME nurses at a particular disadvantage. On the basis of the evidence provided to us during this hearing we concluded that in relation to this particular respondent it did not. This is because the statistical data does not support the claimant's case that there was a disproportionate number of BAME nurses referred to the NMC by the respondent compared to their white counterparts. We make no findings as to whether more generally referrals to the NMC are disproportionate.

170. Ms Bennett submitted that the referral to the NMC put the claimant at a particular disadvantage because it put his nursing licence at risk, meant that he was not able to work, threatened his visa status and caused him shame and embarrassment. That this was the consequence of the referral was not disputed. However the claimant's claim is not about the consequences of his referral but the fact of being referred in the first place; namely whether a greater proportion of BAME nurses were being referred to the NMC than their white counterparts. It was not disputed that the claimant personally was put at a disadvantage by the referral, since on the facts the claimant had been referred and the respondent had conceded that a referral to the NMC was a detriment and unwanted conduct. The fact that such referrals have potentially more serious consequences for one group over another, even if true, does not support a finding of indirect discrimination in the absence of evidence that there was any disproportionality in the referrals that were made.

171. In the absence of any evidence that a disproportionate number of BAME nurses were being referred to the NMC for misconduct, we find that there was no indirect discrimination. We do not make any findings as to whether, had there been disproportionality, the PCP was capable of being justified, ie a proportionate means of achieving a legitimate aim.

Direct Sex Discrimination

172. Ms Bennett in her closing submissions did not refer us to any evidence, or make submissions, that the claimant was treated less favourably on grounds of his sex, however these claims were not conceded so we consider them briefly below.

Was this a detriment?

173. The respondent did not dispute that the decision to refer the claimant to the

police, suspend him on the 7 October 2021 and refer him to the NMC constituted a detriment to him.

The Decision to Refer the Claimant to the Police

Was this less favourable treatment?

174. We consider that the correct comparator in this case was a female nurse with an exemplary record accused of an equally serious offence, not merely someone who is accused of misconduct. We again note that the purpose of comparator is to identify the reason why, and that the circumstances must be the same or not materially different.

175. None of the statistical information (Chief Nurse table, HR table and WRES data) provided a breakdown by sex, therefore no inference could be drawn from these documents. The only evidence before us was the female nurse accused of slapping a patient (comparator 1). In her case she was referred to the police but the police were content for the respondent to conduct its own internal investigation. Since this was a less serious offence, it undermines the claimant's case that his referral was because he was male.

176. We do not draw any adverse inference from the fact that the female nurse was only referred to the police following a multi-disciplinary meeting since the allegations were not comparable; the allegation against the female nurse being far less serious than that against the claimant. This view was supported by the police response (see below). In any event we remind ourselves that mere difference in treatment and difference in sex is not, without more, sufficient to shift the burden of proof onto the respondent.

What was the reason for the less favourable treatment?

177. In addition, and in any event, we accept the respondent's non-discriminatory reason for referring the claimant to the police. We conclude that the reason why the claimant was referred to the police was due to the seriousness of the allegation made by patient A and not because of his sex.

The Decision to Suspend on the 7 October 2021

Was this less favourable treatment?

178. Again, we consider that the correct comparator in this case was a female nurse with an exemplary record accused of an equally serious offence.

179. The only evidence before us was the female nurse accused of slapping a patient (comparator 1). In her case she was not suspended but moved to a non-clinical role. However, we do not consider that she is a correct comparator, since she had not been accused of an equally serious offence. That this was the case is supported by the fact that the police were content for the female nurse to continue to work for the respondent whilst an investigation was conducted. Whereas the claimant was initially subjected to police bail conditions to not contact or interfere either directly or indirectly with any prosecution witness; conditions that prevented him attending work where patient A was still being treated and where the staff who had treated her worked.

The decision to suspend the claimant was made before his bail conditions were lifted. Thereafter the police informed the respondent that the claimant should not return to work whilst the police investigation was ongoing. This suggests that the allegation against the claimant was far more serious than those against the female nurse and that the female nurse was not someone in the same or not materially different circumstances. In any event we remind ourselves that mere difference in treatment and difference in sex is not, without more, sufficient to shift the burden of proof onto the respondent.

What was the reason for the less favourable treatment?

180. In any event, we accept the respondent's non-discriminatory reason for suspending the claimant. We conclude that the reason why the claimant was suspended was due to the seriousness of the allegation made by patient A, and nothing to do with his sex.

The Decision to Refer to the NMC

Was this less favourable treatment?

181. Again, we consider that the correct comparator in this case was a female nurse with an exemplary record accused of an equally serious offence.

182. It is not known whether the female nurse who had slapped a patient was referred to the NMC (comparator 1). The Chief Nurse table and the HR table did not provide any breakdown by sex. Further the WRES data did not provide a breakdown by sex. Therefore, there was no evidence from which any inference could be drawn that a female nurse would have been treated any differently.

What was the reason for the less favourable treatment?

183. In addition, and in any event, we accept the respondent's non-discriminatory reason for referring the claimant to the NMC. We conclude that the reason why the claimant was referred was due to the seriousness of the allegation made by patient A and nothing to do with his sex.

Not Progressing the Claimant's Grievance

184. For the reasons set out above we do not find on the facts that the claimant was subjected to this detriment. Further and in any event, we conclude that the reason for not progressing the claimant's grievance was because the respondent do not recognise grievances from external organisations and the claimant did not pursue the matter and therefore was nothing to do with the claimant's sex.

Harassment Related to Sex

185. Ms Bennett in her closing submissions did not refer us to any evidence, or make submissions, that the claimant's harassment was related to his sex. However these claims were not conceded so we consider them briefly below.

Was this a Detriment?

186. The respondent did not dispute that the decision to refer the claimant to the police, suspend him and refer him to the NMC constituted unwanted conduct.

The Decision to refer the Claimant to the Police

187. For the same reasons as above, there was no evidence before us that this decision was related to the claimant's sex. The only evidence before us was that of the female nurse (comparator 1) and she had also been referred to the police, albeit not immediately but after the multi-disciplinary meeting. However, for the same reason as the claim for direct sex discrimination, we conclude that the reason why the claimant was referred to the police was due to the serious nature of the allegation, and not related to his sex.

The Decision to Suspend on the 7 October 2021

188. For the same reasons as above, there was no evidence before us that this decision was related to the claimant's sex. However, for the same reasons as the claim for direct sex discrimination, we conclude that the reason why the claimant was suspended was due to the serious nature of the allegation, and not related to his sex.

The Decision to Refer to the NMC

189. For the same reasons as above, there was no evidence before us that this decision was related to the claimant's sex, rather we find that it was solely related to the serious nature of the allegation.

Not progressing the Claimant's Grievance

190. For the reasons set out above we do not find on the facts that the claimant was subjected to this unwanted conduct. Further and in any event, for the same reasons as above, we do not find that the respondent either intended to create a hostile environment or that it had that effect. Finally, for the same reasons as above, there was no evidence before us that this decision was related to the claimant's sex, rather we find that it was solely related to the fact that the grievance was from an external organisation and on being informed of this the claimant did not pursue the matter.

CONCLUSION

191. For the reasons set out above, we concluded that all the claimant's claims for race and / or sex discrimination / harassment do not succeed, and should be dismissed.

Employment Judge Hart

Date: 4 March 2024