EMPLOYMENT TRIBUNALS

Claimant: Mrs Y Muzadzi-Matika

Respondent: Northern Care Alliance NHS Foundation Trust

Heard at: Manchester Employment Tribunals

On: 3-6 October 2023 (Hearing) and 25 October & 7 November (In Chambers)

Before: Judge A Miller-Varey, Mr I Taylor and Ms C Linney

Representation

For the Claimant: Mr Matthew Todd (Counsel)

For the Respondent: Mr James Boyd (Counsel)

JUDGMENT

a) The complaint of harassment based upon allegation 2.1.1 is dismissed upon withdrawal.

b) The complaint of race discrimination and harassment based upon allegation 2.1.7 is dismissed upon withdrawal.

c) With the exception of the complaints based upon allegations 2.1.14 and 2.1.15 in the List of Issues (LOI) at Annex A, the complaints of discrimination and harassment under the Equality Act 2010 were not brought before the end of 3 months starting with the date of the relevant acts, in accordance with section 123(1)(a) of the Equality Act 2010. Those complaints were also not made within a further period the Tribunal considers just and equitable.

d) Had there been jurisdiction for those out of time complaints identified above, the Tribunal would have judged that they were not well-founded and should be dismissed.

e) The in-time complaints of discrimination and of harassment on grounds of race under the Equality Act 2010, are not well-founded and are dismissed.

f) The complaint of constructive unfair dismissal under Employment Rights Act 1996 is not well-founded and is dismissed.

REASONS

Overview and Issues

1. This claim arises from the Claimant's employment with the Respondent as a social worker working in adult social care. Her employment started on 20 March 2017 and lasted until 16 April 2021 when the Claimant resigned with immediate effect.

2. She brings claims of (a) constructive unfair dismissal and (b) direct discrimination and harassment, on grounds of race. In support of all claims, the Claimant relies on a common set of factual allegations. In turn, these centre around three investigations (and one outcome) in which the Claimant's conduct has been examined by the Respondent. They span the period between July 2019 and April 2021. We will refer to them as Disciplinary 1, the Fraud Investigation and Disciplinary 2.

3. There have been a number of iterations of a draft List of Issues (LOI). Counsel were able to agree the LOI in final form and this is annexed at Annex A.

The Hearing

4. The hearing was listed to be heard over a week beginning on 2 October 2023. That was set down at a preliminary hearing for case management purposes which took place in August 2022. The Respondent's Counsel and witnesses attended on the first day. There was no attendance by or on behalf of the Claimant. Her solicitors had made a mistake. They had not heeded the extended hearing dates [p.79]. The Tribunal granted an adjournment to the Claimant to the morning of Wednesday 4 October 2022.

5. It was possible to conclude the evidence and submissions in the time available, just. We spent time deliberating on 25 October and again on 7 November 2023.

6. The Claimant gave evidence and was cross-examined.

7. For the Respondent we heard evidence from:

   - Clare Nott. At the material time she was Divisional HR Business Partner for the Integrated Care Division. We granted an application to admit her witness statement which had been served late, giving reasons for doing so.
   - Michelle Longfield (the Claimant's team manager until September 2020).

- Janine Mellor (Principal Manager Adult Social Care, Eccles, and line manager of Michelle Longfield).

8. We also admitted a statement from Jennifer (Jenny) Leyland dated 5 September 2023.

9. There was an agreed bundle of 1255 pages and numbers in square brackets in these reasons refer to that bundle. There was also a separate bundle of witness statements. We use the suffix "WB" to refer to the pages of the witness bundle. In the course of hearing we admitted the following further documents from the Respondent:

- A circular dated 27 March 2012 to Divisional HR Managers entitled "Indefinite Final Warnings – HR Review Process"

- 11 letters (dated variously between 15 November 2017 and 1 August 2019) by which other employees were given an indefinite final warning.

- A pro forma declaration of interest form

- A printed copy of 2 x online declaration of interest entries by Nadia Galit

FINDINGS OF FACT

10. Having considered all the evidence, we find the following facts on the balance of probabilities, and such additional facts as are contained in the analysis and conclusions section below. The parties will note that not all the matters that they told us about are recorded in our findings of fact. That is because we have limited them to points that are relevant to our determination of the issues.

11. The Claimant is a qualified social worker. She gained her primary qualification in 2012. In 2016, she became qualified to undertake deprivation of liberty safeguard assessments (DOLS). These assessments are undertaken by local authorities in respect of persons for whom they organise care but who lack capacity to consent to their freedom being circumscribed for their wellbeing.

12. The Claimant first worked with the Respondent as an agency social worker as part of the Swinton team, in around 2016. She was recruited the same time as a friend and colleague.

13. The Claimant was initially managed by Janine Mellor who was then a team manager. Janine Mellor was impressed by the Claimant's performance and encouraged her to apply for a permanent role with the Respondent.

The Claimant was ultimately successful in obtaining that role and joined the Eccles Integrated Care Team on 20 February 2017 [p.150]

14. The Claimant's statement of terms and conditions of employment provide that outside employment, financial interests or activities which *"may compete for an NHS contract to supply either goods or services to the trust and the wider NHS, must be declared"* [p.156]. Further, registration of such interests must be done on appointment whenever those interests are gained. There must also be approval in writing from the Trust Secretary, not to be unreasonably withheld.

15. The Claimant was also required to raise any concerns about her own lack of competence or illness to her manager [p.157].

16. The disciplinary policy of the Respondent provides expressly for the sanction of an indefinite final warning, the material provision being as follows:

Exceptionally where the misconduct relates to patients which is so serious that it cannot be realistically ignored for future disciplinary purposes the warning may remain active for an indefinite period subject to review at the request of an employee or on an annual basis [p.1146].

17. Where an indefinite final warning has been issued, section 12 of the policy requires arrangements to be in place for an annual review of the warning or alternatively, review at the request of the employee.

18. The Claimant's employment was without incident from a performance or disciplinary point of view until April 2019.

19. In April 2019 the Claimant was being managed by Michelle Longfield. She was then a team leader

20. The Claimant's day-to-day work as a Level 3 social worker was as part of a team of 18, working with adults to undertake care assessments and supporting carers of people with support needs. She also undertook mental capacity assessments, best interest meetings and safeguarding enquiries.

21. The composition of the team included at least 14 people who were not white british. The Claimant identifies as black African (Zimbabwean). The other non-white british colleagues were black british, mixed asian and white estonian background (Nadia Galit).

22. A feature of the Claimant's work was a monthly supervision meeting with Michelle Longfield. Though called a "supervision" meeting, we are satisfied that this regular meeting extended beyond oversight of the Claimant's caseload. It extended to discussing the well-being of the worker. There was an expectation that matters of her own health and wellbeing liable to

impact upon her work would be discussed. This is reflected by the standard supervision meeting template.

23. In April 2019 a supervision meeting took place which caused Michelle Longfield to raise concerns about (a) the Claimant's lack of documented observations on a particular case and (b) an oversight that had been made previously by her when another case was closed.

24. We find the meeting was supportive and that the Claimant did not identify there were any extraneous issues affecting her performance. It was agreed [p.313] that Michelle Longfield would authorise the Claimant's written work from that point on, in order that further concerns could be picked up at an early stage. This meant that the Claimant would be unable to close cases and discharge people from care without having sign off from Michelle Longfield. We are satisfied the Claimant did not disagree with this action, and Ms Longfield, we find, was genuine when she told the Claimant that she should come back and seek further support if needed.

25. In this period there was a particular difficulty regarding staffing of the team's office in the late afternoon. Visits very often took place in the afternoon meaning that there was a shortage of cover for duty social work. There were two level 3 social workers on sick leave which created a greater demand upon the Claimant, somebody who was then relatively more experienced as a worker.

The genesis of Disciplinary 1

26. On Tuesday 9 July Michelle Long was away from the office. She received a report from Deborah White, advanced practitioner, concerning the Claimant's work. Ms White provided a statement about the same some 2 days later [p.336].

27. In summary, Ms White's account was as follows. On Tuesday 9 July 2019 the Claimant told her (Ms White) that she needed to attend a meeting in connection with a service user. Owing to the staffing shortages the Claimant was asked explicitly to return at 3:30 PM in the afternoon, so that she could be there for the last hour of the day. The Claimant left sometime after 2:55 PM saying that she would be back later. Her diary referenced the visit taking place between 2.30 and 3.30.

28. In the event she did not return and so Ms White (who was providing management cover) made contact with the manager at the service user's flat complex. The Claimant was not there. Enquiries were taken forward by Ms White. The result was that by 4:25 PM Miss White received confirmation from the scheme manager that the Claimant had not signed in, the service user denied ever seeing her and the Claimant was confirmed not to be present in the flat, at that time. When very shortly afterwards Ms White rang the Claimant and asked her where she was, she replied that she had just finished the visit. When asked about the arrangement to return to the office the Claimant said the visit had ran over,

and that the scheme manager finished work at 2:30 PM so was not in the meeting.

29. On Wednesday 10 July Michelle Longfield was in the office briefly and so did not get the opportunity to discuss the concerns with the Claimant. However, the Claimant in fact approached her, to inform her that she had two meetings that afternoon, one with the client where an advocate was also attending and a DOLS assessment in Broughton she had arranged with the service users' family. Ms Long replied only that she was unhappy about the visit taking place in the late afternoon but that the Claimant would have to attend given it had been arranged with the family. The Claimant did not return to the office on 10 July 2019.

30. On Thursday, 11 July there was a Teams meeting in which Michelle Longfield raised with all affected staff, that afternoon visits should not be arranged without checking with an approved person or team manager. She spoke to the Claimant directly afterwards. She asked her about the visit on Tuesday, 9 July. The Claimant was angry about being questioned, saying *"how are you supposed to be able to see the clients you are allocating to me if you will be in the office all the time"*. Michelle Longfield informed the Claimant she should not be arranging visits after 1 PM. In reference to her actions on Tuesday, the Claimant said she did not return to the office because housing were late arriving. The Claimant was asked to put in writing why she did not return to the office [p.266].

31. There was no discussion then with the Claimant about the visits which had been arranged for Wednesday, 10 July.

32. Ms Longfield followed up the position here on the 18 and 19 of July with telephone calls to the service users who purportedly the Claimant had visited (SU 5 and SU16), as well as the family of the DOLS case. Ms Longfield received information that SU16 had not seen the Claimant for months, that SU5 denied that he had seen a social worker in the last week, and the family in relation to the DOLS case had not spoken to the Claimant.

Disciplinary 1

33. From the documents and evidence, our finding is that the decision to institute a disciplinary investigation against the Claimant was made between 9 July and 18 July. It was Jenny Leyland's advice that a disciplinary process was appropriate because the Claimant appeared to have deliberately lied about her whereabouts [p.39]. Michelle Long was asked to be investigating officer.

34. The Claimant was on annual leave on 12 July. On 18 July Michelle Longfield wrote to the Claimant [p.167] informing her that an investigation was to be conducted in relation to seven allegations. These included the falsification of visits on 9 July and on 10 July. It was also alleged that she had left the team understaffed on 9 July without adequate level 3 workers.

35. Within the letter the Claimant was told Michelle Longfield would be the investigating officer and that the investigation would be undertaken to establish the facts of the case. No disciplinary action would be taken until the case had been fully investigated and at that point the panel would be convened. The Claimant was invited to a meeting to establish the facts to be held on Wednesday, 24 July. She was told of her right to representation.

36. On 23 July the Claimant messaged saying that she was too unwell to attend and that her union representative would not be available at such short notice. The meeting was duly convened for 15 August.

37. In the intervening period, on or around 29 July 2019, Michelle Longfield undertook an audit of the Claimant's current open cases. We find this flowed from genuine concern that the Claimant may have behaved previously in a similar way, meaning there could be adversely affected current service users and families. This concern was amplified by the fact the Claimant was on unplanned sick leave and the Respondent was without any obvious explanation for the Claimant's recent conduct. The nature of the allegations, allied to the previous concerns from the supervision in April, made it necessary to consider the impact on current service users for which the Respondent had responsibility.

38. At this stage, there was no examination of closed cases.

39. By 13 August the Claimant had obtained another sick note for a period of 3 weeks lasting until 2 September. She had missed an occupational health appointment because relevant correspondence went to her work email address.

40. The meeting of 15 August duly went ahead and the Claimant was represented by Julie Long, trade union representative. As well as Michelle Longfield, Jenny Leyland was present and Andrew Smith, HR administrator also attended as notetaker.

41. The Claimant answered questions about the 16 open cases. The notes (the late provision of which is an independent allegation), satisfy us that Michelle Longfield and Jenny Leyland first clarified there were further issues in respect of other cases and offered the Claimant the opportunity to get them first in writing. The Claimant and her union representative indicated that they were content to carry on with the additional questions [p.361].

42. At the conclusion of the meeting, it is unclear to us what next steps were discussed. The minutes that were eventually sent [p.370], record only the Claimant's response to the last open case which had been audited.

43. In terms of the meeting, the disciplinary policy does not provide a specific timeframe for the provision of documents, or indeed minutes. We find they

were received for the first time under cover of a letter of 13 November 2019 [p.393]. We have been provided with copies of internal emails with the notetaker.

44. Based on this and the witness evidence that we have heard, we find that he was only chased for the notes of the *first* meeting on the day of the second investigation meeting i.e. on 12 September 2019. It is clear from the tone and content of Jenny Leyland's chaser that neither she nor anyone else had previously given him any deadline [p.186 - "if you managed"]. Some two weeks later, on 26 September 2019, Andrew Smith had managed to complete *some* of the notes only [p.194], it appears, in relation to the second interview. On 11 October 2019 he was given the target of providing the rest - of the second interview - by Monday or Tuesday 14 or 15 October [p.194].

45. Understandably, the notes had to be reviewed for accuracy on the Respondent's part by Michelle Longfield [p.197]. The earliest time the notes from the first meeting were finalised by her was mid-October (although for the reasons given it is not clear when between 12 September and mid-October, they were finalised by Andrew Smith) and the earliest that the second interview notes were completed was 4 November 2019.

46. When eventually the minutes were provided to the Claimant on 13 November 2019, the Claimant did have changes that she wished to make, as well as volunteering her own statement. This led to two sets of minutes signed by her on 22 November 2019 [p.370].

47. In terms of the second invitation to interview, this was sent undercover the letter of 30 August 2019 [p.375]. It rehearsed identical allegations to the first invitation. It said, *"I would like to meet with you for a further investigation into the facts of the case and to give you the opportunity to provide information you feel is relevant to the investigation"*. The proposed date was 5 September. In the event, the Claimant's trade union representative could not attend and it was rearranged for 12 September 2019.

48. The invitation does not reference the audit of closed files. The evidence of Jenny Leyland was that the Claimant had been given the option at the meeting on the 15 August 2019 of dealing with closed cases that day or arranging a further meeting (paragraph 15, p.24, WB). That cannot be right because the audit there was only completed by Michelle Longfield and Sheila Jones on the 29 August 2019 [p.374], Jenny Leyland herself on 12 September emailed notes to assist with the opening of the meeting [p.187-189], which say this:

Following the interview on the [date] it prompted me to look at the recent closed cases. It became clear there were actions that Yvonne should have done... It also became apparent that Yvonne had closed cases from 25 April.

49. Michelle Longfield's evidence was that as a result of the closed cases audit, she decided she needed to liaise with the Claimant further to establish the facts and this was the reason for arranging the second investigation meeting [p.41].

50. It follows that the Claimant was not given a clear indication of the scope of the meeting of 12 September. This all fits with the subsequent opening written statement of Julie Long on 30 January 2020 [p.298] which asserts that at the conclusion of the meeting on the 15 August, the next correspondence expected would be confirmation of whether the matter would progress to a disciplinary investigation, instead of which there followed an invitation to a meeting on 12 September. As the statement says "*..at this meeting the trade union representative had to enquire about the purpose of the meeting"*.

51. That said, although it is also clear that Ms Long considered this was the first moment at which she and the Claimant were told the matter was being dealt with under the disciplinary procedure, that was respectfully, a misunderstanding given the clear terms of the invitation to the first meeting.

52. The minutes of the September meeting were sent with the earlier minutes of the August meeting, on 13 November 2019. Somewhat extraordinarily, the Claimant was given a week to return amended/signed notes, failing which it would be deemed that she agreed with the contents and they could be used in evidence.

53. We have described already the steps which the Claimant took in terms of amendments to the minutes and making her own additional statement. Within that statement the Claimant refuted the allegations of falsifying the visits of the 9 and 10 of July, saying that she had not made any recordings, and that she had intended to complete such visits. Her case was that on the way to the service user on 9 July she received an upsetting personal phone call leaving her too distressed to complete the visit. She went home. She said that she had been having personal problems since April 2019 and was too embarrassed to speak with her supervisor.

54. So far as 10 July was concerned, in relation to the similar point about there being no case recordings, the Claimant added that she had intended to make a visit but instead finished work at that time because her personal problems were impacting upon her work and she realised her mind was not in the right place [p.396]. The combination of the statement [see heading "additional information" p.397] and the correction to the minutes satisfy us that the Claimant accepted that she did not disclose her personal situation to Ms White. She did not respond to the direct allegation of having told Ms White in clear terms that the meeting had run over [p. 361].

55. The Claimant was notified by letter of 28 November 2019 that her case would be progressing to a disciplinary hearing. It was originally due to take place on 12 December but as Julie Long could not attend, the meeting was put back to the new year.

56. It ultimately took place on 30 January 2020. Michelle Longfield furnished a management report. The report included the investigation findings that said [p.259]:

9 July 2019 - Not attending a visit on which Yvonne had recorded in her diary and Skype and being dishonest the recovery manager. Leaving the team understaffed when the covering manager specifically on to return to the office after the visit stop not contacting the client to cancel the visit.

10 July 2019 - not attending to visits on which Yvonne had recorded in her diary and Skype. Not contacting the clients to cancel each visit.

57. The written allegations to be considered, encompassed six headings: (1) failure to act to complete work in appropriate timescales (under which heading was listed not completing visits which were organised in the Claimant's diary and "not communicating with Michelle Longfield about workload *honestly"*), (2) fraudulent recording of working time in outlook (3) failure to document work appropriately, (4)failure to follow departmental processes, and in respect of closed cases, (5)failure to act or complete work (6)failure to document work appropriately [p.163].

58. The Claimant provided her opening written statement.

59. The resulting meeting was chaired by Patricia O'Connell, Head of Service, who was advised by Claire Nott.

60. Ms O'Connell is herself a former social worker. We are satisfied that she asked questions of the Claimant that were relevant and informed.

61. We also accept Ms Nott's account that Ms O'Connell was shocked by the shortfalls in the Claimant's case work, that Ms O'Connell considered the Claimant mischaracterised her workload as especially complex and that she regarded there to be sufficient grounds overall to terminate the Claimant's employment.

62. We accepted, as was Ms Nott's evidence, that factors informing the serious view taken were the impact on service users and the conclusion that there had been a deliberate failure to record accurate working times and/or to mislead the organisation [para 16 of Ms Nott's statement].

63. The outcome was that the Claimant received an indefinite final warning. She was not dismissed as a result of the mitigation, primarily around her personal problems and previous clean disciplinary record.

64. The disciplinary outcome letter of 11 February 2021 [p.441] expresses its conclusions employing the headings contained in the invitation letter [p.163] which itself mirrored the investigation report. The Tribunal finds all of the allegations under those headings were proven. In respect of allegation (1) tracing back, the following was proven:

It appears that Yvonne did not complete visits to MSU for, SU 16, SU 5 which were organised in her diary on 9th and 10 July 2019

it appears that Yvonne did not contact clients SU full, SU 16 and SU 5 when she did not attend the visit on the 9th and 10th and failed to rearrange the visits

It appears that Yvonne did not communicate with Michelle Longfield about workload honestly

65. In respect of the allegation of "fraudulent recording", this allegation related to SU13 i.e. **not** one of the missed visits. The concern here was that the Claimant had listed in her diary visits to this client which were overstated in number. This arose only out of the open cases review.

66. More generally, we found the outcome letter as a whole to be balanced. Miss O'Connell acknowledged the Claimant's work had not always been overseen by managers and that as a senior team they should have had more robust processes in place previously. She also made the points however, that the Claimant's workload was not excessive, and said this:

" I did stress to you that your accountability of your whereabouts is a serious concern to me".

67. The Claimant was notified of her right to appeal within 14 days. She did not appeal from the outcome. She did however commence a grievance on 27th of February 2020. The Claimant alleged that during the disciplinary process, an advanced practitioner had disclosed confidential information to a staff member in another team. This is not the subject of a complaint in these proceedings.The advanced practitioner in question, Sheila Jones, acknowledged some sharing of information and made a substantial apology to the Claimant in a statement of 6 August 2020. Janine Mellor also reminded staff in a circular of 11 August 2020 about the importance of confidentiality.

The Fraud Investigation

68. Michelle Longfield remained the line manager of the Claimant until September 2020. Whilst the action plan had been drawn up in February 2020, its implementation was somewhat frustrated by the Covid 19 pandemic. The Claimant had catch-up calls with Michelle Longfield who was then responsible for managing a team of eighteen and handling the operational impacts on the service.

69. On 20 August 2020 Janine Miller queried with Michelle Longfield whether or not she had managed to speak to the Claimant and to Nadia Galit to clarify if they were doing private DOLS work for Manchester [p.542]. The evidence of Michelle Longfield, which we accept, was that she first became aware of private DOLS work a couple of days prior to this email and that she had been the one to inform Janine Mellor. Janine Mellor had no idea that either social worker was undertaking private DOLS work or had registered as a second job.

70. It only came to Michelle Longfield's attention via discussion that was ongoing between social workers in the office. An advanced practitioner came to see Michelle Longfield and asked whether she was aware that the Claimant and Nadia did additional DOLS work on a self-employed basis. No further detail was given. Her concerns at that stage were around the long hours that both might be doing and the question of tax and National Insurance. She spoke to Janine Mellor about this. Hence her email was following up.

71. Michelle Longfield spoke to the Claimant and Nadia Galit. They gave distinct accounts as set out in her email reporting back to Janine Mellor [p.541]. In Nadia's case she explained that she talked to Jane Bowmer about it to make her aware she wanted to register as a private BIA. This was around 2018. She explained that Jane had checked the matter out with HR and agreed she could. Nadia agreed to seek out "the email" which she said HR had sent to her. She indicated her work was run through a limited company and was ongoing.

72. The Claimant gave an account to Michelle Longfield that she had registered as a private best interest assessor whilst working for another employer some years ago. She had done work for Bolton and for Manchester and had a registered limited company together with an accountant who dealt with her tax affairs. She told Michelle Longfield that she had done about 10 assessments in 2019. She had not done more because of the issues at work and not feeling well enough. She said that Jane Bowmer was aware she undertook the work and then it was some time now since she had done any assessments.

73. Janine Mellor sought advice from Jenny Leyland who confirmed that if employees have a second job/business it had to be declared. Jenny Leyland forwarded to Martin Sexton, Janine Mellor and Michelle Longfield the same email which included a hyperlink where electronic declarations of second jobs could be made.

74. On 29 September 2020 an online declaration was made by Nadia Galit in respect of her self-employed DOLS work. The Claimant gave evidence that following Michelle Longfield making an enquiry of her about the DOLS work, she spoke with Nadia who told her [the Claimant] that she had received a declaration from Michelle. The Claimant said that Michelle had sent an email to Nadia. The Claimant did not call Nadia Galit as a witness.

75. Ms Longfield was cross-examined about this matter. She said she was not aware there was a declaration previously. She gave convincing evidence that she would not have passed the email and link on to Nadia without similarly passing it on to the Claimant. She checked her emails the night before giving evidence and examining her sent items could trace no email, to the Claimant or to Nadia in her sent items which went back to March 2020.

76. We were impressed by the evidence of Michelle Longfield. She answered questions in a direct and open manner. She was candid about the challenges the service faced e.g. that owing to the 18 staff she had and associated pressures, audits were undertaken less frequently than she would have wanted. She was not defensive in cross-examination. She spoke convincingly about her genuine concern as a social worker, in her words to make sure all those people [those the subject of the open cases review] "were ok and the job had been done".

77. We conclude, on the balance of probabilities that Michelle Longfield did not pass on the email and link to Nadia Galit or to the Claimant.

78. Ms Longfield moved posts to the review and extra care team on 30 September 2020 and stopped acting as the Claimant's manager. Sarah Hardman took over.

79. Janine Mellor developed evolving concerns about the Claimant's private DOLS work. These were based on her distinguishing between Nadia and the Claimant based on the information she received from Michelle Longfield. She understood Nadia to be saying she had received an email from HR confirming the work was acceptable but that was not the case in relation to the Claimant. That was a justified interpretation of the information she received.

80. This concerned Janine Mellor because she was aware the Claimant had practising restrictions as a consequence of the first disciplinary. She was concerned about patient safety whereby the Claimant might be doing work which she had been restricted from undertaking in her own employment. Her concerns also evolved into whether the Claimant's private work was being undertaken in the Respondent's time the possibility of fraud. This was discussed with Jenny Leyland..

81. On 12 November 2020 Jenny Leyland made a referral to Mersey Internal Audit Agency in reference to the Claimant. She said [p.603]:

"*We have concerns [the Claimant] is working for Manchester City Council as a contractor completing DOLS assessments. Yvone is a social worker in X team.*
There are concerns about her performance and she has had sick leave. We are keen to seek support as there are concerns she is working during NHS time or during sick leave"

82. In her written statement Ms Leyland says that the matter had to be referred "as per usual practice" [p.32WB]. We have been provided with the antifraud and human resources joint working protocol template but only the 2022/2023. This document does provide for HR staff as soon as practicable to report suspected fraudulent and corrupt activity to counter fraud or AFS.

83. An investigation was opened by MIAA 27 November 2020. No further internal enquiries were undertaken by the Respondent and the matter was not discussed with the Claimant pending the MIAA outcome. The Respondent furnished the investigator, Paul McGrath, with requested information and witness statements.

84. The progress of the antifraud enquiry was protracted. By a process of triangulating data, it had been identified by 18 February 2021 that there were 27 dates in which the Claimant had completed DOLS work for Manchester which coincided with times when the Claimant was working for the Respondent. Mr McGrath reported this: Of the 27 dates, 7 DOLS have been completed at 9am, 10am or 11 and 20 at 4pm or after.

85. The Claimant was called for interview under caution which she attended on 21 April 2021, with legal representation. Shortly thereafter MIAA issued a report to the Respondent advising them that their investigation would be closed with no further action as it could not be proven beyond reasonable doubt that the Claimant completed the DOLS forms during periods of sickness or core time, only that she submitted them on an individual date [p.1104]. In the case of the cross-over days with her trust work, the Claimant's account was this was simply the act of uploading the forms, the work having taken place previously outside of working hours or at weekends. The uploading process only took a minute or so.

Disciplinary 2

86. On 30 November 2020, the Respondent opened a section 42 Care Act safeguarding enquiry in respect of "SUA". This followed a report from the Ambulance Service raising a concern of neglect of a service user. The circumstances were that SUA had been discharged from a care home 5 days previously. The Ambulance Crew attended SUA when neither his carers on that day, nor urgent care nurses were able to clean or change him due to poor mobility. SUA was found having been sat in his own urine and faeces for days. His wife (who had her own carers too and whose own hospital admission had been the cause of SUA's respite) was in a similar position although not injured. She too had limited mobility and had been incontinent of urine in the same period.

87. SUA went to hospital and was noted to have suffered skin maceration to lower belly, groin, genitals, lower back, buttocks, sacrum and thighs down to knees.

88. An Adult Safeguarding Board case conference took place on 8 February 2021 which the Claimant attended.

89. The Claimant had been in charge of the discharge of SUA. She had never met him because her involvement began during the Covid restrictions and all assessments had been completed over the phone.

90. She made a plan for his discharge which meant there would be two sets of carers. She had previously assessed SUA as lacking capacity at the time he went into respite. In essence, she defended the decision to discharge SUA home on the basis that SUA had fluctuating capacity and at the time of his wife's release from hospital, he had capacity and wanted to return home.

91. Neil Symons, an advanced social work practitioner, was asked to lead the independent enquiry. He substantiated the safeguarding concern against the two care providers and against the Claimant [p.667]. His key findings in respect of the Claimant's conduct were of no robust discharge planning, lack of communication, two care providers involved and no MDT prior to discharge. In answer to a Tribunal question of Ms Linney we received convincing evidence from Janine Mellor that she believed the outcome would have been different with a different discharge plan.

92. In the meantime since early November 2020 Sarah Hardman and Janine Mellor had identified some concerns about the Claimant's work which resonated with the previous concerns [p.578]. Sarah Hardman was concerned that the Claimant was not working autonomously, required extensive support and was showing deterioration, not improvement. Sarah Hardman reviewed the action plan with the Claimant on 4 November – well before the unforeseen safeguarding incident - and recommended that she remain on it for a further three months. We are satisfied those concerns were honestly held.

93. On 21 January Janine Mellor sought advice from the overall Head of Service about whether, given the indefinite warning and the potentially serious outcome of the s.42 enquiry, it was necessary to suspend the Claimant or place her on restricted duties. Jenny Leyland advised all new disciplinary cases needed to follow the Just Culture Framework where it was necessary to look at mitigation and impact on service users before sanctioning an investigation. When outlining her multiple concerns in reference to the safeguarding Ms Mellor wrote *"I suppose I am a little unsettled about things given YM previous disciplinary history and I do not think there has been any significant improvements with YM practice since the last disciplinary investigation"* [p. 564]. We are satisfied Ms Mellor was extremely concerned and this related to keeping service users safe and upholding the service's duties to them.

94. This is exemplified by detailed correspondence she pursued with a senior colleague regarding her concerns.

95. The Claimant was put on to doing low level carers assessments which were to be signed off by Ms Hardman. However, following the substantiation of the safeguarding allegation Janine Mellor grew concerned about the need to commence any investigation promptly and was also concerned about how it would reflect, if ultimately it was necessary to inform the social workers regulator, Social Work England (SWE). She felt SWE would want reassurance about what steps had been put in place to protect vulnerable people.

96. The question of whether to pursue disciplinary action was agreed at a Just Culture Meeting of 24 March 2021. It was agreed that the Claimant's duties should be limited rather than her being excluded. The Claimant was notified by letter the next day but Janine Mellor telephoned her first.

97. The scope of the investigation was detailed and extended beyond the broad thematic failures matters Neil Symons identified but notably in his outcome he had said *" I also think we do need to add to this the concerns raised earlier in the investigation to the admission into respite care, which although was not included in the actual safeguarding, I have included it in this investigation because I feel it highlights poor professional practice and should belooked into further by the workers team manager* "[p.745].

98. The allegations in the Trust investigation display there had been analysis of the underlying actions and the documentation, and went back to August 2020 [p.714]. The matters included:

- *5.8.20 Failure to undertake or document a formal MCA assessment in regard to respite care*

- *5.8.20 Failure to provide accurate information within the ASC for which stated that SUA had capacity to agree to respite, however the ILA dated 27.3.20 was not complete by YM and stated that SUA did not have capacity*

- *5.8.20 Failure to complete an up to date ILA for SUA admission into respite care*

99. On 29 March 2021 the Claimant went on sick leave with stress.

100. The Respondent was told on 15 April by MIAA that they could now inform the Claimant about their investigation in respect of her private DOLS work. That was because MIAA had now notified the Claimant of the allegations and invited her to an interview. Janine Mellor telephoned the Claimant to inform her that a further allegation in respect of undertaking private DOLS work in Trust time had been added to the scope of the investigation. The Claimant was stressed by this and told Janine Mellor who mentioned the independent support available to her. The Claimant asked Janine Mellor whether she should resign from her job. Janine Mellor urged her to talk with her union representative.

101. The Claimant resigned by email sent to Ms Hardman on 16 April. Her resignation referenced the disappointment in being subject to an internal investigation for SUA matters. She said this:

I would like to highlight that the case in question involves me being closely monitored by my supervisor and all suggested actions were completed in a timely manner. In addition the letter informing me that is to be an internal investigation fails to note that I was on leave when a safeguarding referral was received by adult social care this referral was not acted on by the duty team or management and therefore this service user was vulnerable to further neglect. I feel that I am being subjected to unfair scrutiny about this case and feel anxious and disappointed that management to have been supporting me through this case now intend to question my practice.
I consider that the mutuality of trust and confidence necessary for all employment relationships has irretrievably broken down.

102. The Respondent's letter accepting the resignation indicated that, the Claimant having resigned in the absence of a conclusion on the disciplinary matter, future references would contain a statement to that effect. The Claimant would be referred to her regulatory body [p.768].

103. Following the Claimant's resignation there was some internal debate about the necessity to conclude the disciplinary hearing, essentially in the absence of the Claimant. However, Ann Brooking contacted SWE and SWE wanted an immediate referral to them, given the nature and seriousness of the concerns [p.747]. The referral [p.794] gave a summary of the concerns going back to July 2019 and included the subsequent safeguarding enquiry and fraud enquiry. We find the terms of the referral where a non-partisan, accurate factual reflection. It was supported by relevant copies of documents supporting the concerns. A referral to DBS was also made. It was also recognised that Manchester City Council service users, for whom the Respondent knew the Claimant was potentially working, may be affected and they accordingly notified them too. It was clear that this was done on legal advice.

THE LAW

Race Discrimination

104. Under s13(1) of the Equality Act 2010 read with s9, direct discrimination takes place where a person treats the Claimant less favourably because of race than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case. 'Race' includes nationality or national origins.

105. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the Claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the Claimant was treated as she was. (**Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] IRLR 285**).

106. Decisions are frequently reached for more than one reason. Provided the protected characteristic or, in a victimisation claim, the protected act, had a significant influence on the outcome, discrimination is made out. (**Nagarajan v London Regional Transport [1999] IRLR 572, HL**) 35 The case law recognises that very little discrimination today is overt or even deliberate. Witnesses can even be unconsciously prejudiced.

Harassment

107. Under s.26 EqA a person harasses another person if they engage in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect (in relation to that person) of violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. The test for whether there is harassment is a mixed subjective and objective one and the test involves two steps: (a) did the Claimant genuinely perceive the conduct as having that effect and (b) in all the circumstances was that perception reasonable: (**Smith v Ideal Shopping Limited UKEAT/0590/12/BA** and **Pemberton v Inwood [2018] EWCA Civ 564).** The Tribunal kept in mind the Code of Practice on Employment issued by the Equality and Human Rights Commission which came into force on 6th April 2011, particularly chapter 7 which deals with harassment.

Burden of proof

108. Section 136 of the Equality Act 2010 sets out the burden of proof. The burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another. (**Hewage v Grampian Health Board [2012] IRLR 870, SC.**)

109. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision.

110. Guidelines on the burden of proof were set out by the Court of Appeal in **Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258**. Once the burden of proof has shifted, it is then for the Respondent to prove that it did not commit the act of discrimination. To discharge that burden, it is necessary for the Respondents to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive. Since the facts necessary to prove an explanation would normally be in the possession of the Respondents, a tribunal would normally expect cogent evidence to discharge that burden of proof.

111. The Court of Appeal in **Madarassy v Nomura International Plc [2007] EWCA Civ 33**, a case brought under the then Sex Discrimination Act 1975, states: "The burden of proof does not shift to the employer simply on the Claimant establishing a difference in status (e.g. sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the Respondent had committed an unlawful act of discrimination".

112. A false explanation for the less favourable treatment added to a difference in treatment and a difference in sex can constitute the 'something more' required to shift the burden of proof. (**The Solicitors Regulation Authority v Mitchell UKEAT/0497/12**.)

Constructive Dismissal

113. The Tribunal derives from the case law the following principles of general applicability to a claim for constructive unfair dismissal which is founded (as the Claimant's claim is) on alleged breaches of the implied term and trust and confidence:

- Whether there has been a repudiatory breach of contract should be objectively assessed and the employer's subjective intention is not relevant (**Leeds Dental Team Limited v Rose UKEAT/0016/13/DM**).

- In general, there is well established distinction between cases where the fundamental breach is comprised of a course of conduct taken together and cases where a one-off, single act by the employer is relied upon as fundamentally breaching the contract. In particular the following principles are relevant:

- The act precipitating the resignation in a last straw case need not itself be a breach of contract (**Lewis v Motorwold Garages Ltd 1986 ICR 157 AC**)

- The last straw, if an incident which is part of a course of conduct that together constitutes a breach of the implied term of trust and confidence, will revive the employee's right to resign. In that situation it does not matter that they worked and affirmed the contract after earlier incidents forming

part of the course of conduct (**Kaur v Leeds Teaching Hospitals NHS Trust 2019 1 ICR 1, CA)**

- The last straw does not need to be proximate in time or of the same character to the previous act of the employer (**Logan v Celyn House Limited EAT 0069/12** and **Omilaju v Waltham Forest London Borough Council 2005 ICR 481**). It need not blameworthy or unreasonable but must contribute to the breach of the implied term.
- An act which is entirely innocuous cannot be a final straw, even where it is interpreted by the employee as hurtful and destructive of his trust and confidence. (**Omilaju**).

114. **Polkey**: this is the adjustment that may be made to any compensatory award, where in the main the unfairness flows from an unfair procedure. It is applied in accordance with principles established in the case of **Polkey v AE Dayton Services Ltd [[1987] UKHL 8; Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; and Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604**. The Respondent said that the Claimant would have been dismissed in any event, therefore any award should be reduced by 100%. This was not conceded by the Claimant although she did not offer any substantive argument.

115. **Contributory fault:** Two deductions are possible under statute for culpable conduct in the slightly different circumstances set out in the ERA 1996:

Section 122(2) provides as follows:

"Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly."

Section 123(6) then provides that:

"Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

Time Limits

116. The Equality Act 2010 (EqA 2010) provides time limits for bringing claims. The provisions relevant to this case are as follows:

123 Time limits

(1) Subject to section 140B, proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable

…

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

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

117. We have also considered **Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548, CA and Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530, CA** in respect of the correct approach to continuing acts. The Tribunal should look at the substance of the complaints in question — as opposed to the existence of a policy or regime — and determine whether they can be said to be part of one continuing act by the employer.

Discretion to extend time

118. The tribunal has the discretion to extend the time limit for a discrimination claim to be presented by such further period as it considers just and equitable (section 123(1)(b), EqA 2010). Following **Adedeji v University Hospital Birmingham NHS Foundation Trust [2021] EWCA Civ 23** caution must be exercised against over-reliance on the so-called "Keeble

factors"(so named after **British Coal Corporation v Keeble [1997] IRLR 336** in which the factors of length of and reasons for the delay, the extent to which the cogency of the evidence may be affected and the steps taken by the Claimant to obtain advice were said to be relevant). The best approach for a tribunal in considering the exercise of the discretion is to assess all the factors in the particular case that it considers relevant, including in particular the length of, and the reasons for, the delay (as per Underhill LJ in Adedeji at paragraph 37).

Analysis and Conclusions

119. We will deal with the allegations separately but group them according to which disciplinary/investigation they relate to.

120. Before we turn to them, we deal with an overarching submission of Mr Todd. He urged us to step back and consider the whole of the Respondent's actions. He submitted that the Claimant can raise unconscious discrimination without the necessity of an express pleading to that effect and we should draw inferences from:

- The profound differences in seriousness between the conduct of the other employees who garnered indefinite final warnings (IFW) and the Claimant; and
- The absence of any fraud concern from Janine Mellor when she learned that Nadia Galit was undertaking DOLS - Nadia Galit, Mr Todd says, was seen as professional and trustworthy. She ended up filling in a declaration which the Claimant did not and, he contends, must have been preferred in that process.

We analysed these points both individually in reference to the allegations, as well as matters which might pass the burden of proof overall under s.136.

We concluded they do not cause the burden to move in respect of all or any of the allegations.

There are identifiable differences with the other employees who were sanctioned with IFWs. On a casual reading, the nature of the types of conduct overall seems more serious (e.g. shouting aggressively at patients, falsifying clinical records). On the other hand, those other employees are demonstrably not in substantially the same circumstances as the Claimant. We are satisfied that they were medical professionals by and large. Their roles were different. We find as a matter of fact that the Claimant's actions were judged for her role as a Level 3 social worker and, in that context, to be extremely serious. There was a real prospect of a dismissal. Michelle Longfield was clear in her evidence that one of the visits was to a man living in fly infested housing. It was an important and necessary meeting, to the point where she said the duty manager would have sent a duty worker had

the Claimant's non-attendance been known. The crude, side-by-side comparison with the other IFW cases therefore, does not lead to an inference of discrimination.

We reject too that the attitude to Nadia Galit discloses a tendency to treat white people more favourably (and correspondingly the Claimant less favourably). Nadia was not in the same situation as the Claimant. She had no disciplinary history which brought into question her professionalism and honesty with colleagues. We also placed some weight on the encouragement which Janine Mellor had previously given to the Claimant to become a permanent employee.

(a) Disciplinary 1

2.1.1 - (discrimination only) On 9 July 2019, instigating a disciplinary investigation against the Claimant in relation to how she carried out her practice, including singling out the Claimant for poor case recordings when other white employees' service user records were far below standard but no action was taken against those employees.

121. Our assessment is that the disciplinary investigation was instituted on or around 18 July 2019. As a matter of fact, the scrutiny of the Claimant's current and closed cases was not instituted unilaterally or without cause - the Claimant's non-fulfillment of visits and not volunteering this, was significantly concerning. Secondly, the two audits were *not* instituted at the same time. Rather, the Respondent took an incremental approach and it was only when the Claimant's answers were unsatisfactory in relation to the current cases that the retrospective review was embarked upon. Until 15 August when the first review of records had already been completed, there was no obvious, credible reason or mitigation for her actions. She had not disclosed them in supervisions to Michelle Longfield as would be expected and as the Claimant knew was open to her.

122. The factual allegation of singling out is not made out. The action was not because of the Claimant's race but because of her own conduct. Nor did it constitute a breach of the implied term of trust. The reality was the Claimant, if anyone, was in breach of contract.

2.1.2 - On or after August 2019 failing to provide the Claimant with further correspondence updating her on the assessment

123. We accept that between 15 August 2019 and the invite to the second meeting, the Claimant was unclear as to the progress of the investigation. However, we find it was clear or ought to have been clear from the very start of the investigation, that the disciplinary process was on foot and this may result in the matter being referred to a disciplinary hearing. We are not satisfied that the reason why there was no correspondence in between

times was because of the Claimant's race. The Claimant remained represented throughout and did not herself seek clarification regarding progress.

2.1.3 - Failing to provide any written records of the August 2019 meeting in time for the Claimant to prepare adequately or at all her for the investigation and disciplinary meetings.

124. The Respondent was at fault in not providing the minutes of the meeting of August 2019 until 13 November. It's quite clear that no real priority was given by Jenny Leyland to their preparation. This was despite the fact that the Claimant had (willingly) discussed much wider matters than had been foreshadowed in the original invitation. In circumstances too where the invitation to the second meeting did not delineate any fresh or new purpose, this took on a greater significance. Whilst the Claimant had agreed to forego her opportunity to reflect on current cases before answering questions on 15 August, she was evidently not speaking from a preprepared script and might legitimately wish to be refreshed by the answers given, in order to prepare for what might reasonably be raised in the next meeting.

125. We are not satisfied the reason why is because of the Claimant's race or that it was harassment. It was simply poor.

2.1.4 - On or around 12 September 2019, informing the Claimant that she was going to be subjected to a disciplinary hearing when her white colleagues had been placed under capability procedures for far more serious allegations in similar situations to the Claimant.

126. The Claimant seeks to rely on a number of comparators as identified in paragraph 3.1 of the list of issues. However, she has not adduced any persuasive evidence of any differential treatment in the selection of disciplinary route rather than a capability route. Factually, the treatment of the matter under the disciplinary process rather than a capability issue went back far earlier to the meeting which ultimately took place on 15 August 2019.

127. Further, having considered the matter closely, we find the Respondent's decision to invoke the disciplinary procedure to be manifestly, objectively justifiable. The capability policy [p.1171] confirms that its prime aim is to help employees reach the standards of performance that the organisation requires for meeting the needs of patients. The clear trigger for Michelle Longfield taking advice was the failure to attend meetings on the 9th and 10th of July. At the time of the institution of the disciplinary policy (i.e. by setting up an investigation meeting) the facts were not suggestive of

professional incapability. The early response of the Claimant to Michelle Longfield had not been honest, and there was already the additional background of problematic record keeping, since which time the Claimant had not sought support.

2.1.5 - Asking the Claimant, on return from sickness absence on 24 September 2019 to take one day's forced annual leave so that the Respondent could make arrangements to restrict the Claimant's duties within the team without any consultation with the Claimant.

128. As a result of the two investigation meetings, it was identified - reasonably in our view -that the Claimant was a potential risk to service users from a safeguarding perspective. She was therefore placed on restricted duties. She was only notified of this when she presented for work on 23 September. The conversation took place between the Claimant and Michelle Longfield. The Claimant was told that the Respondent was not yet in a position to allow her to work under the restrictions. The Claimant was not offered an additional day of paid leave. Although Ms Longfield did not say in terms that the Claimant *had* to take leave, no other solution was offered. We find that the Claimant took this to mean that in order to be paid, she would need to take a day's annual leave.

129. We do not consider this situation was imposed upon the Claimant by reason of the Claimant's race. It's clear from the letter setting out the restrictions that there had been a need for discussions with colleagues to determine an appropriate management of any risk. It had only been 11 days since the second investigation meeting in respect of the closed cases. There was no deliberate delay therefore. The Claimant did not take forward any active conversation about the point. Yes, the Respondent left the question of how the matter could be dealt with hanging, but it did not follow that it would not have been receptive to a different suggestion (e.g. a day in lieu). The written notification of the restrictions left the way open for discussion of concerns or questions. We consider the Claimant's experience of Ms Longfield as a fair-minded and supportive boss meant that was not an empty gesture.

2.1.6 - On 30 January 2020, administering an indefinite final warning against the Claimant when her comparators, in a similar situation, were put on lesser sanction of incapability procedures and given a chance to improve

130. In the Tribunal's experience an indefinite final warning is very uncommon sanction in the sense of one not often provided for within a disciplinary policy. That is not difficult to see why. Despite the review mechanism and the apparent motivation ("saving" the employee from actual dismissal) it has shades of placing the employee in a form of employment purgatory; caught between leaving with the stain of an indefinite warning and staying

knowing a small infraction could render them summarily dismissible with potentially very limited recourse.

131. It does not follow however, that because it might be draconian and unusual that it was an act of discrimination. We have established it was an express sanction under the disciplinary policy and, from the cases that we have received outcomes from, we know that the Respondent really did invoke it. It did so in at least 11 cases. These were proximate in time to the Claimant. The emloyees concerned had different ethnic backgrounds, including white british, asian and black british.

132. We note the Claimant alleges the Respondent administered an indefinite final warning against her where white comparators were put in a lesser sanction of incapability procedures and given a chance to improve. The Claimant has not adduced any evidence to show that there was a lesser sanction applied to colleagues in substantially the same position as her. We repeat the point above about what relevance we attach to the evidence we received about other employees.

133. For completeness (and we deal with constructive dismissal separately below) we did reflect whether the imposition of such as sanction might go to the heart of trust and confidence in that it has the effect, potentially, of denuding the employee's rights or protections to an iniquitous degree. That is no doubt a debatable legal question but in the end, none of this matters. To the extent it could be a repudiatory breach, the Claimant has long since affirmed it. We will explain below why this is not a straw case either.

(b) Fraud Investigation

2.1.9 - in August 2020, mounting an investigation for allegedly carrying out private DOLS work during SRFT time when other white employees were allowed to carry out such work by signing the declaration form.

134. Given the date identified this can only reasonably be understood as a complaint that the referral to MIAA was because of her race. Our firm conclusion is that is not the case and that it was because (a) the Respondent had a belief, based on wholly reasonable grounds, that the Claimant might be dishonestly using trust time (or paid sick leave) to undertake the work and (b) where such suspicions arise there is expectation on staff of reporting to the dedicated anti-fraud team. They have much wider powers to enable them to pursue the matter fully.

135. The context is of vital importance. Jenny Leyland was the decision maker. She drew upon discussion and information gathered through Janine Mellor

and Michelle Longfield, and her own detailed first-hand knowledge of the first disciplinary.

136. The final conclusion of the first disciplinary was only 6 months ago. The Claimant was on an extended work plan. She was on restricted duties. We accept incompetence and dishonesty do not go hand in hand. However, fairly and closely analysed, the unappealed conclusions included serious unprofessional conduct, including a lack of honesty by the Claimant. It was found that the Claimant did not communicate with Michelle Longfield about her workload honestly. And beyond everything that is expressed across the four corners of the disciplinary conclusion (when fed back to the allegations list), it was never resisted by the Claimant that she had misled Deborah White and Michelle Longfield, which was supported by statements. There was of course her personal mitigation but account had been taken of that in the sanction.

137. The Claimant seeks to make ground out of the idea that falsification and falsifying were unjust descriptions in reference to the visits that were not undertaken. We have analysed the route cause by which that came about –see above in reference to SU13 . To the extent they were used in reference to the visits, the point remains that the Claimant had been found not to have been honest with colleagues

138. Materially, Michelle Longfield, Janine Mellor and Jennifer Leyland were all aware that these issues arose in 2019, the very same period in which the Claimant was now saying that she had done some private work. When asked by Michelle in August 2020, she never suggested that any of Michelle, Janice or Jenny knew before. There was also, at least, a tension with the Claimant's mitigation of how personal issues had affected her work, and the levels of sick leave she had. Those circumstances could not be reconciled easily with her voluntarily taking on further work, outside of Trust hours.

139. Against this backdrop, referring the Claimant for investigation into potential dishonesty was justified. Although in one sense it comes after the fact, we take the Respondent's point in closing submissions that the very fact that criminal proceedings were still being contemplated in April 2021 speaks to the soundness of the suspicions. Of course, the Respondent would not have known how the audit trail would pan out at that time but as a minimum, it would be something of a happenstance if, as the Claimant suggests, the referral to MIAA was really because of her race.

140. Mr Todd argued there were no grounds for finding that the Claimant's white colleague Nadia Galit was referred to MIAA.

141. The untested evidence of Jenny Leyland (paragraph 71 of her witness statement) is that Nadia Galit "was referred". She styled it as a "usual

practice". It is right that we have not seen any documentary evidence to support that. Nor, so far as we aware, did the Claimant seek disclosure of it.

142. We have to take into account that Jenny Leyland was on leave overseas at the time of the hearing and in advance of it, the Respondent sought to accommodate her evidence by the addition of another day.This was refused. The Claimant also withdrew the harassment allegations to which she was central. We say this to mark there can be no proper inference of the Respondent dodging the bullet of calling her.

143. It is more likely than not in our view that Jenny Leyland did have some contact with MIAA regarding Nadia. However, in our view that could only have been perfunctory. We conclude that because, what would such a referral have said? In contrast to the Claimant (and this is the Respondent's own argument) the position of Nadia was completely different. She is not a true comparator. She was not in substantially the same position as the Claimant. She attracted none of the concerns of the Claimant, barring that she was found newly by Michelle, Janine and Jenny in August 2020 to be doing this work. She in fact was working efficiently. We accepted the clear evidence of Janine Mellors that *"Nadia was a really experienced social worker effective, efficient..Nadia was really progressing – she did progress to an advanced practitioner"*

2.1.10 Failing to afford the Claimant an opportunity to sign a declaration that she could carry out private DOLS whereas her white colleagues (specifically Nadia Galit) were given this opportunity

144. The Claimant's assertion has been rejected by the Tribunal. Michelle Longfield did not offer the declaration link to Nadia. We can see entirely that by 29 September Nadia had completed the declaration and had done so in a fullsome way. We do not exclude that she may have solicited or even got uninvited assistance from someone in the Respondent to find and complete it. But having rejected that it was Michelle or Janine and taking account the issue had been raised with Nadia (in the same way as the Claimant), we draw no positive factual conclusion of how Nadia came to know of it. That would be speculation. The Claimant's case therefore fails because she has not proved it.

2.1.14 - On 15 April 2021, subjecting the Claimant to a sham fraud investigation in relation to DOLS work, after an unexplained delay of 8 months from when first notification was given. 2.1.15 In or around 2021 falsely and/or maliciously advising potential recruiters not to employ the Claimant , including Manchester

*City Council, despite the Social Workers England investigation clearing the Claimant of any wrongdoing and endorsing her to carry on workin*g.

145. This allegation we found to misconceived. The word sham implies that it was a deliberate confection. The evidence runs entirely counter. By the time the allegation was added to the internal investigation, yes MIAA had found they would not prosecute over difficulties of satisfying the criminal burden of proof but the evidence gathered in the process was some way apart from there being "nothing to see". The Respondent had learned that she had done 27 reports, potentially in Trust time. As for the unexplained delay, the evidence quite clearly shows that the Respondent was operating under an embargo on discussing the matter with the Claimant. This was not the Respondent treating the Claimant either consciously or unconsciously in an unfavourable way. They had invoked a process of referral. Paul McGrath then independently steered and evaluated the merits of the investigation. In not telling her they were simply reflecting standard practice. The evidence also shows that almost as soon as they were permitted to, they told the Claimant. Janine Mellor did so in a fair and considerate way by telephone.

146. We do pause here to emphasise this. Standing back, we really do appreciate from the Claimant's perspective, that as events unfolded, there ended up being a confluence of stressful events for her in Spring 2021.

147. On 25 March she learned that she was facing disciplinary action in respect of SUA, on 4 April an external prosecuting force invited her to an invitation under caution and on 15 April she was told by her employer that she was being looked into for the same matters. That all happened in less than the space of a month. It cannot have been easy for her at all and it is perhaps not difficult to see how she felt surprise and fear for her career and livelihood. But a root cause analysis shows that neither independently nor cumulatively, did they arise because of the Claimant's race.

(c) Disciplinary 3

2.1.8 Subjecting the Claimant to this disciplinary investigation, whilst she was on sickness leave, in relation to the care and safeguarding issues re: SU A but not subjecting other staff to similar measures and who were involved in SU A's care to the same treatment; and

2.1.11 Subjecting the Claimant to this disciplinary investigation, whilst she was on sickness leave, in relation to the care and safeguarding issues re: SU A but not subjecting other staff to similar measures and who were involved in SU A's care to the same treatment.

148. We take these two together. Our assessment is that the institution of the disciplinary was predicated, first and foremost, upon on the findings of an independent review by an advanced practitioner. He has no discriminatory motivation. He was taking a holistic view of the causes of the safeguarding referral and as an advanced practitioner himself, could identify the points where the Claimant's actions had contributed. He knew how her job as a Level 3 social worker should be conducted. A knee jerk reaction to reading about SUA's (and wife's) very sad circumstances is to think the harm can *only* fairly be connected to an abject failure of those appointed to actually provide physical care to him over the relevant days. And to think, why is focus being placed on the Claimant who was on leave and not supposed ever to provide any physical care to SUA? However, there was a clear and dispassionate analysis that informed the scope of the investigation which also drew on Mr Symon's recommendation of a look back exercise. The Respondent is right that it was both inevitable and necessary that the investigation would be undertaken with regard to the circumstances around SUA.

149. The actions of the Respondent were completely unconnected to race.

150. The Claimant contends that at no point were any concerns raised about the conduct of the duty social worker Ann Fallon or the advanced practitioner on duty or the advanced practitioner who approved the plan which the Claimant drew up for SUA.. Nothing like sufficient evidence has been placed before us to suggest that they are true comparators to the Claimant or what the extent of their roles and duties were in reference to SUA. The thrust of Janine Mellor's evidence was that Anne Fallon had actioned the concern raised in the Claimant's absence which was around two agencies going in to attend to SUA given Covid restrictions. The care providers told her they were happy to go in over the weekend when SUA sustained the harm. It is not demonstrated therefore that he would suffer harm (or worse harm than he would otherwise) because of Anne Fallon's actions or inactions with the care providers.

151. The care plan would have been approved by Sarah Hardman or another AP. Janine Mellor was challenged that the approving AP, acting fairly, ought to have been subject to investigation too. She acknowledged, candidly, that might have been a direction in which the investigation (had it proceeded) went. We found persuasive her evidence that part of the concern about the Claimant's work on the case was that important considerations were undocumented. Any AP looking at a plan, would, we find, have taken it on trust. So approval of the plan by the AP does not place the Claimant and the AP in the same position in reference to SUA's outcome. The AP decision making could only be as good as the information they were presented with. Again, the comparison the Claimant draws does not indicate discriminatory motivation.

2.1.15 In or around 2021 falsely and/or maliciously advising potential recruiters not to employ the Claimant , including Manchester City Council, despite the Social

Workers England investigation clearing the Claimant of any wrongdoing and endorsing her to carry on working.

152. This is an aspect of discrimination which on the Claimant's case is post-termination. It cannot go to her constructive dismissal claim.

153. Taking the component parts in turn we have seen no evidence that the Respondent ever instructed recruiters not to employ the Claimant. In fact, the Claimant's witness statement was silent on this matter. In her oral evidence it was clear, her chief complaint was the inclusion in the reference to having referred the Claimant to SWE which she said would not have been included if she was white. She also said that if there was anything that warranted a referral to SWE at all, this should have happened before she resigned.

154. Again, pausing there, this is not a pleaded act of discrimination. But we do see that for the Claimant, she may not have foreseen this outcome (with its potentially disabling effects on her re-employment) prior to her resignation. Thus, she felt it keenly because it was the catalyst for a further process by which her practice was under scrutiny. But it was not being saved up to that time to discriminate against her by harming her employment prospects. Janine Mellor, we are certain, wanted it to happen far sooner because she genuinely had serious concerns about service users' safety and for the Service's professional obligations to refer as set out in email regarding operational and organisational risks ("the things keeping her awake"). It had not been delayed to somehow impose greater damage at a later stage once she had resigned.

155. On the other hand, at the time she gave her resignation there was already an intention to suspend her whilst under investigation[p.794]. The Respondent could not sensibly ignore that once she had left her employment with them, there could be risks to service users of the Claimant's new employer over which they had no control. They felt under an understandable duty to see it managed by the professional regulator.

156. As we have set out the Claimant was informed as soon as her resignation was accepted what the effects of her resignation would be on a future reference. What the Respondent proposed and in fact what happened, was consistent with its tortious obligation to provide a true accurate and fair reference. The words alighted upon to be included in requested references were: [the Claimant] r*esigned with immediate effect pending a formal disciplinary investigation and referral was made to Social Work England*. That was unimpeachably true. The allegation of falsity therefore fails as a fact.

157. In terms of Manchester City Council at its highest we see that they had information shared with them which represents confidential information sharing between two publicly funded bodies about a professional who was undertaking the same work for them, where there were significant

performance and conduct concerns. That is not discriminatory or harassment.

158. The final part of the allegation we found no sufficient evidence of at all and the Claimant's counsel did not address us about it either. We have certainly seen nothing that suggests that at a time when the Claimant had been found fit and safe to work by SWE, the Respondent somehow sought to dissuade employers or that they drew attention to their referral to SWE, knowing it had been negated.

Harassment

159. We have not specifically mentioned harassment under each specific allegation. However, in each case we have applied the looser connection required between the conduct and the protected characteristic for harassment, but the claims also fail on this basis. We accept the Claimant was disturbed, personally and professionally by what happened. On our assessment however, the conduct she relies upon does not relate to the protected characteristic.

Constructive Dismissal

160. The Respondent's Counsel pointed us toward the fraud investigation being the last straw based on the Claimant's oral evidence but not referenced in her resignation letter. Her resignation letter nowhere references that but does refer to the safeguarding investigation which was by then around three weeks prior.

161. Be that as it may, we have focused on both those matters as being the most proximate to her resignation; the resignation letter does not have to be exhaustive. This was not to the exclusion of the other matters and the potentially alloyed effect on a last straw basis.

162. Our conclusion is that, objectively assessed, the Respondent did not by any of these steps conduct itself in a way either calculated or likely to destroy or seriously damage its relationship of trust and confidence with the Claimant. We have no doubt that the Claimant personally felt at the end of some unwelcome and focused scrutiny in March and April 2021. It was not contrived. It was not unjustified. It had an objective basis. We keep in mind too that both the fraud and the safegaurding investigations were just that. They did not have foregone conclusions. We conclude the effective cause of the Claimant's resignation was the pressure she felt under. That was situational and not the product of repudiatory actions of the Respondent.

Time Limits

163. On the question of time, it is common ground that complaints about something that happened before 5 March 2021 might not have been brought in time. That is the provisional cut-off date for limitation. Our view is that there is no continuing course of conduct here so that each alleged act of discrimination attracts its own time limit. As freestanding complaints only 2.1.14 and 2.1.15 are in time.

164. We then turn to all of the rest of the complaints save for 2.1.8 which we deal with separately. For the reasons that we have given above, those claims are unmeritorious. They go back in time to August 2020, to January 2020 and back in time further still. Although based on the swathes of materials before us, the forensic prejudice to the Respondent does not seem to be great, the Claimant by February 2020 was on a work plan. It was not working perfectly but she did not complain. She was not affected by any of the issues in this claim between February and November 2020, yet took no action. She has not provided any witness evidence on this point. The periods of the extension required for each allegation is long; we think impermissibly long for an extension to be fair.

165. We deal with this allegation 2.1.8 (Launch of s.42 safeguarding enquiry) separately for time limits purposes, conscious that there is such a close factual nexus with the in-time complaint at 2.1.11 (launch of disciplinary 2) and a smaller delay. We are not minded to grant an extension. We have had the chance to examine the merits and they are unsound. Safeguarding procedures are a statutory corner stone of protecting vulnerable people. It had a range of outcomes but the Claimant was obviously within its purview given her involvement and the seriousness of harm to SUA. So there are complexities – absent real evidence of malice - in even construing participation or identification in such a process as unfavourable treatment. We do not extend time.

166. This means the in-time allegations are allegations 2.1.14 and 2.1.15 together with the unfair constructive dismissal claim.

167. For the reasons we have given however, we do not think those claims are well-founded and they fail.

Tribunal Judge A Miller-Varey
(acting as an Employment Judge)

5 January 2024

Sent to the parties on:

8 January 2024

For the Tribunals Office

Annex A

Final List of Issues
As agreed by Counsel on the morning of 3 October 2023

The issues the Tribunal will decide are set out below.

1. Time limits (S.123 of the Equality Act, 2010)

1.1 Given the date the claim form was presented (9 August 2021) and the dates of early conciliation (4 June 2021 and 16 July 2021), any complaint about something that happened before 5 March 2021 may not have been brought in time.

1.2 Were the direct race discrimination and harassment complaints made within the time limit in section 123 of the Equality Act 2010?

The Tribunal will need to decide:

a) Were the claims made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

(b) If not, was there conduct extending over a period?

(c) If so, were the claims made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

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

(i) Why were the complaints not made to the Tribunal in time? (ii) In any event, is it just and equitable in all the circumstances to extend time?

2. Unfair dismissal (Constructive) (S.95 (1) (c) of the Employment Rights Act, 1996)

2.1 Did the Respondent do the following things:

2.1.1 On 9 July 2019, instigating a disciplinary investigation against the Claimant in relation to how she carried out her practice, including singling out the Claimant for poor case recordings when other white employees' service user records were far below standard but no action was taken against those employees.

2 2.1.2 On or after August 2019, failing to provide the Claimant with further correspondence updating her on the investigation.

2.1.3 Failing to provide any written records of the August 2019 meeting in time for the Claimant to prepare adequately or at all her for the investigation and disciplinary and meetings.

2.1.4 On or around 12 September 2019, informing the Claimant that she was going to be subjected to a disciplinary hearing when her white colleagues had been placed under capability procedures for far more serious allegations in similar situations to the Claimant.

2.1.5 Asking the Claimant, on return from sickness absence on 24 September 2019 to take one day's forced annual leave so that the Respondent could make arrangements to restrict the Claimant's duties within the team without any consultation with the Claimant.
2.1.6 On 30 January 2020, administering an indefinite final warning against the Claimant when her comparators, in a similar situation, were put on lesser sanction of incapability procedures and given a chance to improve 3

2.1.7 Subjecting the Claimant to bullying and harassment at the unfair investigation meeting held on 15 August 2019 by making extraneous and patronising comments, including Jenny Leyland informing the Claimant " .. I am also busy, but I have to complete my work", etc.

2.1.8 In or around January 2021, subjecting the Claimant to an unfounded safeguarding allegation/investigation in relation to the care of SU A which occurred when the Claimant was on sickness absence.

2.1.9 In August 2020, mounting an investigation for allegedly carrying out private DOLS work during SRFT time when other white employees were allowed to carry out such work by signing a declaration form.

2.1.10 Failing to afford the Claimant an opportunity to sign a declaration that she could carry out private DOLS whereas her white colleagues (specifically Nadia Galit) were given this opportunity

2.1.11 Subjecting the Claimant to this disciplinary investigation, whilst she was on sickness leave, in relation to the care and safeguarding issues re: SU A but not subjecting other staff to similar measures and who were involved in SU A's care to the same treatment.

2.1.12 The Claimant was individually audited for the shortfalls in her work, specifically by the reopening and examination of closed cases, which was not done to other white colleagues,

2.1.13 Between July 2019 and January 2020, subjecting the Claimant to unreasonable and unexplained delays in the investigation process including, but not limited to failure to give the Claimant regular updates. The delay was deliberate and designed to prevent the Claimant from practising in her chosen career and/or to tarnish her professional reputation

2.1.14 On 15 April 2021, subjecting the Claimant to a sham fraud investigation in relation to DOLS work, after an unexplained delay of 8 months from when first notification was given.

2.1.15 In or around 2021 falsely and/or maliciously advising potential recruiters not to employ the Claimant , including Manchester City Council, despite the

Social Workers England investigation clearing the Claimant of any wrongdoing and endorsing her to carry on working.

2.2 Was this a fundamental or repudiatory breach, i.e., one that went to the root of the contract so as to be sufficiently serious to justify the Claimant's resignation? 2.3 Did the Claimant resign in response to the breach, and not for some other, unconnected reason?
2.4 Did the Claimant delay too long in terminating the contract in response to the 4 Respondent's breach and thereby affirming the breach?

3. Direct race discrimination (s.13 Equality Act 2010)

3.1 The Claimant identifies as black African (Zimbabwean) and she compares herself with:
(a) Natalie Jones - Advanced Practitioner – White
(b) Ann Fallon – Unqualified Social Worker – White
(c) Nadia Galit - Advanced Practitioner – White
(d) Gavin [Surname] – Level 3 Social Worker – White
(e) Alternatively, she relies upon hypothetical comparators.

3.2 Did the Respondent do the following things:
3.2.1 The Claimant relies upon the matters identified at paragraphs 2.1 above.
3.3 Was that less favourable treatment? The Tribunal will decide whether the Claimant was treated worse than the comparators. There must be no material difference between their circumstances and the Claimant's. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.
3.4 If so, was it because of race?

4. Harassment related to Race (Section 26, Equality Act 2010)
4.1 Did the Respondent do the following things?
4.1.1 The Claimant relies upon the matters identified at paragraphs 2.1 above.
4.2 If so, was that unwanted conduct?
4.3 Did it relate to race?
4.4 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
4.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

5. Remedy Discrimination
5.1 What financial losses has the discrimination caused the Claimant?
5 5.2 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
5.3 If not, for what period of loss should the Claimant be compensated?

5.4 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?
5.5 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

6. Remedy for unfair dismissal

6.1 What financial losses has the dismissal caused the Claimant?
6.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
6.3 If not, for what period of loss should the Claimant be compensated?
6.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
6.5 If so, should the Claimant's compensation be reduced?
By how much?
6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
6.7 If so, did the Respondent unreasonably fail to comply with it by:
6.7.1 delaying investigations;

6.7.2 not concluding investigations within reasonable time;
6.7.3 failing to provide notes of investigation meetings in time or at all;
6.7.4 failing to specify the charges under investigation with any precision
6.7.5 Administering an indefinite final warning in breach of ACAS Code of disciplinary sanctions
6.8 If so, did the Claimant unreasonably fail to comply with it by:
6.7.6 failing to appeal the final warning after the hearing on 30 January 2020; 6.7.7 failing to raise a grievance.
6.9 If so, is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?
6.10 If the Claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?
6.11 If so, would it be just and equitable to reduce the Claimant's compensatory award? By what 6 proportion?
6.12 Does the statutory cap of fifty-two weeks' pay or [£86,444] apply? 6.13 What basic award is payable to the Claimant, if any?
6.14 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

7 **HOLIDAY PAY**

7.1 Is the Claimant entitled to any days of outstanding holiday pay on termination of her employment?