Case No: 3309850/2022
3301672/2023

EMPLOYMENT TRIBUNALS

Claimant: **Ms Zainab Adan**

Respondent: **Barnet, Enfield and Haringey Mental Health NHS Trust**

Heard at: Watford **On: 22,23,24,25,29 January 2024**
(26-27 February 2024 In Chambers)

Before: EJ Bansal
Members – Mrs CM Braggs & Mr J Appleton

Representation

Claimant: **In person (assisted by Miss Simmons Safo)**
Respondent: **Miss C Ibbotson (Counsel)**

RESERVED JUDGMENT

The unanimous judgment of this Tribunal is that;

1. the complaints of direct race discrimination; direct discrimination on the grounds of religion, and direct discrimination on the grounds of disability (contrary to s13 Equality Act 2010) and harassment on the grounds of race and religion (contrary to s27 Equality Act 2010) and victimisation (contrary to s26 Equality Act 2010); are not well founded and are dismissed;

2. the complaint of detriment for making protected disclosures (contrary to s47B(1) Employment Rights Act 1996) is not well founded and is dismissed;

3. the complaints for constructive unfair dismissal (contrary to s94 Employment Rights Act 1996) and for notice pay are not well founded and are dismissed.

REASONS

Background

1. The claimant presented two Claim Forms. The first claim was presented on 27 July 2022 for a period of ACAS early conciliation from 29 May 2022 to 29 June

2022. The claims pursued were under the Equality Act 2010 for unlawful discrimination on the grounds of race, religion or belief, and perceived disability. The second claim was presented on 5 February 2023 following a period of ACAS early conciliation from 5 December 2022 to 5 January 2023. The claims pursued were under the Equality Act 2010 and the Employment Rights Act 1996, namely unlawful discrimination on the grounds of race and religion or belief, constructive unfair dismissal and notice pay.

2. The Respondent contested and denied liability to both claims.

3. These claims were discussed at a case management preliminary hearing held on 10 March 2023 before EJ Bedeau. At this hearing, the two claims were consolidated, case management orders made, and in particular the claims and legal issues were clarified and finalised subject to the claimant providing some additional information to complete the legal issues.

4. In summary, the claimant makes the following complaints; direct discrimination on the grounds of her race, religion and disability; harassment related to race and religion; victimisation, detriment for making protected disclosures; constructive unfair dismissal and notice pay.

The Legal Issues

5. At the start of this hearing, the Tribunal was presented with an agreed final List of Issues to be determined by the Tribunal. These are annexed to this judgment.

The Hearing

6. The claimant was a litigant in person. She was assisted by her former Manager and friend Ms M Simmons-Safo, who acted as a Mackenzie Friend. The respondent was represented by Miss C Ibbotson of Counsel.

7. An agreed bundle of documents of 1529 pages, a cast list and chronology was provided at the start of the hearing. During the hearing additional documents were added by the parties. The respondent added the Occupational Health Referral Guidance Guide and the claimant a copy of the Properties page to show modification of the RIO activity guidance document. At the start of the hearing the parties were informed that only documents referred to in the witness statements and those referred to in evidence will be read. Accordingly, the Tribunal read and considered the documents directed by the parties during the hearing.

8. For the claimant, the Tribunal was provided with a witness statement from the claimant, and supporting statements from;
   (i) Dr Afia Appiah;
   (ii) Ms M Simmons-Safo (MSS) (Former Manager of Claimant) and
   (iii) Salma Ali (SA) (who did not attend to give evidence).

9. For the respondent, witness statements were provided for;
   (i) Gary Passaway (GP) (Managing Director for Haringey Division);

(ii) Jeanne Faulet-Ekpitini (JFE) (Service Lead) (who did not attend to give evidence);
(iii) Dr Karrie Fehilly (Dr KF) (Medical Lead);
(iv) Nicholas Win (NW) (Senior People Partner-Haringey Services)

10. The witnesses who attended gave oral evidence and were cross examined. Also the Tribunal asked questions of these witnesses for clarification. JFE and SA did not attend. Their witness statements were taken as read. The Tribunal determined what weight, if any, was to be attached to their evidence in consideration of the issues.

11. At the conclusion of the hearing, due to lack of time the parties were given given the opportunity to submit written submissions. Both parties submitted lengthy submissions which are not rehearsed in this judgment. These were carefully considered and taken into account in the Tribunal discussion.

Findings of Fact

12. The Tribunal has made findings of fact as set out below on the basis of the evidence heard and documents read, including making an assessment on the credibility of the witnesses. Where a conflict of evidence arose the Tribunal has resolved the same, on a balance of probabilities.

13. Only relevant findings of fact pertaining to the issues and those necessary for the Tribunal to determine have been referred to in this judgement. It has not been necessary and neither would it be proportionate to determine each and every fact in dispute. Also the Tribunal has not referred to every document it read and were referred to in the findings as set out below. The numbers appearing in brackets in this judgment is reference to a page number in the bundle.

The Claimant

14. The claimant identifies as Somalian, Black African, and a Muslim.

15. The claimant was employed by the respondent in the role of Child and Adolescent Mental Health Practitioner (CAMHS Practitioner) in the Health and Emotional Wellbeing Service (HEWS) from 5 August 2019 until she resigned effective on 15 March 2023. She was a Band 7 grade and started working full time hours (i.e 37.5hrs per week). She was based at St Ann's Hospital, London. She was issued with a Statement of Terms and Conditions of Employment (p128-142). The claimant's Line Manager was MSS, until December 2022 when MSS herself resigned from her role. During the times MSS was absent from work, and following MSS's resignation, the claimant was managed by JFE.

The Respondent

16. The respondent is a NHS Trust which provides mental health services to the boroughs of Barnet, Enfield and Haringey.

17. During the claimant's employment, the managerial structure was that GP was the MD for the Haringey Division; JFE was the Service Lead; Dr Karrie Fehilly was the Medical Lead and Simon Gosling CAMHS Service Manager.

18. The claimant in her witness statement gave some background information relating to the behaviour of a Manager Brigette Murray (BM), and what the claimant described as "sexualised behaviour". The claimant stated that in the first week of her employment in the Dept, BM entered the office room and proceeded to massage the claimant's shoulders, and that this type of behaviour which included touching and stroking continued into without any intervention from JFE. The claimant set out further incidents of sexualised behaviour which included BM asking intrusive personal questions and making sexual remarks to her.

19. According to the claimant she raised her concerns with Simon Gosling (SG) (Service Manager) sometime in April 2022 but these concerns were not taken further. There was no evidence provided by the claimant to show that she chased SG about these concerns.

Background to the events from 22 February 2022 to August 2022

20. The Tribunal considered it necessary to set out the relevant parts of emails exchanged between the claimant and JFE, to put into context the issues which arose as a consequence and which form the basis of the claimant's complaints and this Tribunal claim.

21. On 22 February 2022 at 22:06, on the instruction of JFE, an email was sent out to the CAMHS Dept. The subject matter was headed; "Important-Please Action". The full email stated as follows;

Dear All,

As per mentioned in the check-in this morning ***we are required to outcome our RIO appointments within 24 hours. This is a Trust requirement which must be adhere by****. Emails have been sent to the various teams with the list of a note unoutcomed appointments. Thanking you for prioritising this.*

Another report will be will be run by performance on Friday 25.02.22 end of play to ascertain the situation.

As mean to support any appt not attended to by then will be outcomed on your behalf during the weekend as long as the RIO notes reflect the activity.

From Monday 28th February 22 we will move ***to Zero target for unoutcomed appt****. If necessary, performance management will be initiated for clinicians who are not compliant.*

I am aware of work pressure however not outcoming our appointments is unhelpful as we are unable to demonstrate our actual clinical activities.

Supervisors/team managers – Please outcome on behalf of staff who are on leave.

Many thanks for your support with this. (p281)

22. The purpose of this email was to inform the team that they were required to complete the outcome of their appointments ("RIO") within 24 hours and that this was now a requirement which must be adhered to. JFE sent this email as part of her role of Service Lead to ensure that they met their key performance indicators (KPI's).

23. The claimant replied to this email on 23 February 2022 at 09:56. The email

was copied to everyone in the CAMHS Dept. The email read as follows;

Dear Jeanne, thank you for your email. I appreciate the important of capturing this information, however would you kindly send such emails to the individuals concerned as I personally find their tone heavy-I am sure that's not your intention. Aside from the work pressures you mentioned, I'm just thinking about our colleagues who may be neurodivergent and therefore struggle with some tasks- I wonder how they may experience this email? Perhaps we can incorporate this into our collective thinking about inclusion in the workplace. Just food for thought. Kind regards
Zainab (p279)

24. The claimant relies on this email to be a qualifying disclosure and a protected act.

25. JFE in her witness statement explained that she felt the claimant's email *"as inappropriate in the tone and the manner as this was sent to the whole service and seemed to be undermining her legitimate request"*. JFE replied immediately at 09:59. Her reply was also copied to the CAMHS Dept. It stated, *Zainab, Thank you sharing your thought. (p277)*

26. The claimant, at 10:04, emailed JFE and copied the whole Dept, in which she wrote;

Thankyou Jeanne, I'm just wondering what are your thought on my observations? As this is a mental health organisation, how do you think our colleagues who may be neurodivergent, experience your email? (p275)

27. At 10:33 JFE replied to the claimant and copied to the Dept. She wrote,

Dear Zainab,
As this matter was discussed in the check in with the team it might be best to raise it in that forum then or during the next business meeting rather than via e-mail. I'm always available for a conversation if someone would like to discuss this further separately. Have a good day. Best regards (p272-273)

28. The claimant replied to the email at 13:04, and stated,

Dear Jeanne, expressing a point and acknowledging it can be done in an email or in the forums you suggest I think this approach is outside of the trust values. I generally outcome my appointments within the prescribed time as you know-I am just making a point that any workplace that uses these approaches are in danger of ending up with people who all think and do the same and I am sure you will agree this is not conducive for a productive, healthy and happy workplace.
Hope that's helpful. Have a nice day. Kind Regards (p270-271)

29. On 1 March 2022, at 17:31, JFE sent an email to the claimant, it was marked confidential, and of high importance. The email stated,

Dear Zainab,
Your emails last week which were addressed to me and the rest of the service did not reflect any of the Trust values we uphold. The tone was not appropriate and the forum neither.
I have raised this issue with HR who will explore it further with you. Best Regards (p282)

30. JFE in her statement explained that she and HR felt that the claimant's tone and manners in the email were provocative and challenging and despite that the claimant was offered other avenues for discussion she carried on. This

behaviour was viewed contrary to the Trust values of positive, respect and working together.

31. The claimant replied to JFE's email that same evening at 18:42. She wrote,
Dear Jeanne,
Thank you for email. I am rather surprised to receive this correspondence as I thought I was being helpful in thinking about inclusion in the workplace. In relation to the forum not being appropriate, as said earlier I see nothing wrong with responding to a team wide email about inclusion and my concerns about the absence of thought around the lack of reasonable adjustments, in relation to disability discrimination. In essence I have made a protected disclosure and as I am aware my email is in line with that framework. I am not aware of not adhering to the Trust values by communicating my concerns in the manner in which I did. I would like to clarify that I have always been a champion for diversity and dignity at work. I welcome HR's input to eliminate these stress and anxiety your behaviour is having on me. I would really apricate you minimizing future communications of this nature with me. Have a nice evening. Kind regards. (p310)

32. On 2 March 2022 at 06:56, the claimant sent an email to the entire Dept, including JFE. The email stated,
Dear all, It was brought to my attention at my recent emails have caused offence to Jeanne and my colleagues as a whole. This was not my intention and I sincerely apologise for the upset my email has caused any member of the team.
At the time I felt I was wording was ok, because I didn't write the email in the way I was thinking about the request to outcome appointments within 24 hours-because I felt talking about legislation was a bit harsh so I try to put it in a different way. I made sure I didn't use what we all agree as inappropriate- exclamation marks, capital letters, bold or underlining my words.
I think asking people to outcome within 24 hours is unreasonable. I completely understand the need for progress notes because of risk-but not a diary outcome. I also think kip's should be directional with management for lots of reasons.
To be honest I'm not sure how this 24 hr rule passed the equality impact assessment but it did. I was only concerned about colleagues who come under the equality legislation and wonder how these 24 rule would apply to them. As we are a mental health Trust, I don't think our internal systems should make it difficult especially for individuals with conditions protected by the equality act.
As a result of how I see things rightly or wrongly, I felt any talk of underperformance and possible consequences worrying and inappropriate -in both a verbal and written context.
I feel compelled to speak on what I see as unjust because of my own lived experiences of discrimination in and out of the workplace.
I would like to validate the upset caused and if anybody would prefer a verbal apology, please send me an email and I can do that that's not a problem.
I have been referred to HR who will be helping me understand how my behaviour has impacted others and how it's inconsistent with the trust values.
Thank you for taking time to read my e-mail. Kind regards. (p268-269)

33. JFE in her statement explained that she felt this email to be inappropriate and another attempt to undermine her, as the claimant shared confidential information, by stating that she had been *"referred to HR who will be helping me understand how my behaviour has impacted others and how it is inconsistent with the Trust values".* The purpose of the meeting with HR was to provide the claimant with the opportunity to discuss her concerns as the claimant had declined to speak with JFE.

Request for Grievance Policy

34. On 3 March 2022, the claimant emailed Yves Hlaire-Tchoudi (Yves) HR People Partner and requested the Grievance Policy, as she wanted to raise a formal grievance for bullying and harassment for raising *"issues related to workplace inequalities resulting from both Jeanne's behaviour and the misuses of policy."* (p317) Yves replied with the requested policy by email on 7 March 2022. (p314)

RIO – Guidance

35. On Tuesday 8 March 2022, there was a Learning Zone meeting with the Dept. Following on from that meeting on 10 March 2022, JFE sent an email to the Dept concerning RIO. Attached was the RIO activity guidance. The email stated,

Dear All,
Many thanks to all who attended the learning zone on Tuesday 08.03.22
Please find enclosed all RIO activity guidance. I actually stand corrected after meeting with Performance- CPA must be done ***within 24 hours too not 48 hours*** *(well done Ferelyth;)*
So as a recap;

- ***Diary need to be outcome within 24hrs of contact been made.***
- ***Risk assessments need to be done within 24 hrs after contact with patient.***
- ***CPA need to be written within 24 hrs.***

This is a ***Trust requirement*** *– if you have any difficulty please raise it with your manager/your supervisor. (p337)*

36. On 10 March 2022 at 17:18, the claimant sent an email to Yves and others, concerning the RIO Activity Guidance document that was issued. The email stated,

Dear Yves, the word document was distributed to the whole service and we were informed this policy with reference with the 24 hr rule. As you can see, Jeanne sent us a word document-which was edited by herself this morning just after 9am (I have a screenshot but you can find this timestamp yourself) on the document. The other PDF document is what I downloaded from the internet. I am concerned because I can see discrepancies in the information provided-notably no 24 hour rule in the initial PDF document(on the Internet) but 24 hours as well as another timeframe change has been noted in the word document distributed by Jeanne.
In any case, neither policies have an attached equality impact assessment which you know is a legal obligation.
I look forward to hearing back from all of you with your thoughts- in my mind this warrants a full investigation as this would constitute gross misconduct as BEH policies have seemingly been edited without any due process and thus bring the organisation into disruptive. Kind regards (p335)

37. The claimant wrote another email soon after at 18:04 to Yves, in which she stated;

Dear Yves,
I forgot to mentioned the internet document was downloaded a few days ago and again this afternoon after I received the email. I want to reiterate what I said to in the previous emails, this type of behaviour has undermined my feeling safe at work among other behaviour which I will tell you about.
I want you to deal with this under the whistleblowing policy, as I know I will be protected from any repercussions from particular individuals.
Kind Regards (p334)

38. On 14 March 2022 at 13:11, the claimant emailed Yves & others, in which she stated;

Dear Yves, I have not had a response yet and I am feeling anxious. Please can you tell me about the change of information from no time frame in the PDF to 24hrs and the change from 9 days to 24 hours. I also think the addition of a names person in the word document rather concerning as they obviously did not put their name on the footnote in 2016 when the document was written-the name only appears when modified last week, when modified by Jeanne.
Can you confirm my email and an investigation to take place or should I go outside the organisation as this type of leadership is so concerning that should be attended to immediately. Kind regards (p334)

39. On the same day, at 14:52 Yves replied to this email. He stated,

"Thank you for bringing these concerns to the attention of the Chief Executive Officer and Haringey Managing Director regarding the RIO activity guidance relating to CPA protocol. I am writing to acknowledge formal receipt of your concerns which may give rise to discrepancies in the information that is cascaded to the CAMHS service.
I can confirm that Garry Passaway-Managing Director for Haringey has referred this to be looked into as an initial step and I can reassure you that a full investigation will be opened into this matter if it's discovered that the guidance has been altered for any reason whatsoever.
In the meantime, I am arranging to meet with you together with another senior manager to discuss this concern further. I hope you have no objection for us to meet face to face preferably at St Ann's. I will come back to you shortly to confirm the new date and time. Best regards (p333)

40. The claimant in her email to Yves sent on 14 March 2022 at 17:14 clarified her concerns. She stated,

" ….. My concerns are. 1) the two versions have been shared with staff and are inconsistent and the word document was modified by adding in 24 hrs.
2) a name and time attributed to the version was added to the new version emailed out to us. 3) an equality impact assessment was not completed which is a legal obligation. These concerns, if founded breached the data protection principles and frankly speaking would constitute fraud-in my view. I therefore feel an informal resolution would not be appropriate under these circumstances.
I have attached screenshots to make it easy for you to see what I am referring to, so you will understand the gravity of my concerns and the need to view this as gross misconduct…..." (p331-332)

41. Yves replied to the claimant by email that evening at 20:17. It was a long email, which provided an explanation to her concern based on the explanation received from the Communications Team. The email provided links to the published documents, and explained that based on the investigation *"there is no evidence to suggest that the word document was modified no further investigation is required as no breach no misconduct has been committed on this instance."* (p331)

42. The claimant replied that evening by email at 21:38. The claimant pointed out an issue with the first link which would not open. She confirmed, as the Trust had decided the concern raised did not merit a formal investigation, she was intending to share her concern with her and Jeanne's professional body, and the appropriate equalities body. The email further stated,

"…… I am astonished that our service manager would threaten us with performance

management with what you describe as guidance. I always complete my outcomes within 24 hr, but this is not about me, it's about my colleagues who, like I said from the start maybe neurodivergent and therefore find additional challenges in completing diary outcomes because of the characteristics of their condition especially within a 24hr timeframe. This is not an inclusive or compassionate way of operating and I am deeply concerned about the discrimination which underpins this guidance. Especially as the scrutiny of an equality impact assessment has not been applied. Ultimately, we need to make BEH an inclusive workforce. Another concern is that this guidance is not applied consistently across the three boroughs because the document most accessible is not the one which was emailed to us. So we are being subjected to rules not necessarily applied to others…. " (p330)

43. On 15 March 2022 at 8:02 the claimant emailed Yves. She was on annual leave. She explained that the document could not be found on the intranet looking under IT RO – it could only be accessed by the link. Her concerns remained that Yves had not explained how JFE's name is last edited on the 10th at just after 9, and she had not been provided with evidence supporting why there was no reason to investigate this issue. She confirmed this was causing her much distress. (p329)

44. In the bundle, the Tribunal noted the contents of the email sent on 11 March 2022 at 10:53 by Sarah Wilkins, (Chief Information and Performance Officer) to Natalie Fox (NF) (Deputy Chief Executive Officer). This email was to address the issue raised by the claimant about the RIO document. The email stated,

" I can't speak to the back story but the Word document is published on the RiO page of the internet here (link attached). This version has been agreed through the Data Quality Improvement Group and also the RiO Design Authority in autumn 2021, both of which have representatives from across divisions and corporate services. I have asked if there was formal communication of the update Trust wide- I'll let you know. Apart from removing references to previous commissioning regimes and quotes from a former CEO, the main update is around the timeliness of updating records-moving from 9 days(!) to within 24 hours. This is aligned with most professional bodies which say records should be updated at the time care is provided all as soon as possible thereafter.

Although the previous 2016 version was removed from the RIO section, it looks like a further copy was stored elsewhere and is still available from the documents section of the Internet here (link attached). I think this is the root of the issue here unfortunately.

It is referenced as guidance not a policy, so although an EQIA would be good practise I don't think it is a requirement……. (p339)

45. From the explanation provided by Sarah Wilkins, the Tribunal noted that the previous document was still available and that there is no legal requirement for the guidance to go through an equality impact assessment. The clamant did not provide any evidence in support of her understanding and held view that an equality impact assessment was a legal obligation. In the absence of this supporting evidence the Tribunal could not conclude that the claimant's held view was correct and that the respondent was in breach a legal obligation.

46. The Tribunal also considered JFE's witness statement on the allegation that she had changed the document. At Paragraph 8, JFE states " I explained that I absolutely had not done this and then did not hear further on this.."

The Tribunal took into account the claimant's protestations and the additional document produced to show that JFE had edited the RIO document. The Tribunal did not making a finding about this as it is a technical issue which required expert evidence. The respondent referred the matter to Sarah Wilkins, (Chief Information and Performance Officer) who explained the discrepancy. The explanation formed the respondent's belief that contrary to the claimant's belief the document had not been edited by JFE. The Tribunal noted the claimant did not accept the explanation given based on what she considered was strong evidence.

47. GP explained in his statement that he felt it necessary to step in as the issue was escalating further. Hence, on 21 March 2022 at 14:28, GP responded to the claimant's concerns as raised in the emails. It is a detailed and lengthy email. In summary, GP thanked the claimant for raising her concern, and that by doing so she had helped to identify that two versions of the RIO guidance documents were still downloadable from the Trust intranet. He re-confirmed that contrary to the claimant's view JFE had not edited the RIO document. He reiterated that the Trust policy for all appointments to be outcomed within 24 hours as per the RIO document. In relation to neurodivergent colleagues, GP said he encouraged a conversation to be held with line managers. (p328-329)

48. In particular GP raised a concern about the claimant's responses and view held. He wrote,
"…I note from your reply to the response from Yves in addressing the concerns you raised, that you do not wish to accept that as a plausible explanation. Instead, you have insisted rather worryingly that the service manager Jeanne had tampered with the document and accused her of threatening to performance manage staff who fail to comply with this requirement. As I have already mentioned, this is a trust requirement and staff should be working to that standard, however, those who are not should be reminded do so. Understandably, staff who fail to comply with this requirement without any acceptable mitigations may have to undergo performance management. I am somewhat puzzled how you insist (against the most reliable information) that the service manager has edited this document which calls into question whether there is an ulterior motive and which unfortunately is outside of the spirit of our raising of concerns at work policy.
I am also concerned with the inflammatory tone of your language. As your team manager is currently off sick. I am happy to meet with you informally to understand a little more about your individual concerns on issues within your team. Additionally I will be attending a wider CAMHS meeting and will look forward to meeting more of the team.
From reading the trail I can ascertain that you feel strongly about this but I believe the evidence provided is sufficient to ensure that there is clarity between the issue you have raised….. (p329)

49. In response to GP's email, the claimant wrote a series of emails on 21 March 2022 in which she asked for clarification and explanation and raised further concerns. These emails are summarised below.

(i) <u>22/03/22 at 15:57</u>

"…..I am disappointed that you have an impression that I have a motive other than equality. I would apricate you expanding on that so I understand better. I see nothing wrong with my observations and me insisting on an investigation. I think an

independent assessment would be more appropriate-but if you insist this does not meet the threshold or respect your view but I continue to disagree..
A meeting would be fine with me. However, I would like you to send me information about what is inflammatory and specifics about my tone-given I am making a disclosure. In addition, I would like to know what was wrong with the first email-HR have not told me yet and again I have been told by colleagues they see nothing wrong.
I reiterate this 24 hr rule is not something I struggled to meet. I actually bumped into a colleague this afternoon who commented on that initial email and named people who would struggle with that. They also questioned by HR were drafted in- are you at all curious about why that happened? Perhaps an ulterior motive and one not in the spirit of trust values?
The document with no specified 24 hrs and the 9 days unexpected recording advice is still on Rio-the link you sent take me to another place only accessible by the link so I reiterate this is not accessible. For the first time in the past three years I have been at BEH a communications emails sent with the link-and it's not in the same place as all trust policies/guidance, which is inconsistent I reiterate neither documents refer to any thinking about mitigating circumstances related to disability. I look forward to hearing back and meeting you. (p327-328)

(ii) 21/03/2022 at17:28

"..I forgot to ask you to also specify what motive you assume I have? It really is unfortunate that issues are being conflated-I kind of feels it's a way of distracting form the lack of equality impact assessment which is a legal requirement-guidance and requirements have been used to describe this document and as performance management can be applied to those who fail to adhere to it-it all boils down to same thing.
I have not yet addressed this issue outside the organisation, but I continue to plan to do this as this is breaching a legal requirement. I think NHS England would probably like to hear about this too. Look forward to meeting you after I receive the information requested. (p327)

(iii) 21/03/2022 at 18:28

" ..I find your comment on ulterior motive quite worrying-might be that people like me are only meant to be rescued? How could you arrive at that conclusion when I have provided all the information. I find this highly offensive because to me it show some sort of bias about the type of people who raise concerns and they type of people who don't-because we don't have agency. I have sent you all the screenshots which demonstrate reasonable concern-yet you are preoccupied by my motive. It's a clear issue-BEH do not have a equality impact assessment, which makes this an unlawful document- call it what you want. I will be including this in my grievance (p327)

(iv) 22/03/2022 at 09:39
".. I want you to know your comments have created additional anxiety and my mood had dipped as a result of your accusations" (p326)

(v) 22/03/2022 at 14:00
" I understand you may be busy but can I ask you to prioritise a response to me because I'm really having a hard time. My questions need to be answered as soon as possible." (p326)

50. By email sent on 24 March 2022 at 16:11 GP informed the claimant that he was unable to meet her personally due to pressing work priorities and that he

had asked Fungal Nembaware (Crisis Telephone service-Clinical Lead) and Angela Mayes (HR People Hub Manager) to meet with the claimant. (p326) The claimant did not agree to meet with Fungal Nembaware & Angela Mayes and was content to meet with GP in person, when able to. In the email sent, in reply the claimant asked GP to answer her questions about how he arrived at the view that she had ulterior motives.(p325)

51. GP then agreed to facilitate a meeting with the claimant. However, the claimant made it clear to GP that before the meeting he was required to respond to her outstanding questions and information, namely (i) the reason for her initial referral to HR and information about how her email was inconsistent with the Trust values and who made the complaints and (ii) why he made the allegation that she had an ulterior motive. The claimant made it clear that she would not be prepared to have any meeting without this information. (p323-321)

52. By email sent on 7 April 2022 at 17:16 the claimant wrote to GP, *".. can you please answer my questions I have sent you several emails asking for clarity with your statement as well as the other questions and you are ignoring me.,* (p319). GP replied to this email on 8 April 2022 at 16:26, in which he stated, "…*Regarding the questions you have for me, I think it would be it would make more sense for us to meet as we have previously agreed and I have offered you dates and times for this already..(p318)* This was followed by another email from the claimant to GP sent that same day at 16:42, in which the claimant wrote*, ".. You are causing me anxiety as you keep evading my questions and I see this as a deliberate act it's appalling behaviour and not what I expect from a senior leader. When you answer my questions we will arrange a face to face meeting. If you continue to ignore my questions about your accusations then we will remain stuck unfortunately and I will lose respect for you as a leader. Have a nice weekend. (p318)*

53. GP in his witness statement and in cross examination explained what he meant by using the wording, "ulterior motive", and the context to it. He said, from the email exchange he had read and because the claimant refused to accept a plausible explanation about the confusion with the RIO document, her desire was to undermine JFE as her Line Manager, and by making reference to fraud and gross misconduct was seeking disciplinary action against JFE. The Tribunal carefully considered this explanation and concluded that given the background facts and the tone and content of the claimant's emails, this was a reasonable view taken by GP. The Tribunal rejected the claimant's belief that this view was related to the claimant's race, religion or disability, because this view was taken in the context of the claimant's conduct.

Claimant's Grievance – 26 April 2022

54. On 26 April 2022 by email the claimant raised a formal grievance against JFE, GP and the Trust. (p359-360) The grievance contained 6 paragraphs that confirmed the individual issues. There are summarised below;
    (i) The claimant being referred to HR concerning her response to JFE's email of 22/02/2022 concerning the RIO Guidance.
    (ii) The different versions of the RIO Document.

(iii) GP accused the claimant of having "ulterior motives"
(iv) Why the RIO guidance had not been the subject of equality impact Assessment, which is a legal requirement.
(v) Being referred to HR for highlighting the challenges for neurodivergent colleagues would have with a 24 hour rule to outcome an appointment.
(vi) Why her complaint about sexual harassment and behaviour was not given due consideration.

55. The respondent appointed Barry Day (BD) (Barnet Managing Director/ Deputy Chief Operating Officer) as the Case Manager to the grievance. To assist BD, Gary Hay (GH) was appointed as an independent investigator. This was confirmed to the claimant by letter dated 29 May 2022 from BD. (p371-372)

56. GH is a solicitor by qualification, but is not in practice and works as an independent investigator. He is also a Non-Executive Director at Portsmouth NHS Trust. GH first contacted the claimant using his yahoo email account, and then used his NHS email account. The claimant declined to meet with GH as she was concerned that the respondent was using a qualified solicitor, that they were not transparent about, and that GH was using different email accounts, which caused her concern about data protection issues.(p217-218) The Tribunal noted from the correspondence in the bundle, that BD in his first letter to the claimant informed the appointment and involvement of GH. (p371-372)

Cease and Desist

57. On 29 April 2022,Jatin Ponnitt on behalf of Dr Ferelyth Watt,(Dr FW) sent out information about a meeting on Epistemic Trust, in which it stated that *"Epistemic trust is an important concept and impacts on our work….. "* (p399)

58. By email sent by the claimant to Dr FW on 12 May 2022 at 05:30, which was copied to the CAMHS Dept and the senior SLT, she wrote, *".. I have asked you in several private emails not to include me in circulations about reflective practice-extended to topics like epistemic trust, despite my request I continue to get these emails. I have shared with you that these emails trigger me because, they are far from my lived experience of working in this service because of the overly aggressive and sexualised behaviour which I have shared with you. It's hard to trust at work when your emails are policed and sent to HR for symbolic deliverance, but when you raise concerns about sexual harassment at work, nobody reports this to HR and my colleagues seen indifferent. This behaviour has seemingly been normalised. ….. I apologise in advance to anyone who will find reading this email uncomfortable, but please empathise with the discomfort of holding all of this in for so long. Regards " (p395)*

59. That morning at 05:48, JFE emailed GP, which was copied to Yves, in which JFE pointed out that the claimant had sent the email to the whole service, and asked to meet urgently with Yves to discuss next steps. (p393)

60. Later that day, at 14:29 JFE emailed the claimant and stated, "*I acknowledge receipt of your email. While I'm saddened that you felt the need to*

outline your distress within this forum, I would like to reiterate that, should you so desire, I'm happy to discuss issues raised with you on a 1-to-1basis……..". (p409)

The claimant replied to JFE within a few minutes at 14:34 and stated, "

"Dear Jeanne, thank you for this offer. I have expressed on several occasions that I do not feel safe with you because of your behaviour- please do not feel the need to respond to this. You have never shown any curiously as to why I feel unsafe around you which is a shame.

HR are investigating and the matter really needs to be addressed outside the organisation unfortunately as a culture is toxic. I am considering the most appropriate steps. Regards (p407)

61. Following a discussion with HR, on 12 May 2022 at 16:06, JFE sent out an email to all, which was headed Cease & Desist. She wrote,

"Dear All,

Further to the various emails send today could I please request that all further communications via this route cease and desist immediately, the Executives copied in are aware. However I must remind you that anything relating to individuals is confidential and should not be shared. I would advise you that anything you may have concerns or to be worried about should be raised with your Line Manager in the first instance and escalated to your Service Lead/ Managing Director only via the appropriate channels

As a Trust we would like to support everyone and we would expect that confidential discussions are dealt with via the appropriate route on an individual basis in line with the Trust Care Values….. Best Regards " (p392)

62. The claimant replied to this email on 13 May 2022 at 07:35. The email was sent to JFE, and copied to all, in which she stated,

"Dear Jeanne, I want to make it clear that I will express myself in any way I see fit-it is not for you or the Trust to dictate how I communicate my distress, especially when the duty of care toward me has been neglected for so long and my dignity being stripped away from me. Should the Trust prefer, I can express my distress outside the confines of the organisation and on Twitter and other forums instead. When issues like this arise what is required is sensitive and compassionate leadership, and not and authoritarian approach. Have a nice weekend Regards" (p390)

Claimant's suspension

63. On the morning of 13 May 2022, following a discussion with JFE and Karen Swift, (Associate Director of People) it was agreed that GP would meet with the claimant and suggest to her to take a period of annual leave and/or special paid leave. GP explained in evidence that they considered this with a view to seeking Occupational Health advice or if this was not possible to medically suspend her. GP confirmed he decided to complete the Suspension Checklist Form, in the event it was necessary to suspend the claimant. In accordance with the respondent's procedures, before an employee is suspended on medical grounds authorisation must be obtained from the Director of Nursing. In that Form, the reason given for considering suspension, was as stated, "concerns relating to the claimant's mental health and wellbeing". (p427- 428)

64. That same morning, GP went to meet the claimant at her office. GP discovered that she was working from home. He then decided to call her by telephone. GP called the claimant on her mobile phone and introduced

himself, and explained that Dr MacKenzie (Clinical Director) and Ms Gaglani (HR) were present with him on the call. GP said he informed the claimant that he wanted to meet with her at the office but as she was working from home, he decided to telephone her. He explained to the claimant that he wanted to discuss matters following the series of emails over recent days and that he was concerned at their content, tone and that they were becoming quite incessant. He confirmed that he explained his concern for her well-being and asked if she was ok. He offered her some annual leave because of concerns about her well-being and the patients she worked with. As an alternative to this he proposed special leave as an alternative. GP stated that the claimant told him that she felt uncomfortable speaking to him following which she terminated the call.

65. The claimant's evidence was that GP telephoned her at around mid-day, and that it lasted 02:58 seconds. Her recollection is that she had no warning about the call and neither did GP explain the purpose of the call. GP did not make it clear that she was being suspended and only realised this when she was told that her IT access would be suspended. She then realised this was a form of suspension.

66. Following this call the claimant sent GP three emails between 12:22 to 12:48. The emails confirmed the claimant's shock and distress at being suspended. She perceived this as another attack on her and as harassment. (p416)

67. That same day GP sent a detailed letter to the claimant by post and to her personal email account. The letter confirmed the suspension on full pay and the reasons. The stated reasons were concerns about her wellbeing, erratic behaviour and communications. In particular, it referred to communications being sent very late at night; her unwarranted emails to a large number of colleagues, which was in breach of a reasonable management instruction; the impact of her behaviour and her work colleagues and the service delivery. In that letter GP also mentioned referring the claimant to Occupational Health and seeking her consent including consulting her own doctor. (p430)

68. In evidence, the claimant explained that after the call with GP, she telephoned MSS who at the time was on sick leave. MSS then contacted GP about the claimant's suspension and the call he made to her. MSS also contacted NF first by telephone and then by email that same evening and expressed her concern about the claimant's wellbeing and the events of that day. She also confirmed her concern about GP's conduct. (p423-424)

69. The claimant's suspension was confirmed by letter dated 13 May 2022 sent by GP. It is a detailed letter, in which GP has explained the reason for the medical suspension from duty on full pay, which related to her erratic behaviour and communications, and the view taken that it is not safe for her, her colleagues or for the service to attend work. It also confirmed the decision to restrict access the IT systems. Further, the claimant was requested to agree to an Occupational Health referral to consider how she could be supported on her return to work. (p430-431)

70. Following this, by email sent later that evening the claimant informed BD that she had decided not to meet him or anyone to discuss her grievance, however she was prepared to send any information by email and that from now on her preferred method of communication was by email. She also confirmed that she would be continuing with her normal duties from Wednesday and will not be responding to any communications from GP about her suspension. (p417)

Decision to suspend the claimant

71. The Tribunal gave consideration to the reason for the claimant's suspension as confirmed in the suspension letter. The Tribunal took note of the following facts and information;
    (i) The respondent's contractual right to medically suspend an employee. The Tribunal was referred to the respondent's medical suspension policy. The policy provides, "In circumstances where the employee's state of health, in the opinion of the manager, constitutes a risk to the safety of the individual, other staff, or patients, the employee will be required to seek medical advice and to take enforced medical leave for a specified period…." (p1508).
    (ii) The emails sent by the claimant during the period from 10 March 2022 to date of suspension. Miss Ibottson set these out in tabular form in her submissions. Each of these emails were considered, from which it was noted the claimant herself mentioned about her wellbeing, feeling stressed, distressed and suffering from anxiety. Also, MSS in her emails during this period observed that the claimant was feeling stressed and distressed and the impact this was having on her wellbeing
    (iii) The tone of the claimant's emails and her behaviour and manner of approach on the issues which she felt strongly about.

72. The Tribunal was of the view that the claimant raised a valid point in her email sent on 23 February 2022 about the impact of the RIO guidance. The respondent offered the claimant the opportunity to deal with her concern direct with JFE, which the claimant refused. The Tribunal found this refusal to be irresponsible of the claimant. Further, the claimant then to escalate issues further in the manner that she did, in the Tribunal's view, gave the respondent justified cause for concern about her wellbeing and the potential impact on her colleagues and ability to perform her role effectively. The Tribunal concluded that GP's decision to suspend the claimant was a reasonable step for the respondent to take given the claimant's behaviour.

73. A consequence of the claimant's suspension was that her access to her emails and the IT system was restricted. This was confirmed in the letter confirming her suspension. It was not surprising that given the claimant's use of the emails that the respondent wanted to restrict her use until the suspension was lifted. The Tribunal noted that it is common practice for employers to restrict a suspended employees access to its IT systems until the suspension is lifted, whatever their protected characteristic. This is a legitimate reason to do so.

Emails and correspondence between 17/05/2022 – 20/05/22

74. On 17 May 2022 at 9:36am, the claimant emailed NF to express her concern about the telephone call she received from GP, his conduct and then being suspended for a reason she disagreed with. The claimant stated *"the organisation has a culture of sending emails at all hours and weekends. I have received emails at 12 midnight from Jeanne and others. And whilst this was unusual to me when I first started I have acclimatised to the environment…"* The email further stated, as follows;
"*The act of medical suspension has been experienced by me as a racist act and further victimisation.*
I am a Muslim and Muslims perform a pray called Tahajjud which is prayed after Isha (the obligatory nightly pray) and before Fajir (the obligatory prayer).The most desirable time to perform Tahajjud is between midnight and Fajr……. – the only difference is that GP has a vendetta against me,
I have read the Trust policies and cannot find a medical suspension subsection and would appreciate you sending me this as well – bring my attention to what Gary referred to on Friday afternoon …
It's depressing to see this type of racist and oppressive assessment made of my mental health…." (p434-435)

75. By a detailed letter dated 17 May 2022, NF replied to the claimant's points in her letter. (p444-446). Regarding the claimant's suspension NF reiterated the point that the decision to suspend her was made with careful reflection about concerns relating to her well-being and the potential ramifications this may have on patients, her colleagues, and the service. The claimant was strongly encouraged to make contact with Occupational Health and seek medical advice. NF confirmed that her suspension would be kept under review pending medical advice. (p444-446)

76. In reply to this letter, on 18 May 2022 at 17:59 the claimant emailed NF, and said she wanted her racism complaint to be taken down a formal route, and the medical suspension withdrawn because it is draconian. She also confirmed she would not be sending any emails or contacting any clients whilst on suspension. However she wanted to keep up to date with the team and her access to her emails to be restored. (p433)

77. During this period of suspension, the respondent appointed Caro Mayo (CM) (Interim Deputy Director of Nursing) to be a contact for pastoral and welfare support. On 17 May 2022, CM sent a letter to the claimant confirming her contact details and that she had tried to make contact with the claimant on 16 May 2022 but received no response. CM requested the claimant to contact her. (p443)

78. On 18 May 2022, JFE completed an Occupational Health Referral Form and referred the claimant to Occupational Health. (p451-453). The claimant complained to NF that she did not give her consent to be referred to Occupational Health. JFE in her statement explained that she made the referral based on her authority as Service Lead, and because the claimant was on medical suspension it was necessary to have her assessed to facilitate her return to work. The Tribunal noted NF's email dated 31 May 2022 to the claimant which confirmed the Manager's right to refer a staff

member to Occupational Health when they are concerned about their health and well-being. NF also referred to s14.17 of the NHS Agenda for Change Handbook, which states, *" Employers may, at any time, require an employee absent from work to attend an examination by a medical practitioner. Furthermore, staff do not need to be sick to be referred by their employer for a medical "* (p497)

GP's emails to the claimant

79. On 19 May 2022 at 14:04 GP sent an email to the claimant on her personal email account. This email was in response to the emails the claimant had sent to him on 13 May 2022. GP wrote, ,
" Dear Zainab,
I refer to your emails below. I understand that you have raised similar issues with Natalie Fox and that she has provided you with a comprehensive response. Best wishes.." (p458).

80. On 19 May 2022 at 14:19, the claimant wrote to NF, in which she enquired why GP had sent an email to her personal email account, when she had not given him her email address. She considered this to be racism and harassment, and wanted this to be included in her grievance. The claimant in that email asked that GP stop emailing her and only to communicate with her by letter. (p460)

81. The Tribunal noted this is the first email or written confirmation from the claimant requesting GP not to contact her on her personal email account. This email was in response to GP's email sent to the claimant that afternoon at 14.03. This email was sent to NF and not GP.

Claimant's referral to Occupational Health.

82. On 20 May 2022 the claimant referred herself to Occupational Health. (p478) In response to this email, North Middlesex University Hospital informed the claimant that they had already received a referral from the respondent and an appointment would be sent to her. (p479) In subsequent correspondence, the claimant questioned the respondent's referral as she had not given her consent. (p483)

83. On 20 May 2022 at 1:50 NF responded to the claimant's email of 18 May 2022 NF confirmed that her concerns will be fully investigated by BD and asked her to agree to engage in the process. With regard to the IT access, NF confirmed her IT access would remain restricted for the same reasons the access was first suspended, and that her suspension from work would be reviewed when the Occupational Health report is received.(p486-487)

84. On 27 May 2022 at 16:30, the claimant emailed NF concerning the Occupational Health referral. In that email the claimant was confused why her self-referral was rejected and JFE's referral was accepted. The claimant pointed out that she had not given JFE consent to make contact with Occupational Health. The clamant requested a copy of the referral form sent. In addition, the claimant stated she was very upset and was caused more distress. (p485)

85. The claimant complained that JFE in referring the claimant to Occupational Health without her consent was an act of discrimination on the grounds of race and disability. The Tribunal noted NF's email to the claimant of 31 May 2022 in which she confirmed that Managers are entitled to make a referral without consent where there is a concern about the employees' health and wellbeing. The Tribunal concluded that the reason for referring the claimant to Occupational Health had nothing to do with the claimant's race or disability. Also contrary to the claimant's view the respondent did not require the claimant's consent to do so in the circumstances.

86. On 27 May 2022 at 4:13 GP emailed a letter to the claimant to her personal email address. The letter was headed, "Update on medical suspension". The letter confirmed that the suspension was to continue on full pay as no Occupational Health Report had yet been received. Her referral was to be fast tracked, and she was directed to seek medical advice for her GP in relation to fitness to work. (p493-495)

87. That same day at 16:52 the claimant emailed NF. This email was copied to GP. The tone of the email was direct. The claimant stated,
"*.. Would appreciate you letting me know why my personal email continues to be used by Gary. This is unbelievable. The harassment continues. It is a Friday afternoon and again this does not demonstrate any concern for my emotional well-being. The behaviour is contradictory.*
Gary, you cannot have unsolicited access to me, I have not given you consent to contact me via my personal email only contact me by letter. Nor have I given consent for Jeanne to refer me to OH. I made a self-referral as advised……I have taken out a grievance on you because of your conduct so please do not email me again…Natalie you have a duty of care to protect me from Gary and I am astounded you allowed this communication.." (p499)

88. In evidence GP explained that as the claimant was on suspension, his method of contacting the claimant was by letter or her personal email account. He could not recall, if NF had informed him about the claimant's email of 19 May 2022 requesting GP to only communicate with her by post. GP explained that by emailing the claimant on 19 May 2022 at 14:03 was a genuine mistake. Had he been aware of the claimant's request he would not have emailed the claimant on her personal email account. GP confirmed that after he was copied into the claimant's email of 27 May 2022,which specifically requested that must not email her on her personal email account he complied with the claimant's request. This was the first direct email he received from the claimant about this issue. The Tribunal accepted the claimant's explanation and rejected the claimant's assertion that by sending the email was an act of race discrimination. The Tribunal noted the first claimant asserted this was an act of discrimination was in the Claim Form.

Outcome of Claimant's Grievance

89. On 31 May 2022 the claimant was invited to attend a meeting with GH scheduled for 14 June 2022 to discuss her grievance issues. (p505) By email dated 1 June 2022 the claimant informed NF that she would not be attending the scheduled meeting because she did not consider GH was a suitable investigator for the reasons previously given and that she had not given consent for her grievance to be processed outside the organisation. (p524)

90. By letter dated 16 June 2022 the claimant was invited to a re-scheduled meeting on 1 July 2022. This meeting was still to be held by GH. (p528-529) The claimant did not attend this meeting. The Tribunal was not referred to any correspondence or note to show if the claimant replied to this invitation or the reason why she did not attend.

91. As part as the grievance investigation GH interviewed JFE and GP on 31 May 2022. (p502-504) GP in his interview explained that *"Simon Gosling had illuded that ZA (i.e claimant) was being influenced by MSS. Explains unusual behaviour"* (p502). In evidence GP explained in his interview, he provided GH with relevant background information including that he did not know the claimant that well but that the Simon Gosling had noted that " a few staff members had being quite challenging" and Simon Gosling had eluded *"that the claimant was being influenced by MSS."* GP denied that using this language was an act of discrimination on the grounds of race, religion or disability. The Tribunal concluded that this comment was made by Simon Gosling not GP.

92. On 11 July 2022 GH produced his Investigation Report. The findings of the investigations were that the claimant's grievance issues were not upheld. (p545-550)

93. By letter dated 3 August 2022, the respondent invited the claimant to a meeting to discuss the outcome of the grievance investigation. This meeting was scheduled for 18 August 2022 at 2.00pm with BD. (p581)

94. The claimant did not attend this meeting and neither made a request for it to be re-scheduled. Accordingly, the meeting was held in her absence. The meeting was chaired by BD, and also present were Kate Swift (Associate Director of People) GH, Aisha Prendergast (Senior People Services Advisor) and Alexia Da Costa (People Services Adviser). The conclusion of this grievance was stated as follows;
" ..The decision after routine the investigation report and having the grievance hearing is to confirm that this grievance has not been upheld due to the lack of evidence provided by yourself please be reminded that the decision is purely on the evidence presented on the grievance report and the information provided…"

95. The claimant did not appeal this outcome.

96. On 13 August 2022 at 13:42 the claimant replied to BD concerning the letter of 3 August 2022 inviting the claimant to the meeting on 18 August 2022. The claimant, wrote;
".. I would like to clarify that most of these suggested meeting were set on days I am not contracted to work for BEH.
In relation to your comments about not providing reasons for disengaging with this process. I have made it clear to you on more than one occasion that I do not recognise this process as fair impartial and objective due to the use of Gary Hay for reason shared with previously.
You shared my data (grievance) with Gary Hay who is external without my consent-he used his personal email to receive this information. I consider this is a data breach, in addition to other concerns about his role.
I have submitted an ET1 and hope to find justice in this impartial environment…" (p613)

97. On 17 August 2022 at 09:24, BD sent a reply to the claimant. He stated,
" .. Thank you for your email. I note your comments in relation to your reasons for not engaging with the process
In relation to your concern about data, the Trust can process your personal data for the purposes of its legitimate interests without seeking or requiring your consent. In this case those interests were to facilitate an investigation into serious allegations. Your data was not processed beyond what was proportionate for that purpose…" (p612)

Claimant's return to work

98. On 4 August 2022 the respondent held a meeting with the claimant and her Advocate Barbara Lisicki. The meeting was chaired by Nicholas Win (NW) (Senior People Business Partner-Haringey), with the purpose to facilitate the claimant's return to work. Also in attendance was JFE. The claimant requested the meeting was recorded and transcribed. The Tribunal read the transcription notes in their deliberations. (p585-601)

99. In their discussions JFE explained the reasons for the claimant's medical suspension, and the concerns held by management. The claimant confirmed she had no current health related reasons and that she was keen to return to work.

100. There was discussion about the claimant's management on her return. The Transcribed notes confirm that the claimant pointed out that her Line Manager was MSS and that she wanted MSS to continue to manage her on her return. NW did not consider this would be the case initially as he explained that JFE wanted to be assured and to have confidence in the claimant given what had happened in the last months. The claimant did not agree and insisted that MSS continued to be her Line Manager. The reason she gave was that she felt more comfortable, safe and happier with MSS than with JFE. Following further discussion, JFE is recorded to have agreed to the claimant's request. The transcript note states, JFE saying, *".. Let's resume with Michelle as a line manager and then we will monitor. If I feel like at any point things are getting out of hand, then that will change and we can put in writing.."* (p598) From this dialogue the Tribunal concluded that given that JFE was the Service Lead, her suggestion was a temporary measure. It was reasonable for JFE to suggest this given the issues and concerns about the claimant. The Tribunal did not find that JFE insisted that she managed the claimant. The issue was discussed with the claimant, and it was agreed that MSS continued to manage the claimant.

101. Following their discussions it was agreed that the claimant would:
(i) return to work on a phased basis (for 1 month) under the line management of her current Manager (MSS) with JFE having an oversight on this;
(ii) not send emails to large numbers of colleagues or to senior members of the Trust Executives unnecessarily;
(iii) agree to a management referral to Occupational Health;
(iv) have her IT access re-activated by 12 August being the first day back to work.
(v) do limited duties;

The outcome of this meeting of 4 August 2022 was confirmed by letter dated 16 August 2022. (p610-611)

102. The claimant returned to work on 12 August 2022 as agreed. On her return she found that her IT access had not been reactivated. Following a complaint to NW, the claimant's access was reactivated from 15 August 2022.

103. On 15 August 2022 at 09:53, the claimant emailed NW and copied to NF, MSS and Barbara Lisiki. The claimant complained that having been told by the respondent that she had a underlying mental health condition for the last 3 months and which prevented her from working, and this has had a huge impact on her for which she would be having therapy caused by the medical suspension. The claimant explained this was known as latrogenic harm. Her Manager, MSS had done an audit on her work which indicated no cause for concern. Further having returned to work she discovered that her absence had been recorded as sick leave, and that her out of office reply, stated, *"the recipient email has been disabled and will not be able to access emails".* The claimant found all this had impacted on her confidence.(p607- 608)

Occupational Health Report

104. On 25 August 2022 at 12:45, the claimant had a face to face consultation with a Occupational Health Practitioner. The outcome of the consultation was that she was considered fit for work; that she be allowed to do clinical duties and one-to-one meetings with her line manager, and that the arrangement with her line manager is continued. A risk assessment was recommended to be done. (p623-624) The claimant did not give her consent for the outcome letter to be disclosed to the respondent. It was addressed and disclosed to MSS on the claimant's instructions.

Grievance re; Dr Karrie Fehilly (KF)

105. On 18 November 2022 at 12:40, the claimant sent an email to NW and copied to NF and P. Bajaj (Lead Psychiatrist). The email raised a formal grievance about the conduct of KF. (p677-678)

106. The background to this grievance was explained by KF in her witness statement and oral evidence. She explained that at the beginning of the pandemic there was a significant number of absences within the CAMHS teams. This meant that clinicians were asked to cover for colleagues and complete tasks that they may not have been previously tasked with. Hence, it was agreed by the Senior Leadership Team (SLT) that clinicians would be asked to rate RAG (i.e red-amber-green) the young people on their caseloads, and particularly for those colleagues who were off sick.

107. On 31 March 2020 the claimant emailed KF to confirm that she would "get onto it as soon as I can". (p166-168) The claimant did not complete this task. KF confirmed she was informed that the claimant had instructed other colleagues not to complete the task until they were given the list of RIO numbers to work from. The claimant had said she would not complete the task without first speaking with her Manager.

108. On 20 April 2020, JFE asked KF to read into a patient's referral to CAMHS. JFE had explained that she had asked the claimant to take on this particular case. The claimant sent an email to her Manager, which was copied to JFE, who found to be rude. (p185-186) The relevant part of the email stated;
".. I am going through the assessments; which I am conducting on behalf of Access and should I continue to keep finding wildly inappropriate referrals, I shall have to formally request the removal of all such allocations and any goodwill to help out with Access assessments will vanish. I am really disappointed as it really feels like a dumping culture!..."
JFE sought KF's opinion on whether it was reasonable to ask the claimant a qualified CMHS practitioner to take a case such as this.

109. KF reviewed the email. In KF's opinion, she found the claimant's tone rude. She did not agree with the claimant's assertions. Also, KF did not agree with the claimant's view that the patient required a face to face review and needed to see a psychiatrist. At this time there were clear guidelines about offering face to face reviews which was for only Red cases, which this case was not. KF was disappointed that the claimant was not willing to continue with the care of this young person which should be her primary concern. KF noted that on 30 March 2020 the claimant had refused to comply with earlier instructions given to her to RAG rated cases. (p167-168)

110. On 21 April 2020 at 17:07, KF emailed the claimant about this, in which she gave her assessment and gave her further directions as how to deal with the case given the points she made. The claimant sent her reply the following day by email at 09:19, in which she explained her view, and what she felt was inconsistent information. She confirmed that she would discuss this case and another case she had with her Manager, *"with a view to discussing observations and concerns with the freedom to speak guardian.."*

111. On that same morning at 10:49, MSS emailed KF about this case, in which she confirmed her observations and asked KF *"to call the GP to have a Dr to Dr conversation."* (p189) KF replied by email to MSS, in which she stated,
"No I will not be calling the GP. The task is a simple clinical conversation that could be undertaken by any clinician and does not require a Consultant Psychiatrist. I would be saying this at any time, let alone at the moment when the demands on my time are immense.
I really don't want to be pulled into the wrangling going on here. I was asked to give a clinical opinion and I have done so. If Zainab knows the case and has capacity to manage a single phone call I would suggest that she does so. In the time taken to argue about this case the task could have been completed and everyone's a mindset to rest. I am at the North Middlesex today so I will not be attending to this further.." (p189)

112. KF informed Simon Gosling (SG) (Service Manager of CAMHS) of the situation and copied him into the emails. SG in his email to KF and copied to the claimant and MSS agreed with KF's clinical recommendation and the decision made.(p188)

113. KF explained the claimant and MSS missed the point that the young person should have been their priority and that there assessment was introducing a delay to the action.

114. Following this email exchange MSS raised a concern. On 21 May 2020, the claimant attended a meeting involving MSS and Dr P Bajaj (Lead Psychiatrist). KF explained that at the meeting she felt that MSS did not listen to her and was allowed to shout at her. She left the meeting extremely upset and that night she found it hard to sleep. In the early hours of the meeting, at 5am, she decided to write her thoughts about the meeting. She hand wrote her account (p206-214) In that account, the claimant wrote that *"tensions were already running high"* and with reference to the young person, she wrote, *"a young person's care was being used as a pawn to play out a turf-war battle."* In evidence, KF explained that by using these words she meant that there was unnecessary conflict about who should take on a particular referral due to wider issues in the team. KF was fed up that it seemed that members of the team were being rigid in refusing to take on patients referrals when everyone else were doing what was necessary and required in the circumstances.

115. On 18 November 2022 the claimant raised a grievance against KF. This was after the claimant was supplied with a copy of KF's hand written note by MSS who received a copy as part of her disclosure relating to her own on-going Tribunal claim against the respondent. The claimant in her grievance stated that she found the comments about her highly offensive and racist as a black woman. The Tribunal noted the claimant did not raise in this grievance that KF's use of the words was unlawful discrimination on the grounds of her religion or belief.

116. KF in evidence, explained that the use of the words "turf-war battle" had nothing whatsoever to do with the claimant's race or religion. She explained that in the clinical field these words are often used. She had used these words multiple times during her 35 year career. The Tribunal accepted the KF's explanation without hesitation. The Tribunal found KF to be a honest witness. The use of the words must be considered in the context of the care issue for the young person, and the fact that these words are commonly used to describe the kind of situation KF was facing. It is the claimant's own perception that the words were connected to or related to her race and religion. In cross examination of KF, the claimant used the words in the context of gang activity in Tottenham. The Tribunal considered this not to be an appropriate analysis to make.

117. On 9 December 2022 KF left the respondent's employment. On 18 October 2022 KF attended an exit interview. In the exit interview KF stated her reason for leaving was due to ongoing difficulties with MSS. (p636-640)

118. The claimant was on annual leave from 28 December 2022 to 11 January 2023.

Events January 2023

119. From 12 January 2023 Mr Kwaku Adjepong (KA) (Senior People Business

Partner CAMHS) corresponded with the claimant about dealing with the grievance. The claimant made it clear that she wanted the grievance to be dealt with formally, and did not want JFE involved at all because she had a Tribunal case involving her and that she was concerned about her behaviour. KA was then engaged in finding a management lead to deal with the grievance.

120. By email sent on 12 January 2023 at 12:03, KA advised the claimant of a grievance meeting scheduled for 20 January 2023 at 2pm. The claimant replied by stating that *"she cannot agree to attend without the terms of reference – I think this is reasonable.."* (p687). There were further emails between the claimant and AK that afternoon, in which the claimant has repeated her request for a copy of the terms of reference and agenda.

121. By letter dated 13 January 2023 the claimant was invited to attend a grievance meeting with Clive Blackwood (CB) (Head of CAMHS-Operations) (p691). This grievance did not take place due to the claimant being off work and subsequent resignation.

JFE Incident 12/01/2023

122. On 13 January 2023 at 15:03 the claimant emailed AK. The claimant stated,
" .. I passed Jeanne in the corridor and she gave me a threatening look. I think it's important to share this with you. I'm shaken up." At 15:09 the claimant sent an email to Patricia Simmons at the Guardian Service, in which she reported,*" Hi Patricia, I have been unable to get hold of you by telephone. I'm feeling upset because Jeanne's behaviour towards me in the corridor…."* (p682-683) The claimant did not describe what actually happened or what she said in these two emails. Neither did the claimant explain in her witness statement about this incident. In oral evidence the claimant said JFE gave her a threatened look as she walked passed in the corridor.

123. The Tribunal considered JFE's witness statement. JFE has denied the allegation on the basis that she does not recall an incident and that the claimant has not been specific about her behaviour. It is clear from the claimant's email that the behaviour relates to a threatening look. The Tribunal concluded that given the claimant's email there must have been some interaction between the claimant, which caused her to report to AK.

124. The claimant also referred to an incident concerning JFE who did not offer her a piece of cake. This is relied upon as one of the breaches in support of constructive dismissal claim. In evidence, the claimant's evidence was limited to not being offered a piece of cake when others were. The Tribunal considered JFE's witness statement. JFE has given her account. She has confirmed she brought in cakes for the whole service on a Tuesday. One team member was not in work that day, and she kept a piece for her, which she gave her on the following day. According to JFE the claimant did not work on a Tuesday and therefore may not have been aware of the situation. The Tribunal concluded that based on the limited evidence from the claimant JFE's explanation and understanding was plausible. Accordingly, the

Tribunal did not find that the claimant was denied a cake.

125. On 13 January 2023 the claimant went on sick leave due to a frozen shoulder. (p704) The claimant also reported sick leave for 18 January 2023 for the same reason. (p703)

126. By email sent on 18 January 2023 to JFE, the claimant asked for one day's leave for 27 January 2023 to attend an appointment. (p702) To consider this request JFE asked for the claimant's annual leave card, which JFE stated in her statement is standard practice to request. In reply, the claimant did not send her card as she was unable to find it but provided information based on her memory. JFE replied that her leave request approval will be pending receipt of the card. (p700) In an email to JFE sent on 20 January 2023, the claimant said she could not log into the system to verify her leave information, and wanted this to be approved in principle, and that she was "happy to take it as unpaid leave". (p698) Following this email, JFE approved her request notwithstanding she did not have the requested information. (p697)

Claimant's resignation

127. By email sent to CB on 20 January 2023 at 12:08, the claimant confirmed her resignation. The email stated;
".. I am writing to resign from my post. Last week I emailed you regarding unpleasant behaviour by Jeane. This is not the first time I have experienced hostile, intimidating and offensive behaviour from SLT members such as Jeanne and Bridgette and recently finding out the extent of Dr Karrie Fehilly's problem with me having read her exit interview and other documents where she has mentioned me-all based on untruths. It is now reasonable for me to believe Dr Fehilly was involved in my medical suspension the name of the complainant which has been withheld from me is her name.
Despite my best efforts to stay in my role, going part time is not enough for me to maintain my wellbeing whilst at work and I feel I don't have enough fuel left in my tank to continue-the obstruction in getting 1 day annual leave is just the latest examples.
Given these circumstances, I would apricate if we could negotiate my end date. Kind Regards (p706)

128. The claimant's resignation was acknowledged by CB. He was willing to agree a sooner leave date of 2 weeks or less by agreement. (p705) Following a series of emails, CB confirmed to the claimant he was happy to agree a shorter notice period that took account of her annual leave entitlement which meant her last day at work would be 13 March 2023. (p717) The claimant's last working day was agreed as Wednesday 15 March 2023.(p721)

The applicable Law

Direct discrimination – s13 Equality Act 2010 (EqA)

129. Section 13(1) provides that :
A person (A) discriminates against another (B) if, because of a protected

characteristic, A treats B less favourably than A treats or would treat others.

130. Bad treatment per se is not discriminatory; what needs to be shown is worse treatment than that given to a comparator.- *Bahl v Law Society 2004 IRLR 799 (CA).* Unreasonable behaviour alone cannot found an inference of discrimination but if there is no explanation for the unreasonableness, the absence of an explanation may give rise to this inference of discrimination. The Court of Appeal said that proof of equally unreasonable treatment of all is one way of avoiding an inference of unlawful discrimination, but it is not the only way. At paragraph 101 Gibson LJ said quoting from Elias J in the EAT in the same case*; " The inference may also be rebutted – and indeed this will, we suspect, be far more common – by the employer leading evidence of a genuine reason which is not discriminatory and which was the ground of his conduct. Employers will often have unjustified albeit genuine reasons for acting as they have. If these are accepted and show no discrimination, there is generally no basis for the inference of unlawful discrimination to be made."*

131. The fact that a claimant has been treated less favourably than an actual or hypothetical comparator is not enough to establish discrimination. Something more is required, In *Madarassy v Nomura International Plc (2007) ICR 867,* Mummery LJ said; *" The base facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, a sufficient material from which a tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination"*

132. In determining whether discrimination has taken place, the tribunal must enquire as to the conscious or subconscious mental processes which led the alleged discriminator to take a particular course of action in respect of the claimant, and to consider whether a protected characteristic played a significant part in the treatment. *(Nagarajan v London Regional Transport and others (1999) ICR 887 (HL)*

Comparison

133. Section 23 of the EqA 2010 provides that:
(i) On a comparison of cases for the purposes of section 13 EqA there must be no material difference between the circumstances relating to each case. In other words, the relevant circumstances of the complainant and the comparator must be either the same or not materially different. Comparison may be made with an actual individual or a hypothetical individual.

Burden of proof (s136 EqA 2010)

134. Section 136 requires the claimant to prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of unlawful discrimination, and it is then for the employer to prove otherwise.

135. The cases of Barton v Investec Henderson Crosthwaite Securities Ltd (2003) ICR 1205 and Igen Ltd v Wong (2005) EWCA Civ 142 provide a 13 point form/checklist which outlines a two stage approach to discharge the burden of proof, namely;
    (a) Has the claimant proved facts from which in the absence of an adequate explanation the tribunal could conclude that the respondent had committed unlawful discrimination?

    (b) If the claimant satisfies (a) but not otherwise, has the respondent proved that unlawful discrimination was not committed or was not to be treated as committed.

136. The burden is on the claimant to prove, on a balance of probabilities, a prima facie case of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. The claimant must establish more than a difference in status (eg religion in this case) and a difference in treatment before a Tribunal will be in a position where it could conclude that an act of discrimination had been committed.

137. It is not enough for a claimant to show that he/she has been treated badly in order to discharge the burden of proof that he/she had suffered less favourable treatment because of a protected characteristic. The fact that the claimant has been subject to unreasonable treatment is not, of itself, sufficient to shift the burden of proof. (Glasgow City Council v Zafar 1998 ICR 120 HL). It does not matter if the employer acts in an unfair way, provide the reason has nothing to do with the protected characteristic. As Mrs Justice Simler (as she then was) observed in Chief Constable of Kent Constabulary v Bowler EAT0214/16 "merely because a Tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean that the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic."

Inferences

138. "Inferences" are where the Tribunal can draw conclusions from primary facts and must proceed on the basis initially that there is no adequate explanation (Igen Limited & others v Wong [2005] Court of Appeal). This set out a two-stage process:
    (a) First stage – a complainant is required to prove facts from which the Tribunal "could conclude in the absence of an adequate explanation that a respondent has unlawfully discriminated". If the complainant does not prove such facts he or she will fail.
    (b) Second stage – if the Tribunal could conclude the possibility of unlawful discrimination and there is a shift in the burden to the respondent, the respondent is required to prove that they did not unlawfully discriminate.

139. Tribunals cannot draw inferences from thin air (Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] House of Lords).

140. The mental processes of the discrimination should also be considered (Reynolds v CFLIS (IL) Limited [2015] Court of Appeal).

Reason why

141. In addition, the Tribunal can take a "reason why" approach and consider the evidence put forward by the respondent and if it is satisfied that the respondent has established the reason for the treatment and that it is not connected with discrimination it can proceed on that basis.

Disability – s6 Equality Act 2010

142. Section 6 of the Equality Act provides;
(1) A person (P) has a disability if –
(a) P has a physical or mental impairment, and
(b) the impairment has a substantial and long term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a Disability.
(3) In relation to the protected characteristic of disability –
(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability.

Discrimination by perception

143. In Chief Constable of Norfolk Constabulary v Coffey (2019) EWCA Civ 1061 the Court of Appeal approved the parties agreed position that in a claim of perceived disability discrimination it is not enough that the claimant is treated less favourably because of the employer's perception that he or is unwell the punitive discriminator most perceive that all the elements in the statutory definition of disability are present.

Harassment – s26 Equality Act 2010

144. Section 26(1) of the EqA 2010 provides that;
"A person (A) harasses another (B) if
a. A engages in unwanted conduct related to a relevant protected characteristic, and
b. The conduct has the purpose or effect of –
i. violating B's dignity, or
ii. creating an intimidating, hostile, degrading, humiliating or offensive environment for B ….
(4) In deciding whether conduct has the effect referred to in (1)(b), each of the following must be taken into account
a. The perception of B;
b. The other circumstances of the case
c. Whether it is reasonable for the conduct to have that effect.

145. In relation to a claim for harassment under Section 26, it is open to a Tribunal to find that conduct was unwanted even if a claimant chooses to stay in employment and even if a claimant chooses not to object whether

formally or informally (Munchkins Restaurant Ltd v Karmazyn and others EAT 0359/09).

146. The Equality and Human Rights Commission: Code of Practice on Employment (2011) states as follows:

(i) Unwanted conduct covers a range of behaviour, including spoken or written words or imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour.

(ii) The word 'unwanted' means essentially the same as 'unwelcome' or 'uninvited'. 'Unwanted' does not meant that express objection has to be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment.

147. When considering whether a comment was "related to" a protected characteristic under Section 26 Equality Act 2010, a broader enquiry is required involving a more intense focus on the context of the offending words or behaviour (Bakkali v Greater Manchester Buses (South) Limited t/a Stage Coach Manchester [2018] UKEAT/0176/17).

148. In order to assess the "purpose" of the alleged conduct, the Tribunal must consider the alleged harasser's motive or intention.

149. In considering whether the conduct had the specified effect, the Tribunal must consider both the actual perception of the complainant and the question whether it is reasonable for the conduct to have that effect. That entails consideration of whether, objectively, it was reasonable for the conduct to have that effect on the particular complainant. If a complainant is hypersensitive and unreasonably prone to take offence, there will have been no harassment within the meaning of the section (Richmond Pharmacology v Dhaliwal (2009) IRLR 336 at paragraph 15).

150. In assessing whether the conduct met the required threshold by producing the proscribed consequences, Tribunals should not place too much weight on the timing of any objection (Weeks v Newham College of Further Education UKEAT/0630/11).

151. Whether it was reasonable for a claimant to regard treatment as amounting to treatment that violates his/her dignity or has an intimidating, hostile, degrading, humiliating or offensive environment is a matter for factual assessment of the Tribunal having regard to all the relevant circumstances, including the context. In the case of Richmond Pharmacology v Dhaliwal (2009) IRLR 336, the EAT said at paragraph 22: *"Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct … it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase".*

152. In speaking of the statutory language in Section 26(1), Elias LJ in Land Registry v Grant (2011) ICR 1390 said (at paragraph 47): *"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment".*

153. When a Tribunal is considering whether facts have been proved from which it could conclude that harassment was on the grounds of religion, it is always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on the grounds of religion. The context may, for example, point strongly towards or strongly against a conclusion that harassment was on the grounds of religion. The Tribunal should not leave the context out of account at the first stage and consider it only as part of the explanation at the second stage after the burden of proof has passed. (Nazir v Asim & Nottinghamshire Black Partnership (2010) IRLR 336 EAT)

Victimisation – s27 Equality Act 2010

154. Section 27 of the Act provides;

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

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

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
(4) This section applies only where the person subjected to a detriment is an individual.
(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

155. The treatment must be by reason of the protected act. The Tribunal must consider the employer's motivation (conscious or unconscious); it is not enough merely to consider whether the treatment would not have happened 'but for' the protected act. (Martin v Devonshires Solicitors (2011) ICR 352, Panayiotou v Kernaghan (2014) IRLR 500) approved in Page (appellant) v Lord Chancellor and another (respondents) – (2021) IRLR 377.)

156. Victimisation claims under the Equality Act are subject to the same shifting burden of proof set out in section 136 EqA. Thus, the claimant is required to show evidence which could suggest that she has been subjected to less

favourable treatment because she had made a protected act.

Public Interest Disclosure -s43B &s47 Employment Rights Act 1996

157. A qualifying disclosure is a disclosure that falls within section 43B of the Employment Rights Act 1996.

158. In order for the disclosure to be protected it has been made in the public interest and the claimant has to reasonably believe that it tended to show one or more of the following:
(i) a breach of legal obligation;
(ii) that a criminal offence has been committed;
(iii) there has been a miscarriage of justice;
(iv) there is a health and safety danger;
(v) environmental damage
or that any of the above is occurring or is likely to occur.

159. Qualifying disclosures can only be made to certain classes of person; these include a person's employer. (s43C ERA 1996)

160. In *Williams v Michelle Brown AM UKEAT/0044/19/00, HHJ Auerbach* identified five issues which a tribunal is required to decide in relation to whether something amounts to a qualifying disclosure.

" *It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a believe it must be reasonably".*

161. The word disclosure must be given its ordinary meaning which involves a disclosure of information, that is conveying facts which means that making of mere allegations will not be a "disclosure" for these purposes. In *Cavendish Munro Professional Risks Management Ltd v Geduld (2010) IRLR 38)* Slade J said,

"…the ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be, " The wards have not been clean for the past two weeks. Yesterday sharps were left lying around" Contrasted with that would be a statement that, "You are not complying with Health and Safety requirements" In our view this will be an allegation not information."

162. Thus care must be taken not to draw false distinctions between allegations and information when often a disclosure maybe both.

163. In *Kilraine v London Borough of Wandsworth (2018) ICR CA Sales LJ* provided the following guidance;

(i) s43B (1) should not be glossed to introduce into it a rigid dichotomy between information on the one hand and allegations on the other…

(ii) On the other hand although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision.

(iii) In order for a statement or disclosure to be a qualifying disclosure according to this language it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)

(iv) Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgement by a tribunal in the light of all of the facts of the case.

164. The disclosure will only be a qualifying disclosure if the worker believes that the disclosure is in the public interest. This requirement was considered by the Court of Appeal In *Chesterton Global Ltd v Nurmohamed (2017) EWCA Civ 979,* in which it was held that they may not be a white line between personal and public interest, with any element of the former ruling out the statutory protection; where they are mixed interests it will be for the employment tribunal to rule, as a matter of fact, as to whether there was sufficient public interest to qualify under the legislation.

165. It was stated that the Tribunal has to determine, (a) whether the worker subjectively believed at the time that the disclosure was in the public interest and (b) if so whether that belief was objectively reasonable.

166. The legislation does not define what the "public interest" means in the context of qualifying disclosure although the Employment Tribunals must be intended to apply it "as a matter of educated impression" looking at all the following factors; (i) the numbers in the group whose interests the disclosure served; (ii) the nature of interests affected and the extent in which they are affected by the wrong being disclosed;(iii) the nature of the alleged wrongdoing disclosed; and (iv) for the identity of the alleged wrongdoer.

Detriment

167. Section 47B(1) of the Employment Rights Act 996 provides:

> *"A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."*

168. *"On the ground that"* means that the fact that the worker made the protected disclosure must be "*the reason*" for the treatment: Jesudason v Alder Hey Children's NHS Foundation Trust (2020) EWCA Civ 73.

169. The protected disclosure will be the reason for the detriment if it "*materially influenced*, *in the sense of being more than a trivial influence*" the employer's treatment of the worker: Manchester NHS Trust v Fecitt *(*2012) ICR 372.

Constructive unfair dismissal

170. Section 94 of the Employment Rights Act 1996 ("ERA 1996") sets out the right of an employee not being unfairly dismissed by his or her employer.

171. An unfair dismissal claim can be pursued only if an employee has been dismissed as defined by Section 95 of the Employment Rights Act 1996.

172. Section 95(1)(c) provides that an employee is dismissed by his employer if: "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

173. The case of *Western Excavating (ECC) Ltd v Sharpe 1978 IRLR 27*, established that in order for the circumstances to entitle the employee to terminate the contract without notice, there must be a breach of contract by the employer, secondly that the breach must be sufficiently important to justify the employee resigning: the employee must leave in response to the breach not some under connected reason, and that the employee must not delay such as to affirm the contract. The breach relied upon can be a breach of an express or implied term.

174. In *Malik and Mahmud v Bank of Credit and Commerce International SA 1997 ICR 606* it was confirmed that every contract of employment contains an implied term that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. It is implicit in this that any breach of the implied term will be sufficiently important to entitle the employee to treat himself as dismissed and the reason for that it is necessary do serious damage to the employment relationship. That position was expressly confirmed in *Morrow v Safeway Stores Limited 2002 IRLR 9*.

175. The test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in Malik recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust.

176. Where the breach alleged arises from a number of incidents culminating in a final event, tribunal may, indeed look at entire conduct of the employer and the final act relied on need not itself be repudiatory or it even unreasonable, but must contribute something even if relatively insignificant to the breach of contract. *Lewis and Motor World Garages Ltd1985 IRLR 465 and Omilaju v Waltham Forest London Borough Council 2005 IRLR 35*.

177. In *Kaur-v-Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978*, the Court of Appeal reviewed cases on the 'last straw' doctrine and Underhill LJ formulated the following approach in relation to the Malik test;

"In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of 45 above)

(5) Did the employee resign in response (or partly in response) to that breach?"

Analysis and Conclusion

178. For ease of reference the Tribunal sets out its conclusions to each of the complaints as set out in the agreed List of Issues.

Direct discrimination on the grounds of race and religion.

179. In evidence the claimant strongly expressed her belief that she has been subject to discrimination on the grounds of her race and/or religion. Having considered the background events it appears this belief became more crystallised from March 2022 onwards up to her resignation. However, a belief that there has been unlawful discrimination, however, strongly held is not enough.

180 In respect of these complaints the claimant relies on a hypothetical comparator and who is not of Muslim religion. The alleged perpetrators are GP and Dr KP.

181. On each of the pleaded allegations as discussed below the Tribunal concluded that apart from the held belief and assertions made, the claimant failed to offer evidence of “something more” which would have suggested that either race or religion was the reason for the treatment. Also the Tribunal concluded that an employee not sharing the claimant’s race and religion in a similar situation, would not have been treated any differently.

182. Accordingly, as the claimant did not prove primary facts from which the Tribunal could have concluded that the treatment was because of her race or religion the burden of proof did not shift to the respondent to explain the reason for the treatment. Even if the burden of proof had shifted the respond would have discharged that burden.

(i) *Allegation 2.2.1 & 3.2.1-GP emailing the claimant on 21 March 2022 stating that she had ulterior motives and that an investigation into her concerns would not take place.*

183. The claimant was provided with a reasoned explanation about the discrepancy of the two RIO documents, which was provided by Sarah Wilkins. This confirmed JFE had not altered or modified the document contrary to the claimant's strongly held view. As JFE had not done so, there were no grounds to investigate the issue further. GP's view that the claimant had ulterior motives was held in the context of the claimant refusing to accept the explanation and wanting JFE being investigated and disciplined/dismissed for fraud which is a gross misconduct. The email sent confirmed GP's position. It had nothing to do with the claimant's race and/or religion.

(ii) *Allegation 2.2.2 – The claimant being medically suspended from duties based on GP's impressions on 13 May 2022.*

184. GP gave his full reasons for the decision to medically suspend the claimant in the suspension letter. GP had genuine concerns about the claimant's wellbeing and health. This was done in line with the respondent's Enforced Medical Leave Policy. It had nothing to do with the claimant's race and/or religion.

(iii) *Allegation 2.2.3- GP sending emails to the claimant's personal email address without consent and when asked not to do so during her medical suspension on 19 May 2022.*

185. The Tribunal, at paragraph 88 concluded the claimant did not show that GP did not have her consent to send emails until the claimant emailed GP on 27 May 2022. In the suspension telephone discussion the claimant did not inform the claimant not to communicate with her on personal email account. This allegation is not factually made out.

(iv) Allegation 2.2.4 -JFE referring the claimant to Occupational Health on 23 May 2022 without consent

186. The Tribunal has made its findings at paragraphs 82-85 above. Further, the Tribunal noted the claimant's Contract of Employment, Clause 9, which provides *" At any time during your employment you may be required to undergo a health assessment by Occupational Health…."* (p132). Also the OH Referral Guidance refers to Managers being entitled to make these OH referrals without the employee's consent in "exceptional circumstances" (p150).

(v) Allegation 2.2.5- GP used language to describe the claimant as being influenced by others on 31 May 2022.

187. The Tribunal found that Simon Gosling had initially said that *"ZA was being influenced by MSS".* GP also formed this view in the context of the events from March 2022 onwards, and the involvement of MSS, the claimant's Line Manager, who herself had displayed a similar pattern of

behaviour. GP did not actually use these words or language. He formed a view following his discussion with Simon Gosling. This allegation is not factually made out.

(vi) Allegation 2.2.6 & 3.2.4-DR KF describing the claimant's interactions during clinical discussions as "turf war battles" on 22 May 2020.

188. KF explained the context to and rational for the use of the words "turf war battles" in evidence as set out in paragraphs 114-116. In cross examination. she said, the phrase is commonly used in the NHS and by doctors. She has also used the words with her colleagues, *"let's not get caught up in turf war battles, let's move on".* The claimant did not use the words in the context proposed by the claimant, namely gang activity in Tottenham.

189. Whilst the claimant may have perceived the words to have a racial connotations, KF was not motivated either consciously or unconsciously by the claimant race and/or religion.

190. For the reasons as set out the complaints of unlawful discrimination on the grounds of race and religion are not well founded and are dismissed.

Direct discrimination on the grounds of perceived disability

191. The claimant advanced a claim of discrimination on the grounds of perceived disability as set out in the List of Issues. The claimant did not advance this claim in her witness statement or in evidence. The claimant did not cross examine GP if because she was medically suspended that he perceived the claimant to be disabled. This point was not established in evidence.

192. The Tribunal noted in his witness statement GP (the alleged perpetrator) simply denied the allegations and gave the same explanation for his actions as for the race and religion discrimination claims.

193. The made no findings of fact about this complaint. Therefore, this complaint fails, as the claimant did not prove primary facts from which the Tribunal could have concluded that the treatment was because of the claimant's perceived disability.

Victimisation

194. In the agreed List of issues, the claimant relied upon the protected act being the email she sent to JFE on 23 February 2022 concerning the effect of the RIO policy on those who had disabilities.

195. However, in evidence the claimant relied on 2 further emails as protected Acts. All three emails are copied below, and marked as PA1-3 respectively;

PA1. Email sent on 10 March 2022 (p334)

Dear Yves, I forgot to mentioned the intranet document was download a few days ago and again this afternoon after I received the email. I want to reiterate what I said to in previous emails, this type of behaviour has undermined my feeling safe at work- among other behaviour which I will tell you about. I want you to deal with this under the whistleblowing policy, as I know I will be protected from any repercussions from particular individuals.
Kind regards, Zainab

PA2. Email sent on 23 February 2022 (p1235 &1282)

Dear Jeanne, thank you for your email. I appreciate the important of capturing this information, however would you kindly send such emails to the individuals concerned as I personally find the tone heavy- I am sure that's not your intention. Aside from the work pressures you mentioned, I'm just thinking about our colleagues, who may be neurodivergent and therefore struggle with some tasks-I wonder how they may experience this email? perhaps we can incorporate this into our collective thinking about inclusion in the workplace. Just food for thought.
Kind regards, Zainab

PA3. Email sent on 23 February 2022 (p1279)

Thank you Jeanne, I'm just wondering what are your thought on my observations? As this is a mental health organisation, how do you think our colleagues who may be neurodivergent, experience your email?
Kind regards, Zainab

196. The respondent accepted that PA2 & PA3 amount to protected acts. The Tribunal were in agreement with this acceptance.

197. The Tribunal was also in agreement with the respondent's submissions that PA1 is not a protected act for the reasons stated, namely that it does not contain either an express or implied allegation of a breach of the Equality Act.

198. For the purposes of determining acts of victimisation, the Tribunal concluded that GP had knowledge of the emails (i.e PA1-3) relied upon by the claimant.

199. The Tribunal's findings in respect of each of the acts of victimisation as advanced are set out below. The Tribunal noted the acts of victimisation relied upon can amount to detriments. Hence, the Tribunal considered the justification for the said acts and if these were motivated by the protected acts.

(i) *5.3.1 Gary Passaway emailing the claimant on 22 March 2022 stating that she had ulterior motives and that an investigation into her concerns would not take place*

Factually, the email referred to is clear in its content and supports the claimant's position. This can amount to a detriment. The Tribunal considered the motivation, conscious or unconscious of GP in sending this email and his justification for his view that the claimant had an ulterior motive and why he would not be investigating JFE concerning the document. The Tribunal made its findings at paragraph 53 above. The

Tribunal was satisfied with GP's explanation and did not conclude that his actions were because of the protected acts. This complaint fails.

(ii) 5.3.2 *The Claimant being medically suspended from duties based on Gary Passaway's impressions on 13 May 2022;*
The Tribunal concluded at paragraphs 71-72 that the decision to medically suspend the claimant was a reasonable step to take in the circumstances. GP and JFE had serious and genuine concerns about the claimant's wellbeing as evidence by her behaviour and exchange of emails. Again this decision was not motivated by the protected acts. This complaint fails.

(iii) 5.3.3 *The Claimant's IT accounts being suspended on 13 May 2022;*
The claimant's IT account was suspended as a direct consequence of her suspension. The suspension was not in any way connected to or motivated by the protected act. This complaint fails.

(iv) 5.3.4 *Gary Passaway sending emails to the Claimant's personal email address without consent and when asked not to do so during her medical suspension on 19 May 2022.*
The Tribunal made its conclusions at paragraph 85 above. The claimant provided no evidence to support the assertion that she did not give GP consent to email her and in particular told him not to in their discussion on 19 May 2022. The claimant did not, in cross examination, question GP about this alleged conversation. Further, the Tribunal found the email of 27 May 2022, is the only email directly sent to GP telling him no to do so. As highlighted in the submissions for the respondent, in cross examination the claimant accepted that it was not until her email off 27 May 2022 that GP was told not to write to her on her personal email account. The Tribunal concluded that GP was not motivated by the protected acts. This complaint therefore fails.

200. The victimisation complaint fail for the reasons mentioned.

Whistleblowing & Detriment -s43B & s47 Employment Rights Act 1996

201. In the List of Issues the claimant confirmed the disclosure to be the email dated 23 February 2022, which stated.
"*Dear Jeanne, thank you for your email. I appreciate the important of capturing this information, however would you kindly send such emails to the individuals concerned as I personally find their tone heavy-I am sure that's not your intention. Aside from the work pressures you mentioned, I'm just thinking about our colleagues who may be neurodivergent and therefore struggle with some tasks- I wonder how they may experience this email? perhaps we can incorporate this into our collective thinking about inclusion in the workplace. Just food for thought. Kind regards*
Zainab (p279)

202. However, in evidence the claimant stated that she relied on 2 further emails, which are set out below;
(i) email – 23 February 2022 to JFE (p1279)
"Thank you Jeanne. I'm just wondering what are your thought on my

observations? As this is a mental health organisation how do you think our colleagues who may be neurodivergent experience your email? Kind Regards"

(ii) email- 10 March 2022 to Yves (HR) (p334)

" *Dear Yves,*
I forgot to mentioned the intranet document was download a few days ago and again this afternoon after I received the email. I want to reiterate what I said to in previous emails, this type of behaviour has undermined my feeling safe at work-among other behaviour which I will tell you about. I want you to deal with this under the whistleblowing policy as I know I will be protected from any repercussions from particular individuals. Kind Regards

203. The claimant has asserted that the information disclosed in each of the disclosures tended to show that the respondent failed to comply with a legal obligation in accordance with s43B(b).The legal obligation which was breached was to complete an equality impact assessment.

204. In relation to each of these disclosures, the Tribunal had to determine;
(a) Did the claimant disclose information?
(b) Did the claimant believe the disclosure of information was in the public interest?
(c) Was that belief reasonable?
(d) Did the claimant believe it tendered to show that the respondent had failed, was failing or was likely to fail to comply with any legal obligation?
(e) Was that belief reasonable?
(f) If it was a protected disclosure was it made to the respondent?

205. The Tribunal first considered if the three emails relied contained a disclosure of information. We concluded that none of the emails disclosed information. The content of these emails do not contain any reference to that it was a legal requirement to carry out an equality impact assessment and that a failure to do so was breach of a legal obligation. The reference to colleagues who may be neurodivergent does not specifically refer to any breach of legal obligation, namely the requirement to undertake an equality impact assessment. Accordingly, this complaint fails. The Tribunal did not consider it necessary to make any further determination on this complaint.

Harassment (related to race and/or religion)

206. The unwanted conduct relied upon are items 7.1.1, 7.1.2. & 7.1.3 in the List of Issues. The Tribunal applied the statutory test and came to the conclusions as set out below.

Was there unwanted conduct?

207. The Tribunal found that the claimant did experience unwanted conduct as complained of.

Was that conduct related to the claimant's race and/or religion.

208. Whilst the Tribunal found there was unwanted conduct, it did not find that

this conduct was related to the claimant's race and or religion because of the context in which the events took place. The context includes our findings which are;

(i) GP formed the view that the claimant had ulterior motives was formed on the basis of the claimant's insistence that JFE had altered the document despite the explanation provided by the respondent and her insistence that JFE should be disciplined for this, as she considered she had committed gross misconduct.

(ii) The respondent referred the claimant's concerns to its Information Officer who reported its analysis and response which the claimant did not accept.

(iii) The claimant was suspended not because of GP's personal impressions, whatever they may have been, but based on the unreasonable conduct of the claimant and concern for her own well-being and health.

(iv) GP sending the email to the claimant's personal account was a genuine mistake.

209. The Tribunal did not find that the respondent's actions as above were either consciously or unconsciously motivated by the claimants race or religion.

210. Given the Tribunal concluded that the conduct was not related to the claimant's race or religion, the Tribunal did not need to consider the purpose or effect of the conduct. However, even if such conduct was related to the claimants race or religion the Tribunal concluded that the conduct did not have the purpose or effect as required by the Act.

211. The Tribunal concluded that conduct did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, for the reasons in this judgment.

212. In terms of the effect of such conduct, the Tribunal accepted that claimant's evidence that she was upset and distressed. However, the Tribunal concluded that it was not reasonable for the conduct to have that effect on the claimant in the context of her own conduct and behaviour.

213. Accordingly, the complaint of harassment fails.

Constructive unfair dismissal

214. The claimant in her resignation email dated 20 January 2023 stated the breaches of conduct were; (i) the unpleasant behaviour of Jeanne; (ii) finding about the contents about Dr KF's exit interview; and (iii) the obstruction in getting one day annual leave. However, in the agreed List of Issues, the claimant expanded the breaches to 7 separate breaches, which are examined below. In her witness statement and evidence the claimant the incident with JFE in the corridor and the cake was the last straw

215. The first issue the Tribunal had to decide was whether each conduct relied upon amounted to a fundamental breach, and whether it was calculated or likely to cause serious damage to, or destroy the implied term of trust and confidence between the claimant and respondent, which entitled the

claimant to resign. The Tribunal also had to consider whether the said conduct looked together amounted to a breach of the implied term of trust and confidence. In doing so, it was necessary to consider whether the last straw itself contributed to the breach of trust and confidence in at least in some material way.

216. The Tribunal noted that the implied term of trust and confidence was not breached merely if an employer had behaved unreasonably, and that the conduct complained of must have been serious.

217. The Tribunal examined the breaches as set out below;

(i) Item 8.2.1 - HR failing to address concerns about JFE
The Tribunal considered this breach in respect of the claimant's formal grievance about JFE in her email dated 26 April 2022. (p358-359); and concerns expressed about her feeling unsafe when in the presence of JFE. In line with its Grievance Procedure, the respondent appointed BH to deal with the grievance raised, and also appointed an independent external Investigator GH. The Tribunal concluded this was a reasonable and appropriate step for the respondent to take which was in accordance with its Grievance Policy. The claimant was invited to an investigation meeting with GH. As has been set out in paragraphs 89-90 the claimant refused to engage in the investigation process. This was an opportunity for the claimant to pursue her grievance with an independent investigator openly and without fear. The Tribunal considered the claimant's reluctance and/or refusal to do so for the reasons she gave during this process were without justification. The Tribunal also considered the claimant's concerns about not feeling safe with JFE. At the return to work interview held on 4 August 2022, the claimant made reference to this without giving specific details. The claimant did not provide any information in evidence to show that she had provided the respondent with firm details about this concern or that she raised a formal grievance. The Tribunal also noted that in cross examination the claimant accepted she did not provide specific details to the respondent about her concerns. That being the case, the respondent was not in a position to address the claimant's concerns. The Tribunal concluded that this alleged breach was not made out.

(ii) Item 8.2.2.- HR failing to protect the claimant's dignity at work ensuring the claimant was distanced from JFE.
The claimant advanced this breach on the premise that the respondent failed to ensure that she was kept away from JFE, once she had raised concerns about JFE and feelings of being unsafe around JFE. The Tribunal noted the claimant did not pursue this issue further despite being afforded the opportunity to do so. JFE in her statement stated that her direct contact with the claimant was limited, however as Service Lead she had to have some contact with the team, particularly in the in the absence of the Team Manager (MSS) The Tribunal accepted that the contact between JFE and the claimant was limited and there was no evidence that JFE acted unreasonably or that there were serious concerns about her management and interaction with the claimant. The Tribunal concluded that this alleged breach was not made out.

(iii) Item 8.2.3 - Systematically deskilling the claimant by medically suspending her, referring to Occupational Health and restricting her work duties.
Based on the findings and facts as set out above the Tribunal concluded that the respondent's decision to suspend the claimant was a reasonable step taken by the respondent in the circumstances. This suspension did not have the effect of deskilling the claimant. It is hard to understand that by being absent from work for a period of 3 months would have deskilled the claimant given the nature of her role. Further, there was no evidence to show this was the case. The suspension period was unnecessarily delayed by the claimant's own refusal to engage with Occupational Health, which she eventually agreed to but then refused to give consent to release the report to the respondent. The Tribunal concluded that given the reasons for the claimant's suspension the respondent was contractually entitled to refer the claimant for an assessment with Occupational Health. With regard to restricting the claimant's work duties, the Tribunal concluded this was done with the claimant's agreement made at the return to work interview on 4 August 2022. The Tribunal concluded that this alleged breach was not made out.

(iv) Item 8.2.4- JFE insisting on line-managing the claimant
The claimant advanced this breach based on JFE's insistence that she managed the claimant on her return to work in August 2022. As set out in paragraph100 the Tribunal concluded JFE did not insist to line manage the claimant. Accordingly, this alleged breach was not made out.

(i) Item 8.2.5-On one occasion the claimant was not offered a piece of cake
This alleged breach was not made out for the reasons as stated in paragraph 124. Even if the claimant had not been offered a cake as claimed, the Tribunal was not satisfied that would have amounted to breach or even a repudiatory breach.

(ii) Item 8.2.6-The respondent refused to allow the claimant to take one day's leave.
The Tribunal concluded at paragraph 126, that the claimant's request for leave was not refused. It was granted by JFE. This alleged breach is not made out.

(viii) Item 8.2.7-JFE's behaviour in the office and corridor at work, which resulted in the claimant's one week sickness absence prior to her resignation.
The claimant went on sickness absence on 13 January 2023 due to a frozen shoulder. The claimant provided no evidence in support to show that her frozen shoulder was caused by JFE's behaviour or the alleged incident in the corridor. There alleged breach was not made out.

218. For the reasons stated, the respondent was not in fundamental breach of the implied term of mutual trust and confidence. Accordingly, this complaint of unfair constructive dismissal fails.

219. Although the Tribunal determined that there was no to repudiatory breach in each of the individual alleged acts of conduct relied upon, the Tribunal considered whether there was a course of conduct that viewed cumulatively

amounted to a breach of the employed term of trust and confidence. Based on the conclusions reached the Tribunal concluded that the acts relied upon even viewed as a course of conduct, would not have cumulatively amounted to conduct calculated and likely to destroy or seriously damage the relationship of trust and confidence.

220. The Tribunal noted that in the resignation email, the claimant stated *"..Despite my best efforts to stay in my role going part time is not enough for me to maintain my well-being was at work and I feel I don't have enough fuel left in my tank to continue....."* Based on this reason, the claimant's decision to resign was because she did not want to go part-time, which was her choice. Therefore, the claimant did not resign in response to a repudiatory breach as alleged.

Notice Pay

221. The Tribunal concluded this complaint is not well founded for the following reasons. The claimant's contractual notice period was 2 months. The claimant on giving notice of resignation, requested a shorter notice period, which was agreed. The agreement reached was that the claimant's last working day was 15 March 2023, and that she would take her remaining annual leave as part of her notice period.

222. For the reasons stated above the claimant's complaints are not well founded and are dismissed.

223. This Judgment and Reasons have taken far longer to produce than they should have. This was due in part to the need for the Tribunal to meet to complete its deliberations and commitments of the Judge. The Tribunal apologises to the parties for this delay.

_____
Employment Judge Bansal
Date 24 April 2024

JUDGMENT SENT TO THE PARTIES ON

25 April 2024.....

……..
FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

ANNEX A
The Final Agreed List of Issues

1. **Jurisdiction**

1.1 Has the Claimant presented the discrimination complaints within the time limits set out in s.123(1)(a) and (b) EqA 2010, taking into account any extension of time for taking part in Acas Early Conciliation?

1.2 If not, would it be just and equitable to extend the time limit for the Claimant to do so?

2. **Direct discrimination on the grounds of race**

2.1 The Claimant's race is Somalian, Black, African.

2.2 Did the Respondent subject the Claimant to the following treatment?

2.2.1 *Gary Passaway emailing the Claimant on 21 March 2022 stating that she had ulterior motives and that an investigation into her concerns would not take place*;
2.2.2 *The Claimant being medically suspended from duties based on Gary Passaway's impressions on 13 May 2022;*
2.2.3 *Gary Passaway sending emails to the Claimant's personal email address without consent and when asked not to do so during her medical suspension on 19 May 2022*;
2.2.4 *Jeanne Faulet-Ekpitini referring the Claimant to Occupational Health on 23 May 2022 without consent;*
2.2.5 *Gary Passaway used language to describe the Claimant as being influenced by others; The claimant has confirmed that Mr Passaway described her as having been influenced by her colleagues.*
2.2.6 *Dr Karrie Fehilly describing the Claimant's interactions during clinical discussions as "Turf war battles" on 22 May 2022.*

2.3 Was any of that treatment "less favourable treatment", i.e., did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated the comparator(s)?
The Claimant has confirmed that she relies on a hypothetical comparator.

2.4 If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that this was because of her race?

2.5 If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

3. **Direct discrimination on the grounds of religion or belief**

3.1 The Claimant relies on the following religion: Islam.

3.2 Did the Respondent subject the Claimant to the following treatment?

3.2.1 *Gary Passaway emailing the Claimant on 22 March 2022 stating that she had ulterior motives and that an investigation into her concerns would not take place.*
3.2.2 *Jeanne Faulet-Ekpitini stating that she had concerns about the Claimant's mental state, due to emailing out of hours in the Occupational Health referral on 23 May 2022;*
3.2.3 *Gary Passaway used language to describe the Claimant as being influenced by others;*
3.2.4 *Dr Karrie Fehilly describing the Claimant's interactions during clinical discussions as "Turf war battles" on 22 May 2020.*

.

3.3 Was any of that treatment "less favourable treatment", i.e., did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated the comparator(s)?
The Claimant relies on a hypothetical comparator in relation to all of the allegations.

3.4 If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that this was because of her religion?

3.5 If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

4 **Direct discrimination on the grounds of disability (perception)**

4.1 Did the Respondent perceive that the Claimant had a mental impairment which had a substantial and long-term adverse effect on the Claimant's ability to carry out normal day to day activities within the meaning of s6 EqA 2010? *The Claimant relies upon a "serious mental health condition" as the perceived disability*

4.2 Did the Respondent subject the Claimant to the following treatment?

4.2.1 *Suspending the Claimant on medical grounds on 13 May 2022;*
4.2.2 *Gary Passaway used the language to describe the Claimant as being influenced by others on 31 May 2022 (permission to amend granted at preliminary hearing of 19 July 2023)*
4.2.3 *Referring the Claimant to Occupational Health without consent on 23 May 2022.*

4.3 Was any of that treatment "less favourable treatment", i.e., did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated the comparator(s)? *Actual comparator is Jeanne Faulet-Ekpitini, she is not disabled and she would send emails out of hours*.

4.4 If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that this was because of the Respondent's perception that the Claimant was disabled?

4.5 If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

5. **Victimisation**

5.1 Did the Claimant do a protected act? The Claimant alleges that the following were protected acts:

5.1.1 *The Claimant's email of 23 February 2022. The email raised concerns about the effect of the policy on those who had disabilities*.

5.2 Insofar as the protected act relied on constitutes allegations that the EqA was contravened made by the Claimant, was the allegation false and made in bad faith?

5.3 Did the Respondent subject the Claimant to the following treatment?

5.3.1 *Gary Passaway emailing the Claimant on 22 March 2022 stating that she had ulterior motives and that an investigation into her concerns would not take place*

5.3.2 *The Claimant being medically suspended from duties based on Gary Passaway's impressions on 13 May 2022;*

5.3.3 *The Claimant's IT accounts being suspended on 13 May 2022;*

5.3.4 *Gary Passaway sending emails to the Claimant's personal email address without consent and when asked not to do so during her medical suspension on 19 May 2022.*

5.4 Did the Respondent carry out any of the treatment in the paragraph above because the Claimant did the protected act and/or because the Respondent believed that the Claimant had done the protected act?

6. **Whistleblowing**

6.1 In relation to the following alleged protected disclosure(s) did the claimant disclose information?

6.1.1 *the Claimant's email of 23rd February 2022 (the email raised concerns about the effect of the policy on those who had disabilities)*

6.1 If so, did the Claimant believe that the information disclosed tended to show that;

6.1.1 *the Respondent had failed was failing or was likely to fail to comply with any legal obligation to which it was subject (s43B(B)?*

The claimant has specified that the specific legal obligation which she says was breached was that the Respondent had not completed an equality impact assessment.

6.2 If so, was the Claimants belief reasonable?

6.3 Did the claimant also believe the disclosure of information to be in the public interest?

6.4 Did the claimant raise the disclosure(s) with an appropriate person (s43C)?

6.5 For the purposes of remedy only, did the Claimant raise the disclosure(s) in good faith (s43C)?

Detriment (s47(B) ERA 1996)

6.6 Did the Respondent subject the Claimant to any of the following alleged detriments?

6.6.1 Gary Passaway emailing the Claimant on 22 March 2022 stating that she had ulterior motives and that an investigation into her concerns would not take place
6.6.2 The Claimant being medically suspended from duties based on Gary Passaway's impressions on 13 May 2022;
6.6.3 *The Claimant's IT accounts being suspended on 13 May 2022;*
6.6.4 *Gary Passaway sending emails to the Claimant's personal email address without consent and when asked not to do so during her medical suspension on 19 May 2022.*

6.7 Was any such detriment done on the grounds that the Claimant had made a protected disclosure ?

6.8 Was that act or failure to act part of a series of similar acts or failures?

6.9 Has the claimant brought a claim in respect of the above allegations of detriments within time?

6.10 If not was it reasonably practicable to do so?

6.11 If not, has the claim being brought within such further period as the tribunal considers reasonable ?

7. **Harassment (related to race and/or religion)**

7.1 Did the Respondent engage in the following conduct?

7.1.1 Gary Passaway emailing the Claimant on 22 March 2022 stating that she had ulterior motives and that an investigation into her concerns would not take place;
7.1.2 The Claimant being medically suspended from duties based on Gary Passaway's impressions on 13 May 2022;
7.1.3 Gary Passaway sending emails to the Claimant's personal email address without consent and when asked not to do so during her medical suspension on 19 May 2022.

7.2 Was the conduct unwanted?

7.3 Did the unwanted conduct relate to the protected characteristic race and/or religion?

7.4 Did the conduct have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

7.4.1 In considering whether the conduct had 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.

8 **Constructive unfair dismissal**

8.1 What term of the Claimant's contract of employment is relied upon by the Claimant? The implied term of mutual trust and confidence.

8.2 Did the Respondent commit a fundamental breach by:

8.2.1 HR failing to address concerns raised about Jeanne Faulet-Ekpitini;
8.2.2 HR failing to protect the Claimant's dignity at work ensuring the Claimant was distanced from Jeanne Faulet-Ekpitini;
8.2.3 Systematically deskilling the Claimant by medically suspending her, referring her to Occupational Health and restricting her work duties;
8.2.4 Jeanne Faulet-Ekpitini insisting on line-managing the Claimant;
8.2.5 On one occasion the claimant was not offered a piece of cake;
8.2.6 The Respondent refused to allow the claimant to take one day's annual leave.
8.2.7 Jeanne Faulet-Ekpitini behaviour in the office and corridor at work which resulted in the claimant's one week sickness absence prior to her resignation.

8.3 Were any such breaches sufficiently serious as to constitute a repudiatory breach of the contract of employment giving rise to an entitlement to treat the contract as terminated?

8.4 Did the Respondent have reasonable and proper cause for any such breach?

8.5 Did the Claimant affirm or waive any such breaches?

8.6 Did the Claimant resign in response to any such repudiatory breach of contract?

8.7 If the Claimant was entitled to terminate the contract by reason of the Respondent's conduct, was the dismissal fair?

9 **Notice Pay**

9.1 What is the source relied on for the Claimant's notice and what, in fact, was the Claimant's contractual (including statutory) notice? C's contract of employment stated 2 months' notice but the respondent only allowed her two weeks' notice.

9.2 Was the Claimant entitled to notice pay in all the circumstances and, if so, did the Respondent in fact fail to pay the Claimant's notice pay as alleged?

10. **Remedy**

Discrimination

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

Constructive unfair dismissal

10. 2 Is the Claimant entitled to a basic award? If so, at what level, taking into account whether the Claimant contributed to her loss?

10.3 Is the Claimant entitled to a compensatory award? If so, at what level, taking into account:

10.3.1 Has the Claimant appropriately attempted to mitigate her loss?
10.3.2 Would the Claimant have been dismissed in any event, Polkey applied?
10.3.3 Was there a failure by either party to comply with the ACAS Code of Practice?
10.3.4 Did the Claimant contribute to her loss?

Notice Pay

10.5 What award should be made in respect of the Claimant's claim for notice pay?
