



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant **and** **Respondents**

Dr V Lyfar-Cissé **(1) Brighton and Sussex University
Hospitals NHS Trust
(2) Mr A Kildare**

HELD AT: London South **ON:** 10-14 and 17-21 December 2018
(of which 20-21 December
were in Chambers)

BEFORE: Employment Judge K Bryant QC
Ms S Campbell
Ms Y Batchelor

Appearances:

For the Claimant: In Person

For the Respondent: Mr T Kibling (Counsel)

RESERVED JUDGMENT

The Claimant's claims for direct race discrimination and victimisation fail and are dismissed.

REASONS

History of this case

1. Before discussing the final hearing of this case, and the events that took place and evidence given at that hearing, the tribunal will set out some of the history in so far as relevant to matters the tribunal has to determine.
2. The Claimant commenced the Early Conciliation ('EC') process against a number of prospective Respondents at various times in 2016 and early 2017. According to the EC certificates in the trial bundle, contact was made with ACAS in respect of the following prospective Respondents on the following dates:
 - 2.1 Dr Smith Mark on 27 June 2016;
 - 2.2 The First Respondent on 21 November 2016;
 - 2.3 Ms Rachel Cashman on 7 December 2016;
 - 2.4 Mr Brendan Ward on 8 December 2016;
 - 2.5 Mr Antony Kildare (who is now the Second Respondent) on 1 February 2017.
3. The ET1 in this case was presented on 10 February 2017. It named three Respondents, the First Respondent, Ms Cashman and Mr Kildare. At the time of presentation the Claimant was represented by a solicitor who was named in the ET1. At that stage the Claimant indicated in the Grounds of Claim appended to the ET1 that this case was *'designed to supplement the Claimant's complaint which is the subject of ongoing proceedings at the London South Employment Tribunal, Case No. 2302458/2015'*; the ongoing proceedings being referred to were a claim (**'the Hill Claim'**) concerning a report following an investigation by Henrietta Hill QC (**'the Hill Report'**) to which the tribunal will return later in these reasons. As matters transpired, the Hill Claim was heard over a number of days in May and June 2017 (at which the Claimant was represented by counsel) and the judgment was promulgated on 27 July 2017. This case proceeded separately.
4. The tribunal notes that there is in the trial bundle a letter dated 15 March 2017, written by the Claimant's solicitor, the content of which amounts to an application to add Mr Ward and Dr Smith as Respondents to this case. That letter is not on the tribunal file and nor does there appear to have been any reference to it in later correspondence or at any of the subsequent Preliminary Hearings ('PHs') in this case. In any event, at no stage before this hearing were Mr Ward and Dr Smith added as Respondents to this case and no application was made to add either of them at any stage during this hearing. The tribunal also notes that in a letter dated 19 August 2017 the Claimant informed the tribunal that she had decided not to pursue claims against Ms Cashman (as to which see below), Mr Ward and Dr Smith. The same point

was made in a Case Management Agenda completed by the Claimant at about the same time.

5. A telephone PH took place on 25 August 2017. By then the Claimant had been dismissed by the First Respondent and had presented a further claim concerning that dismissal (**'the Dismissal Claim'**). This case was listed for a further PH (open and in person) to consider, amongst other things, whether this case and the Dismissal Claim should be consolidated.
6. The open PH took place on 25 September 2017. At that hearing the Claimant withdrew her claim against Ms Cashman. The parties were in agreement that this case should not be consolidated with the Dismissal Claim and no consolidation order was therefore made. Case management directions were given in respect of the case against the two remaining Respondents, ie the First Respondent and Mr Kildare as Second Respondent, including listing it for this final hearing.
7. Although the final hearing was listed in September 2017 and directions given for the steps needed in preparation for this hearing, by late November 2018 there were still outstanding case management issues between the parties and so a further telephone PH was held on 30 November 2018. One matter dealt with during that PH was an application by the Claimant to amend her claim to add 5 new comparators in respect of her direct discrimination claim. That application was refused. Another matter raised by the Claimant was an objection on her part to judgments in previous cases between the Claimant and the First Respondent being included in the trial bundle for this hearing. The tribunal directed that the previous judgments could be included in the trial bundle. The tribunal also notes that the Claimant confirmed during the course of the telephone PH that she did not rely on any matters in this case that post-dated 10 August 2016; the tribunal notes that there is a typographical error in the record of the PH (which refers to 2018 rather than 2016) but has confirmed from the Employment Judge's notes of the PH that the relevant date is 10 August 2016.
8. By a notice of appeal dated 3 December 2018 and received by the Employment Appeal Tribunal (**'EAT'**) on 4 December 2018 the Claimant appealed against the refusal to allow her amendment to add 5 new comparators to this case. By an order dated 5 December 2018 the Claimant's appeal was dismissed by Choudhury J under Rule 3(7ZA) of the Employment Appeal Rules 1993. As set out in the reasons included in the order, the effect of an appeal being dismissed under Rule 3(7ZA) is that there is no entitlement to a Rule 3(10) oral hearing and any application for leave to appeal would have to be made direct to the Court of Appeal. Although the Claimant indicated at the start of this hearing that she had written again to the EAT the tribunal was not told about, or shown, the content of any further correspondence.

The first day of the hearing

9. The first day of this hearing had been designated at one of the earlier PHs as a reading day. On the morning of the first day the Claimant handed to the tribunal clerk a small pack of documents which included two written applications. Given that the Respondents were not present or represented at that time the tribunal notified the Claimant, through the clerk, that it would hear her applications the next day.
10. The tribunal then proceeded to read the witness statements as provided by the parties and also to read what appeared to the tribunal to be the key documents in the extensive trial bundle.

The claims and issues

11. At the start of the second day of the hearing the tribunal, with all parties present, informed them that one of the lay members had been part of the tribunal panel which had heard the Dismissal Claim over a number of days in September 2018 and in respect of which that tribunal had reserved, but not yet promulgated, its judgment. No issue was raised by any party in respect of that lay member also sitting on this case.
12. There had been considerable correspondence between the parties and discussion at PHs as to the claims pursued by the Claimant and the issues to which they gave rise. The case had been amended a number of times and there was no agreed list of issues; there had been various drafts passing between the parties and one of the documents handed to the tribunal clerk by the Claimant on the first day of the hearing was another version of the draft list of issues.
13. The tribunal therefore spent some time seeking to clarify the substantive claims relied on by the Claimant and the issues to which they gave rise.
14. The Claimant confirmed that her claims were for direct race discrimination and victimisation. There are no other types of claim pursued.
15. The Claimant is a black British woman of Jamaican ethnic origin; although not set out in her evidence in this case, this was the race relied on in the Hill Claim (see paragraph 13 of the liability judgment in that case).
16. With regard to the victimisation claim, the Respondents conceded that there had been a number of protected acts done by the Claimant before the events in question and that the relevant individuals were aware of at least some of those protected acts at the material times.

17. The Claimant confirmed that she relied on the following as substantive parts of her case, each being said to amount to direct race discrimination and/or victimisation:
 - 17.1 Mr Kildare's refusal, on 11 July 2016, of her appeal against the Hill Report;
 - 17.2 Dr Smith's decision to exclude her from work on 6 May 2016;
 - 17.3 Dr Smith's decision to progress matters to a disciplinary hearing, the date of which was later clarified as being 29 July 2016.
18. The Claimant confirmed that she relied on three actual comparators, namely Mr Morris, Mr Prosser and Ms Burns; she also sought by amendment to rely on further comparators but this was not allowed by the tribunal as discussed below. She would also rely on a hypothetical comparator if necessary.
19. The Claimant also confirmed that she did not rely on any of the following:
 - 19.1 anything done by Mr Ward;
 - 19.2 the appeal against the disciplinary sanction of a final written warning;
 - 19.3 anything concerning a meeting that took place on 26 January 2017;
 - 19.4 anything done by Mr Abayomi Alemoru.
20. There was one matter that the Claimant said she did wish to rely on but the Respondents said she could not, namely a disciplinary decision by Ms Cashman on 11 November 2016 to give her a final written warning.
21. Having heard from the parties on this disputed issue the tribunal found that Ms Cashman's disciplinary decision was not a live substantive part of this case. It was clear that Ms Cashman's decision had at one time been a live part of the case. The Claimant had withdrawn her claim against Ms Cashman as a separate Respondent in September 2017 but that of itself would not necessarily answer the question; the Claimant could still pursue a claim against the First Respondent based on the actions of Ms Cashman. However, it is clear from the record of the telephone PH on 30 November 2018 and from the Employment Judge's notes of that PH that the Claimant confirmed in clear terms that she did not rely on anything as a substantive part of her case that post-dated 10 August 2016. The tribunal is aware that the Claimant is acting in person but she has considerable experience of tribunal litigation and the process of identifying and clarifying the claims that are relied on. The tribunal has concluded that there was at the November 2018 PH a clear and express withdrawal of any remaining claim concerning matters that post-dated 10 August 2016, including Ms Cashman's disciplinary decision. The tribunal notes that this is also consistent with the Claimant's own witness statement, dated 3 December 2018, which confirms (at paragraph 314) that she intended to rely on matters other than the three specific live issues identified above '*as background information only*'.

22. The tribunal informed the parties of its conclusion that there was no live substantive issue in this case concerning Ms Cashman's disciplinary decision or anything else that took place after 10 August 2016, and its reasons for that conclusion as outlined above. It also informed the parties that a substantive claim concerning Ms Cashman's disciplinary decision could only be pursued if there were an amendment to the case. The tribunal discussed with the Claimant the question of jurisdiction in that all of the substantive claims now pursued appeared to be out of time but a claim concerning Ms Cashman's decision would, if pursued, appear to be in time.
23. The Claimant then asked for a break until 2pm (it being 12.30pm by this time) to consider her position. The tribunal gave the Claimant the time she had requested.
24. On the resumption of the hearing, shortly after 2pm, the Claimant said that she had decided not to seek an amendment to her claim and that she would argue in due course that it would be just and equitable to extend time to allow her existing claims to be heard. The tribunal checked with the Claimant that this was the position she wished to adopt and that she understood the implications, in terms of jurisdiction, of not applying to amend her claim to add back in her allegations concerning Ms Cashman's actions, and she confirmed that it was.

The Claimant's applications

25. As noted above, the Claimant handed in a pack of documents on the first day of the hearing which included two written applications. Having clarified the live substantive claims as indicated above, the tribunal proceeded to hear the two applications.
26. The first application was, in summary, a renewal of the Claimant's objection to previous tribunal decisions being included in the trial bundle. In oral submissions the Claimant narrowed her objection to the two judgments in the Hill Claim and one judgment in an earlier case ('**the White Claim**') which, the tribunal was told, is subject to a reconsideration hearing in January 2019. The essence of the Claimant's objection was that knowledge of the earlier judgments could influence the tribunal and somehow affect their judicial independence and impartiality.
27. In response, the Respondents said that they were content for the judgment in the White Claim to be removed from the trial bundle; it was therefore removed from the tribunal's copies and the witness copy of the trial bundle at that point. With regard to the judgments in the Hill Claim, the Respondents said that these were a matter of public record and findings in those judgments would be binding on this tribunal. It was important, they said, that this tribunal be aware of previous findings as it would define the parameters of this case. They also said that the Claimant referred to some of her previous litigation in her witness

statement and she could not be selective as to which of her previous cases were included in evidence before the tribunal.

28. The tribunal then heard the Claimant's second application, which she acknowledged raised the same point as had been dismissed at the telephone PH on 30 November 2018 and again by the EAT on 5 December 2018. She said that she needed the 5 new comparators to support her claim and she had only realised this when writing her witness statement.
29. The Respondents said that it is only in limited circumstances, ie where there has been a material change of circumstances, that a tribunal may revisit an earlier decision of this type. They said that this was, as the Claimant accepted, the same application that had already been rejected by a different Employment Judge and that this tribunal was not at liberty to review it. They also said that if the new comparators were to be added at this late stage they could not proceed with the hearing; it would have to be adjourned and would not then be relisted until some time in 2020.
30. Having taken time to consider the two applications, the tribunal then gave its decisions on them.
31. On the first application, to remove the Hill Claim judgments from the trial bundle, the tribunal noted that the Claimant was not saying that the tribunal should be able to reopen previous findings of fact but also noted that it may be difficult for the tribunal to avoid doing so if it was not allowed to know what those previous findings were. The Claimant's real concern was that the minds of this tribunal may be clouded by knowledge of the findings of a previous tribunal. The tribunal assured the Claimant that its members were all very experienced in dealing with discrimination cases and were well aware of the difficulties faced by claimants in trying to prove discrimination. The tribunal also assured the Claimant that its members were well used to focusing on the case in hand and deciding it on the relevant evidence without being distracted by extraneous matters. The tribunal declined to remove the Hill Claim judgments from the trial bundle.
32. On the second claim, the Claimant had accepted that this was the same application that had recently been rejected by a different Employment Judge and by the EAT. The tribunal did not accept the Respondents' submission that it can only review an earlier decision where there has been a material change of circumstances; the test, in the tribunal's judgment, also allows for other circumstances where it would be in the interests of justice to review an earlier decision. However, in this case there had been no material change of circumstances and there were no other circumstances to indicate that it would be in the interests of justice to reopen the previous decision. The application was made very late, i.e. at the start of the final hearing of the case, and it had been rejected by a different Employment Judge and the EAT only a few days earlier. There would also be a clear and significant risk, if the application

were granted, that the case would be postponed and would not be relisted for over a year. The Claimant accepts that neither of the relevant decision-makers in this case, i.e. Mr Kildare and Dr Smith, was involved in decisions concerning the 5 new comparators and so, in any event, the tribunal questions the merit of any argument that there are no material differences in the circumstances of the Claimant and of those new comparators. The tribunal is mindful of the overriding objective and of its duty to level the playing field, but in all the circumstances this application was also dismissed.

The Claimant's letter

33. Before turning to the evidence and making its findings of fact, the tribunal should note one further matter. The Employment Judge had indicated at the start of the hearing that if anyone wished to raise anything with the tribunal then they should feel free to do so at any stage.
34. The Claimant's evidence was started and concluded on the third day of the hearing. On the morning of the fourth day of the hearing the Claimant handed to the clerk a letter addressed to the Employment Judge. The letter, dated 13 December 2018, said that the Employment Judge had asked her to make known any concerns that she had during the proceedings. She then set out a number of concerns she had about questions asked of her by the Employment Judge and by one of the lay members during her evidence the day before.
35. When the parties were present in the tribunal room, the Employment Judge referred to the letter (which had been copied to the Respondents) and made three points. First, he clarified that the Claimant had referred to the wrong lay member in her letter. Second, he said that if the Claimant was concerned (as it appeared from the letter she may be) that this tribunal would seek to go behind findings made in the Hill Claim then he could reassure her that it would not. Third, he said that he would make no further comment on the content of the letter (which, for the avoidance of doubt, the tribunal does not accept is entirely accurate) unless and until some sort of specific application were made.
36. The Claimant then made a number of further comments as did the Respondents' counsel.
37. The Claimant was asked during the course of her comments whether she wished to make any application to which she replied that she did not.
38. Finally, the tribunal notes that a slightly amended version of the Claimant's letter of 13 December 2018 was appended to the Claimant's written closing submissions, but the only change from the original version was to correct the name of the lay member whose questions of the Claimant had caused her concern.

The evidence

39. The tribunal was provided with 7 volumes of agreed trial bundle running to 2628 pages together with a supplementary bundle prepared by the Claimant. The tribunal made clear at the start of the hearing that the parties should not assume that the tribunal had read a document unless one of the parties had specifically asked it to read that document.
40. The tribunal was also provided with an agreed chronology and an agreed cast list. The Respondents handed up written opening submissions summarising their understanding of the case and of the applicable law.
41. Both parties handed up written closing submissions at the conclusion of the evidence.
42. The tribunal should say here that the parties helpfully agreed a timetable for the hearing which allowed time for the tribunal to deliberate following the conclusion of evidence and closing submissions. During the course of the hearing the tribunal gave the Claimant additional time to prepare her cross-examination of the Respondents' witnesses and, following the conclusion of the evidence, to prepare her closing submissions. The tribunal notes that the parties nevertheless concluded their evidence and submissions within the agreed timetable and thanks them for doing so.
43. The tribunal heard from the Claimant on her own behalf; she gave evidence by reference to a written witness statement. The tribunal also heard from the following witnesses on behalf of the Respondents, each of whom again gave evidence by reference to a written witness statement:
 - 43.1 Antony Kildare, the Second Respondent and at the material times Chair of the First Respondent;
 - 43.2 Brendan Ward, who at the material times was Interim Director of Change;
 - 43.3 Mark Smith, Chief Operating Officer at the material times;
 - 43.4 Helen Weatherill, Director of HR (and the only one of the Respondents' witnesses still working for the First Respondent);
 - 43.5 Abayomi Alemoru, a solicitor and Director of Litigation Services at Vista Employer Services Limited.
44. The Respondents also relied on witness statements from Lois Howell, Director of Clinical Governance at the relevant time and who had heard the Claimant's appeal against her final written warning, and Spencer Prosser, Finance Director at the relevant time and who was also part of the appeal panel with Ms Howell. The Claimant agreed that these two statements could be taken into evidence by the tribunal and indicated that she had no questions for those witnesses; they were not therefore called to give live evidence. The

tribunal notes that initially the Claimant indicated that she had no questions for Mr Alemoru. The tribunal encouraged her to consider overnight which witnesses she wished to attend the hearing so that she could question them and on reflection she confirmed that she did not want Ms Howell or Mr Prosser to attend but did have some questions for Mr Alemoru.

Findings of fact

45. In light of all the evidence heard and read by the tribunal, it has made the following unanimous findings of fact.

Employment history

46. The First Respondent is an acute NHS Trust which operates two hospitals in Sussex, specifically in Brighton and Haywards Heath.
47. The Claimant was initially seconded to the First Respondent from the University of Surrey in 1983 and then started employment as a biochemist in 1985. She completed her PhD in 1991. She undertook a number of roles with the First Respondent and by April 2014 was Principal Clinical Biochemist. She became Associate Director of Transformation in October 2014. She was dismissed in June 2017 but, as noted above, her dismissal is the subject of separate tribunal proceedings and the events leading to her dismissal are not within the remit of this tribunal or relevant to the issues the tribunal has to decide in this case.

Statistics

48. The Claimant has referred to statistics contained in a CQC report dated 17 August 2016 which in turn refers to a Workforce and Race Equality Standard ('WRES') report from August 2015. These showed that the likelihood of the First Respondent's BME staff entering a formal disciplinary process had increased from 1.1 to 2.3 times the likelihood for white staff.
49. A further WRES report dated January 2017 gives a figure of 1.96 times more likely for the period from 1 April 2014 to 31 March 2016 and for the previous period the figure given was 1.52.
50. The tribunal notes that all of these statistics were compiled by the Claimant herself, but they were not challenged by the Respondents and so the tribunal accepts them as accurate and has taken them into account as part of its deliberations.

Events up to and including the Hill Report

51. Events leading up to and including the Hill Report were the subject of the Hill Claim. They are the subject of a judgment and reasons in the Hill Claim

which was sent to the parties on 27 July 2017. Findings of fact made in the Hill Claim are binding on this tribunal and are relevant here in so far as they form the background to the matters of which the Claimant now complains in this case.

52. Relevant findings made in the Hill Claim include the following:
- 52.1 As well as her substantive role as Associate Director of Transformation, the Claimant was also chair of the local and national BME Networks.
 - 52.2 Henrietta Hill QC (who was a named Respondent to the Hill Claim) was asked by the First Respondent to investigate 9 linked grievances.
 - 52.3 These included two grievances raised by a Ms Burns who had alleged that she had been subjected to bullying and harassment by the Claimant at a BME Network meeting on 28 January 2014 and that the Claimant's treatment of her was homophobic. She also complained that the Claimant had opened a BME conference on 4 April 2014 (at which Ms Burns was not present) by stating that Ms Burns had raised a grievance and by speaking about Ms Burns' allegations and her (i.e. the Claimant's) innocence.
 - 52.4 These two grievances sparked further allegations and counter-allegations so that by the time Ms Hill was asked to investigate them the total was 9 grievances.
 - 52.5 The first two grievances by Ms Burns were investigated by a Mr Hann, an independent consultant. The Claimant cooperated with Mr Hann's investigation. Mr Hann concluded that Ms Burns' complaints of harassment based on sexual orientation and bullying were not well founded. However, he also found made findings critical of the Claimant, including that her behaviour at the meeting on 28 January 2014 in respect of Ms Burns had been unpleasant, high-handed and unnecessary. He also referred to her actions as unacceptable and inappropriate and he recommended that the Claimant should be made aware of this.
 - 52.6 Mr Hann's report was published on 2 October 2014. Both Ms Burns and the Claimant were unhappy with the outcome of Mr Hann's investigation and they both appealed against it (this being allowed under the First Respondent's policies); Ms Burns appealed on 19 October 2014 and the Claimant on 22 December 2014.
 - 52.7 Ms Burns presented a third grievance against the Claimant on 13 November 2014 concerning an email that she had sent to members of the BME Network but not to Ms Burns (who was also a member).
 - 52.8 The Claimant raised a further grievance against Ms Burns on 23 December 2014.
 - 52.9 On 12 January 2015 eight members of the BME Network raised a collective grievance against Ms Burns concerning matters she had raised in one of her earlier grievances.

- 52.10 On 22 January 2015 Ms Burns raised a further grievance concerning the collective grievance.
 - 52.11 The appeals against the outcome of Mr Hann's investigation were dealt with by different managers and both appeals were upheld. The recommendation from both was for a fresh investigation to cover the matters investigated by Mr Hann and all subsequent linked matters.
 - 52.12 On 14 April 2015 the Claimant raised a grievance against the manager who had allowed Ms Burns' appeal, in particular his suggestion that there should be a fresh investigation.
 - 52.13 On 15 April 2015 Ms Burns raised a grievance against Ms Weatherill alleging that she had instructed Mr Hann not to investigate a particular issue.
 - 52.14 In mid-May 2015 the First Respondent, via its solicitors, contacted Ms Hill with a view to instructing her to conduct an investigation into a number of linked grievances.
 - 52.15 On 2 June 2015 those concerned with the grievances were informed of Ms Hill's appointment as investigator.
 - 52.16 The Claimant objected to the decision to reinvestigate and on 9 June 2015 she lodged a grievance concerning the Chief Executive's request that she participate in another investigation.
 - 52.17 Ms Hill was sent final Terms of Reference on 16 July 2015 which explained that she was to investigate allegations made by Ms Burns, by the Claimant and by the eight BME Network members. The allegations raised in the nine grievances were summarised.
53. Following her investigation, Ms Hill prepared the Hill Report which is dated 7 August 2015 and consists of 33 pages of report with over 650 pages of appendices including witness statements and contemporaneous correspondence and other documents.
54. Ms Hill concluded that there was a case to answer against the Claimant. The tribunal notes that the Claimant did not cooperate with Ms Hill's investigation and declined to be interviewed by her.

Relevant policies

55. The tribunal has been taken to a number of the First Respondent's policies during the evidence and it has taken into account all those extracts to which it was referred. It is neither necessary nor proportionate to repeat in detail here the content of those policies, but the tribunal notes in particular the following:
- 55.1 The investigation by Ms Hill was conducted under the Dignity at Work Policy.
 - 55.2 The Grievance Policy provides (at paragraph 1.4) that matters regarding discrimination, bullying and harassment and/or victimisation should be dealt with under the Dignity at Work Policy rather than the Grievance Policy.

55.3 The Dignity at Work Policy provides (at paragraph 5.7) that all parties have the right to appeal against an investigation process or findings and that any such appeal should be raised in accordance with the Grievance Policy, which in turn provides for an appeal mechanism that involves a review rather than rehearing.

55.4 The Dignity at Work Policy provides (paragraph 1.2) that any breaches of an individual's right to dignity at work by another member of staff are wholly unacceptable, that the aim is to promote a zero tolerance approach to any forms of bullying, harassment, discrimination and victimisation and that any allegations of such action will be regarded seriously.

55.5 Where a matter is to be investigated under the Dignity at Work Policy it provides (paragraph 5.6.1) that:

'At the conclusion of their investigation the investigating officer may recommend/determine the following outcomes:

- a) If there is a case to answer and if so, whether there is a need to invoke the disciplinary procedure (and at what stage).*
- b) If there is no case to answer and if so, all records will be disregarded.*
- c) Whether the matter can be dealt with through mediation or other resolutions.*
- d) If it is necessary to consider moving either or both parties in the interests of good working relationships within the department.'*

55.6 The Disciplinary Policy provides (at paragraph 5) that:

'In certain circumstances, it may be necessary to exclude an employee from duty pending investigation into allegations made. The act of exclusion is not a disciplinary act nor does it imply that there is any suggestion of guilt. It is a neutral act enabling the individual to be released from their place of work, whilst receiving full pay, pending an investigation. Full details are contained in the Investigation Policy and Procedure.'

55.7 The Investigation Policy (at paragraph 6) contains materially the same provisions as set out immediately above and (at paragraph 7) provides that:

'Exclusion should always be used pending an investigation into allegations of gross misconduct. It should also apply where it is considered that the employee's continued presence at work is a risk to other employees or the public, may jeopardise the investigation or is not in the employee's own interest.'

55.8 The tribunal has also seen a specific Exclusion from Work Policy which is applicable to non-medical staff of the First Respondent. This

provides (at paragraph 3) that exclusion from work should be reserved for only the most exceptional of circumstances but that:

'An immediate time-limited exclusion may be necessary in the following circumstances:

- *A critical incident when serious allegations have been made; or*
- *Serious concerns about capability or poor performance;*
- *There has been a breakdown in relationships between a member of staff and their colleagues;*
- *The presence of the member of staff is likely to hinder an investigation;*
- *Loss of or failure to renew professional registration which prohibits [the] member of staff from working.*

These are intended as examples only and there may be other instances where immediate exclusion is deemed appropriate.'

The start of the Claimant's appeal against the Hill Report

56. As noted above, the Hill Report is dated 7 August 2015. The Claimant presented her ET1 in the Hill Claim, naming the First Respondent and Ms Hill as Respondents, on 11 August 2015. The Claimant first saw the Hill Report on 13 August 2015.

57. The Claimant then submitted her appeal against the Hill Report (as she was entitled to do under the Dignity at Work Policy) in a three page document on 22 September 2015. The first substantive complaint in this case concerns the outcome of that appeal.

58. The grounds of appeal raised by the Claimant may be summarised as follows (although the tribunal notes, and has taken into account, that her grounds were set out in more detail):

58.1 The First Respondent and Dr Farine Clarke, who had been appointed to oversee the investigation, had failed to ensure that the investigation was conducted in an impartial manner.

58.2 The process and outcome of the investigation *'on every account was premeditated, biased and unfair and as such amounts to discrimination and harassment on the grounds of my race.'*; the Claimant also said that Ms Hill's conduct amounted to victimisation.

59. The tribunal also notes here a particular passage from the Hill Report (at paragraph 18) which was the subject of much discussion during the hearing of this case and to which the tribunal will return further below:

'The TOR [ie Terms of Reference] is silent as to the test I should apply to the question of whether there is a case to answer against any individual. The

relevant part of the DAWP [i.e. Dignity at Work Policy] (section 5.6 ...) does not provide for any specific test either. In other disciplinary contexts the approach used in deciding whether there is a case to answer is for the investigator to consider whether a disciplinary panel could, on the balance of probabilities, conclude that the misconduct alleged did take place. This seems to me the appropriate approach and is the one I have adopted.'

60. Julian Lee, Chairman of the First Respondent at that time, wrote to the Claimant on 2 October 2015 acknowledging receipt of her appeal and inviting her to an appeal hearing on 2 November 2015.
61. However, the Claimant started a period of long term sick absence on 6 October 2015. She then wrote to the Chief Executive of the First Respondent raising a number of matters including what appears to have been an objection to Mr Lee hearing her appeal and she asked for the appeal to be postponed until her tribunal claim (which was presumably a reference to the Hill Claim) had been resolved.
62. The Claimant's letter was passed to Mr Lee who wrote on 12 October 2015 indicating that he did not agree with the proposal to postpone the appeal process.
63. The Claimant remained off sick for the remainder of 2015 and into 2016. During her absence there was much correspondence, principally between solicitors acting for the Claimant and for the First Respondent, about a number of ongoing issues including her outstanding appeal. For example, in a letter dated 22 February 2016 the Claimant's solicitor objected again to Mr Lee hearing the appeal and also said that Ms Hill should not attend the appeal hearing.
64. Ms Hill agreed not to attend the appeal hearing but Mr Lee did not agree to stand down. The first day of the appeal hearing took place on 20 April 2016. The Claimant had produced a document titled 'Notes for appeal hearing against Hill report' (which ran to 73 pages with another 120-odd pages of appendices) which she gave to Mr Lee at the start of the hearing. Most of the day was then taken up with the Claimant reading her document aloud. She wished to call three witnesses who had also not cooperated with the Hill investigation and she was allowed to do so, even though, as she accepts, the appeal was a review rather than a rehearing.

The CQC inspection

65. The First Respondent was subject to a CQC inspection in early April 2016. This led to it being put into special measures after the CQC report was published in August 2016. Shortly before the CQC inspection, a new interim Chief Executive, Dr Fairfield, was appointed. At that time the First Respondent was under considerable pressure. There had been various

recent changes in senior management and there were significant concerns about performance.

66. The Respondents' evidence is to the effect that, in early to mid 2016 and beyond, senior managers were 'firefighting'. They were extremely busy trying to deal with performance issues and to maintain staff morale as best they could. The Claimant did not dispute this evidence.

The Claimant's return to work

67. The Claimant's sick absence ended on 15 March 2016 after which she took a period of annual leave, returning to work on 4 April 2016. She then wrote to Dr Fairfield saying that she was her new line manager (the Claimant having reported to the previous Chief Executive before her sick absence) and requesting a return to work interview. It seems that Dr Fairfield did not reply and so the Claimant's solicitor wrote on 13 April 2016 chasing a reply.
68. Mr Ward, who had started as interim Director of Change in January 2016 on a short term contract, was asked by Dr Fairfield to reply which he did by letter dated 14 April 2016. The essence of his reply was that Dr Fairfield was rather busy dealing with other matters but that she had asked Mr Ward to conduct a return to work interview with the Claimant.
69. Mr Ward had previously been employed by the First Respondent, from November 2014 to September 2015, but had only had contact with the Claimant on one occasion when she asked him to attend a BME patient forum which he declined as his contract was about to come to an end.
70. The Claimant and Mr Ward met for the first time after her return to work at the appeal hearing on 20 April 2016 where Mr Ward was to present the management case. As matters transpired the whole of the first day of the appeal was taken up with the Claimant's case and so the management case was put off to a later date.
71. The Claimant and Mr Ward met again on 26 April 2016 for her return to work interview. Without Mr Ward's knowledge, the Claimant recorded the meeting and prepared a transcript of it. The meeting was a long one, to the extent that Mr Ward cancelled other appointments so that it could conclude.
72. They discussed a number of matters, as set out in the transcript, and they completed and signed a sickness notification form. They also agreed to meet again (Occupational Health having advised that there should initially be fortnightly meetings) and shortly after the meeting the Claimant emailed to say that she could meet him again on 10 May 2016.
73. In fact, they met again on 27 and 28 April 2016 but in the context that Mr Ward was presenting the management case on a number of appeals involving

other members of staff and the Claimant was accompanying those members of staff.

74. Some days later Mr Ward realised that there was another form, a 'Return to work checklist' which should have been completed at the return to work meeting. He therefore filled in those parts of the form that he felt able to and asked his secretary to send it to the Claimant which she did on 3 May 2016. Mr Ward had written on the form: *'Fortnightly review agreed with line manager for first 6/52'*. He had also signed in the place designated in the typed pro forma for 'Line Manager'. In a covering email Mr Ward's secretary asked the Claimant: *'Please can I ask you to review the form and send back a signed copy?'*
75. Mr Ward had not intended the version of the form he drafted necessarily to be the final wording. He was aware that he had agreed to meet with the Claimant on 10 May 2016, that OH had recommended fortnightly meetings, that he was shortly to leave the First Respondent but that the Claimant's line manager could then pick matters up after the meeting on 10 May. He also signed the form next to 'Line Manager' not to suggest that he was her line manager but because there was no other appropriate place for him to sign the form. In any event, he had been asked by the Claimant's line manager, the Chief Executive, to deal with her return to work.
76. The Claimant replied to Mr Ward (copied to his secretary and to Dr Fairfield and Mr Lee) raising concerns about the draft form and saying that her solicitor had already written *'regarding the inappropriate manner in which my return to work arrangements are being handled'* and saying that if matters were not satisfactorily resolved shortly she would have no other option but to escalate matters. She said that in the first instance she would wait until the meeting on 10 May 2016.

Events of 5 May 2016 and the Claimant's exclusion from work

77. On 5 May 2016 Mr Ward and the Claimant had a chance meeting outside one of the First Respondent's buildings. During the course of a relatively short conversation a number of things were said by the Claimant and by Mr Ward. It is not necessary for the tribunal to make findings as to what was in fact said, there being no substantive allegation made against Mr Ward in this case.
78. Shortly after the chance encounter between the Claimant and Mr Ward, Mr Ward sent a text message to Ms Weatherill as follows:

'Just bumped into VLC [je the Claimant]. Her comment: "U r everything that I despise in a white senior manager"! On one level, I can roll with the punch but I do consider it a verbal assault that I probably wouldn't accept from anyone else. TBH, I really wondered whether she was quite well.....'

79. Mr Ward then made a file note recording in more detail comments that he said had been made by the Claimant during their conversation:
- 79.1 *'Brendan, I have to tell you that you are everything that I despise in a white senior manager'*
 - 79.2 *'Do you think that we came in on a banana boat'*
 - 79.3 *'I have to say that, when I was researching you, not everything I was told was positive'*
 - 79.4 *'If you think that your career will escape unscathed from being asked to manage the BME issues within BSUH, you have another thing coming'*
80. Mr Ward met with Ms Weatherill later that afternoon. Ms Weatherill believed that the matter was sufficiently serious that it should be discussed with Dr Fairfield but she was not in that day so Ms Weatherill spoke with Dr Fairfield on the phone and described what had been reported to her by Mr Ward. Dr Fairfield said that in her previous role at a different NHS Trust she had been involved in a similar matter involving a senior manager who she had suspended. She said that she felt an immediate suspension was appropriate in this case. She was not going to be in the following day and asked Ms Weatherill to ask Dr Smith, who deputised when she was absent, to deal with it. She made clear that it would be for Dr Smith to decide whether he also felt that suspension was warranted.
81. Ms Weatherill spoke with Dr Smith on the morning of 6 May 2016. She explained her understanding of the events of the previous day. Dr Smith then asked to speak with Mr Ward who explained his version of what had happened. Dr Smith then decided that immediate suspension from work (or exclusion from work to use the phrase in the First Respondent's policies) was appropriate. HR prepared a note for Dr Smith, essentially a script, which he read to the Claimant when he met with her later on 6 May 2016. He also handed her a letter dated 6 May 2016 setting out the comments that she was alleged to have made to Mr Ward and saying that if they were made then they could amount to gross misconduct, that the First Respondent had decided to initiate a investigation and that it had also been decided to exclude the Claimant from work pending the investigation in light of the serious nature of the allegations and a belief that the Claimant's continued presence at work was a risk to other employees.
82. Dr Smith did not seek the Claimant's version of what had happened at this time. Indeed, as part of the script read at the exclusion meeting he said that it was not the purpose of this meeting for her to respond to the allegations and that a separate investigation would be arranged. The Claimant says that the Exclusion Policy does not say that an employee against whom allegations have been made should not put their side of the story at an exclusion meeting. However, nor does the policy say that they should be allowed to do so.

83. Dr Smith then appointed Mr Alemoru to undertake an investigation into the allegations made by Mr Ward. He notified the Claimant of this in a letter dated 10 May 2016. The Claimant's union representative wrote on 12 May 2016 objecting to Mr Alemoru. Dr Smith did not accept the objection and the tribunal notes that there is no substantive complaint in this case concerning Mr Alemoru or Dr Smith's decision to appoint him.
84. On 17 May 2016 Ms Weatherill wrote to the Claimant to notify her that Mr Lee had resigned as Chair of the First Respondent and suggesting that her appeal against the Hill Report should restart and be heard by someone else. The Claimant objected to that approach. She said that, since the first day of the appeal hearing had been recorded, a new manager could read the documents and the transcript and pick up where Mr Lee had left off.
85. As noted above, Mr Ward and the Claimant had agreed at the return to work meeting on 26 April 2016 to meet again on 10 May 2016. In light of the events of 5 May 2016 and the Claimant's subsequent exclusion from work that meeting had not taken place. Mr Ward had not yet replied to the Claimant's email of 4 May 2016 concerning the draft Return to work checklist. Mr Ward therefore wrote to the Claimant on 23 May 2016 saying that he would be leaving at the end of the month and that the meeting previously arranged for 10 May would need to take place but who would hold the meeting would depend on when the Claimant returned to work. The tribunal finds that Mr Ward's email was sent as a matter of courtesy since he had not sent an earlier reply. It was not, as the Claimant contends, designed to cause her upset by reminding her that she had been excluded from work.

The conclusion of the Claimant's appeal against the Hill Report

86. Mr Kildare had been a non-executive director of the First Respondent since 2013. Following Mr Lee's resignation as Chair on 17 May 2016, Mr Kildare took over as Chair. He was also asked to take over the Claimant's appeal against the Hill Report.
87. Mr Kildare was provided with all relevant documentation, including the transcript of the first day of the appeal hearing, on 14 June 2016. He read all of it carefully. He says, and the tribunal accepts, that although he may have heard the Claimant's name at Board meetings, he had no previous involvement with her, or specifically with the matters that were the subject of the appeal.
88. The resumed appeal hearing took place on 22 June 2016. The Claimant says that Mr Kildare displayed hostile behaviour at the meeting. Mr Kildare denies this. The tribunal has been provided with a transcript of that hearing which the Claimant says will make good her point. The tribunal can see nothing in the transcript of the meeting to suggest that Mr Kildare behaved unreasonably in any way. He did try to keep the Claimant focused on the issues that he had

to decide and whilst doing so he occasionally asked her why a particular question was relevant. The tribunal has adopted much the same approach during the course of this hearing. The Claimant also says that there were elements of Mr Kildare's hostility that are not shown in the transcript. The tribunal accepts that matters such as tone of voice and body language are not shown in a transcript, but having heard from the Claimant and from Mr Kildare the tribunal has no hesitation in finding that there was no inappropriate conduct by Mr Kildare at the appeal hearing.

89. Having read all of the documents with care and conducted the second day of the appeal hearing, Mr Kildare reached his decision on the appeal. He set out his decision in a letter dated 11 July 2016. He said that he had not made findings on every point made in the Claimant's 73 page document because it was not practicable but he had focused on her letter of appeal and what he believed to be the key issues. Having summarised his understanding of the key points relied on by the Claimant and his conclusions on those points, Mr Kildare said this:

'Overall, my finding is that there is a case to answer in relation to the complaints made against you although again I make it clear this is a finding that there is evidence that could – not would – lead to the allegations being upheld. My view is that the complaints against Ms Hill QC are unfounded and the investigation is the reasonable and professionally presented outcome of an independent, non-discriminatory investigation of the facts into which you refused to participate.

Consequently, I reject your appeal and recommend a disciplinary process be arranged in order for those matters identified by Ms Hill QC to be formally addressed. I appreciate that you will be disappointed by this decision, but in light of the evidence put forward I believe this to be the appropriate outcome.'

90. The tribunal notes that the test for a 'case to answer' applied by Mr Kildare was essentially the same as that applied by Ms Hill as set out at paragraph 18 of the Hill Report as quoted above.

Mr Alemoru's investigation and Dr Smith's decision

91. Mr Alemoru conducted an investigation into Mr Ward's complaint concerning the Claimant's conduct on 5 May 2016. Mr Alemoru is a solicitor and has worked in the area of employment law for over 30 years and has been carrying out investigations for employers for over 15 years. He has conducted 30-50 investigations each year for the last 4 or 5 years. He has undertaken a number of investigations for the First Respondent. His reports have been challenged, including in a number of tribunal claims, and have never been found to be anything other than fair and balanced. He says, and has not been challenged on this by the Claimant, that in a significant number of his investigations he has reached conclusions adverse to the employer by whom he has been appointed.

92. Mr Alemoru was given terms of reference for his investigation which included a requirement to establish an accurate account of relevant facts and to act impartially.
93. Mr Alemoru met with Mr Ward on 25 May 2016 and took his account of the relevant events. He invited the Claimant to meet with him by email dated 6 June 2016 and they met on 8 June 2016. The Claimant was accompanied by a union representative. The Claimant gave Mr Alemoru a 'Position Statement' (of some 12 pages) including a reiteration of her objection to Mr Alemoru carrying out the investigation.
94. Mr Alemoru took notes during the meeting. The Claimant sent him a soft copy of her Position Statement and he then added to it based on his notes of what was said at the meeting. He indicated his additions clearly by indentation. The Claimant had indicated that she would be on leave until 22 June 2016 so Mr Alemoru sent his amended version of the Position Statement to her on 23 June 2016.
95. The Claimant replied on 30 June 2016. She said that she could not accept his record of what she had said at the meeting. She sent a further version of the Position Statement which included Mr Alemoru's additions but had a further section added at the end in which she said, amongst other things, that Mr Alemoru had made a false, inaccurate and biased record of her evidence.
96. A few days later, on 4 July 2016, the Claimant's union representative wrote to Dr Fairfield raising '*grave concerns*' about Mr Alemoru's notes of his meeting with the Claimant and asking for a fresh investigator to be appointed to start the investigation again.
97. That letter was passed to Dr Smith who replied on 7 July 2016 rejecting the suggestion that Mr Alemoru's investigation be stopped.
98. Mr Alemoru completed his investigation and provided a report and various accompanying documents to Dr Smith dated 15 July 2016.
99. Mr Alemoru's conclusion was that there was a case for the Claimant to answer. He said that there was evidence from which it would be possible to believe Mr Ward's account. If he were believed then he said that there would be a basis on which a panel could conclude that the Claimant's conduct had been threatening, abusive and discriminatory in one or more forms. He emphasised that he had not concluded that the Claimant did behave in the way alleged but that he was satisfied that the evidence was such that it could result in such a finding if the matter went to a disciplinary process. The tribunal notes here that Mr Alemoru applied materially the same test for a 'case to answer' as had Ms Hill and Mr Kildare.

100. Under cover of a letter dated 29 July 2016 Dr Smith sent a copy of Mr Alemoru's report to the Claimant. He also informed her in that letter that he had reviewed the report carefully and had reached the view that there was evidence to justify a requirement for her to attend a disciplinary hearing.
101. As noted above, there is no substantive allegation in this case concerning Mr Alemoru. The third and final substantive allegation is that Dr Smith's decision that the subject of Mr Alemoru's report should proceed to a disciplinary hearing was an act of direct race discrimination and/or victimisation.

Subsequent events

102. The subject matter of the Hill Report, as upheld by Mr Kildare, and of Mr Alemoru's report was then passed to Ms Cashman, Director of Strategy and Commercial Development, who wrote to the Claimant on 10 August 2016 setting out a number of disciplinary allegations and inviting the Claimant to a hearing on 24 August 2016.
103. In fact, the disciplinary hearing took place over three days, namely 6 and 20 September and 18 October 2016. The Claimant was notified of the outcome by letter dated 11 November 2016. In relation to the allegations arising from the Claimant's conversation with Mr Ward on 5 May 2016, Ms Cashman upheld 2 of 4 allegations. Of 13 allegations arising from the Hill Report, Ms Cashman upheld 3. An allegation arising from the Claimant's failure to cooperate with Ms Hill's investigation was also upheld. A final written warning was imposed.
104. The Claimant appealed against Ms Cashman's findings and the appeal was heard by Ms Howell and Mr Prosser on 22 December 2016. By letter dated 4 January 2017 the Claimant was notified that her appeal was not upheld.

Applicable law and the parties' submissions

105. As noted above, the Respondents provided the tribunal with a written opening and with written closing submissions and the Claimant also provided written closing submissions. Both sides also gave brief oral submissions to emphasise certain aspects of their respective cases but it is not necessary to repeat here either the parties' written or oral submissions, all of which have been considered carefully by the tribunal.
106. The tribunal has reminded itself of the following key provisions of the Equality Act 2010 ('EqA'):

'PART 2 KEY CONCEPTS

Chapter 1 Protected characteristics

4 The protected characteristics

The following characteristics are protected characteristics–

...
race;

...
9 Race

- (1) *Race includes—*
- (a) *colour;*
 - (b) *nationality;*
 - (c) *ethnic or national origins.*
- ...

Chapter 2 Prohibited conduct

13 Direct discrimination

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

23 Comparison by reference to circumstances

- (1) *On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.*
- ...

27 Victimisation

- (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.*
- ...

PART 9 ENFORCEMENT

...
Chapter 3 Employment Tribunals

...

123 Time limits

- (1) *Subject to sections 140A and 140B, proceedings on a complaint within section 120 may not be brought after the end of–*
- (a) *the period of 3 months starting with the date of the act to which the complaint relates, or*
 - (b) *such other period as the employment tribunal thinks just and equitable.*

...

- (3) *For the purposes of this section–*
- (a) *conduct extending over a period is to be treated as done at the end of the period;*
 - (b) *failure to do something is to be treated as occurring when the person in question decided on it.*
- (4) *In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something–*
- (a) *when P does an act inconsistent with doing it, or*
 - (b) *if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

...

Chapter 5 Miscellaneous

136 Burden of proof

- (1) *This section applies to any proceedings relating to a contravention of this Act.*
- (2) *If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
- (3) *But subsection (2) does not apply if A shows that A did not contravene the provisions.*

...

- (6) *A reference to a court includes a reference to–*
- (a) *an employment tribunal;*

...

107. The tribunal has also reminded itself of the now well-established principles set out in previous judgments of the EAT and appellate courts in the cases referred to by both sides in their written submissions. It is not necessary for the tribunal to set out here all of the cases referred to by the parties but they have all been taken into account by the tribunal during its deliberations. The following seem to the tribunal to be the key points arising from the cases:

107.1 It is for the Claimant to prove, on the balance of probabilities, primary facts from which the tribunal could make a finding of discrimination or victimisation in the absence of an innocent explanation from the Respondents (section 136(1) of the EqA).

- 107.2 If the Claimant does prove such primary facts then the burden of proof shifts to the Respondents to prove (again on the balance of probabilities) that there was no contravention of the EqA (section 136(3)) and if the Respondents are not able so to prove then the tribunal would be obliged to find in the Claimant's favour (section 136(2)); see also *EB v BA* ([2006] EWCA Civ 132, [2006] IRLR 471) as referred to in the Claimant's submissions.
- 107.3 It is not necessary for race or a protected act to be the sole or principal reason for the relevant treatment by the Respondents; it is enough if it is a material factor: this point is made in a number of authorities, including *Owen & Briggs v James* ([1982] ICR 618, [1982] IRLR 502) as relied on by the Claimant.
- 107.4 The tribunal should consider the totality of the evidence presented to it, including the wider picture, and any conclusions it can draw from the surrounding circumstances that may assist in its consideration of the substantive matters in issue: see *Rihal v London Borough of Ealing* ([2004] EWCA Civ 623, [2004] IRLR 642).
- 107.5 Direct race discrimination requires less favourable treatment than an appropriate comparator (actual or hypothetical); there must be no material differences between the circumstances of a claimant and the relevant comparator (section 23(1) of the EqA), although if there are material differences the tribunal may still consider how others were treated when considering how a hypothetical comparator would have been treated: *Watt v Ahsan* ([2008] 1 AC 696, [2008] IRLR 243, HL).
- 107.6 Direct discrimination also requires that the treatment in question is because of race; although in some cases it will be convenient and helpful to consider the statutory question in two stages, ie whether there was less favourable treatment and, if so, whether it was because of race, the two stages are often intertwined and may be answered by determining the reason why the claimant was treated as he or she was: *Shamoon v Chief Constable of the Royal Ulster Constabulary* ([2003] ICR 337, [2003] IRLR 285), HL).
- 107.7 When considering the burden of proof provisions (section 136 of the EqA) it will often be helpful for a tribunal to consider the statutory test for direct discrimination in the two stages outlined above, but that is not mandatory and where, for example, a hypothetical comparator is in play it may be appropriate to ask what was the reason for the claimant's treatment, the answer to which will answer both stages of the test: *Laing v Manchester City Council* ([2006] ICR 1519, [2006] IRLR 748, EAT) and *London Borough of Islington v Ladele* ([2009] ICR 387, [2009] IRLR 154), EAT).
- 107.8 Further, more is required to shift the burden of proof than merely establishing a difference in treatment and a difference in race: *Madarassy v Nomura International plc* ([2007] ICR 867, [2007] IRLR 246, CA).
- 107.9 Where the tribunal looks to a respondent to provide an innocent explanation for its treatment of a claimant, the question is not whether

the explanation is sensible or reasonable but whether it has nothing to do with race: *Glasgow City Council v Zafar* ([1998] ICR 120, [1998] IRLR 36, HL).

108. The tribunal has also taken into account the provisions of the Equality and Human Rights Commission Code of Practice on Employment (2011), including those provisions referred to by the Claimant in her submissions.

Discussion and conclusions

Jurisdiction

109. As noted above, the live substantive claims appear on the face of it to be out of time. The parties addressed the tribunal as part of their closing submissions on the question of jurisdiction. As part of those submissions the Claimant referred to *British Coal Corporation v Keeble* ([1997] IRLR 336]) and the Respondents referred to *Bexley Community Centre v Robertson* ([2003] EWCA Civ 576, [2003] IRLR 434). The Respondents also referred to a judgment of the Court of Appeal in one of the Claimant's previous cases against the First Respondent ([2006] EWCA Civ 1548). The tribunal has taken into account the guidance given in those cases and has reminded itself of the relevant statutory provisions as set out above.
110. The ET1 in this case was presented on 10 February 2017. The last (and only) allegation against Mr Kildare concerns his decision to dismiss the Claimant's appeal against the Hill Report, a decision communicated to her in a letter dated 11 July 2016. The last allegation against the First Respondent concerns Dr Smith's decision to progress matters concerning her interaction with Mr Ward on 5 May 2016 to a disciplinary hearing, a decision which was communicated to the Claimant in a letter dated 29 July 2016. The tribunal notes here that the Claimant had said at the PH on 30 November 2018 that she did not rely on any matters later than 10 August 2016, which is the date of the letter setting out the disciplinary allegations to be considered by Ms Cashman, but as matters were clarified at this hearing it was agreed that the last act of which complaint is now made took place on 29 July 2016.
111. The primary limitation period in respect of a claim against Mr Kildare expired on 10 October 2016: see section 123 of the EqA. The EC period in respect of Mr Kildare as set out in the relevant certificate amounts to 2 days in February 2017, ie some months after the primary limitation period had expired. There is therefore no EC extension of time under section 140B of the EqA in respect of the claim against Mr Kildare. The ET1 in respect of Mr Kildare was presented 4 months out of time.
112. The primary limitation period in respect of a claim against the First Respondent expired on 28 October 2016. The EC period in respect of the First Respondent as set out in the relevant certificate amounts to 2 days in

November 2016, ie after the primary limitation period had expired. There is therefore again no EC extension of time in respect of this aspect of the claim. The ET1 in respect of the claim against the First Respondent was presented about 3½ months out of time.

113. On the second day of the hearing, after the tribunal had found that there was no live claim concerning Ms Cashman's disciplinary decision and after the Claimant had decided not to apply to add such a claim back into this case, the Claimant indicated that she accepted that this meant that all of her claims were out of time and that she would need an extension of time if the tribunal were to have jurisdiction to hear them.
114. In her written closing submissions, however, the Claimant asserts (paragraphs 68-72) that her claims are in fact in time. She contends that her claims amount to a continuing act (or 'conduct extending over a period' to use the statutory language of section 123(3)(a) of the EqA). However, the effect of a continuing act for limitation purposes is that all matters that form part of the continuing act are treated as having taken place at the end of the relevant period. In this case the last act of which substantive complaint is made was on 29 July 2016 and so even if earlier acts are taken to be part of an act extending over the period up to 29 July 2016, they would still all be out of time.
115. The Claimant appears to seek in her closing submissions to link earlier acts with the disciplinary decision of Ms Cashman in November 2016. The difficulty with that argument is that it has already been decided that there is no substantive live issue in this case concerning Ms Cashman's decision and there has been no application to amend the claim to add such an issue back in.
116. The Claimant also says, as the tribunal understands it, that amending in September 2017 to discontinue some of her claims and instead to concentrate on others was a mature and proportionate approach. That may be right but it does not help the Claimant in terms of establishing that any part of her substantive live claim was presented in time. The tribunal also notes that this submission confirms its earlier finding that the Claimant did indeed withdraw any claim concerning Ms Cashman's disciplinary decision and that she intended to do so.
117. The tribunal therefore turns to the question of whether it would be just and equitable to extend time to allow some or all of the Claimant's claims to be heard, that being the statutory test under section 123(1)(b) of the EqA. The Claimant deals with this at paragraphs 73-77 of her written closing submissions. The essence of her argument seems to be that because her claim as originally presented included allegations against Ms Cashman which would have been in time and she could, and presumably would, have argued that earlier acts were part of a continuing act up to and including Ms

Cashman's decision, the fact that she subsequently withdrew the allegations against Ms Cashman (in what she says were the interests of proportionality) should not result in her remaining live claims failing for lack of jurisdiction.

118. The Claimant has not put forward any other argument or explanation as to why an extension of time should be granted in this case. Nevertheless, the tribunal has considered whether there is evidence from other sources to support an extension of time. Unfortunately for the Claimant such evidence as is available seems to the tribunal to point in the other direction.
119. It is clear that the Claimant was aware of her right to complain to an employment tribunal and the mechanism for so doing. Not only had she brought various previous tribunal claims but, as noted above, she started the EC process concerning Dr Smith in late June 2016.
120. There is also no suggestion that the Claimant was off sick or impeded in any other way during the relevant period for which an extension of time is required, ie October 2016 to February 2017. She was clearly capable, at or around this time, of formulating and presenting detailed arguments about matters of the type that arise in this case; for example, she prepared documents for, and presented evidence and argument at, a disciplinary hearing over 3 days in September and October 2016 and again at an appeal hearing in December 2016. She also had access to solicitors who assisted her before, during and after the relevant period both with internal matters and with the Hill Claim which was ongoing at that time. Although the Claimant has represented herself before this tribunal, it is fair to say that she has considerable experience of tribunal litigation and, in particular, with the law and principles concerning time limits in discrimination claims. The tribunal notes, for example, that in one of the Claimant's previous cases there was an appeal to the Court of Appeal on a time point under the predecessor provisions of the Race Relations Act 1976 (see the judgment in *Lyfar v Brighton and Sussex University Hospitals Trust* at [2006] EWCA Civ 1548 as referred to above). This is not a claimant who can claim ignorance of the relevant time limits or the legal principles in play (and in fairness the Claimant has not sought to do so in this case).
121. The tribunal also notes the comment from the Court of Appeal (per Hooper LJ at paragraph 37 in the Claimant's previous case) that the Claimant had failed in that case to advance any explanation for the non-presentation of her claim in time. That comment could also be made in this case. As noted above, the only point made by the Claimant is that if she had not withdrawn her allegations against Ms Cashman then her claim would have been in time. However, the fact is that she did withdraw those allegations. In any event, there would always have been a question concerning the tribunal's jurisdiction to hear claims involving allegations concerning Mr Kildare and Dr Smith which were on the face of it out of time from the start, a point made by the Respondents in their ET3s in early April 2017. The Claimant has therefore

known that there was a live time point since shortly after the start of these proceedings.

122. The tribunal reminds itself that it has a wide discretion to extend time where it considers it just and equitable to do so. The tribunal also reminds itself that an extension of time remains the exception rather than the rule and that the burden is on the Claimant to show why an extension of time should be granted. Taking all of the matters presented by the parties into account, in the tribunal's judgment there is nothing to justify an extension of time in this case.
123. The tribunal therefore has no jurisdiction to hear the Claimant's claims and they must therefore be dismissed. However, since the tribunal has heard evidence and argument on the merits, it will also consider what its conclusions would have been if it had jurisdiction to hear these claims.

Comparators

124. The Claimant relies on 3 actual comparators: Mr Morris, Mr Prosser and Ms Burns. The tribunal will consider each of the 3 named comparators in turn.
125. Mr Morris was a senior manager seconded to the First Respondent from the Department of Health in 2010 to be its Director of People and Strategy. At a joint conference between the First Respondent and the BME Network on 9 November 2010 Mr Morris made a speech. The context was that the Claimant had brought a number of ET claims against the First Respondent. A claim presented in 2005 (Case No. 3100484/2005) was heard in 2007 and a finding of unlawful discrimination on grounds of race was made concerning a failure to deal properly with a grievance the Claimant had raised. She then presented a number of further claims against the First Respondent (Case Nos. 3103597/2007, 3103721/2007 and 3102646/2008) which were settled by way of a compromise agreement. The agreement included an admission of discrimination on grounds of race and victimisation concerning the Claimant's removal as Chair of the BME Network and the handling of a number of grievances. The Claimant was reinstated as Chair of the BME Network and the First Respondent apologised for its treatment of her.
126. In his speech, Mr Morris reiterated the First Respondent's apology to the Claimant. He also made a number of comments including, by way of example, that the Claimant's treatment had been *'the expression of a white supremacist philosophy which blinded the leaders of the hospital'* and that *'I choose to name the problem, the corrosive disease, and to say it is not simply racism, not simply institutional racism, but white supremacism.'*
127. The Claimant seeks to use Mr Morris as a comparator in that no action was taken in response to his speech in which he referred to senior management as set out above but, in contrast, when she was accused of making comments to Mr Ward on 5 May 2016 she was excluded from work and subsequently

subjected to a disciplinary procedure. However, tribunal has concluded that the circumstances of Mr Morris's speech in November 2010 and of the Claimant's alleged comments in May 2016 were very different and certainly were not materially the same. One clear distinction is that there was a complaint raised almost immediately concerning the Claimant's alleged comments whereas there is no evidence to suggest that anyone raised any complaint about Mr Morris's comments.

128. The second actual comparator relied on by the Claimant is Mr Prosser. The Claimant says that she was told, by someone who had been present at a training session with Mr Prosser in March 2014 concerning race issues within the First Respondent, that Mr Prosser had said something to the effect that he did not believe that complaints by BME staff that they had been discriminated against on grounds of race were valid and that he believed that they had been 'playing the race card'. The Claimant says that no action was taken against Mr Prosser but when she was accused of making comments to Mr Ward in May 2016 action was taken.
129. As far as the tribunal is aware, no formal complaint was made at the time, ie in 2014, concerning Mr Prosser. That again represents a material difference. The Claimant did raise the matter with Ms Weatherill shortly after the training session but Ms Weatherill confirmed to the Claimant that Mr Prosser had not said what had been attributed to him. She said that in fact she, Ms Weatherill, had used the phrase 'playing the race card' during the session when explaining to those present that, although some may perceive that race complaints are invalid and amount to playing the race card, such a perception was wrong and racist behaviour does happen. Neither the Claimant nor anyone else took the matter further.
130. The tribunal accepts Ms Weatherill's evidence in this regard. The tribunal also accepts Mr Prosser's evidence, in which he denies using the words attributed to him; his evidence is consistent with that of Ms Weatherill, they were both present at the training session and the Claimant was not, and the Claimant has chosen not to challenge any aspect of Mr Prosser's evidence.
131. The third and final actual comparator relied on by the Claimant is Ms Burns. The essence of the comparison the Claimant seeks to make is that Ms Burns made complaints against the Claimant and the Claimant made complaints about Ms Burns. No action was taken against Ms Burns following an investigation by Ms Hill but that same investigation found that the Claimant had a case to answer, her appeal against the investigation outcome was dismissed by Mr Kildare and the matter led to disciplinary proceedings.
132. The tribunal notes that the outcome of the investigation by Ms Hill was that there was a case to answer against the Claimant but not against Ms Burns. That, the tribunal finds, clearly amounts to a material difference in circumstances.

133. For the above reasons, none of the named comparators relied on by the Claimant passes the requirements of section 23 of the EqA.
134. However, as the tribunal reminded the Claimant during the hearing and during her closing submissions, even if her comparators do not pass the requirements of section 23(1) of the EqA they can still be relied on to inform the tribunal how a hypothetical comparator would have been treated. The tribunal has, therefore, considered the evidence concerning those individuals when deciding how a hypothetical comparator would have been treated.

First allegation – Mr Kildare’s decision

135. For the reasons set out above, the tribunal has concluded that none of the named comparators relied on by the Claimant in this case in support her direct race discrimination claims passes the requirements of section 23 of the EqA, in that their circumstances and those of the Claimant are materially different. The tribunal has therefore considered how a hypothetical comparator would have been treated by Mr Kildare. The Claimant accepted during submissions that a hypothetical comparator would, in effect, be the Claimant but if she had been of a different race.
136. The first substantive allegation concerns Mr Kildare’s decision not to uphold her appeal against the Hill Report. It is said that his decision amounted to direct race discrimination and/or victimisation. The Claimant accepted a number of times during evidence and submissions that the nub of her case is that the Hill Report is so obviously flawed that an inference should be drawn that Mr Kildare’s decision not to allow her appeal against it must have been based on the Claimant’s race and/or previous protected acts.
137. One difficulty with that argument is that it is essentially the same argument as relied on by the Claimant in the Hill Claim: see the last sentence of paragraph 86 of the reasons in the Hill Claim. The tribunal in the Hill Claim found the Hill Report to have been ‘*a thorough and fair-minded report*’ and that the Claimant’s criticisms of it as incompetent and/or biased and/or racist and/or a whitewash ‘*are overblown epithets which in no way fit the careful and conscientious enquiry undertaken by [Ms Hill]*’.
138. The tribunal has itself considered the contents of the Hill Report and its appendices and can identify no aspect of it that would justify the drawing of any adverse inference against Mr Kildare for upholding its conclusions.
139. The Claimant’s approach before this tribunal has been to dissect reports and other documents in an attempt to find points of detail with which she disagrees. That mirrors, the tribunal finds, her approach during the course of the various internal proceedings. It does not, however, provide any

substantive support for her claims of discrimination and victimisation in this case.

140. She has, for example, criticised the Hill Report for not referring to certain detailed aspects of the evidence gathered by Ms Hill, in particular evidence which she describes as exculpatory. However, all of the relevant evidence was included in the many pages of documents appended to the Hill Report (and which Mr Kildare read in detail) and the Hill Report was never intended to refer to every single item of evidence.
141. Similarly, the tribunal finds that no adverse inference should be drawn from the fact that Mr Kildare, in his outcome letter of 11 July 2016, does not refer to every one of the many points raised by the Claimant in her appeal documents. Rather, as he said in his letter, he focused on what appeared to him to be the key points raised in respect of the Claimant's grounds of appeal.
142. One aspect of the Hill Report on which the Claimant puts great emphasis is the passage at paragraph 18 concerning the test for 'case to answer'. The Claimant has taken strong objection to the test applied by Ms Hill (and also by Mr Kildare and Mr Alemoru). She says, rightly, that the Dignity at Work Policy says (at paragraph 5.6.1) that the investigating officer may determine whether there is a case to answer. She says that Ms Hill went beyond this in saying that this meant that she had to decide '*whether a disciplinary panel could, on the balance of probabilities, conclude that the misconduct alleged did take place.*' She says that this was an obvious error and that an adverse inference should therefore be drawn against Mr Kildare for upholding Ms Hill's conclusions.
143. It is correct that the relevant policy refers to 'case to answer' but does not define further what that is intended to mean. The Claimant said during the course of this hearing that as far as she was concerned as long as there was 'some' evidence in support of an allegation then there would be a case to answer. Later, she refined this to 'sound' evidence.
144. It seems clear to the tribunal that if a test of 'some' evidence in support of an allegation is all that is required for there to be a case to answer, then that is a significantly lower hurdle than that applied by Ms Hill. If the test is 'sound' evidence then the test would, in the tribunal's judgment, be much the same as that applied by Ms Hill. These points were put to the Claimant by the Employment Judge during the hearing but she would not accept them.
145. In her written closing submissions the Claimant appeared to go back to 'some' evidence being the threshold for a case to answer but when this was explored again with her during her oral submissions her position was expressed as being that if there was evidence to support an allegation and no evidence to the contrary then there would be a case to answer, but if there was evidence in support and evidence to the contrary then an investigator could not make a

decision at all as to whether there was a case to answer. When asked where this would lead in a case (presumably the vast majority of cases) where there is evidence going both ways she referred to 'other options' such as mediation.

146. The tribunal finds that the test adopted by Ms Hill (and others) as to whether there was a case to answer was entirely sensible and reasonable. Further, it is consistent with the First Respondent's policies. It provides no support, the tribunal finds, for any inference of discrimination or victimisation against Mr Kildare.
147. That of itself does not necessarily mean that Mr Kildare's decision not to allow the Claimant's appeal against the Hill Report was not influenced by the Claimant's race and/or previous complaints. The tribunal has also considered the wider picture.
148. The tribunal has been referred to evidence of how previous complaints of discrimination against white employees of the First Respondent have been dealt with. In every case (of which there are a number) the individual was either dismissed or given a final written warning. The Claimant has not disputed this evidence.
149. The Claimant has suggested that a large number of individuals, including Mr Kildare (and Dr Smith), were involved in a 'scheme' to do her down because of her race and/or her previous complaints. There is, however, no evidence to support the suggestion that Mr Kildare (or Dr Smith) was part of any such scheme. As noted above, Mr Kildare had had no dealings with the Claimant before he heard the latter part of her appeal against the Hill Report and there is nothing to suggest that his actions in respect of the Claimant or anyone else were because of race or any protected acts.
150. The tribunal has also considered carefully whether the fact that Ms Cashman found in the Claimant's favour on a number of the disciplinary allegations made against her and which arose from the Hill Report supports her claim that Mr Kildare's decision was because of race or because the Claimant had made previous complaints. It is true that the majority of the disciplinary allegations were not upheld by Ms Cashman, but those that were included allegations of bullying and victimisation relating to Ms Burns and of harassment and race discrimination concerning Mr Ward. In the circumstances the tribunal has concluded that the outcome of the disciplinary process does not provide any substantial support for the Claimant's case.
151. In light of all the evidence presented in this case, both directly concerning Mr Kildare's involvement and looking at the wider picture, the tribunal has no hesitation in finding that neither race nor any protected act played any part in Mr Kildare's decision.

Second and third allegations – Dr Smith’s decisions

152. The two remaining substantive allegations concern decisions by Dr Smith, first to exclude the Claimant from work on 6 May 2016 and then to put forward the matters arising from Mr Ward’s complaint and Mr Alemoru’s investigation into that complaint to a disciplinary process.
153. The Claimant’s case in this regard is, as she has accepted during this hearing, much the same as in respect of Mr Kildare’s decision as discussed above. She says, in effect, that Mr Ward’s allegations made on 5 May 2016 and the contents of Mr Alemoru’s investigation report are so obviously flawed that an inference should be drawn that Dr Smith’s decisions must have been based on the Claimant’s race and/or previous complaints.
154. The allegations raised by Mr Ward are clearly, on their face, very serious. He raised them almost immediately after his chance encounter with the Claimant. Part of what he alleged the Claimant had said was included in a contemporaneous text message. He also prepared a file note shortly after the event which supported his allegations as to what had been said.
155. The tribunal finds that Dr Smith’s decision to exclude the Claimant from work was carefully considered by him, was consistent with the First Respondent’s policies and was also consistent with the First Respondent’s previous practice.
156. One criticism the Claimant makes of Dr Smith’s actions is that he did not give her an opportunity at the exclusion meeting to give her side of events. However, Dr Smith’s approach was consistent with the First Respondent’s policies and their past practice and with the HR advice and script he had been given for the exclusion meeting. The Claimant would have, and did have, full opportunity to put her side of the story as part of an investigation; that, rather than at the exclusion meeting, was the appropriate time.
157. The Claimant has also criticised Mr Alemoru’s investigation report. His report appears to the tribunal to be fair and balanced. The Claimant raised serious objections to Mr Alemoru’s record of his investigation meeting with the Claimant and, as noted above, did so by adding passages to the end of his amended version of her Position Statement. Mr Alemoru then included the Position Statement, including the Claimant’s additions, in the appendices to his report. There was no attempt to hide the Claimant’s response to the allegations or her comments on his notes of their investigation meeting. Rather, he left any matters of disputed fact to be resolved by a disciplinary panel if the matter went to a disciplinary process.
158. Mr Alemoru’s conclusion was that there was a case to answer in that there was evidence from which it would be possible to believe Mr Ward’s account of what the Claimant had said. That conclusion, and Dr Smith’s decision to

accept it and to put the matter forward to a disciplinary process, appear to the tribunal to have been consistent with the First Respondent's policies and past practice.

- 159. There is nothing that the tribunal can identify about Dr Smith's decisions that suggests that they were influenced in any way by race or by any previous complaints.
- 160. Again, the tribunal has considered the totality of the evidence presented to it to see if the wider picture assists the Claimant. However, the tribunal finds that neither race nor previous complaints played any part in the decisions by Dr Smith concerning the Claimant.

Conclusion

- 161. For all the reasons set out above, the tribunal has concluded that:
 - 161.1 It does not have jurisdiction to hear the Claimant's claims as they were presented out of time and it is not just and equitable to extend time;
 - 161.2 In any event, the decisions by Mr Kildare and Dr Smith that are the subject of the Claimant's substantive case were not in any way influenced by race or by any previous complaints made by the Claimant.
- 162. The Claimant's claims therefore fail and must be dismissed.

.....
Employment Judge K Bryant QC
4 January 2019 London South