RM

EMPLOYMENT TRIBUNALS

Claimant: **Miss J Panahian-Jand**

Respondents: **(1) Barts Health NHS Trust**
(2) Barts Health Staff Bank

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **27, 28, 29 January 2021 and (in chambers) 5 February 2021**

Before: **Employment Judge Moor**
Members: **Mr L Purewal**
Mr S Woodhouse

Representation
Claimant: In person
Respondent: Mr S Sudra, counsel

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. The First Respondent unlawfully victimised the Claimant contrary to section 27 and section 39 of the Equality Act 2010 by:

    1.1. restricting her work from 30 May 2019; and

    1.2. delaying communicating to her the outcome of the investigation into her conduct; and

    1.3. Miss Hook twice blocking her path on 3 June 2019.

2. The First Respondent subjected the Claimant to the detriments set out in paragraph 1 because she had made protected disclosures, contrary to section 47B of the Employment Rights Act 1996.

3. Pursuant to section 124 of the Equality Act 2010, the Tribunal recommends that, no later than 4 weeks after this Judgment is sent to the parties, the restriction on the Claimant working at Acorn Ward and at Whipps Cross Hospital be removed.

4. The First Respondent is ordered to pay the Claimant £26,083.19.

5. By consent, the claim is dismissed against the Second Respondent because it is not a legal entity.

REASONS

1. This hearing was held remotely by video (V fully), which was consented to by the parties. A hearing in person was not practicable due to the restrictions on social distancing during the coronavirus pandemic. We had available to us an agreed bundle, written witness statements, a chronology and cast list, a skeleton argument from the Claimant and written closing statements. Numbers in brackets in this judgment are to the Agreed Hearing Bundle.

2. The Claimant was a paediatric bank nurse with the First Respondent ('the Trust'). She claims that she was subject to detriments because she had made allegations of discrimination. She puts these claims, in the alternative, as 'whistleblowing' claims.

3. We confirmed we would deal with liability and remedy issues at this hearing.

4. Given the larger number of Trust witnesses than expected, we set a rough timetable aiming to hear all the evidence and submissions in the 3-day listing. We thank both the Claimant and Mr Sudra for meeting this timetable and for the courteous, calm and structured way in which they conducted their cases.

Issues

5. At the outset of the hearing we ensured we understood the issues (61). We corrected the list of issues to make it consistent with the legal principles:

   5.1. the acts/omissions complained about could be detriments and the restriction could be breaches of 39(3) of the Equality Act 2010 ('EA'); and

   5.2. the Claimant explained, in her public interest disclosure claim, that she was relying on a belief that she was disclosing information that tended to show a breach of the legal obligation of the Public Sector Equality Duty and that she reasonably believed the disclosures were in the public interest because of the nature of that duty and the fact that she had nothing to gain personally from the complaints.

6. Mr Sudra confirmed that the Trust did not allege that the Claimant made her discrimination allegations/disclosures in bad faith.

7. The Trust also accepted that the Claimant was its 'worker' for the purposes of the Employment Rights Act 1998 ('ERA') and its 'employee' under the wider definition of employee in the EA.

8. The main complaint is of 'suspension': it was agreed that this referred to the restriction that the Trust admits it applied to the Claimant from 30 May 2019 by directing its Bank Partners not to offer the Claimant bank shifts on Acorn Ward

(the Claimant alleges it was for Whipps Cross Hospital). This restriction was unpaid.

List of Issues

Victimisation

9. Did the Claimant make/do the following acts:

   9.1. Raise a complaint of discrimination to Heather Roberts, Ward Manager, on 11 May 2019 (in respect of patient allocation and workload between members of staff on Acorn Ward).

   9.2. Raise a complaint of discrimination to Heather Roberts, Ward Manager, on 11 May 2019 (in respect of bullying and harassment of two junior members of staff on the ward).

   9.3. Raise a complaint of discrimination to Heather Roberts, Ward Manager, on 14 May 2019.

   9.4. Raise a complaint of discrimination to Heather Roberts, Ward Manager, on 27 May 2019: and

   9.5. Make a written complaint in June 2019 (which post-dates the alleged detrimental treatment).

10. Did these or any of them constitute a protected act for the purposes of s.27(2) EA?

11. Was the Claimant subjected to the following treatment:

    11.1. 'Suspending' her from her duties on 30 May 2019.

    11.2. Treating her differently from other bank members of staff in that: (a) The Claimant was approached aggressively by Jamie Hook in the back of the hospital car park on 3 June 2019 and the Trust did not investigate this despite the Claimant complaining about it in her call to HR on 10 June 2019, in her letter to HR on 20 June 2019 and during her investigatory interview with Ms Cooper-James on 16 July 2019; and (b) Ms Elliott and Miss Hook, two members of staff cited within the original complaint, were neither restricted nor suspended from duty despite the Claimant making allegations against them of race discrimination.

    11.3. Causing 'damage to the Claimant's reputation' in her field in relation to senior staff (Mrs H Roberts (Ward Manager), Ms L Barker (Ward Sister), Ms L Davis (Ward Sister) and Ms R Jones (Ward Sister)) making '*slanderous and defaming comments that the Claimant was banned from various hospitals and that she had been removed from post following a mental breakdown after the death of her child*'.

    11.4. Denying the Claimant the opportunity to be informed of the allegations against her as part of the June 2019 investigation conducted by Mrs D Kara.

11.5. Denying the Claimant the opportunity to respond to the allegations against her as part of the June 2019 investigation conducted by Mrs D Kara.

11.6. Taking over four months to communicate the outcome of the June 2019 investigation conducted by Mrs D Kara to the Claimant.

11.7. Miss J Hook approached the Claimant in the car park on 3 June 2019, to harass, bully and intimidate the Claimant.

12. If so, by those acts or omissions or any of them, did the Trust subject the Claimant to a detriment or did those acts otherwise fall under section 39(3) or 39(4) EA?

13. If so, did the Trust do those acts or omissions because the Claimant had done a protected act?

Detriment on the Grounds of Making a Protected Disclosure

14. Did the Claimant make disclosures of information, as set out at paragraph 9 above?

15. If so, did the Claimant reasonably believe that she was disclosing information that tended to show breach of a legal obligation, namely the Public Sector Equality Duty?

16. If so, did the Claimant reasonably believe that it was made in the public interest?

17. If so, did the Trust subject the Claimant to the acts/omissions at paragraph 11?

18. If so, by doing so did the Trust subject the Claimant to a detriment/s?

19. If so, did the Trust subject the Claimant to those detriments because the Claimant made the protected disclosure/s?

Remedy

20. What remedy, if any, should the Employment Tribunal award? Including any compensation for:

20.1. Injury to feelings; and

20.2. Loss of earnings.

20.3. Any unreasonable failure to comply with the ACAS Code of practice on grievance and discipline.

Findings of Fact

21. Having heard the evidence of the Claimant, Mrs H Roberts, Miss J Hook, Mrs G Stephenson, Mrs D Kara, Mrs S Cooper-James, Ms R Jones and Mr S Steward; and having read the written statements of Ms Moyo and Ms

Goldsmith; and having read the documents referred to us, we make the following findings of fact. Where there is a dispute on the facts that has been necessary for us to decide we have reached our decision by asking the question: what is more likely than not to have occurred?

22. The Claimant identifies as white. She worked as a bank nurse for the Trust. A relatively junior Band 5 nurse, she was trained as a paediatric nurse and was not qualified to work on adult wards. At the time of the events, she had worked on Acorn ward, the only paediatric ward at Whipps Cross Hospital, for about 10 years (earlier as a member of staff and latterly as a bank nurse). Her A&E triage training was not up to date and she was not qualified to do neonatal nursing, therefore Acorn Ward was the only place the Claimant could work at Whipps Cross.

23. The Claimant earned £25 per hour as a bank nurse. Her shifts were usually 12.5 hours (as is normal for nurses), including a 1 hour unpaid break. She received holiday pay of 1 hour after 10 hours of work.

24. About 60 members of staff worked on Acorn Word: about 7/8 nurses per shift, fewer at night. Mrs Roberts was fairly new to the ward manager role, at band 7. She also worked as a band 6 some nights. Band 6s had a management role including the allocation of work.

25. The Trust is responsible for four other sites: the Royal London Hospital, Bart's Hospital, Mile End Hospital and Newham Hospital.

26. For Trust work, a bank nurse would normally book shifts via an app controlled by the Trust through its Bank Partners. The app would show what was available and once the nurse had booked herself on those shifts, she was obliged to work them. At the time of the events, the Claimant had an informal arrangement with Acorn Ward that she would be rostered on for a series of shifts rather than having to apply per shift via the app. At the time of her restriction she had 8 shifts booked on Acorn ward for the rest of June and at least 8 for July 2019.

Policies and Procedures

27. The Claimant confirmed that she was subject to the Trust's policies and procedures, including the Dignity at Work policy. This policy specifically provides for an informal approach to resolve concerns, including approaching the line manager and mediation.

28. Under the Trust's Whistle-blowing Policy:

    28.1. paragraph 1.4 provides that: *The Trust encourages a culture that challenges inappropriate behaviour, suspected wrongdoing … at all levels without fear of victimisation or reprisal.* Similarly paragraph 1.5 *Encourages employees to raise genuine concerns in good faith and supports a culture of openness.*

    28.2. the definition of whistle-blower includes: *someone who comes to a decision to express a concern after a great deal of thought …They are not a "sneak" or a "trouble maker". …They do not have to produce unquestionable evidence to support their*

concern; this is for the Trust to investigate.

28.3. concerns can be raised first with the line manager (114).

28.4. complaints should be in the public interest. Those concerning bullying should be raised under the Dignity at Work policy.

29. The Trust had a disciplinary policy for bank staff (87):

29.1. paragraph 2.3 provides that the bank worker should be told of the nature of the allegations against them;

29.2. paragraph 3 establishes an informal procedure for allegations of 'minor misconduct';

29.3. if, having been spoken to informally by the line manager, the problem persists or the matter is serious, then paragraph 4 allows a formal route to be taken, which involves independent investigation of the alleged misconduct;

29.4. paragraph 2.4 provides generally that bank workers could be restricted 'if appropriate'. Paragraph 4.3 states that, if the matter was deemed serious enough, then a restriction decision could take place in consultation with various senior staff members. (Mrs Roberts, ward manager, confirmed that a restriction would only take place if a serious allegation was made and if it was needed to ensure patient safety, colleague safety, or to avoid interference with the investigation. Mrs Stephenson, Associate Director of Nursing for Children, told us and we accept, given her greater experience, that restrictions (and suspensions of permanent employees) were rare;

29.5. paragraph 4.4 provides for the appointment of an independent investigating manager; and

29.6. paragraph 4.5 establishes that, after investigation, if there is a case to answer then there will be a disciplinary hearing; if not, then no disciplinary action follows.

11 May 2019

30. On 11 May 2019 during the night shift there was a general discussion on the ward at the nurses station, including the Claimant and Ms Devlin. Mrs Roberts joined it. The discussion was about groupings of staff along racial lines and unfair allocation of work. Someone made reference to the *Essex girls'* group. In talking about cliques or groupings on the ward, the Claimant drew a triangle on a piece of paper to reflect a lack of mixing and included some initials of staff members. The Claimant described groups on the ward divided by race: a group of white nurses; a black and ethnic minority group and some nurses who were in between. This piece of paper was subsequently referred to as a 'list'.

31. Then the Claimant and Mrs Roberts spoke away from the group. Mrs Roberts understood the Claimant to be raising concerns of race discrimination covering

three matters: allocation of work on the ward; groups or cliques of workers divided by race; and the bullying of two junior members of staff.

32. We find the Claimant was not raising these concerns in her own private interest. We find she thought race discrimination was wrong and that the hospital had a public equality duty to uphold. She was trying to be a good citizen. Another clue to this is that ultimately she made complaints in writing against some members of staff with whom she had good relationships.

33. Mrs Roberts asked the Claimant if she wanted to make a formal complaint. The Claimant said no, but wanted Mrs Roberts to know about her complaints.

34. Mrs Roberts knew there were issues with allocation, but told the Claimant her view that these were not to do with race.

35. The Claimant and Mrs Roberts agree that, at some point, Mrs Roberts told Claimant not to discuss the allegations. We find Mrs Roberts did not confine this to discussion in the ward's public areas. We find that this qualification was added later by Mrs Stephenson (as shown by her amendments in red, 202) and because ultimately the allegations against the Claimant were drafted in general terms not in particular (273); and there is no evidence patients overheard.

13 May 2019

36. On Monday 13 May 2019, when Mrs Roberts came into work, one nurse said to her she was uncomfortable about the 'list'. That nurse had not been present during the conversations on the 11 May shift.

37. Since the 11 May shift, Mrs Roberts had considered the allegations and thought them a matter of concern. She spoke to her senior managers to take advice. They decided that the Claimant had to be told that she should make a formal complaint.

38. On 13 May Mrs Roberts told the Claimant that, if she wanted to make a complaint about any issues on Acorn Ward, she should do so in a formal complaint. Mrs Roberts asked the Claimant to 'please stop engaging in conversations of that nature.' Again we find that Mrs Roberts did not confine this instruction to the 'open ward'. The Claimant agreed not to speak about the allegations.

39. Mrs Roberts suggestion that there was disruption/upset on the ward by these allegations is limited to the one member of staff, who was not there at the time, telling her that she felt uncomfortable about the list, along with what was said by staff at the original discussion on the night. On the evidence we have heard, we do not accept that at this time there was 'disruption' and Mrs Roberts is mistaken in her evidence about that.

15 May 2019

40. On Wednesday 15 May 2019, Mrs Roberts was informed by a single member of staff, that the Claimant had continued discussing the list of staff cliques and making allegations of racism against members of staff. This member of staff was upset because she thought the allegations

unfounded. Again, we do not consider that, by this point, there was any report or sense of disruption.

41. Mrs Roberts discussed the matter with her managers, and they concluded again that they should require the Claimant make a formal complaint. Other than to ask one member of staff about whether she was being bullied, managers did not consider the need for the Claimant's concerns to be taken on informally, even though the Claimant had said she did not want to complain formally but had wanted Mrs Roberts to know about her concerns.

27 May 2019

42. On 27 May 2019, Mrs Roberts accused the Claimant of continuing to raise her concerns about cliques and bullying and had discussed the list she had previously made. The Claimant denied this.

43. We accept the Claimant's recollection that Mrs Roberts accused her of talking about the issues on multiple shifts, but she pointed out she had only worked one shift in the previous week. She said that others had brought it up.

44. Mrs Roberts evidence about what she heard by 27 May is not at all clear.

    44.1. We accept that she received calls from other upset members of staff. But we find, these calls were about upset and that Mrs Roberts had assumed from this that Claimant was continuing to talk about the allegations.

    44.2. By the end of her evidence, Mrs Roberts was not clear about how many colleagues had contacted her. When I asked her who had complained she said, 'It was people coming to me. I can't remember'.

    44.3. Mrs Roberts at one point in her evidence claimed that nurses wished to remain anonymous, but we do not find that they asked to do so at this stage. This is because Mrs Roberts did not include this important point in her witness statement nor was it a feature of her investigatory interview with Mrs Kara. We find it is unlikely at this stage that anyone asked her to remain anonymous and that is something she has remembered from the later, formal race discrimination complaint.

    44.4. We did not see the text message she referred to after the conversation on 27 May. In cross examination Mrs Roberts acknowledged that it was 'mainly Ms Barker', a band 6 nurse, also a friend of hers, who had complained. Band 6 nurses did allocation and the allegation was about discrimination in allocation. Thus Ms Barker was one of the nurses who was personally implicated in the allegations.

    44.5. In our judgment what Mrs Roberts heard was about upset. The discussions at the nurses station on the 11 May had rippled out into the ward. Mrs Roberts has merged this upset with the fact of

the Claimant talking about the allegations. This is why she contends in her email to Bank Partners that staff were complaining. What we do not accept is that Mrs Roberts heard evidence, except from Ms Barker, that it was the Claimant who had continued to talk.

44.6. Mrs Roberts asked Ms Barker to write down what the Claimant had said. Ms Barker sent that email on 30 May (see below). We do not consider that it supports the contention that the Claimant was continuing to talk about the allegations despite the instruction not to. The email does not refer to the Claimant saying anything about allocation or racial divisions on the ward. The Claimant is alleged to make some general statements about bullies that cannot be argued with (that they are idiots and so on), but no allegations about bullying of anyone in particular or on any grounds. There is an alleged general criticism of management, that is all. We are reinforced in our view because Mrs Kara, the investigating manager, did not conclude that this email contained enough evidence to result in a case to answer.

44.7. Ms Goldsmith, Head of Midwifery, a manager in an entirely different line, who read Mrs Kara's report, decided that the Claimant had been suspended for 'corridor gossip' and that this was inappropriate (see the minutes of 18 December 2019 meeting).

45. While there is clearly evidence that other staff were talking about the issues, there is no evidence Mrs Roberts told those staff not to talk about it.

46. Mrs Roberts again told the Claimant that she should make a formal complaint. She told us: '*I explained that if she did not want to make a complaint, she should stop having conversations about these issues on Acorn Ward as it was upsetting other members of the team*.' The Claimant was not given the option to keep her complaint informal, despite the Dignity at Work and Whistleblowing policies.

47. We acknowledge that Mrs Roberts was an inexperienced manager. We consider her memory of the staff response on Acorn ward is likely exaggerated because she herself was uncomfortable and upset by the allegations as a reflection on her own management. She had wanted a happy ward.

48. Mrs Roberts had reached a view that the allocation problem was not about race and told the Claimant that. She told us she thought her role was to be a ward advocate, but her actions were one-sided: she spoke for those upset by the allegations and was not prepared to consider them informally to see whether others supported them. She had already reached her own view about one of the allegations.

49. Mrs Roberts decided that the Claimant had broken her instruction not to talk about the allegations and wrote an incident form to Bank Partners to that effect. She also drafted a letter to the Claimant dated 29 May (202). The words

in red were not Mrs Robert's original draft but added in by Mrs Stephenson. These parts changed the concern from being told not to speak about the allegations to not to speak about them 'on the open ward'.

50. Bank Partners asked whether the Trust wished to restrict the Claimant. The decision to restrict her was made on the same day primarily by Mrs Roberts and approved by Mrs Stephenson (232).

    50.1. Mrs Roberts told us restriction was appropriate, because the allegation was serious and that was because of the impact on staff upset and their wellbeing.

    50.2. What we find difficult in this is that staff were upset by the allegations that had rippled out from the 11 May discussion. But that upset did not relate to the breach of an instruction. We are concerned that Mrs Roberts has merged the fact of the allegations (which caused upset) to the fact that they were discussed amongst the staff (which caused upset) and the breach of the instruction to the Claimant not to talk about them for which she had the inadequate evidence of Ms Barker.

    50.3. Mrs Stephenson says that, having spoken to Mrs Roberts, she could see things had become emotionally charged on the ward and there was upset. But again this does not suggest that was because the Claimant had continued to talk. Mrs Stephenson relied on Ms Barker's email for that, which was unsatisfactory.

51. Mrs Roberts had not warned the Claimant she would be restricted if she continued to talk.

52. Mrs Roberts gave us another example of alleged misconduct that would justify a restriction, a nurse pushing a parent.

53. On 30 May 2019 Bank Partners wrote to the Claimant to inform her of the restriction. It told her she was restricted from Acorn ward but could work on other sites at the Trust. In reality, because of the Claimant's qualifications, this meant she was restricted from Whipps Cross Hospital.

54. On 31 May 2019, the Claimant replied to the restriction. In this reply she made a formal complaint of race discrimination (197f). In it she raised the three issues she had raised with Mrs Roberts on 11 May (allocation; divisions within the ward; and bullying). She also made specific allegations that named members of staff had spoken or acted in a way towards colleagues and patients that she alleged amounted to race discrimination.

55. It was not until 2 July 2019 that those individual members of staff were informed of the allegations against them.

Car Park 3 June 2019

56. We have considered carefully the evidence in relation to the incident in the hospital car park on 3 June 2019. We have applied the test of what is more likely than not to have occurred. In our judgment, Miss Hook, also a bank nurse on Acorn Ward, blocked the Claimant's path twice in circumstances

where it was not necessary for her to do so.

56.1. We find it likely, contrary to her evidence, that Miss Hook heard the corridor gossip about the Claimant's accusations of race discrimination in allocation and groups divided on racial grounds. On 3 June she had shared a lift into work with Ms Devlin who was there on 11 May and we find it likely that they did talk about the allegations, as they had become a talking point.

56.2. We do not consider it likely that this incident, can be the product of a misunderstanding. The Claimant is clear in her recollection that Miss Hook blocked her way twice in a car park in which there was plenty of room. The two had previously had a good relationship.

56.3. The Claimant complained about the matter on 10 June 2019 in a telephone call to HR and followed this up in writing. This is sufficiently contemporaneous in our view to support her account. She had a close relative in hospital and it was appropriate to take time to reflect on what had happened.

56.4. The Claimant had made a number of allegations by this stage, there was no reason why she would need to supplement her complaints with this one, if it were not likely to have occurred.

57. We find Miss Hook is likely to have been annoyed with the Claimant for making allegations of race discrimination, and, having just talked about them with Ms Devlin in the car, translated that annoyance into blocking the Claimant's path. This was hostile conduct that got her message across to the Claimant without her needing to use words.

58. The Claimant complained about this incident to HR on the telephone on 10 June 2019, identifying the person she'd complained about. She sent her complaint in writing by amending her original written complaint.

Invitations to staff to race discrimination investigation

59. Members of staff who had race discrimination allegations made against them personally were invited to interviews by way of letter on 2 July. This letter was handed to them personally by Mrs Stephenson. The allegation concerning each individual member of staff was extracted from the whole complaint in this letter.

60. Once these allegations became known, those accused were very upset. Ms Jones, a Sister on Acorn ward, came across Mrs Roberts and Ms Barker at work in tears talking about the complaints of racism against them. She heard, from this conversation, that the Claimant had been 'banned' from working shifts at Whipps Cross.

Ms Jones' Comments to Ms Akram

61. Ms Jones had a good relationship with the Claimant for over 10 years. She was involved with supervising her as a student and then as a nurse. Both agree they got on well.

62. After hearing that the Claimant was banned from Whipps Cross in the conversation with Mrs Roberts, Ms Jones assumed the Claimant would have been warned beforehand. She said both senior and junior staff were talking about the allegations.

63. We accept Ms Jones' that she had a conversation in mid-July/early August with Ms Akram, a Health Care Support worker on the ward, who had just been interviewed by Ms Cooper-James. Ms Akram wanted to know 'What is it with Jay?', Ms Jones told her about the complaints of racism and that she was banned from working 'with us'. Ms Akram remarked that it was out of character. She went on to wonder whether it was to do with the Claimant having had a miscarriage. Ms Jones, who had not known this, recalls sympathising and saying that 'maybe' that was why.

64. Ms Jones denies, and we accept, that she said anything about a mental breakdown or that the Claimant was banned from multiple hospitals. This was a private conversation in which Ms Jones echoed Ms Akram's speculation in a sympathetic way.

Mrs Kara's Investigation and Outcome

65. On 24 June, Mrs Stephenson wrote to Mrs Kara with the terms of her investigation. Mrs Kara was a Recruitment Business Manager in the HR department and therefore independent of those involved. The first draft terms included not only the misconduct allegation against the Claimant but also the Claimant's race discrimination allegations. Mrs Kara was clear that she had only been asked to undertake a misconduct investigation so she requested the terms to be corrected. She received accurate terms of investigation from Mrs Stephenson on 10 July 2019.

66. On 15 July 2019 the Claimant wrote to the Trust about the delay and asking about the progress of the investigation. The Trust flowchart she had been given stated that its aim was that the whole process should conclude in 28 days (181).

67. Mrs Stephenson gave a number of reasons for the delay: that she had a busy day job and time went on and she needed to take advice from HR, but we have concluded that those reasons accounted for no more than a week because drafting these terms was part of her day job; this was a simple allegation to state; involving no more than one piece of advice from HR. Mrs Stephenson took about 2 weeks longer to just draft the terms of reference than the whole process was supposed to take.

68. Mrs Kara investigated the allegation of misconduct against the Claimant. She reviewed the letter dated 27 May, the incident form prepared by Mrs Roberts and the Claimant's statement in response. On 16 July she invited the Claimant to an interview on 24 July 2019 (272). The Claimant was informed that Mrs Kara was:

> *To investigate whether Jeyrand Jand refused a reasonable management request to refrain from talking about issues that made other staff feel uncomfortable and caused them distress / not wanting to work in the department. Specifically, that she*

received clear guidance on the 27th May 2019 in the form of a letter that outlined the standards required whilst working in the ward and method of formally raising complaints. Please produce a report that sets out the timeline of events, what guidance and advice was given to Jeyrand and detail the events that lead to her exclusion from working on Acorn Ward.

69. At the outset of her investigation Mrs Kara knew that the Claimant had not received the letter referred to until the day of her restriction and, so, the 'clear guidance', as she understood it, was not the letter itself, but a reference to what Mrs Roberts had told the Claimant on 27 May. She acknowledges it is unfortunate that the terms of reference still referred to the letter as being the instruction.

70. During her interview Mrs Kara could not tell the Claimant what she was supposed to have said that was in breach of Mrs Robert's instruction and when and to whom she was supposed to have said it. The Claimant could not therefore provide a detailed response, for example by referring to the days she worked and with whom she had worked. Mrs Kara told the Claimant that she would check this detail with Mrs Roberts and come back to her. Instead, having spoken to Mrs Roberts and investigated further, Mrs Kara concluded there was no case to answer and therefore found no need to ask the Claimant any further questions.

71. From 24 July and her report on 4 October 2019, Mrs Kara:

71.1. Interviewed witnesses from 29 July to 26 September 2020.

71.2. on 31 July spoke to Mrs Roberts. She said members of staff had spoken to her but could give no names in particular except to say it was mainly Ms Barker (373).

71.3. received the Ms Barker email;

71.4. on 2-20 August was on leave;

71.5. on 11 August the Claimant asked her to interview two members of staff.

71.6. on 30 August Mrs Kara wrote to the 2 witnesses inviting them to meetings on 9 September but rearranged to 18 September and 26 September for their convenience.

72. After looking at all the evidence, Mrs Kara concluded that there was no case to answer. Her reasons were:

As to the allegation that Ms Panahian-Jand had then failed to follow Mrs Roberts' instructions in this regard, and made further inappropriate comments in the ward or on the nurse's station, my view was that there was insufficient evidence to uphold this allegation. Whilst Ms Barker said that she felt that Ms Panahian-Jand was making comments about her on the night shift of 27 May 2019, the comments were not made directly to her but rather to Ms Jarrett. Ms Jarrett and Ms Shittu both said that they

had conversations with Ms Panahian-Jand at the night-shifts on 27 May 2019 but these were general conversations and nothing said was inappropriate.

73. Mrs Kara also recommended in her report the need for managers to address issues as they arise.

74. On about 4 October 2019 she sent the draft report to Mr Steward, then Head of Human Resources. Ms Goldsmith was by now the commissioning manager.

Mrs Cooper-James' Investigation

75. In her written complaint the Claimant alleged that she had observed bank nurses Miss Hook and Ms Elliott bullying other members of staff. She made specific allegations against each of them that they had made racially abusive remarks. These two bank nurses were not restricted.

76. Mrs Stephenson considered restriction in those cases but told us she did not do so because the allegations against them would be investigated whereas the allegation causing the Claimant's restriction was that she was continuing to do something causing real anxiety. We do not accept that this can have been her only reason because there is no logic to it: the allegations of bullying against the other bank staff were ongoing, too.

77. The Claimant's race discrimination complaint was investigated by Mrs Cooper-James, Head of Investigations Services at London Audit, which is hosted by the Trust and therefore to some extent independent of it.

78. Mrs Stephenson formulated the terms of reference. She did not include the added complaint about the car park incident. We conclude this is because she was likely using the original written complaint rather than the one that had been amended by the Claimant. We think this likely to have been an error in communication by HR.

79. Mrs Stephenson asked Mr Steward whether a 6-8 week estimate was reasonable for the investigation. He answered:

> *If a full-time investigator is on this, I think it is feasible to do this. Many of the points are at this stage, statements without evidence and we would need to clarify who witnessed them* ***. I have added in complaints from patients and staff because if there are none, the allegations, begin to fall apart.*** *(our emphasis)*

80. The Claimant suggests this shows Mr Steward's wish to see the allegations fall apart. Mr Steward said he was simply adding in that complaints should be looked at as they would provide independent evidence.

81. While it may have been relevant to look for complaints, that there had been none in the past, does not necessarily suggest that this complaint would be without merit. We therefore agree with the Claimant that this wording does suggest a hope that the complaint would fall apart.

82. Mrs Cooper-James' first report is dated 9 September 2019. But, during the course of her investigation the Claimant raised further allegations and her

second report on these allegations was not concluded until 17 January 2020.

83. Mrs Cooper-James did find evidence to support the three race discrimination allegations first raised informally with Mrs Roberts on 11 May 2019 (allocation; groups on the ward, and bullying). Her conclusions are at pages 374, 376, 376-7 of the Hearing Bundle. Upon been taken to those conclusions, Mr Steward accepted, in relation to those matters, it could not fairly be said that there was '*no real evidence of discrimination*', as he had told us in his written statement. This phrase is identical in the witness statements of Mr Steward and Ms Goldsmith and is patently incorrect in relation to these three allegations.

84. Mr Steward drafted a letter for Ms Goldsmith, which summarised Mrs Cooper-James' findings in a letter to the Claimant on 4 February 2020 (498). We have only looked at those 3 allegations that the Claimant raised initially, but the summary is not fair as Mr Steward accepted in his oral evidence:

84.1. Allegation 6: 'If there is evidence of racial discrimination of staff members particularly those from non-white backgrounds'. Mr Steward's summary says that '*No evidence was found though divisions were expressed and diversity and inclusion training was recommended*.' Whereas Mrs Cooper-James reported '*Evidence has been found of racial discrimination against staff. Non-White staff speak of a definite divide within the Ward according to race. It is indicative that all but one of the BME staff interviewed expressed that a divide was present. However, all white staff expressed there was no such divide.*'

84.2. Allegation 23: 'If patient allocation is equitable across the Team on duty regardless of race or colour.' Mr Steward writes '*In order that there is clarity around the allocation of patients, it is recommended that all staff are involved (where practicable) in the allocation of patients*.' Whereas Mrs Cooper-James plainly concludes there is evidence to substantiate the allegation because all but one of the BME staff stated they felt they were given the heavier workload (376-377).

84.3. Allegation 26: in relation to staff bullying. Mr Steward writes: 'If staff believe there is bullying on Acorn Ward. Other members of staff should be invited to make complaints if they wish to do so.' Whereas Mrs Cooper-James stated in terms that evidence had been found to substantiate that staff believed there was bullying on the ward.

85. Why have both of these witnesses told the Tribunal there was no real evidence of discrimination, when on any fair reading of Mrs Cooper-James' report there was some? We are astonished by this. The Trust has sought to hide in its summary of the report, evidence of race discrimination found in the investigation. Mr Steward plainly did not want these findings aired and it supports us in our conclusion that he hoped the allegations would fail.

86. Where allegations concerned what people had said, Mrs Cooper-James' approach was to look for an independent witness. If there was no independent witness, she did not uphold the allegation. That is, of course, very different from deciding the allegation was false or that the Claimant was lying about it. It is merely to prefer the denial to the accusation where there is no independent evidence. (There is only one instance in her report where, because the person who told the Claimant the information denied doing so, she thought that particular complaint was 'potentially vexatious.')

87. We are very concerned that Mrs Roberts in her evidence understood the allegations had not been upheld. In relation to all three verbal complaints made to her on 11 May, Mrs Cooper-James found cause for concern.

After Investigations

88. In early October 2019, the Claimant sought an update and Mr Steward confirmed to her that a draft report had been received from Mrs Kara on 4 October.

89. After that there was a great deal more delay. Mr Steward was asked why it was necessary to keep considering the restriction. He referred to all the circumstances including an environment the Claimant had said was unsafe (but this is not what she said at the December meeting as we record below) and that she had complained against Mrs Stephenson and Mrs Roberts and referred to circumstances where others were upset by having race discrimination allegations and that that investigation had to be concluded. He had also advised of the necessity of a debrief meeting with the Claimant and other members of staff with a view to returning to work.

90. According to the Trust's procedures, we find that what should have happened after Mrs Kara's report was a decision that there was no case to answer and that the restriction would be lifted. There was no need for a meeting with Ms Goldsmith for this purpose:

    90.1. Mrs Kara's outcome of no case to answer was unambiguous.

    90.2. The decision should have been swift because there had already been a prolonged period of restriction and the procedure had been delayed far beyond the aimed-for timescale of 28 days.

    90.3. When Ms Goldsmith did finally meet the Claimant on 18 December 2019, she was very clear in her view, having read the report, that the suspension should never have happened.

    90.4. Mr Steward referred to the safety of the Claimant as an issue because of her complaint. If at that point it was felt she was unsafe, then it was for the Trust to consider suspending/restricting the individuals complained about. It was not within their procedures to suspend a complainant. In December when finally asked about this the Claimant did not have safety concerns.

90.5. As Mr Steward identified, concerns about ongoing relationships could have been dealt with by an initial ward debrief and induction plan. This could and should have started very soon after Mrs Kara's report.

90.6. Overall we consider would have taken no more than two weeks to inform the Claimant of her ability to return to work and the date for a ward debrief after Mrs Kara's report.

91. What did happen was a great deal more delay.

92. On 11 October 2019 (a week later) Mr Steward sent the report to Ms Goldsmith under cover of an email (457):

> *… My reading of the report is that this is not upheld and that there is no barrier to this person returning to the ward except....... **She has raised a complaint about bullying and harassment and that report is still to be completed**. My advice is that : have a read of the report and see if you conclude with what I have found. You might not and require additional information. If you reach the same point. We should invite [Claimant and TU rep] in to discuss how and when she might return **given the outstanding allegations she has made**. There is also some handling considerations here with Ghisl and Heather, who made the decision to suspend.* (our emphasis)

93. The Claimant chased on 23 October and 28 October. Internally Mr Steward wrote to Ms Goldsmith asking her if she had had a chance to look so that '*we can discuss bringing this woman back to work*' (427). Ms Goldsmith had been delayed by 3 weeks by an unannounced CQC inspection. The trade union representative, Mr Bickerstaffe, asked for an urgent meeting on 30 October. On 31 October Ms Goldsmith explained the delay and offered to meet.

94. Mr Bickerstaffe asserted that, if there was no case to answer, then the report should just be sent to Claimant. Despite the Claimant's many, polite requests, Mrs Kara's report was not provided to her until she made a subject access request for it.

95. Finally, the Claimant, Ms Goldsmith and Mr Bickerstaffe met on 18 December 2019. This was two and a half months after Mrs Kara's report and six and a half months after the restriction. The minutes of that meeting record the Claimant making the point that a 6-month restriction made it look as if she had done something wrong and it damaged her reputation. Ms Goldsmith was clear in her findings:

> *I have read the report about 5 times it looks as though you have been suspended from working in that place on corridor gossip, which I don't think is appropriate …*
>
> *There are a number of things that I have picked out of this report in terms of escalation of concerns, but you weren't the only one that was raising concerns and it doesn't appear that this has been addressed and this will be in my formal feedback. I don't think you should have been prevented from working in that ward*

on those grounds.

96. The Claimant referred to the grievance investigation, which was still ongoing. Ms Goldsmith confirmed she was the commissioning manager on that, but she said:

> *We have a conclusion on this one, which I am sure you will be relieved. I am going to say that the suspension for you working on Acorn should be lifted you should be able to work on there, in my opinion as an independent person looking at this …*

97. Ms Goldsmith checked with the Claimant that it was alright to lift the restriction while her other grievance was ongoing and the Claimant agreed. There was then further discussion about the grievance and the likelihood that a few members of staff would have difficulty with the Claimant. Ms Goldsmith said:

> *I will speak to [Mr Steward] and we will have to put comprehensive plans into place for when you return. When I say I am going to lift the ban of you doing bank you are going to have to give me a little more time to meet with the staff members and inform them of what is happening. We will have ground rules that people are not to contact you and ask you of any issues about your personal life. I will meet with you and Heather and then have a ward meet to set the scene. If when you do come back and you anticipate that there may be issues then a process will be in place in terms of escalation.*

She confirmed that the Claimant could expected to be reinstated in the new year.

98. In 2020 the Claimant has been promised on a number of occasions that she would be returned to work but this has not happened. The key events are as follows.

99. On 2 January 2020 Ms Goldsmith updated the Claimant that she had not yet met with Mrs Stephenson because she had been on holiday. After being chased for an update on 15 January 2020 Ms Goldsmith informed the Claimant that she was meeting Mrs Stephenson ‘to formulate plans for your return to work here’.

100. On 22 January 2020 Mr Steward wrote to the Claimant to inform her that:

> *We have informed the management team [i.e. Mrs Stephenson & Roberts see Goldsmith WS] of Acorn Ward that you will be returning to work there and shifts will be made available to you to see and book into*. We will determine an effective date after we have met with you to discuss your complaints about those individuals so the nature of the return is clear to all parties and we have a reinduction plan in place.

He again clear linked the return to the grievance.

101. A meeting set for the 3 February 2020 but was missed by HR without giving reasons.

102. On 4 February 2020 the Claimant was sent the summary of Mrs Cooper-James report (see above).

103. Mrs Roberts told us she had no involvement in decision to continue suspension but agrees with it. But Mr Steward and Ms Goldsmith met with Mrs Roberts. As Ms Goldsmith outlines in her statement, Mrs Roberts was concerned about the Claimant's return to the ward because of the race discrimination complaint and the upset it had caused. Initially in her evidence Mrs Roberts said a 'high majority' of staff on the ward were upset and did not want the Claimant to return and some were suggesting they would not work with her. But in her oral evidence she withdrew this and accepted that it was only those people complained against who did not want the Claimant back. She referred to a meeting with ward staff that Mr Steward had attended and the threat of a Trade Union grievance. But that meeting only involved 4 members of staff and a Trade Union representative. Despite Mrs Roberts describing herself as advocate for ward staff, somewhat surprisingly she could not comment on whether those staff who thought there was race discrimination on the ward (as per Mrs Cooper-James' report) did not want the Claimant back. We are not satisfied that there are any more than 4 members of staff on a ward of 60 who are concerned about the Claimant's return. They have formed a loud minority. There has been no Trade Union grievance. Plainly bridges will have to be rebuilt with some members of staff but in our view this issue has been told to us from the point of view only of the accused rather than the majority on the ward. We commend Ms Jones for the attitude she displayed when faced with Mrs Roberts' and Ms Barker's tears: the process should take its course.

104. From then on Mr Steward was responsible. He explained the need for a debrief and reinduction. In our judgment this could have taken place in October, at the latest November. He then referred to the Claimant's appeal of her grievance and that all such cases were now stood down until the summer 2021 because of the pressures of coronavirus on the service. But this concerns the Claimant's grievance and is not relevant to the restriction placed on her by a misconduct investigation that has concluded. Mr Steward accepted he would not have considered a restriction of a bank member of staff bringing a race discrimination grievance.

Other Matters

105. Mrs Roberts did not say anything on the ward about the Claimant having had a breakdown. We have heard no direct evidence that Ms Barker or Ms Davies said those things.

106. Managers do not appear to have been trained in or absorbed the key principles on victimisation in their equality training. All managers referred to equalities training in their written statements but said the following in their oral evidence when asked whether it covered victimisation:

    106.1. Mrs Stephenson: 'I couldn't tell you what it covered'.

    106.2. Mrs Roberts: 'It is all online learning … I had separate training about complaints. I don't know whether it was covered more than that.'

106.3. Mr Steward, now Head of People: ‘Only in a superficial way’.

Remedy Evidence

107. We set out our findings of fact in relation to injury to feelings below because it makes more sense to do so after our determination on liability.

108. We accept that the Claimant could not work elsewhere at Whipps Cross for the reasons we have already given. In any event, it was reasonable for her to consider that, on the information provided to her she was restricted from Whipps Cross Hospital, because the letter referred to her ability to work on other ‘sites’, which she understood reasonably to mean other hospitals.

109. At first, the Claimant expected the restriction on work to last no more than 28 days, as the Bank procedure flowchart provided to her suggested; therefore, she did not look for alternative bank shifts in this period because she expected to be back on the ward relatively quickly. There is also a time lag in booking shifts: it was not the case for her kind of work that she could immediately find work elsewhere once she started looking. Once she appreciated that the restriction was likely to last, she started looking for alternative work in July and, because of that time lag, booked on shifts beginning on 13 August 2019.

110. The Claimant worked 129 bank nursing shifts elsewhere before she found full time work that she could do from home that fully mitigated her loss.

111. For those bank shifts elsewhere, the Claimant had a much longer journey to work. This varied depending on the shift but was 45 minutes, sometimes more, each way. It cost at least £3.00 per shift in extra travel expenses. Whipps Cross Hospital was a short journey from her home involving no cost.

112. The Claimant also claims legal costs but this is not something the Tribunal assesses as compensation.

Submissions

113. The parties both provided succinct and clear written submissions, which we read before asking questions about their respective cases.

114. In oral submissions, Mr Sudra for the Trust:

114.1. conceded that the Claimant had done protected acts by raising verbally her concerns with Mrs Roberts about race discrimination in allocation, the division of staff into cliques or racial groups;

114.2. acknowledged that we could not only look at the initial decision to restrict the Claimant but also the continuation of that restriction after it had been reported that there was no case to answer;

114.3. argued that, on causation, the protected act had to be the ‘principal or main reason’ for the alleged detriment. He submitted that it was insufficient for the protected act to be a material factor. I queried this and gave him an opportunity to make further submissions in writing on this question of mixed factors. In those written submissions he maintained that we should look for the

'core reason' (Khan, see below). He did not make further submissions on whether the Tribunal should look for the 'principal' reason;

114.4. sought to distinguish between the upset caused by the Claimant's allegations of race discrimination and the allegations themselves. He acknowledged that upset is often caused by such allegations, and that there can sometimes be a 'cigarette paper' between the two but that such upset was separable from the protected acts themselves;

114.5. if we considered a recommendation, we should take into account the evidence of a breakdown in relationships with some members of staff on the ward.

115. In her written submissions the Claimant sought 'reinstatement'. I explained that our power (under the EA) was confined to making recommendations. She confirmed that she sought a recommendation that the restriction on her working at Acorn Ward be lifted. She also asked us to consider the ACAS Code and in oral submissions highlighted in particular the delay in the procedure and her contention that she had not been informed of the detail of the allegations against her.

Legal Principles

116. Parliament has decided that those who make complaints of discrimination should not be treated badly for doing so. The policy behind the victimisation provisions is to ensure that workers are not deterred from bringing complaints.

117. Section 39 of the EA provides that:

(3) An employer (A) must not victimise a person (B) …(c) by not offering B employment.

(4) An employer (A) must not victimise an employee of A's (B) - … (d) by subjecting B to any other detriment.

118. 'Employer', 'employee' and 'employment' under the EA are interpreted broadly. There is no dispute in this case that, as a bank worker, the Claimant was employed by the Trust for the purposes of the EA.

119. Section 27 of the EA provides:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because

(a) he 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… (d) making an allegation (whether or not express) that A or another person has contravened this Act.

120. Thus, the definition of a 'protected act' is broad. It is any allegation, even if not made explicitly, that a person has contravened the Equality Act. The EA prohibits discrimination because of race and because of religion, among other protected characteristics.

121. Furthermore, and this is a part of the EA that is sometimes poorly understood, the prohibition against victimisation applies even if the discrimination allegation is inaccurate, as long as it was made in good faith. Here, there is no argument that the Claimant made her complaints in bad faith.

122. To find a 'detriment' (under section 27 and 39 EA and section 47B of the ERA) a Tribunal '*must find that, by reason of the act or acts complained of, a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work'* Shamoon v Chief Constable of the Royal Ulster Constabulary (Northern Ireland) [2003] UKHL 11 (para 34). An unjustified sense of grievance cannot amount to 'detriment' but nor is it necessary to demonstrate some physical or economic consequence.

123. What about the link between the protected act and the detriment: how do we interpret the word 'because'? The law requires more than a 'but for' link: it is not enough to say that, if the Claimant had not made the complaints, then the bad treatment would not have happened.

124. The Tribunal has to consider what was in the mind of the decision maker, consciously or subconsciously. Mr Sudra relies on Chief Constable of West Yorkshire v Khan [2001] ICR 1065 HL, to contend that we must find the 'core reason' or the 'real reason' for the act or omission. And this is correct. But it is incorrect to submit that the reason must be the principal reason. This is not what the authorities tell us. The Equality and Human Rights Commission Code at para 9.10 also makes it clear that the protected act need not be the only reason for the decision.

125. Where there are mixed factors for the decision, the protected act should be a significant factor, in the sense of being material. But it does not have to be the main factor, Underhill LJ (then President of the EAT) summarised the position in Martin v Devonshires Solicitors [2011] ICR 352, UKEAT/0086/10/DA

> *We were satisfied that the correct legal test to apply is not a simple "but for" test. Any misunderstanding on this point, caused by the framing of certain passages in the speeches in James, has long since been laid to rest by later decisions including Nagarajan and Khan . What is required is a consideration of the substantive or operative reasons for the actions of the alleged victimiser, although it is trite law that the protected act does not have to be the sole or main reason. It is also plainly correct that there is no "reasonable and honest" employer defence; just as it is well-established that the fact that an employer may have had some laudable or well-meaning motive for its actions cannot justify direct discrimination on proscribed grounds.*

126. Employers can argue that it was not the protected act itself but some other feature of it that was the reason for their action. If so, the Tribunal should ask whether that feature is genuinely separable from the protected act itself. It is worth quoting Underhill P in Martin again:

> *In our view there will in principle be cases where an employer has dismissed an employee (or subjected him to some other detriment) in response to the doing of a protected act (say, a complaint of discrimination) but where he can, as a matter of common sense and common justice, say that the reason for the dismissal was not the complaint as such but* ***some feature of it which can properly be treated as separable****. The most straightforward example is where the reason relied on is the* manner *of the complaint. Take the case of an employee who makes, in good faith, a complaint of discrimination but couches it in terms of violent racial abuse of the manager alleged to be responsible; or who accompanies a genuine complaint with threats of violence; or who insists on making it by ringing the Managing Director at home at 3 o'clock in the morning. In such cases it is neither artificial nor contrary to the policy of the anti-victimisation provisions for the employer to say "I am taking action against you not because you have complained of discrimination but because of the way in which you did it". Indeed it would be extraordinary if those provisions gave employees absolute immunity in respect of anything said or done in the context of a protected complaint. …Of course such a line of argument is capable of abuse. Employees who bring complaints often do so in ways that are, viewed objectively, unreasonable. It would certainly be contrary to the policy of the anti-victimisation provisions if employers were able to take steps against employees simply because in making a complaint they had say, used intemperate language or made inaccurate statements. An employer who purports to object to "ordinary" unreasonable behaviour of that kind should be treated as objecting to the complaint itself, and* ***we would expect tribunals to be slow to recognise a distinction between the complaint and the way it is made save in clear cases****. But the fact that the distinction may be illegitimately advanced made in some cases does not mean that it is wrong in principle.'* (our emphasis)

127. The Claimant makes the important point, too, that a race discrimination allegation is not necessarily an allegation that someone was motivated by race. Race discrimination can occur entirely unconsciously sometimes referred to as unwittingly by the operation of unconscious biases or racial stereotyping.

128. The employer is liable for the acts/omissions of its employees made in the course of their employment. Although the Respondent did not make submissions that the alleged conduct of Miss Hook was not in the course of her employment, we have nevertheless considered the legal test. The 'close connection' test was confirmed in Mohamud v WM Morrison [2016] UKSC 11, paras 44-45. The court must ask whether there was a sufficient connection between the position in which she was employed and the wrongful conduct to make it right for the employer to be held liable. One way of approaching this

question is to consider whether the employer would seek to regulate the employee's conduct by its disciplinary procedure.

Protected Disclosures (Whistle-blowing)

129. Part VIA of the ERA sets out the circumstances in which a worker makes a '*protected disclosure'*. So far as is relevant to this case, section 43B(1) provides that a qualifying disclosure '*means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following— …(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject*.'

130. In Chesterton Global Ltd and anor v Nurmohamed [2017] IRLR 837 the Court of Appeal held that a worker must have an objectively reasonable belief that the disclosure is in the public interest. The question of whether a disclosure is in the public interest depends on the character of the interest served by it rather than simply on the number of people sharing that interest.

131. The question is not whether the disclosure is an allegation but, following the statutory language, whether it discloses 'information'.

132. The worker making a protected disclosure is protected in two ways under the Act.

133. First, section 47B(1) 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.'* (our emphasis)

134. The meaning of 'on the ground' here is the same as the meaning of 'because in section 27 of the EA.

135. If the Claimant is subject to a detriment by another employee of the employer on the ground that she has made a protected disclosure then that detriment is treated as also done by the worker's employer immaterial of knowledge, see sections 47B(1A-1C). (No defence under section 47B(1D) has been put forward here.)

136. In detriment cases, a complaint may be presented to the Tribunal under section 48 and the burden of proof is on the employer (section 48(2)). Once the Claimant proves a protected disclosure and detrimental treatment, then the employer must show that the detrimental act (or deliberate failure) was not on the ground that the employee had done the protected act. The question involves considering the mental processes (conscious or unconscious) of the decision-maker, in the same way as under the victimisation provisions.

137. Causation in detriment cases was explored by the Court of Appeal in Fecitt v NHS Manchester [2012] ICR 372. Elias LJ considered that '*section 47B will be infringed if the protected disclosure* ***materially influences (in the sense of being more than a trivial influence)*** *the employer's treatment of the whistle-blower'* (our emphasis).

138. The Claimant does not have to show that the employer believed the disclosure was protected, only that the disclosure was the reason or principal reason, Beatt v Croydon Health Services NHS Trust 2017 ICR 1240 CA.

Remedy Principles

139. Under section 124 EA we may make a declaration as to the rights of the complainant; order the Trust to pay compensation; and make an appropriate recommendation.

140. Section124(3) provides that an appropriate recommendation is '*a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate.'*

141. We have the power to award compensation for financial loss attributable to the detriment. The principles to apply are to ask what would have occurred absent the discrimination.

142. The Claimant must mitigate her loss i.e. have taken reasonable steps in all the circumstances to stop or reduce her loss.

143. The award for injury to feelings must compensate the Claimant and not punish the Trust. It must relate only to injury to feelings for the unlawful discrimination we have found, not in respect of the other matters complained about. We must beware not to make an award that is too low, which would diminish respect for the policy underlying anti-discrimination legislation, but we must also be aware that excessive awards can have the same effect. The same principles apply in a protected disclosure detriment case.

144. The bandings set out in Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102 CA are a useful starting point in assessing the level of injured feelings. We remind ourselves that Vento referred to the *acts* of discrimination in setting the bands and that our concern is to compensate for the *impact* of those acts upon the Claimant. We have regard to the seriousness of the unlawful treatment and its duration, but only insofar as this helps us to judge its impact upon the Claimant's feelings. We take into account the period of time over which the Claimant has suffered or is likely to continue to suffer injured feelings.

145. The Vento bands refer to injury to feelings for less serious cases (the lower band), more serious cases (the middle band) and the most serious of cases (the upper band). We have applied the Presidential Guidance (updated 23 March 2018) to uplift the original Vento figures to account both for inflation and the decision in Simmons v Castle [2012] EWCA Civ 879. The relevant middle band is £8,800- £25,700.

146. Where there are multiple acts of discrimination or detriment, then it is usual to make a global award of injury to feelings in order to avoid double-counting.

147. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 applies to both the Equality Act claim and the claim of detriment under section 48 ERA. Section 207A(2) provides:

‘*if … it appears to the Tribunal that*

(a) the claim to which the proceedings related concerns a matter to which a relevant code applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.’

148. We must be careful to consider each step in this test. It is also clear from this section that, if its requirements are met and we exercise our discretion to make the ‘ACAS uplift’, then we can consider whether to apply it to any award we make, not just the award for financial loss.

149. The parties agree that the ACAS Code of Practice on Discipline and Grievance (‘the ACAS Code)’ applied to the disciplinary process the Claimant faced and to the complaint she raised about race discrimination, which was a grievance.

150. So far as relevant, the ACAS Code provides:

150.1. paragraph 4 ‘*whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly. There are a number of elements to this:*

- *…employers … should raise and deal with issues **promptly** and should not unreasonably delay meetings, decisions or confirmation of those decisions*

- *Employers …should act **consistently**.*

150.2. paragraph 32: *If it is not possible to resolve a grievance informally employees should raise the matter formally ....*

151. Under the Employment Tribunal (Interest on Awards in Discrimination Cases) Regulations 1996, SI 1996/2803 as amended, the Tribunal must consider whether to award interest on past loss of earnings and injury to feelings.

151.1. For past financial loss the interest period begins on the mid-point date (from the act of discrimination to the day of calculation) and ends on the day of calculation.

151.2. For injury to feelings the interest period begins on the date of the act of discrimination and ends on the day the amount of interest

is calculated.

151.3. Here the calculation date is 5 February 2021. The interest rate is set by statute at 8%.

Application of Facts and Law to Issues

Victimisation Claims

Protected Acts

152. We find, which is agreed, that on 11 May 2019 the Claimant did a protected act by complaining of race discrimination in allocation and divisions on the ward and bullying to Mrs Roberts. It is plain that these verbal concerns are protected acts under section 27 because they are allegations of a contravention of the EA by the Trust or its employees.

153. In their later discussions on 13 May and 27 May the Claimant did further protected acts by referring to the allegations again verbally in discussions with Mrs Roberts.

154. The Claimant's written complaint of 31 May was also a protected act, because it was a complaint of race discrimination. (We note that it cannot be relevant to the decision to restrict because it was made later.)

Issues 17 and 18: Section 39(3) and/or Detriment

155. We deal with the question of detriment/section 39(3)(a) in relation to each issue that we have found as a fact occurred.

Issue 17.1 Restriction

156. We consider that by restricting her ability to book shifts on Acorn ward (referred to as a suspension in the list of issues): the Trust both subject the Claimant to a detriment and, contrary to section 39(3)(a) treated her less favourably than other bank staff by not making available to her offers of that work. But for the restriction she would have been offered work. This is not a case where the Trust has alleged work would not have been available in any event. It was a detriment to be restricted because the Claimant lost the promise of definite work on the shifts she had already booked with the ward in June and July 2019; and had lost the opportunity of booking regular work on the ward that was the most convenient to her, did not cost her to travel to and was most familiar to her because of the 10 years she had worked there already. All of these factors represented a disadvantage to her and therefore she was subject to a detriment.

Issue 17.2 Failure to Investigate or Restrict Miss Hook

157. The Trust did not investigate the incident with Miss Hook even though the Claimant reported it to HR promptly and was told it would be reported. That, too, was a disadvantage because the Claimant could reasonably view it to be the Trust not taking seriously a complaint of hostile behaviour towards a whistle-blower/someone who complained of race discrimination. This was contrary to the Trust's whistle-blowing policy,

which made it clear employees should be able to challenge inappropriate behaviour without fear of reprisal.

158. So far as the failure to restrict Ms Hook and Ms Elliott, both bank workers accused of particular acts of discrimination within the Claimant's grievance, we do not regard this to be a detriment to the Claimant. She was not disadvantaged in this failure. But it is relevant evidence when we come to consider the reasons for her restriction (see below).

Issue 17.3 Alleged Defamatory/Slanderous comments

159. In our judgment, what we have found Ms Jones to have said in her conversation with Ms Akram did not damage or risk damaging the Claimant's reputation. This is because she was agreeing with Ms Akram's sympathetic speculation, the conversation was private and we have no evidence that it was shared among a wider staff group. Ms Jones did not state the Claimant was banned from multiple hospitals. Nor did she refer to the Claimant having had a breakdown.

160. We have not made findings that any other member of staff made comments likely to damage the Claimant's reputation.

Issues 17.4 and 17.4 Whether Informed of Allegations and given the opportunity to respond.

161. The Claimant was informed, in general terms, of the allegation against her in the letter of 24 July 2019 inviting her to the interview with Mrs Kara. She was given the opportunity to respond to the general allegations and was able to do so to some extent, including identifying relevant witnesses.

162. It is right that the Claimant was not informed of the details of the allegations and Mrs Kara promised to do so. But she did not do this is for the good reason that she had decided there was no case to answer and therefore there was no need to do so. We conclude that the failure of Mrs Kara to come back to the Claimant with those details was not a detriment here because it did not place the Claimant at any disadvantage. This is because there was no longer any case to answer. There was nothing more for Mrs Kara to ask, her having concluded the allegations against the Claimant should be rejected.

Issue 17.6 Delay in Informing of Outcome

163. In our judgment the Trust subject the Claimant to a detriment by the delay in drafting the terms of reference. Six weeks was a wholly unreasonable amount of time to take to write to the investigating officer with simple terms of the investigation. A week should have sufficed even for a busy manager. The explanations for the delay do not adequately explain it.

164. Mrs Kara's report took longer than the procedure but has been fully explained by the delays in speaking to witnesses caused in the main by holidays. Mrs Kara reached her conclusions quickly after the last witness was spoken to.

165. The delay in informing the Claimant of the outcome after 4 October 2020 was wholly unreasonable. It was 2.5 months after the report. The Claimant had to seek a subject access request to obtain it. We do not consider a meeting was necessary at all. No good reason has been provided to us for the failure of the Trust in providing the Claimant with Mrs Kara's report.

166. These two unreasonable delays subject the Claimant to a detriment because she was disadvantaged by the delay because of the continuing restriction in her ability to obtain shifts on the ward most familiar to her, most convenient to her home and where she had been working regularly. Furthermore she had allegations of misconduct hanging over her and we agree that it was reasonable for her to consider that the longer the restriction the guiltier she appeared. These delays amounted to more than half the time the process took to conclude.

Issue 17.7 Miss Hook

167. We have found that the Claimant's path was blocked twice in the hospital car park by Miss Hook, a bank nurse. This was not a misunderstanding or misinterpretation of an innocent event. We consider it was reasonable for the Claimant to regard Miss Hook's conduct as hostile. We have concluded, although a one-off and short-lived event, it did subject the Claimant to a detriment. She can have reasonably felt disadvantaged at work by a hostile act from a colleague with whom she was formerly on good terms.

168. We have concluded that Miss Hook was acting in the course of her employment because the event was on hospital grounds, when Miss Hook was on her way into work. It was therefore sufficiently connected with work.

Issue 18: Were those detriments we have found because of the protected acts?

169. We have to ask what was in the mind of Mrs Roberts when she made the decision to restrict and Mrs Stephenson when she confirmed it. We remind ourselves that we must look for the reason. If there is a mix of factors we must look for the material factors. A factor can be material even if it is not the principal factor. We do not apply a 'but for' or 'trigger' test.

170. We have taken into account the following factors in reaching a decision:

    170.1. On the evidence we have heard about the Trust's approach, this allegation was not serious enough to warrant restriction. Mrs Roberts' example of the nurse pushing the parent is far worse. Patient safety was not compromised here nor colleague safety. Ms Goldsmith's view was that the Claimant should never have been restricted.

    170.2. Restrictions were rare at the Trust.

    170.3. The Claimant was given no warning that she would be restricted.

170.4. There was insufficient evidence for Mrs Roberts to allege that the Claimant had continued 'the conversations'. We agree with Ms Goldsmith she was suspended on the basis of nothing more than corridor gossip. On the careful findings we have made on the totality of Mrs Roberts' evidence, after hearing her oral evidence, we consider she merged in her mind the fact that conversations were taking place on the ward, and the fact that some staff members were upset about the allegations, with the idea that it must have been the Claimant who was continuing those conversations. This is because the Claimant had made the allegations. Mrs Roberts only had Ms Barker's allegation that the Claimant had continued to talk, but once Mrs Roberts had read her email, she would have seen that this was not talk about the allocation issue or the racial division issue and no discussion about the bullying of particular staff.

170.5. We do not accept that there was 'turmoil' or 'disruption' as the Trust has alleged. This allegation has been exaggerated.

170.6. Two other bank members of staff accused of bullying on grounds of race were not restricted by Mrs Stephenson. Her logic for doing so does not hold up given that the allegations against them were continuing, just as she suggested those against the Claimant were. The difference between them was that the Claimant had made a race discrimination complaint.

170.7. Mrs Roberts was plainly herself uncomfortable at hearing the allegations. She had not wished to deal with them in an informal way, contrary to both the Whistle-blowing procedure and the Dignity at Work procedure, and indeed had straightaway rejected the correctness of the allegation about allocation. We have concluded that Mrs Roberts saw them as a reflection on her management.

170.8. Likewise Mrs Stephenson had advised that there should be a formal complaint, again not allowing for the possibility of informal resolution contrary to the procedures.

171. So thin was the evidence of any breach of Mrs Roberts' instruction; so lacking is any evidence that it was serious given it did not concern patient or staff safety, so clear is Ms Goldsmith's view that the Claimant should not have been restricted, that we consider there must have been another material factor in Mrs Roberts' mind for restricting the Claimant. We conclude this factor was the fact that the Claimant had made race discrimination allegations, about which she was uncomfortable and saw as a reflection on her management.

172. Mrs Stephenson knew restrictions were rare. She did not restrict for a serious allegation of bullying on grounds of race that was ongoing. Her reasoning for not doing so lacks logic. Those allegations were of a risk to staff. We conclude the difference between those bank staff and the Claimant was that the Claimant had made a race discrimination complaint. We have therefore concluded that the race discrimination

allegations were a factor for her approval of the decision to restrict the Claimant.

173. Nor do we consider that it is possible to separate the upset described to us, as somehow separable from the allegations. The allegations were ‘out of the bag’ on the night of 11 May. We consider it almost inevitable that some members of staff would be upset to hear that one of their colleagues thought they had organised themselves into racial groups and that the band 6 nurses were allocating work on a discriminatory basis. But this upset, certainly in May, was not so extreme as to form an entirely separate factor from the fact of the allegations themselves, applying the approach in Martin. This factor should not have been taken into account in considering the seriousness of the allegations.

174. In our judgment this is a classic case of an employer treating far too severely a person who had raised allegations because they had done so. This is contrary to the expressed aims of its own Whistle-blowing policy. We refer here to the Claimant’s verbal allegations not the written grievance.

175. In our judgment therefore the Respondent victimised the Claimant contrary to section 27 and section 39(3) and (4) of the Equality Act by placing the restriction on her work on 30 May 2019.

176. Given this finding, we do not need to consider the continuation of the restriction after Mrs Kara’s report. But we have made it clear in our findings of fact that there was no good reason for continuing to restrict the Claimant beyond the week or two it would have taken to confirm the decision and organise a ward debrief. Indeed Mr Steward’s initial email shows that the hold-up is all about the fact of the Claimant bringing her grievance (a protected act) and the potential upset of other staff members. The grievance would not have caused him to restrict the Claimant and should not have caused the continuation of the restriction. Even in the new year the evidence of upset we have heard about was limited to those accused, was not anything like a majority of staff on the ward, and should have been managed by a clear debrief and plan as set out by Ms Goldsmith. If there was any threat to the Claimant’s safety it is not the Claimant who should have been restricted. Such an approach would have been completely contrary to the whistle-blowing policy.

177. Plainly Mr Steward had not wanted the race discrimination complaint to succeed. He diminished the findings of Mrs Cooper-James in his summary so as remove any sense that she had found evidence of race discrimination. He did the same in his written statement to us. We are astonished that the Trust’s Head of People should have adopted this approach.

Failure to Investigate the car park incident

178. The Trust’s failure to investigate the car park incident was not because the Claimant had done the protected acts. We conclude it was likely the result of an error by HR in informing Mrs Stephenson of the amended complaint before she wrote her terms of reference.

Delay in Informing the Claimant of the Outcome

179. We have found two unreasonable delays: Mrs Stephenson's 6 weeks delay in the writing of the terms of reference; and the 2.5 months after the outcome of the investigation.

180. In relation to Mrs Stephenson it was a difficult decision to reach. On the one hand she is likely a busy manager and this could have been merely poor time management. On the other there is the Trusts' 28-day aim, not just to write the terms of reference. This was a pretty simple letter to write and the Trust's HR department was no doubt available to help her to do it.

181. We have concluded the delay was so surprising and so lengthy here for a simple step, that it was not merely Mrs Stephenson's busy schedule that caused it. We have concluded a material factor in the delay was the fact of the Claimant's race discrimination allegations. They meant that Mrs Stephenson was more reluctant to progress the matter. She had told us more about upset she understood had been caused by the allegations than any concern about the allegations themselves. That upset was not severable from the allegations as we have set out above. It was convenient to her, in those circumstances, to have the Claimant restricted for longer. We find this first delay therefore to be victimisation.

182. The delay from 4 October 2019 onwards is inexcusable. The procedure was plain that if there was no case to answer that was that. There should have been nothing stopping HR advising a quick lifting of the restriction with a debrief/induction meeting. Again we have asked ourselves carefully whether this was just poor management or whether one of the factors for the delay was the protected acts. We have concluded the reason that matter was not dealt with in a straightforward way was because the Claimant had brought her race discrimination grievance. It was the fact of this grievance that held Mr Steward back as his email to Ms Goldsmith on 11 October makes plain. Even if it was the upset that was in his mind, we have concluded that it is not severable from the complaints. For these reasons we find that this second delay was also victimisation.

Car Park Incident

183. Our findings of fact make it clear that in our judgment Miss Hook blocked the Claimant's path because she was annoyed that she had made the race discrimination allegations. We have found this subjected the Claimant to a detriment and therefore this was also an act of victimisation.

Protected Disclosure Detriments

184. There is no dispute in this case that the allegations that the Claimant made to Mrs Roberts verbally, included information. She raised the facts of unfair allocation of work as race discrimination; and talked about the fact of divisions of members of staff in racial groups. We consider the allegation about bullying because it referred to race and to particular members of staff also included information. They were, therefore,

disclosures of information.

185. In making those disclosures we accept the Claimant reasonably believed them to be information tending to show the breach of a legal obligation namely the public sector equality duty. Equally there has been no dispute to this element of her case.

186. We also accept that the Claimant reasonably believed herself to be acting in the public interest. Both because of the nature of the duty and because the Claimant was a concerned observer rather than personally disadvantaged and thought of herself as being a good citizen by raising these concerns. The Trust provides a service to the public and it would have been a reasonable conclusion to reach that raising concerns about discrimination, particularly in divisions among staff on a ward, which could affect that service, and in how work was allocated to patients was in the public interest.

187. Given our findings above, it follows therefore, for the same reasons the Trust subject the Claimant to a detriment by restricting her work; delaying in informing her of the outcome of the misconduct investigation; and by Miss Hook twice blocking her path in the car park.

Remedy

Recommendation

188. We have decided to make a recommendation that no later than 4 weeks after this decision is sent to the parties the restriction on the Claimant working at Acorn ward and at Whipps Cross is lifted.

189. For the reasons we have already given in our findings of fact, we do not consider there is a breakdown in relationships as alleged. About 60 people work on the ward: we have heard that about 4 of them have been vocal in their concerns. We accept that there may have to be bridge-building: this is all part of the management of the ward. The Trust has had since 4 October 2019 to do this. The fact that the investigation found evidence supporting the verbal complaints that the Claimant made is important. The Claimant can reasonably argue she is risking reputational damage by the ongoing restriction. The current grievance appeal is no bar to lifting the restriction.

190. This is not of course a recommendation that the Claimant has to apply for shifts. She is in other work and may choose not to do so. But that may change and if it does there is no reason for the current restriction to be in place. We have also heard that Acorn ward is not currently a paediatric ward because it is being used in other ways during the pandemic. If so, then of course, it may be that the Claimant is not qualified to work there at present, but that should not stop the lifting of the restriction placed on her in May 2019.

Financial Loss

191. We consider the Claimant would have continued to work regular shifts on Acorn ward if the restriction had not been in place. This is because it was

convenient to her and the place she had worked for many years. We consider therefore the 129 shifts she worked elsewhere are likely to have been worked at Acorn ward.

192. In our judgment the Claimant did not fail to mitigate her loss. There was nowhere else in Whipps Cross Hospital she could do bank work, with her qualifications. Acorn Ward was the Claimant's customary place of work and had been for 10 years. She had an informal arrangement where she was rostered on for a series of shifts at a time. The allegation against her was a relatively simple one. It was reasonable for her to think that the matter would conclude within the time available. By the time, in July, when she realised the process would take longer she sought shifts elsewhere and, given the time lag, started them within a reasonable time. The Trust has not identified any paediatric bank shift available to her any earlier.

193. The bank work the Claimant did elsewhere cost her extra travel expenses. The Claimant has only claimed the minimum she had to spend at £3 and we award her that for each of the 184 shifts she worked elsewhere while restricted.

194. By August 2020 the Claimant had fully mitigated her loss.

195. We set out our calculations of financial loss in Appendix One below.

Injury to Feelings

196. The Claimant experienced a prolonged period of stress by the prolonged restriction. She had to push very hard just to receive the outcome of Mrs Kara's investigation, which in itself was stressful. We understand and accept that her feelings were injured by the longer period of restriction because it made her appear to be guilty of misconduct and she therefore had concern about damage to her reputation. We agree with Ms Goldsmith's view, expressed on 18 December 2019, that it was not appropriate to restrict the Claimant at all, never mind for such a long period. As a professional nurse the Claimant's reputation is important and particularly so as a lecturer in paediatric nursing.

197. We consider the Claimant's feelings were also hurt because she had lost the opportunity to work in the place she had worked for 10 years, missing out on the familiarity and convenience of doing so and having to travel further to work.

198. For these reasons, we judge this to be a serious case and our starting point should be the higher end of the middle band of Vento.

199. The Claimant was also shaken by Miss Hook's blocking of her in the car park and although the immediate feelings about this were likely short-lived, we can understand her experiencing some longer-lasting hurt, given that the two had had a good relationship before.

200. We discount from our starting point those injured feelings the Claimant says were caused by those issues in the case that did not succeed (in particular the alleged comments by managers and Ms Jones; and the

alleged failure of Mrs Kara to inform of the allegations and give an opportunity to respond.) The Claimant has also been hurt by a breach of confidentiality which is not an issue before us.

201. We take into account also that the Claimant has not had any mental ill health as a result of the discrimination. She has been able to continue to work and has succeeded in finding a full time job.

202. Race discrimination can only be identified and resolved if working people blow the whistle on it, and not necessarily those most affected by it. Here the Claimant spoke up when she herself was not personally affected by the acts she was complaining about. This of course would have been stressful for her even absent the victimisation and we discount for this.

203. We expect, too, that the Claimant's injured feelings will be much ameliorated by her success in this claim and, if the Trust follows our recommendation, by the lifting of the restriction.

204. We take into account the value of money and the necessary respect for Tribunals award that should neither be too low nor too high. Looking at the matter as a whole we judge the Claimant should be awarded £15,000 for injury to her feelings.

ACAS Uplift

205. In our judgment the proceedings before us related both to discipline (of the Claimant) and grievance (her written complaint of race discrimination).

206. From our findings it follows that we find the Trust failed to comply with paragraph 4 of the ACAS Code by failing to act promptly and without unreasonable delay in formulating the allegations; and, after the investigation outcome, reaching a final decision and confirming it to the Claimant.

207. Was this failure unreasonable? We have found there to be significant breaches of the Trust's own bank staff disciplinary procedure. It should not have restricted the Claimant's work for this type of problem: as Ms Goldsmith acknowledged on 18 December 2019. The 6 weeks it took to formulate the very general allegation was wholly unreasonable and an act of victimisation itself. The fact that the Trust took 2 weeks longer to formulate the allegations than it intended the whole process should take shows just how unreasonable. Restriction is a serious matter: the member of staff loses out on rostered shifts and on the ability to work at the ward/hospital of their choice. The Trust should act without unreasonable delay. It is not enough for a manager to say, 'time goes by' or 'I had my day job to do' as Mrs Stephenson did in her oral evidence: this was part of her day job as a manager of people. Furthermore, the 2.5 month delay in reaching a decision after the investigation and informing the Claimant of the outcome was wholly unreasonable: all it would have taken was an email attaching the report. It was not possibly open to Ms Goldsmith to reach a different decision than the one recommended by Mrs Kara. This was such a long delay that the Claimant, after many polite requests, had to go to the effort of making a subject access request for

the report, which again illustrates just how unreasonable was the delay.

208. We do not take into account here the time taken for Mrs Kara's investigation, which was not unreasonable given the delays in speaking to witnesses over the holiday period.

209. The Trust failed to comply with paragraph 32 of the ACAS Code by failing to explore whether it was possible to resolve the Claimant's informal grievance about work allocation and racial divisions on the ward. Mrs Roberts, on the advice of her senior colleagues, required the Claimant to make a formal complaint. This was contrary to the Code and the Trust's whistleblowing procedure.

210. We consider this failure to have been unreasonable: it is a stressful thing to have to formally complain and it behoves managers to seek to manage informally the complaints that they hear about. Had Mrs Roberts observed the processes on the ward through the lens of the Claimant's complaint, or involved HR in an informal investigation, she may have heard the voices of those black and minority ethnic members of staff who had the same concerns about work allocation. She might then have been able to act as *their* advocate, as much as she acted on behalf of those who were upset by such complaints.

211. The Trust failed to comply with paragraph 4 of the ACAS Code by failing to act consistently in restricting the Claimant (for an allegation of failure to follow a management instruction) but not restricting two bank staff (alleged to have committed bullying in a race discrimination complaint). This failure was unreasonable because the latter allegation was continuing and more serious than the allegation the Claimant faced.

212. We have found three separate unreasonable failures to follow the ACAS Code. In our judgment we consider it just and equitable in to increase the awards made for both financial loss and injury to feelings. This is a large employer with an HR department. Managers have had equality training, albeit did not appear to have taken it on board. There is no good reason for such failings. The delay exacerbated the original act of victimisation, the restriction. The failure to act consistently, increased the Claimant's sense of injustice in being mistreated for having complained. The failures impact on both her injured feelings and her financial loss.

213. In all the circumstances we consider the level of increase should be 20%: this reflects that there were three serious failures having a real impact on the Claimant.

Interest

214. The Trust did not make submissions that this would be an inappropriate case for interest. We do not see any reason why interest should not be awarded. The calculation date is 5 February 2021. The date of the act of discrimination is 30 May 2019, the date of the restriction. We choose this first act because, in our view, it was the most serious. We set out the calculation in Appendix One at the end of this Judgment.

Remarks of the Industrial Jury

215. Employers should by now be aware that discrimination is often not intentional. Most people are unwilling to acknowledge, even to themselves, that race could be an unwitting factor in their conduct or decision-making. We all like to think of ourselves as fair and, because of this, discrimination complaints are usually stressful to make and upsetting to receive.

216. We acknowledge that managers receiving such complaints have a difficult job. But complainants should not be made to feel that they have to make formal complaints before the matters they raise are looked into. A manager taking on a matter informally shows she is taking the matter seriously and relieves the burden on the worker. Informal resolution can nip a problem in the bud, people might feel less the need to take standpoints and others can reflect on their practice outside the glare of a formal process.

217. We are concerned that the approach of managers to this complaint seems to have taken little heed of the Trust's whistleblowing policy. And no manager, even the Director of People, appears to have fully understood the victimisation provisions of the Equality Act. Complainants should not be treated as the problem.

218. Finally, we are very concerned here that the Trust went to the expense of an independent investigation but has then misrepresented and diminished the findings of that investigation to the complainant and the ward manager. Mrs Cooper-James' found some evidence of potential race discrimination in work allocation and divisions on the ward. These findings were diminished by the Trust's internal summary (and in witness statements to us) to a point where it hardly appeared that there may be a problem. There is plainly still much work to be done.

Employment Judge Moor

10 February 2021

Appendix One
Remedy Calculation

A. Financial Loss

	£
June 2019: 8 shifts x 11.5 hrs x £25 gross	2300
July 2019: 8 shifts x 11.5 x £25	2300
Not including 1 hour break = 184 hours	
Holiday 1 hour for every 10 worked: 18 x £25 gross	450
Loss of Gross Pay	5050
Loss of Net Pay (using Salary Calculator)	4023.30
Travel expenses until mitigation of loss	
129 x £3	387
Financial Loss	4410.30
ACAS uplift of 20% financial loss award	882.06
Total after ACAS uplift	5292.36
Interest	
30.5.2019 act of discrimination	
11.10.19 presentation date	
3.4.20 mid-point	
5.2.2021 calculation date	
Mid-point to calculation date= 308 days	
Interest at 8% per year 308/395 = 6.75% x 5292.36	357.23
A. Total Financial loss (uplifted plus interest):	**5649.59**
Injury to Feelings	15000
ACAS uplift of 20% on injury to feelings award	3000
	18000
Interest	
From act to calculation date = 617 days	
8% x 617/365 = 13.52% x 18000 =	2433.60
B. Total Injury to Feelings	**20433.60**
TOTAL AWARD A+B	**26,083.19**