



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr B Hailu

v

**The University College London
Hospitals NHS Foundation Trust**

Heard at: London Central

On: 21 – 25 September 2020

Before: Employment Judge Hodgson
Ms S Samek
Ms G Gillman

Representation

For the Claimant: In person
For the Respondent: Mr B Randle

JUDGMENT

1. The claim of unfair dismissal fails and is dismissed.
2. The claim of unlawful harassment fails and is dismissed.
3. The claim of direct discrimination fails and is dismissed.
4. The claim of breach of contract fails and is dismissed.

REASONS

Introduction

- 1.1 By a claim form presented on 10 December 2019, the claimant brought claims of unfair dismissal, harassment, discrimination, and breach of contract.

The Issues

2.1 The issues in this case were defined by EJ Elliott on 20 April 2020 as follows:

(7) Constructive unfair dismissal

(i) Did the claimant resign by email in August or September 2019 by email to Apheresis Charge Nurse Dawn Collier verbally on 14 August 2019 and confirmed in writing on 18 August 2019 or did he resign by email to Supportive Day Care Sister Lauren Plummer on 11 September 2019? The claimant accepts that when he resigned for the second time, he was working his notice and an incident took place which caused him to leave earlier. What was the effective cause of and effective date of termination?

(ii) Did he resign as a result of a fundamental breach of his contract of employment?

(iii) The claimant relies on a breach of the implied term of trust and confidence. The matters he relies upon as amounting to that breach are the same as relied upon for his race discrimination claim which arose prior to the resignation so as to be an effective cause.

(iv) In addition he relies upon (i) not being given a proper opportunity to be rotated to the chemotherapy day unit when it was a fast track development role – he says he was told this during his appraisal on 5 July 2019 and (ii) not being given sufficient opportunity to complete competency units which was also raised in the appraisal?

(v) Did the claimant resign in response to the breach or did he affirm the breach?

(vi) If the claimant was dismissed, was there a potentially fair reason for his dismissal? The respondent relies on capability which is a potentially fair reason.

(8) Section 26: Harassment related to race

a. The claimant describes his racial group as Black African.

b. Did the respondent engage in unwanted conduct as follows:

(a) On 18 June 2019 was he told by Supportive Day Care Sister Lauren Plummer that the information he had mentioned was already on EPIC?

(b) Also on 18 June 2019 did she also say that the claimant needed to be careful in future and to make sure that he read the parameters section of the drugs he administered?

(c) Also on 18 June 2019 did Ms Plumer ask the claimant in front of other colleagues why it took him so long to put up the IVIG?

(d) Was the outcome of the claimant's grievance in the HR outcome letter of 18 October 2019 misguided, misinformed and lacking in the investigation and therefore a further act of harassment?

(e) On 3 September 2019 was the claimant removed from the coordination rota with no prior discussion of the decision?

(f) Was the claimant asked in his internal interview in November 2018 with Helen Keane and Dawn Collier "how would you deal with a patient who declined to be treated by you because you are black?"

(g) On 6 September 2019 at approximately 18:30 hours, did Ms Plummer suggest that the claimant end his employment at an earlier date and was there no return to work discussion after he was off sick with back pain?

- c. Was the conduct related to the claimant's race?
- d. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?
- e. If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?
- f. In considering whether the conduct had that effect, the Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

(9) Section 13: Direct discrimination because of race

- (i) Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act, namely the conduct set out above which is not found to be harassment.
- (ii) Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on the following comparators: Kathryn (Kate) Badger, [Shannah] who is a staff nurse who worked on the Supportive Care Day Unit, last name not known and Naomi Wood. He said he does not rely on hypothetical comparators.
- (iii) If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of his race?
- (iv) If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

(10) Breach of contract for notice pay

- (i) Did the claimant resign with contractual notice or is he entitled to any notice pay?

(11) Time limitation issues

- (i) The claim form was presented on 10 December 2019. Accordingly and bearing in mind the effects of ACAS early conciliation there are acts or omissions which may potentially be out of time, so that the tribunal may not have jurisdiction.
- (ii) Does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?
- (iii) Was any complaint presented within such other period as the Employment Tribunal considers just and equitable?

2.2 The claimant applied to amend, and this was dealt with by EJ J Burns on 21 July 2020. The following two amendments were allowed (I have recorded them as they appear in the order).

18 June 2019 email describing the claimant as lazy and argumentative (as an allegation of race harassment alternatively direct race discrimination)

The claimant's notice period should have ended 13 October 2019 not 27 September 2019 as there is an eight week notice entitlement for band five positions (as an allegation of race harassment alternatively direct race discrimination).

2.3 At the commencement of the hearing, I noted that the allegation of constructive dismissal was unclear. The claim form gives no detail. As part of its description of events of 6 September 2019, it states that he had

handed in his resignation on 14 August 2019. No further detail is given. It does not explain the reason for his resignation.

- 2.4 EJ Elliot's note of the issues refers to the claimant as having resigned for the second time on 11 September 2019 by email. This was not the subject to formal amendment. It appears to be a record of what the claimant said at the case management hearing. It is unclear what is said to be the fundamental breach of contract.
- 2.5 I raised the lack of clarity with the claimant, and I invited him to give a statement, if possible in writing, on day two explaining, at the time he resigned, why he resigned and what he considered to be the breach.
- 2.6 On the morning of the second day, the claimant gave further details of the reason for his resignation. He referred to a number of matters including the following: the failure to rotate him to chemotherapy was in breach of the staff advert (page 251); Ms Plummer's email of 20 June 2020 was an act of discrimination; the promotion of Ms McClean and Ms Nicholson to band six nurses; and receiving statutory sick pay rather than full pay.
- 2.7 The tribunal noted the claimant appeared to be raising new matters. The tribunal confirmed it would look at the claimant's email and consider its status, albeit to the extent it was raising new matters, the claimant may need to amend his claim if he were to rely upon those matters. The claimant chose not to apply to amend his claim to rely on any new matters. In his email, he confirmed the reason for resignation as follows

1. **On 05/7/2019 during my appraisal, I was told by DC, I will not be rotated to chemotherapy daycare, until at least next year [2020] and there are two or three nurses ahead of me. [Final hearing bundle dated 04/09/20, page 248, step 2 Appraisal Meeting Discussion box]. I believe this is in breach of what was described in the job advertisement for staff nurse - cancer day care, "This is a fast track development role for the unit. The successful candidate will be given the opportunity to develop as a qualified haematology-oncology nurse by working in the 5 main area" [Final hearing bundle dated 04/09/20, page 251, Paragraph 6]. Both DC and HK knew I was passionate about completing my chemotherapy training as soon as possible.**
2. **Upon hearing this, I started applying for jobs and luckily, I was offered a position on the 4th of August 2019 at Parexel International and resigned on 14th when I returned from my annual leave.**
3. **Additionally, there were a series of incidents that destroyed my trust and confidence in the management team, such as the racial discrimination and harassment I faced from Lauren Pluumer.**
 - 3.1. **Discrimination in providing study leaves for white nurse but not to me (I found out in June, promotion of white nurses Mrs Nicholson and McClean over BAME candidate who was equally good if not better.**
 - 3.2. **Promotion of another white nurse, Mrs badger covertly, in August.**
 - 3.3. **Only getting paid statutory sick pay when I had been fully working at the unit**
 - 3.4. **Asking divisive interview question that promotes racial inequality.**

- 2.8 We also noted that the allegation concerning the grievance was unclear. It was unclear whether the term "misguided, misinformed, and lacking in the investigation" was the claimant's or the judge's shorthand.
- 2.9 The claimant made the following points as allegations of discrimination or harassment: first, accepting the management evidence; second, not taking a statement from him; third, rejecting his grievance; and fourth, ignoring the strength of his evidence.
- 2.10 It does not appear that those matters are set out adequately or clearly in the claim form. Nevertheless, the respondent has not objected to dealing with these allegations, as formulated.

Evidence

- 3.1 The claimant gave evidence.
- 3.2 We heard from the following witnesses, for the respondent: Ms Lauren Plummer, Ms Dawn Collier, Mrs Helen Keane, and Mr Simon Baxendale .
- 3.3 We received a bundle from the respondent. We received further disclosure. The respondent filed a cast list. We receive submissions from the respondent.

Concessions/Applications

- 4.1 The respondent had prepared a document giving detail of the race and/or ethnicity of members of staff. Prior to the hearing, the claimant applied to know the initials of each member of staff. He abandoned that application on the first day of the hearing.
- 4.2 On the morning of day two, Mr Randle having heard the claimant's further explanation concerning constructive dismissal, indicated the respondent wished to strike out the claim of constructive unfair dismissal. The tribunal noted it was unclear why the application was now being made as it appeared that nothing material had changed. Mr Randle elected not to proceed with the application to strike out.

The Facts

- 5.1 The claimant was employed by the respondent. At the material time, he worked as a nurse in the Macmillan Cancer Centre. The adult service for the cancer centre is made up of four wards: supportive care, chemotherapy, ambulatory care, and apheresis.
- 5.2 Supportive care and apheresis are based on floor four; chemotherapy and ambulatory care are based on floor two.
- 5.3 Staff (below band 7) rotate between the different wards. Whether or not they will rotate between all four wards depends on the nurse's skill set.

Some rotate between two and some between all four wards. Nurses do not rotate between wards from the outset of employment. Different areas have different clinical and educational expectations, it usually takes at least six months for a nurse to consolidate their skills in the ward where they are based. After this time, they start training in shift co-ordination, which means taking responsibility for organising the ward and the work on a specific day. This may be supervised until the nurse has sufficient training to be competent in the coordination role.

- 5.4 The claimant was a staff nurse (band five). Following an interview on 15 November, he joined the Macmillan Cancer Centre in day care as a staff nurse. He started in February 2019. He worked on supportive care. Supportive care is made up of three areas: the bedside, the transfusion side, and the cannulation bay. In the cannulation bay, patients receive short treatment such as blood tests, care, and injections. In transfusion, patients receive infusion treatments of up to ten hours. The cannulation and transfusion are referred to, collectively, as "chair side," as the patients received treatment in chairs.
- 5.5 On the bedside, the patients need to lay down during the procedure, they may be close to end of life or otherwise physically required to lie down. The pace is generally slower and the nurse deals with patients more on a one to one basis. On the chairside, the nurse moves between patients to a greater extent.

The interview

- 5.6 The claimant was employed by the trust from 12 June 2017. On 15 November 2018, he attended, as an internal candidate, an interview conducted by Ms Helen Keane, matron of the Macmillan Cancer Centre, and Dawn Collier, clinical nurse (band 7). He was appointed and worked in supportive care.
- 5.7 The claimant had limited experience. As he was an internal candidate, he was not required to provide a written reference, do a maths test, or a written and practical OSCE. The claimant had done a chemo course at university, but he provided no evidence of practical assessments, or his chemo workbooks. That meant that despite completion of the course he needed to start from scratch in supportive care. A nurse must complete both academic and practical training before being signed off in the Trust, or nationally. There is a national standard. The university module is equivalent to the UKONS SACT passport but does not cover UCLH SACT Theory book 2 which covers the UCLH specific protocols and guidelines.
- 5.8 At the interview, Ms Keane had understood that the claimant had completed the relevant training as he indicated he could administer chemotherapy. There was a misunderstanding: the claimant had limited competence and had administered chemotherapy orally, but not by infusion. He did not have the relevant certification. It had been intended

he would start on the chemo ward without the need for training. There were no training place on the chemo ward.

- 5.9 The claimant alleges that at the interview he was asked the following question, "How would you deal with a patient who declined to be treated by you because you are black?"
- 5.10 This is denied by Ms Keane, and Ms Collier who conducted the interview. They say all candidates were asked the same set of written questions. It is alleged he was asked the following question, "A patient complains about a member of staff because of their ethnic group, how would you manage this situation? Can you think of a policy that would relate to this situation?"
- 5.11 Ms Keane states that clarification may be sought and given. She says this at paragraph 14 of her statement.

14. The question is designed to see whether the individual has any understanding of the Equality Act and what legislation there is to ensure that both staff and patients are protected from discrimination, It also helps us to see how they would protect their colleague and how they would manage the patient and the patients relative in those challenging circumstances. If the candidate does not understand the question, I would never use the racial background of the candidate when trying to explain it to create an example. I would use the racial background of the other person on the panel (in this case Dawn, who is Caucasian).

- 5.12 We will consider the factual dispute further in our conclusions.
- 5.13 The post was designed to allow for fast track development. This did not mean it was a fast track rotation post. Ms Keane explained the position at paragraph 19 of her statement:

Brooke has commented that his role was advertised as a "fast-track development post". That is correct because the intention is to take nurses at band 5 to be ready for band 6 within 18 – 24 months. It depends on the experience they have before they come to us whether that is achievable, but in many cases it is and this is faster progression than within other areas of the Trust. The reason nurses are able to progress quickly through the bandings are that the work at the Cancer Centre is very clinically developed for a nurse. Care at the Cancer Centre is nurse led, rather than led by doctors.

- 5.14 Fast track, and fast rotation are not same. Ms Keane says this at paragraph 20:

20. I would like to stress that the post was *not* advertised as a fast track rotation post, and nobody would have given Brooke that impression. We do not specify how long rotation takes and this cannot be fast tracked. Nurses on the ward can take several years to get ready to rotate. They have a huge amount of minimum competencies to work towards in the first 6 months when they start in Supportive Care. Following on from that, they then need to start to co-ordinate shifts. Nurses are never ready to rotate within 6 months of starting. It can take a year, it can take longer. They need to have

their competencies signed off and they need to be confident in shift coordination...

Events of 18 June 2019

- 5.15 On 18 June 2019, the claimant was allocated to the bedside bay for his shift in supportive care. The bay is split into 10 chairs and eight beds.
- 5.16 The claimant commenced his shift at 8:00. The claimant was required to administer IVIG (an intravenous plasma product) to a patient. The IVIG is initially run for 15 minutes at a set speed. Observations are then taken, and the rate is then increased for a further 15 minutes. Further observations are taken. The speed is increased, thereafter, to a maximum rate (the process is referred to as titrate up).
- 5.17 There were three healthcare assistants. The nurses have staggered shifts. At 9:00, Ms McClean, a staff nurse, started her shift. A further nurse would start at 10:00. This was the normal pattern.
- 5.18 Around 10:00, Ms McClean contacted Ms Lauren Plummer, the band 7 sister, and asked for her assistance. Ms Plummer was informed the claimant had looked after only one patient (JF), whereas Ms McClean had treated the remaining patients and was struggling to cope. There were approximately five relevant patients.
- 5.19 Ms Plummer attended. There is some dispute over the relevant facts. We have preferred Ms Plummer's evidence, and we will explain why in our conclusions. She overheard JF tell the claimant that she always reacts badly to IVIG and asked him to titrate up to a specific rates and then stop, which means he should not speed it up after the second test.
- 5.20 Ms Plummer overheard the claimant saying, "We don't do that." He stated the hospital always speeded it up, and there was no note to say otherwise. Ms Plummer intervened, as she believed the patient was gesturing to her, as if to ask, "What is going on?"
- 5.21 JF is a long-term patient who had been receiving treatment for many years. Ms Plummer perceived JF was frustrated. Ms Plummer took the claimant to one side and spoke to him behind a computer screen, to maintain privacy. She believed they were out of earshot of the patient. It was not appropriate to leave the ward completely. She asked the claimant for an explanation.
- 5.22 Ms Plummer showed the claimant the patient's notes on EPIC, which is a computerized system giving patients notes and drug charts. The patient's prescription set parameters which clearly stated that the nurse should not increment above 2 rates for patient JF.
- 5.23 The claimant, at that time, said that EPIC was "too busy". This was his reaction to his being shown the relevant part of the system. It was apparent that he had not read the notes fully. Inappropriate administration

of the drug could lead to an allergic reaction. In extreme case it can cause anaphylactic shock and death. Ms Plummer advised him to be careful in the future to ensure that drugs were administered correctly in accordance with the relevant parameters as defined for that patient.

- 5.24 During the same conversation, Ms Plummer asked the claimant why it had taken him two hours to start JF's treatment. JF had checked in at 08:17. The claimant asked, "Are you calling me slow?"
- 5.25 Ms Plummer found it difficult to understand what the claimant had been doing as Ms McClean had taken care of the other patients. JF's cannulation had been undertaken by a healthcare assistant. Ms Plummer had the following expectations: on arrival JF should have been taken from reception and put in the bed; initial observations should have been undertaken; she needed premedication; the process would take about 20 minutes; and then the IVIG infusion would start, which is a simple process, as there is no premixing and all that is needed is attachment of the line. Ms Plummer did not understand why the claimant had taken two hours.
- 5.26 Ms Plummer found the claimant's explanation to be confusing and unsatisfactory. He stated he wished to speak to a doctor before starting the infusion, as there was something on the plan he did not understand. The claimant had not sought assistance from senior nurse, which Ms Plummer considered to be the appropriate course of action.
- 5.27 Ms Plummer accepts she felt a degree of frustration. It was not the first time she had experienced frustration with the claimant, but states it was the first time that she communicated that frustration directly to claimant. She believed that he was struggling generally, and she had received feedback from a number of colleagues expressing concerns and frustration. She accepts that individual nurses may have difficulties. She states it is necessary to highlight an individual's difficulties in order to provide appropriate training.
- 5.28 Ms Plummer commonly had conversations with colleagues concerning delays. She considered the conversation with the claimant to be routine, brief, and necessary because of the potential clinical error and her concern about the delay.
- 5.29 She was conscious that the claimant's three-month review was imminent. She had been requested to provide feedback for the claimant appraisal. She documented her concerns by email of 20 June 2019 to Ms Emma Ings, the clinical practice facilitator, (R1/310).
- 5.30 We do not need to quote the full email. It sets out four general issues as follows:
1. **He works slowly**
 2. **That his work needs to be checked because it is often incorrect**

3. He does not communicate with staff (for help, or to delegate) or patients (to update them about why they are waiting).
4. Multiple complaints from supportive care staff that when they are working with him they are taking on the majority of the work load. Below are a couple of recent examples of these issues.

She sets out three examples, including the incident on 18 June 2019. The claimant has not taken issue with the veracity of the other two examples. She concludes her email by stating:

I would like to reiterate that senior staff all try to make him feel supported and make sure he knows he can ask any questions, for help or assistance. I think he is trying to muddle through.

The resignation

- 5.31 The claimant gives limited evidence concerning the circumstances of, and the reasons for, his resignation.
- 5.32 On 14 August 2019, the claimant told Ms Dawn Collier that he had decided to leave the trust. He stated he was going to do some bank work in order to decide in which direction he would go. He did not say anything about discrimination or harassment. He did not allege he been treated inappropriately. At that time, he had applied for, and secured, employment with a company that undertook research, Paraxel. He had already attended an induction. At no time before his employment terminated did he tell Ms Collier, or any other relevant manager, that he had already accepted new employment. It is not referred to in his statement. He has disclosed no relevant documentation. The fact he had applied for employment, attended an interview on 4 August, and commenced work was stated orally at the tribunal hearing.
- 5.33 This failure to secure the respondent's agreement to his starting new employment was a breach of the claimant's contract.
- 5.34 On 14 August, it was agreed his last working day would be 27 September 2019. Ms Collier thought that he was required to give six weeks' notice. The contractual requirement is eight weeks.
- 5.35 Ms Collier asked the claimant to confirm his resignation in writing. He did so on 18 August 2019 (R1/320).

As discussed last week, on Wednesday 14th of Aug. I wish to hand in my resignation notice at support care. I have learned a great deal in the past seven months, and I will like to thank you and Emma in particular for providing me with support and learning opportunities.

- 5.36 By email 21 August 2019, Ms Collier acknowledged receipt and confirmed the final working day was 27 September. She recorded the resignation and final day on the electronic staff record system (ESR).
- 5.37 Thereafter, the claimant spoke with Ms Plummer. The claimant had a few days off work with a bad back and returned on 4 September 2019. She

spoke with the claimant briefly that day. They agreed to speak on 6 September 2019.

5.38 There is a dispute about whether the claimant handed in a return to work form on 4 September. Ms Plummer does not recall the claimant giving her any form. There should have been a return to work interview. Ms Plummer had limited experience of the procedure, and given the claimant was leaving, she did not conduct a formal interview. She did, however, speak to the claimant on 6 September 2019. No return to work form was presented that day or completed by Ms Plummer.

5.39 During the discussion on 6 September, she offered the claimant a short notice period. The claimant thanked her and accepted. She checked whether he had employment to go to, and the claimant confirmed he intended to do bank work. He did not say he had accepted a posting. The claimant suggested a new termination date of 13 September 2019, and Ms Plummer agreed to his request.

5.40 She confirmed the new date by email 9 September 2019 (R1/325). Later that day, the claimant responded as follows:

Thank you for the offer of early end of notice, I have decided this may impact my future employability, therefore, I would like to complete my full-term of employment.

5.41 We have preferred Ms Plummer's account. Ms Plummer confirmed by email of 9 September that the claimant's working day would be 13 September. This supports her account. The claimant's response makes no attempt to suggest that no date had been agreed, but thanks her for the offer of an early termination of notice. On the balance of probability, this indicates that the offer was made on the date agreed.

5.42 They spoke later on 9 September. Ms Plummer confirmed she did not object to the claimant working to 27 September but did not know how to change the date on the system. She asked that he speak to Ms Pippa Wellard or Ms Keane. Ms Plummer was later told by Ms Wellard the claimant had spoken to her, and that Ms Wellard had advised the claimant to confirm with Ms Keane.

5.43 The claimant did not speak to Ms Keane. He had ample opportunity to do so. It follows there was no formal agreement to change the leaving date, as any change was conditional on agreeing the matter with Ms Keane.

5.44 The claimant wrote a further email to Ms Plummer on 11 September 2019 as follows (R1/330)

The way I am currently being treated even after I resigned is at best disrespectful and, at worst, a form of harassment. Therefore, I have decided to consult HR and my union rep regarding this matter. Furthermore, as a result of the degrading and humiliating treatment, I do not feel psychologically safe to attend work.

5.45 Ms Collier responded. She asked the claimant to confirm why he felt humiliated and who had been disrespectful. She noted the claimant had agreed a leaving date of 13 September but had subsequently changed his mind. She stated she was happy to discuss any issue with him.

5.46 The claimant did not return to work.

The grievance

5.47 On 27 September 2019, the claimant filed a formal written grievance. The grievance is long and unfocused it is unclear what is put forward as background fact and what is said to be the grievance. There is reference to his being the only "BME" nurse in the unit. In the section where he is asked to set out the outcome sought; he states:

I believe recruiting from a wide range of nurses, in terms of their protected characteristic, could help supportive care to understand its patient better. I also think the lack of diversity contributes to a lack of understanding, respect and acceptance of each other each other differences, be they patients or staff.

5.48 It follows he referred to a protected characteristic. The main body of the grievance refers to events which are said to be examples of "harassment" but there is no specific mention of any protected characteristic. He also describes himself as frustrated in relation to "the lack of clarity on when I could transfer to the chemotherapy unit"

5.49 It is difficult to understand what is said to be harassment. The claimant refers to a number of events and we can summarise them briefly:

5.49.1 He says on 6 September he was offered, by Ms Plummer, an earlier leaving date. He agreed to this, but complained it was not part of routine return to work interview.

5.49.2 He refers to the emails of 9 September and states he wished to complete his full term.

5.49.3 He describes conversations with Ms Plummer and Ms Wellard. It confirms he was advised to speak to Ms Keane. He says he felt effectively dismissed. He alleged he had not officially confirmed he wanted to terminate his contract.

5.49.4 He complained that on 3 September 2019, he was removed from "coordinating."

5.49.5 He refers to the incident on 18 June 2019. He accepts a conversation concerning the patient and a conversation about the information on EPIC not being clear.

- 5.49.6 He appears to allege that Ms Plummer complained about his being slow, and did so in front of colleagues, as a result of the claimant stating that the information was not clearly visible on EPIC.
- 5.49.7 He states that on 6 September 2019, Ms Plummer suggested that the claimant may wish to finish at an earlier date.
- 5.50 The claimant complains that he was removed from the co-ordination rota without having been notified of this prior to receiving an email from Dawn Collier on 3 September 2019.
- 5.51 Coordinating shifts in supportive care involves the following: planning the workload for the following day, ordering blood products, and medication, ensuring correct therapy plans are on the system, assessing staffing and patient workload, ordering blood tests, checking previous blood tests and liaising with various MDTs to ensure smooth running of the shift . The claimant was inexperienced. He had undertaken co-ordinating on three occasions. He was not fully competent and needed training and supervision. However, it was no longer necessary to give him training as he was leaving.
- 5.52 He had been off work from 28-30 August 2019 and 3 September 2019 with back problems. He was notified of the change to the rota by email. That was the normal mode of communication. When he returned to work, Ms Plummer spoke to him on 6 September and explained he would not need to coordinate during his notice period. He did not object.
- 5.53 The claimant has suggested Ms Naomi Wood, as a white nurse was treated differently. We find she had not confirmed an end date, although she had indicated her intention to move to Wales at some point in the future, depending on her partner's job. She had more experience of co-ordination than Brooke, and had done the role on about 9 occasions

The grievance

- 5.54 Mr Simon Baxendale, HR business partner, undertook the grievance hearing; he produced a written report on 18 October 2019.
- 5.55 He understood the policy was drafted on the basis of the person being employed, but it was not uncommon to investigate grievances of those who have left. He raised the matter with the employment relations team, but a decision was taken to deal with the matter locally, and without a formal process.
- 5.56 Mr Baxendale states that the decision not to use a formal process was in line with the Trust's policy.
- 5.57 As part of his investigation, he met with Ms Keane. He compiled further information. Through Ms Keane, he obtained a statement from Ms Plummer and Ms McClean.

- 5.58 His outcome letter of 18 October 2019 is eight pages long. The claimant asked to be paid for his notice period. He concluded the claimant should be paid to 27 September 2019, provided he confirmed he had not undertaken any paid work and he gave a fit note from his eighth day of absence, if applicable.
- 5.59 Mr Baxendale agreed that Ms Plumer should have undertaken a formal return to work interview.
- 5.60 It follows that the grievance was upheld in part. The remaining allegations were not supported.
- 5.61 By email of 21 October 2019, the claimant said he had worked elsewhere during the relevant period. Mr Baxendale therefore considered it was appropriate to leave the termination date of 15 September 2019. Mr Baxendale did not find that any action related to race or amounted to harassment.

The law

- 6.1 Section 95(1)(c) of the Employment Rights Act 1996 states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances in which he or she is entitled to terminate it, with or without notice, by reason of the employer's conduct.
- 6.2 The leading authority is **Western Excavating ECC Ltd -v- Sharp [1978] ICR 221**. The employer's conduct which gives rise to constructive dismissal must involve a repudiatory breach of contract Lord Denning stated:

If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract then the employee is entitled to treat himself as discharged from any further performance. If he does then that terminates the contract by reason of the employer's conduct. He is constructively dismissed.

- 6.3 In summary there must be established first that there was a fundamental breach on the part of the employer; second, the employer's breach caused the employee to resign; and third, the employee did not affirm the contract, whether expressly or as evidenced by delay.
- 6.4 In so called last straw dismissals, there can be a situation where individual actions by the employer, which do not in themselves constitute a breach of contract, may have the cumulative effect of undermining the implied term of mutual trust and confidence. One or more of the actions may be a fundamental breach of contract, but this is not necessary. It is the course of conduct which constitutes the breach. The final incident itself is simply the last straw even if in itself it does not constitute a repudiatory breach. The last straw should at the least contribute, however slightly, to the breach of the implied term of trust and confidence.

- 6.5 The question of waiver has to be considered. A clear waiver, or simple passage of time, may demonstrate that the employee has affirmed the contract at any particular moment. However, it may be that a final incident would be sufficient to revive any previous incidents for the purpose of showing a breach of the implied term.
- 6.6 In cases where there has been a course of conduct, the tribunal may need to consider whether the last straw incident is a sufficient trigger to revive the earlier ones. In doing so, we may take account of the nature of the incident, the overall time spent, the length of time between the incidents and any factors that may have amounted to waiver of any earlier breaches. The nature of waiver is also relevant, it may be a once and for all waiver or it may be conditional upon the conduct not being repeated.
- 6.7 There is no breach of trust and confidence simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held. If, on an objective approach, there has been no breach then the employee's claim will fail (see **Omilaju v Waltham Forest London Borough Council** [2005] EWCA Civ 1493, [2005] ICR 481, CA). The legal test entails looking at the circumstances objectively, i.e. from the perspective of a reasonable person in the claimant's position. (**Tullett Prebon PLC v BGC Brokers LP** [2011] IRLR 420, CA.)
- 6.8 The repudiatory breach or breaches need not be the sole cause of the claimant's resignation. The question is whether the claimant resigned, at least in part, in response to that breach. (*Nottinghamshire County Council v Meikle* [2004] IRLR 703, CA; *Wright v North Ayrshire Council* UKEATS/0017/13)
- 6.9 **Omilaju v London Borough of Waltham Forrest 2005 ICR 481 CA** is authority for the proposition that the last straw does not have to be of the same character as the earlier acts, nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of mutual trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw. The test is objective. It is unusual to find a case where conduct is perfectly reasonable and justifiable, but yet satisfies the last straw test.
- 6.10 We must consider causation, the employee must show that he has accepted the breach, the resignation must have been caused by the breach and if there is a different reason causing the employee to resign in any event irrespective of the employer's conduct there can be no constructive dismissal.
- 6.11 We note that where there are mixed motives the tribunal must consider whether the employee has accepted the repudiatory breach by treating the contract of employment as at an end. Acceptance of the repudiatory breach need not be the only, or even, the principle reason for the resignation, but it

must be part of it and the breach must be accepted. The tribunal notes the case of **Logan – v Celyn House UKEAT/069/12** and in particular paragraphs 11 and 12.

6.12 In **Malik v Bank of Credit and Commerce International SA 1997 IRLR 462**. The House of Lords confirmed that there is an implied duty of mutual trust and confidence as follows:

...the employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

6.13 We would note that it is generally accepted that it is not necessary that the employer's actions should be calculated *and* likely to destroy the relationship of confidence and trust,¹ either requirement is sufficient.

6.14 In **Malik** the House of Lords held that the trust and confidence may be undermined even if the conduct in question is not directed specifically at the employee and second, it was not necessary for the employee to be aware of the wrongdoing whilst employed. Third, the term may be broken even if subjectively the employee's trust and confidence is not undermined. Whether the term is broken must be viewed objectively.

6.15 Direct discrimination is defined by section 13 Equality Act 2010.

Section 13 - Direct discrimination

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

6.16 Harassment is defined by se 26 Equality Act 2010.

Section 26 - Harassment

(1) A person (A) harasses another (B) if--

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if--

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if--

¹ See, for example *Baldwin v Brighton & Hove City Council* [2007] IRLR 232

- (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
 - (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account--
- (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.
- (5) The relevant protected characteristics are-- ...race....

6.17 Victimization is defined by section 27 Equality Act 2010.

Section 27 - Victimization

- (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
- (a) B does a protected act, or
 - (b) A believes that B has done, or may do, a protected act.
- (2) Each of the following is a protected act—
- (a) bringing proceedings under this Act;
 - (b) giving evidence or information in connection with proceedings under this Act;
 - (c) doing any other thing for the purposes of or in connection with this Act;
 - (d) making an allegation (whether or not express) that A or another person has contravened this Act.
- (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
- (4) This section applies only where the person subjected to a detriment is an individual.
- (5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

6.18 The burden of proof is found at section 136 Equality Act 2010

Section 136 Equality Act 2010 - Burden of proof

- (1) This section applies to any proceedings relating to a contravention of this Act.
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
- (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.
- (5) This section does not apply to proceedings for an offence under this Act.
- (6) A reference to the court includes a reference to—
 - (a) an employment tribunal;
 - (b) ...

6.19 In considering the burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd [2003] IRLR 323** which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong [2005] IRLR 258**. We have particular regard to the amended guidance which is set out at the Appendix of **Igen**. We also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc [2007] IRLR 246**. The approach in **Igen** has been affirmed in **Hewage v Grampian Health Board 2012 UKSC 37**

Conclusions

- 7.1 The claimant was encouraged during the hearing to deal with the allegations of discrimination and harassment, as identified by EJ Elliott and EJ Burns. Despite encouragement, his engagement with the specific allegations was limited. The claimant's submissions were predominantly concerned with the matters which, for him, indicated that some or all of the treatment he received was either because of race, or related to race. Before considering the specific allegations, we will consider the matters raised in his submissions, as these may be relevant to the question of whether the claimant can point to any facts from which it could be concluded that any treatment was because of race.
- 7.2 The claimant states that he was the only black nurse out of ten nurses in supportive care. As part of the grievance, a table was prepared which refers to a mix of nationality and ethnicity across bands 3 to bands 8. It is not broken down, specifically, by colour. There is a total of nine individuals who are described as either Afro-Caribbean or black British. There are three employees in band 3, one in band 4, three in band 5, and two in band 6. The claimant's submissions are particularly concerned with colour. It was noted that there is one Zimbabwean in band seven who was not counted by the claimant, and whose colour is unknown, but no further detail is given. There is a total of seventy-four individuals referred to. Twenty-six are defined as white British. The remaining 48 are a mixture including Indian British, Irish, Welsh, Mauritian, Zimbabwean, Colombian, and Eastern European. We do not need to record all the categories

- 7.3 It is unclear why the claimant limits his analysis to supportive care during the brief period of his employment. It is clear there is rotation within the cancer centre. His suggestion is that there is a lack of diversity. The claimant's assertion is not supported by the statistics. There was no attempt to consider the total population, or the population of the local area. We do not accept there is prima facie evidence of a lack of diversity in the unit.
- 7.4 The claimant refers to been taken off the coordination role. This is not a specific claim before us. We have received an explanation. We accept that explanation is established on the balance of probability. Coordination was part of the training. Training was no longer needed for the claimant. He was an inexperienced co-ordinator. He would have needed support. He compares himself to Ms Naomi Wood. She was in a fundamentally different position. She had not given in her notice. It was not clear when she would give in her notice. She was more experienced. The comparator chosen is not in the same material circumstances.
- 7.5 He complained he was forced to ask for his job back after 9 September. This is not a reasonable interpretation of the events. The claimant was under no obligation to agree a shorter notice period. The offer was made b checked whether he had work to go to, as she did not wish to be out of work. The claimant expressed no concerns. It was the claimant who suggested 13 September as the new date. When he changed his mind, he encountered no resistance.
- 7.6 As the process of termination had already started, it was necessary to unravel it. Ultimately, he was asked to speak to Ms Keane. Had he spoken to Ms Keane, it is likely that his leaving date would have been varied to 27 September. He chose not to speak to her. It is unreasonable to describe this as being required to "beg" for his job. He changed his mind but failed to discuss it with the relevant person.
- 7.7 The claimant complains that Naomi Wood was given an opportunity to coordinate, despite leaving. She had not handed in her notice. . She had more experience. She was in a different material position.
- 7.8 The claimant says he was overloaded with work on 18 June by being given five patients between 8 and 9 AM. The claimant was treated no differently to any other nurse. There was a staggered starting time for the three nurses to facilitate a staggered end time. The claimant has given details of what he did during the period from after 08:00. His own breakdown does not support a contention that he was overloaded. His notes indicate that he dealt only with two patients. The main patient was JF. He records that she attended at 08:17. He undertook an observation at 08:54. The patient was cannulated at 09:10 (but not by the claimant). He performed a blood test at 09:40. He gave pre-medication at 09:53 (hydrocortisone). He gave premedication at 09:55 (paracetamol). The IVIG infusion started at 10:19.

- 7.9 He records that he had only one interaction with another patient, which was an observation at 08:47. It is accepted this was minimal involvement, probably taking a blood pressure reading. There is no evidence that the claimant was overloaded or treated differently to anybody else. There is strong evidence of significant delay in dealing with the patient for whom he was responsible, JF.
- 7.10 The claimant complains of his treatment on 18 June 2020. We will look at this in more detail below. We found that the treatment was reasonable, appropriate, and justified.
- 7.11 The claimant suggests the respondent's witnesses were evasive. We do not accept that. Each of the respondent's witnesses gave clear, cogent evidence.
- 7.12 The claimant is critical of the grievance both in terms of the process and the outcome. For the reasons we will come to, we consider that to be an unfair criticism. The normal procedure was adopted. The investigation was reasonable and thorough. The outcome was justified.
- 7.13 He complains that the return to work form is missing. A proper explanation has been given, as set out in the finding of fact
- 7.14 The claimant refers to a failure to provide documents during the course of these proceedings, but he has not developed that argument and we have no basis for finding that there has been any failure, by the respondent in it duty to disclose relevant documents.
- 7.15 The claimant alleges that the fact that he was the only black nurse of ten nurses in supportive care does not assist. The sample is small both in terms of the number selected, and the period used. It is reasonable to have regard to the entirety of the unit, and there is no prima facie case to suggest a lack of diversity.
- 7.16 It is implicit that the claimant alleges there are facts from which we could find that the alleged detrimental treatment was either because of race, or there was a purpose to harass and that that was related to race. It is possible to discern from the claimant's submissions that he relies on a mix of alleged different, and unreasonable, treatment in relation to individual events, and an assertion that there is statistical evidence which would support a finding of discrimination.
- 7.17 Where there is a clear statistical basis suggesting that the make-up of the workforce is inconsistent with the population as a whole, it may be possible to argue that some form of discrimination should be inferred. Such evidence is particularly important in direct discrimination. Where a workforce does not reflect the diversity in the population, it may be possible to argue that discrimination could be inferred, such that the burden turns. Such arguments may be particularly strong in recruitment claims. When specific incidents which involve the interaction between

workers in relation to specific incidents are being considered, such as the events of 18 June, a lack of diversity within the workplace may not, in itself, be sufficient to turn the burden. The individuals involved may have no influence at all on the overall recruitment of staff, and it may not be appropriate to infer a conscious or subconscious motivation in that individual.

- 7.18 Whatever the theoretical position, contrary to the claimant's assertion, there is strong evidence of significant diversity within the relevant unit; there is no good reason to limit the analysis to supportive care. To the extent we have information on the diversity, it is not supportive of any general assertion that there is some evidence of lack of recruitment of BAME workers.
- 7.19 During his submissions, the claimant made general assertions, which were not supported by any evidence before the tribunal. He stated that 20% of healthcare professionals, including doctors and nurses, were BAME, 60% of whom were nurses. He stated 119 health professionals had died of Covid 19 related illness since April 2020, and of those 60% were BAME. He stated, "I believe this is because most of them are in lower grade jobs and not being provided an opportunity for promotion and growth." This was put forward in support of his contention that he was discriminated against. We noted that the statistical evidence was not before us. We can make no finding of fact on this point. We have not had any evidence. Its relevance is not clear and the assertion about development of individuals seems to be an opinion. We do not consider it relevant. However, as the claimant specifically advanced it as part of this case, we have recorded it.
- 7.20 As part of his submissions, the claimant alleged that it was not in the public interest for nurses to spend up to seventeen months within the cancer unit, before transferring to the chemotherapy ward. The public interest element was not raised with any witness. The average time spent is 17 months. It is necessary to complete training, undertake coordination, and allow for rotation and backfilling of staff. There is nothing to suggest that the claimant was treated differently to any other number of staff.
- 7.21 We have considered the claimant's submissions, and we do not consider there is any matter from which we could conclude that there could be discrimination on the grounds of race, or from which we could conclude that the purpose of any matter relied on was harassment. Lest we be wrong, we will assume that the burden shifted to the respondent when considering each of the specific allegations in the context both direct discrimination and harassment
- 7.22 We will now consider each of the allegations which are before us.

Was the claimant asked in his internal interview in [15] November 2018 with Helen Keane and Dawn Collier "how would you deal with a patient who declined to be treated by you because you are black?"

- 7.23 The claimant alleges a specific question was asked. We have found that the question was not asked, and it follows the allegation fails as there is nothing to explain or justify. The claimant makes no complaint about the question which was asked.
- 7.24 The actual question invites the interviewee to consider the hypothetical response to a patient's relative who was, because of the colleague's ethnicity, objecting to that colleague treating the relative. The question is worded in a way which may be confusing. It is accepted that clarification is sometimes sought. It is not the claimant's case that he sought clarification and that his race was then referred to.
- 7.25 It is possible that if clarification were sought, an example may be given, which could refer to an individual's ethnicity. It is Ms Keane's evidence that she would not have referred to the claimant's ethnicity, and we accept that. Had it been the claimant's case that there was a further question that referred to his ethnicity, we would consider it in that context. But that is not the claim and such an exercise would be hypothetical.
- 7.26 The claim of discrimination fails because the question as described by the claimant was not asked. There is no complaint about the question that was asked. It would be difficult to see how the claimant had been treated less favourably by the question asked, as everyone was asked the same question. That said it is possible that an action could be race discrimination, even if applied equally to all, if the action were detrimental and the motivation were race. Treating everyone the same may not be a defence. But whilst the possibility exists, that is not the case before us.
- 7.27 When considering harassment, there are two possibilities. First, did the question have the purpose of harassing. Second did it have the effect or harassing.² The question asked was designed to explore the candidate's understanding of diversity issues. There is no fact from which we could find that the purpose was to harass. In any event, we accept the explanation. It was designed to explore an individual's understanding of the relevant issues. It is a reasonable question to ask. We have considered whether it has the effect of harassing an individual. It may be that a particular individual is sensitive and does not like the question. However, whilst the individual's perception must be taken into account, all the circumstances must be considered, and we must assess whether it is reasonable for the conduct to have had that effect. The question asked was a reasonable question. It is not reasonable to say that it had the effect of harassing.
- 7.28 We dismiss this allegation both as direct discrimination and harassment.

² When referring to harassment we have in mind that harassment can include behaviour that violates dignity or is intimidating, hostile, degrading, humiliating, or offensive environment.

On 18 June 2019 [the claimant] was he told by Supportive Day Care Sister Lauren Plummer that the information he had mentioned was already on EPIC? Also on 18 June 2019 did she also say that the claimant needed to be careful in future and to make sure that he read the parameters section of the drugs he administered?

Also on 18 June 2019 did Ms Plumer ask the claimant in front of other colleagues why it too him so long to put up the IVIG?

- 7.29 There are a number of allegations concerning the events of 18 June 2019 and we can deal with them together. The claimant was told on 18 June that the information was already on EPIC. He was told he needed to be careful in the future to read the parameters section the drugs administered. He was asked why he had taken so long. Others were present.
- 7.30 For the purpose of this analysis, we will assume that the burden shifts in relation to direct discrimination. Has the respondent established an explanation, on the balance of probability?
- 7.31 We find that an explanation has been established. The claimant had primary responsibility for one patient. The patient's treatment with IVIG should have commenced within a brief period of attending, perhaps at most half an hour. There was significant delay. The claimant told us that he had looked at the notes on EPIC at approximately 09:00 but had not found the relevant information.
- 7.32 On his account it is it is unclear what he was doing until 10:00 when Ms Plummer arrived. It is clear he had not clarified any matter about which he was confused. Despite saying he had checked EPIC at 09:00, he had not contacted and doctor. When Ms Plummer attended after 10:00, the treatment had not started and there was still difficulty with the patient. He appeared to be contradicting the patient. The information was on EPIC.
- 7.33 We have preferred Ms Plummer's account. The claimant's account has been inconsistent and appears to have evolved. On his oral account there was a discussion with JF around 09:00, but that is not set out in his statement. It does not explain why he took no action after 09:00. His statement fails to set out a coherent series of events and instead, it appears to start at the point Ms Plummer attends. The claimant fails to set out, adequately or at all, the conversations he had with the patient. In contrast, Ms Plummer's account is detailed and cogent. On the balance of probability, her account is accurate.
- 7.34 Had the claimant proceeded with the titration, as he was proposing, it could have had a detrimental effect on the patient, and it was contrary to the parameters are set out in the notes. We accept that this came to Ms Plummer's attention as she overheard the claimant's conversation.
- 7.35 Ms Plummer showed him the entry. We accept there was a discussion, and the claimant was asked why he had taken so long to start the IVIG. It

should not have been necessary to show him the entry, as he should have been able to find it himself. Therefore, telling him that the information was on EPIC was reasonable and appropriate. It was necessary because of the claimant's failure; it was important that he should learn and avoid the same error in the future. It also follows that telling him to be careful in the future was reasonable and appropriate. In all the circumstances, it would have been possible for Ms Plummer to view the matter much more seriously. Instead, she treated it as a training need and her reaction was mild and proportionate. There is no basis for saying her reaction was because of the claimant's race; it was a necessary reaction to the claimant's failure.

- 7.36 The claimant alleges that being asked in front of others why he took so long is discrimination. There had been a significant delay. It was appropriate to ask for an explanation. The explanation received was poor and unclear.
- 7.37 Ms Plummer did take steps to have the conversation as discreetly as practicable. She moved away from the patient. There was a minor barrier in the form of the computer screen. They could not leave the ward. The claimant suggested to the tribunal that they could have perhaps gone to an open nursing station. However, there is no guarantee that would have been further away from individuals. It was reasonable for Ms Plummer to ask the question because the claimant had been slow. It was inevitable that others were around, as they needed to stay on the ward. The question was relevant to current treatment and could not reasonably have waited. We accept Ms Plummer's evidence that this question was routine, and she would have treated anyone in the same manner. Her actions were not because of the claimant's race.
- 7.38 We have considered whether any of the allegations concerning conduct on 18 June amounted to harassment. We find it was not the purpose to harass. Ms Plummer identified the claimant was about to make a clinical error. The purpose in speaking to him initially and showing him the relevant information on EPIC was to prevent clinical error. In addition, it was to prevent future problems by providing training. The purpose of asking for his explanation was to ascertain whether there were any difficulties and facilitate training.
- 7.39 We have considered whether it had the effect of harassing the claimant. We accept the claimant may have found the conversations unwelcome. However, they were necessary. They were occasioned by his failure. Even on his best case, he was confused and needed information. He did not seek that information from anyone in a reasonable or timely manner. On his best case, he had looked at EPIC, and failed to find the information, albeit that the information was there, and it should have been obvious to him. Even if it were not obvious, he could have asked for help. As the claimant created the delay, and as there was a potential for inappropriate clinical action, it is not reasonable for him to take the view the Ms Plummer's action was harassment. In any event, there is no facts

from which we could conclude Ms Plummer's action related to his race. The allegations concerning treatment on 18 June 2019 fail, both as claims direct discrimination and harassment.

[Also on] 18 June 2019 email describing the claimant as lazy and argumentative (as an allegation of race harassment alternatively direct race discrimination)

- 7.40 The amendment granted by EJ Burns refers to an email of 18 June 2019. It is common ground before us that the relevant email is 20 June 2019. That email does not describe the claimant as either lazy or argumentative. It is the claimant case before us that in some manner it feeds into a stereotype that black nurses are lazy and argumentative.
- 7.41 We find this claim is without merit. The email was produced because it was necessary to give feedback for the purpose of his appropriate appraisal. It identified four matters of concern and three specific examples. Ms Plummer's account of 18 June 2018 has been accepted by the tribunal. The record of the events as set out in the email is fair, reasonable, and accurate. It gives other examples, and notes that concerns been raised. The email raises quite serious concerns. However, it remains supportive and suggests the need for further training.
- 7.42 Recording that the claimant is slow is not an allegation that he is lazy. Recording that there was a difficulty with a specific patient is true and the event is not embellished.
- 7.43 There is no general allegation that he is argumentative. Taken as a whole, the email would suggest the claimant needs to communicate more. It does not suggested his communications are inappropriately argumentative.
- 7.44 The claim, therefore, fails factually.
- 7.45 Further, Ms Plummer has established her reason for both writing, and sending the email. It accurately reflects her legitimate concerns about the claimant and identifies training needs.
- 7.46 In the context of harassment, there is no basis for saying that the purpose of the email was to harass the claimant. Given that it is essentially accurate and supportive and is designed to facilitate the claimant's training, whatever the claimant's perception, there is no basis for saying that it could reasonably be said to have had the effect of harassing him. There is no basis for saying that it was related to his race.

On 3 September 2019 was the claimant removed from the coordination rota with no prior discussion of the decision?

- 7.47 The claimant complains both about being removed and there being no discussion.

- 7.48 The respondent has established explanations. There was no initial discussion with him because it is not normal to inform or consult prior to the decision. He was informed of the reason after, during the discussion on 6 September.
- 7.49 The claimant was not fully trained to coordinate. He would have required supervision. The only reason that he would have undertaken coordination was for the purpose of training. There was no prospect of him completing training. He was leaving and therefore there was no reason to train him as a coordinator. We accept the respondent has established its explanation on the balance of probability. It follows that the claim of direct discrimination fails.
- 7.50 In the context of harassment, the explanation is also an answer to any claim that the action had the purpose of harassing.
- 7.51 As regards effect, the claimant understood that he was leaving and that there was no need to continue to train him. It is possible that he had in mind that Ms Naomi Wood was being treated differently. However, in his evidence before us, he accepted that he did not believe she was being treated differently, this was based on assumption and not on any fact. Had he understood the full facts, he could not have maintained the view that she was, in some manner, being treated better.
- 7.52 It is not reasonable to find that the conduct had the effect of harassing the claimant.
- 7.53 In any event, it was not related to race, as it was related to the needs of the business the lack of the need to train the claimant, and his lack of experience.
- 7.54 The treatment on 3 September 2019 was neither an act of race discrimination or harassment.

On 6 September 2019 at approximately 18:30 hours, did Ms Plummer suggest that the claimant end his employment at an earlier date and was there no return to work discussion after he was off sick with back pain?

- 7.55 On 6 September 2019 Ms Plummer did suggest to the claimant that his employment may terminate earlier. This was an offer. The claimant was free to accept or reject. We accept her explanation that she made the offer because the claimant had had difficulty with his back, and he may prefer to leave earlier. In fact, he accepted the offer and proposed a date.
- 7.56 As regards direct discrimination, the explanation is clear. Ms Plummer believed the claimant may wish to leave earlier, if he had work to go to, and he wished to avoid exacerbating any back condition. She made the offer because she thought it would be welcome to him. She did not make the offer because she wished him to leave. She would have made the offer to someone, in the same circumstances, who was of a different race.

- 7.57 As for harassment, the purpose is clear. It was to offer the claimant a choice, as she believed the choice would be welcome. It was not because of his race.
- 7.58 Could it have had the effect of harassing the claimant? The evidence we have is that he accepted the offer and nominated a date. He did have work to go to, albeit he did not tell Ms Plummer that he had already accepted a job. The ability to leave early and start his other employment, at the time, was welcome to him. The claimant did not, at the time, perceive the action as harassment. It is not reasonable to find it had the effect of harassing him. There is no basis for saying was related to race.

Was the outcome of the claimant's grievance in the HR outcome letter of 18 October 2019 misguided, misinformed and lacking in the investigation and therefore a further act of harassment?

- 7.59 The final allegation concerns the grievance. The respondent has established an explanation for the both the approach to the grievance and the outcome.
- 7.60 The informal procedure was used because that was standard and consistent with the way Mr Baxendale dealt with the grievances of others who had left. Ms Keane was contacted. Statements were obtained. As the nature of the claimant's grievance was sufficiently clear in detail from his original grievance, it was not necessary to contact the claimant further.
- 7.61 Mr Baxendale identified, with care, the elements of the grievance. He set out the relevant facts and he considered each carefully. He partly supported the claimant in relation to the potential for extending his notice period and he accepted that there should have been a return to work interview. He rejected any allegation of lack of diversity in the unit, and he had ample grounds for doing so.
- 7.62 He found no evidence to support a suggestion that any treatment was because of the claimant's race or amounted to harassment.
- 7.63 The claimant's case is a general one. He alleges the approach to the grievance was misguided, misinformed and unsupported by any investigation. That allegation is not sustainable. There is clear explanation, which in no sense whatsoever was because of race, for the way in which the grievance was approached and investigated, and for the outcome.
- 7.64 In the context of harassment, the purpose was to investigate and considered the claimant's grievance. It is clear that is what Mr Baxendale did and it cannot be argued that the purpose was to harass him.
- 7.65 As regards effect, there can be no doubt the claimant did not welcome the response. It is possible he would have preferred a longer and more

intense investigation. However, as he had left, it would not be reasonable to expect a full investigation, as that was not within the respondent's policy. It is not reasonable to find it had the effect of harassing the claimant. In any event, there is no basis for saying either the way in which the grievance was conducted, or the findings, related to race.

- 7.66 It follows this allegation fails in the context of both direct discrimination and harassment.

Constructive dismissal

- 7.67 The first question is whether the respondent was in breach of contract. The claimant relies on the breach of the implied term of mutual trust and confidence. The clearest statement of his position appears in his email to the tribunal; we need to consider the matters relied on.
- 7.68 He started applying for jobs after his appraisal on 5 July 2019. During that appraisal he was told he would not be rotated to chemotherapy day care. Although not described as such, it is clear that that is the triggering event causing him to find new work and leave; it may be possible to see it as a last straw.
- 7.69 In his email he makes further accusations as follows: there was discrimination in providing study leave for white nurses and promotion of two white nurses Mrs Nicholson and Ms Maclean over an unidentified BAME candidate.; the promotion of another white nurse, Mrs Badger, in August; only receiving statutory sick pay when he commenced working at the unit; and asking divisive questions promoting racial inequality at the interview on 15 November 2015.
- 7.70 We should, as far as we are able to, deal with the various matters relied on.
- 7.71 The reference to a divisive question appears to be a reference to the events of 15 November. There was no unreasonable or divisive question asked.
- 7.72 When the claimant started with the respondent, he did receive statutory sick pay. The previous department had failed to record that his sickness absence had ended. It was not known to the cancer centre until the claimant noticed the problem and raised it. The error was remedied. He received his pay. To the extent that the error could be seen as a breach of contract, it was remedied. He continued working. The contract was affirmed.
- 7.73 In his statement, the claimant alleges that he was not given study leave, whereas others did receive it. He does not set out the circumstances. He does not give the detail of when any request was made, or the circumstances of any refusal. It is not a matter that he pursued with any witness.

- 7.74 His statement refers to pages 257 and 299 in the bundle. We have considered those documents. They do not explain when he applied for study leave, or how, or if, it was refused. The documents themselves are dated 17 November 2018 and 15 February 2019. Therefore, any refusal appears to be in the early part of his employment, and he continued to work, affirming his contract.
- 7.75 The claimant does not explain in his claim form, his witness statement, or anywhere else, what he means by the allegation there was a covert promotion of a white nurse, Mrs Badger. This allegation is not supported by argument or evidence.
- 7.76 The main event relied on it is that on 5 July 2019, during his appraisal, he was told he would not be rotated to chemotherapy day care. He says there were two or three nurses ahead of him. He claims this is in breach of the job advertisement which refers to the role as being a fast-track development role for the unit.
- 7.77 There are difficulties with this allegation. It was not a rotation role. He could not move to chemotherapy, as he had not completed his relevant certification, and he had not trained as a coordinator. The average time to move to the chemotherapy ward was seventeen months. He was therefore in the early stage of his development. There is nothing in the job advert, any job description, or in his contract, to the effect that he would be transferred into the chemotherapy ward within six months. To the extent it had been discussed at the interview, the claimant's representations had led the interviewers to believe that he was already qualified. It had been anticipated he would go straight to the chemotherapy ward, but he was unable to do so because of his lack of certification.
- 7.78 Telling him on 5 July 2019 that he would not, at that time, rotate to chemotherapy day care until at least the next year was not a breach of contract. Moreover, it was not, in any sense whatsoever, inappropriate, unfair, unreasonable, or blameworthy. It was a simple statement of fact, and entirely consistent with the normal development expected. It follows that it could not be a breach of contract. Moreover, as it was not in any sense blameworthy, it is difficult to see how it could be a last straw.
- 7.79 We have considered whether there was a course of conduct. We have considered the matters relied on above. There is no evidence that anyone was covertly promoted, or that the claimant was not promoted because of his race. The claimant has failed to set out the relevant circumstances in relation to study leave. The issues around sick pay had been resolved. For the reasons we have given there was no discrimination or harassment.
- 7.80 We can identify no course of conduct. The issue with wages was a legitimate complaint but that is a discrete matter based on a mistake,

which occurred outside the department and which was rectified. It could not form part of a course of conduct.

- 7.81 It follows that there was no breach of the term of mutual trust and confidence. As there was no breach of contract, the claimant could not elect to accept that breach and treat himself as dismissed.
- 7.82 Even if there were a breach of contract, it is clear that the claimant resigned when he had obtained new employment. He gives no adequate explanation for why he failed to tell the respondent that he obtained a new job.
- 7.83 The fact that somebody gets a new job and leaves may not be fatal to a claim of constructive dismissal. If the respondent is in breach of contract, and if the individual has expressly or implicitly reserved its right in relation to that breach, the breach may still be an operative reason, even if the individual waits until he or she has obtained alternative employment. However, as there was no breach of contract at all, this is hypothetical.

Wrongful dismissal

- 7.84 In order to receive payment for his notice period the claimant must establish that the respondent was in breach of contract and that there was a loss.
- 7.85 The claimant's contract required him to give eight weeks' notice. There was an initial mistake, and it was agreed he would give six weeks, notice. Following the conversation with Ms Plummer, he requested his notice be reduced further and that was agreed. His agreed leaving date was therefore 13 September. There was a request to extend his notice period to 27 September. Ms Plummer was unable to agree this and directed that he should discuss it, initially with Ms Wellard. He was then directed to Ms Keane. At that point, there had been no further variation of the contract. Whilst a clear indication had been given that there would not be a difficulty, it was conditional upon ensuring that the practical arrangements could be made. The claimant chose not to discuss the matter with Ms Keane who could have made the decision. We therefore find that the contract was not varied, and the final date remained 13 September (albeit it was ultimately processed as 15 September).
- 7.86 The claimant accepts he was paid up to the 15 September. It follows that no further sum is due.
- 7.87 If, contrary to our analysis, the discussion with Ms Plummer did reinstate the leaving date as 27 September, difficulties arise. First, the claimant had a new job, in breach of his contract, and was not making himself available for work. Second, any sums earned in the new employment must be deducted from the sums he would have earned. The respondent has no obligation to pay the claimant if he is in breach of contract and is failing to make himself available for work. It is for the claimant to prove

loss. He has given virtually no information concerning his new employment. It is for him to demonstrate that he was earning less. He has failed to do so. He has not established a loss. The claim for notice period is therefore dismissed

- 7.88 We note that EJ Elliott's record of the issues indicates that the claimant resigned a second time by email 11 September 2019 to Ms Plummer. That is not an argument the claimant has pursued before us. We should consider it briefly both in the context of constructive dismissal and in the context of notice.
- 7.89 If he did resign on 11 September 2019, this had no effect on varying the original agreed termination date, being 13 September 2019, and he has received his pay.
- 7.90 The email of 11 September states that he is consulting HR and his union representative about degrading and humiliating treatment. It says he does not feel psychologically safe to attend work.
- 7.91 There are no clear words of resignation. At best, it is an indication of sickness absence because he did not feel psychologically safe. To the extent a potential breach of contract is identified, it is firmly in the context of the disrespectful treatment constituting harassment. It is not clear what the claimant had in mind, and we have no evidence which would assist.
- 7.92 We have considered the events of September that have been put forward as harassment. It is clear that there was no harassment, and those events which he has identified could not be seen as breaches of contract either in themselves or in the context of an allegation there was a breach of the implied term of mutual trust and confidence. It follows that if the email of 9 September was a resignation, there can be no finding of constructive dismissal, as there was no breach of contract.
- 7.93 As there was no dismissal. The claim of unfair dismissal must fail.

Employment Judge Hodgson
Dated: 26 November 2020

Sent to the parties on:

02/12/2020

For the Tribunal Office