



EMPLOYMENT TRIBUNALS

Claimant

Dr Nyo Nyo Khin

v

Respondents

George Eliot Hospitals NHS Trust (1)

Dr Catherine Free (2)

Mr Gary Lawrence (3)

Dr Neena Navaneetham (4)

Heard at: Midlands West Employment Tribunal (In person)

On: 24th, 25th, 26th, 27th, 28th June 2024 (In person)
1st, 2nd, 3rd, 4th, 5th July 2024 (In person)
5th, 8th, 9th July (Deliberations with Members)
22nd July, 1st, 2nd August and 27th October 2024 (Judge alone)

Before: Employment Judge Jonathan Gidney
Mr Kevin Palmer
Mrs Rachel Barrett (Remote)

Appearances

For the Claimant: Mr Calvert (Counsel)

For the Respondent: Mr Heard (Counsel)

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. The Claimant's claim of constructive unfair dismissal, pursuant to s95 Employment Rights Act 1996 ('ERA') is dismissed.

2. **The Claimant's claims of direct race discrimination pursuant to s13 Equality Act 2010 ('EqA') is dismissed.**
3. **The Claimant's claims of direct age discrimination pursuant to s13 EqA is dismissed.**
4. **The Claimant's claims of direct sex discrimination pursuant to s13 EqA is dismissed.**
5. **The Claimant's claim of harassment pursuant to s26 EqA related to her race is dismissed on withdrawal by the Claimant.**
6. **The Claimant's claim of victimisation pursuant to s27 EqA is dismissed.**

REASONS

Introduction

1. The Claimant commenced employed with the Respondent in the role of Speciality Doctor in Obstetrics and Gynaecology on 6th August 2008 [115]¹. The Claimant's sex is female, her nationality is Myanmar (Burmese) and at the date of her resignation from the 1st Respondent on 23rd December 2022 [2815] she was 62 years old. For the purposes of her age discrimination claim the Claimant asserts that at the material time she was in the age group of 'over 60s'.
2. On 13th January 2023 the Claimant notified ACAS of a dispute with the George Eliot Hospital NHS Trust, the 1st Respondent. She received her Early Conciliation Certificate on 16th January 2023 [1].

¹ Numbers in Square Brackets refer to pages within the Main Trial Bundle

3. On 10th February 2023 the Claimant notified ACAS of further disputes with 3 individual Consultants (referred to in paragraph 4 below). She received her Early Conciliation certificates for the remaining Respondents on the same day, 10th February 2023 **[2-4]**.
4. By a Claim Form also dated 10th February 2023 **[5]** the Claimant presented claims of direct race, age and sex discrimination, as well as claims of harassment related to her race and victimisation against the 1st Respondent. The Claimant named the following individuals as Respondents to her Claim:
 - 4.1. Dr Catherine Free, 2nd Respondent, who was at all material times the 1st Respondent's Chief Medical Officer and Responsible Officer. In June 2023 (post the Claimant's resignation) she was promoted to the role of Managing Director of the 1st Respondent. She is female, white British and at all material time was in the age group 50-55;
 - 4.2. Mr Gary Lawrence, 3rd Respondent, who was and is a substantive Consultant in the 1st Respondent's Obstetrics and Gynaecology department. The 3rd Respondent is male, white British and at all material times for this case, in the age group 'over 60s';
 - 4.3. Dr Neena Navaneetham, 4th Respondent, who was and is a substantive Consultant in the 1st Respondent's Obstetrics and Gynaecology department. In 2015 she was appointed Clinical Services Lead. The 4th Respondent is female, Indian and at all material times for this case, in the age group 'over 60s'.
5. The matter was case managed by Employment Judge Krepski on 26th July 2023 **[93]**. The Judge gave directions for the parties to finalise the List of Issues in the case, which was duly undertaken **[102]** (set out below). During initial housekeeping the List of Issues was further clarified and slightly narrowed by agreement between the parties.
6. The Claimant's claim has the following components:

- 6.1. there are 48 separate factual Issues for determination;
 - 6.2. there are 5 of different legal claims (direct sex, race, age discrimination, harassment and victimisation);
 - 6.3. there are 4 alleged discriminators (Respondents 1 to 4)
 - 6.4. there are 8 actual comparators (Doctors Sohail, Erinale, Akol, Misra, Aravindan, Elkinder, Khaire and Datta);
 - 6.5. there are 23 separately defined hypothetical comparators².
7. Broadly speaking, the Claimant has adduced 46 factual matters said to be discriminatory. Her protected characteristics are that she is Myanmar, female and over 60. The Claimant invites the Tribunal to conclude that the reason for any detrimental act that is established on its facts, was any or all of her protected characteristics. She has not attributed any particular detriment to any particular characteristic. In effect the Claimant has presented the Tribunal with a long list of detriments and a list of characteristics and asked the Tribunal to discern whether any characteristic is the reason for her treatment. The characteristics potentially compete against each other and the Claimant has not advanced a positive case that either her sex, race or age was the motivation or reason for any particular detriment.

The List of Liability Issues

8. During the course of the hearing the Tribunal produced a schedule of Issues to assist the parties. The issues recited below are referenced to the issue number in that schedule, with the paragraph number from the original List of Issues **[103]** shown in square brackets. It has been updated to reflect the List of Issues at the end of the evidence, as some issues were withdrawn, narrowed and/or not pursued during the hearing. As such:
9. Did the following incidents occur? Were they detrimental to the Claimant:

² Refer to the Schedule of defined hypothetical comparators provided by the parties.

9.1. **Issue 1 [2.1.1]**

The failure to grant and provide the Claimant her full 34 day annual leave entitlement for the August 2018 to August 2019 leave year.

[Direct Discrimination on the grounds of Race, Sex & Age]

[Against 1st, 2nd, 3rd & 4th Respondents]:

[Comparators: Hypothetical, Dr Sohail, Dr Erinale, Dr Akol & Dr Misra].

9.2. **Issue 2 [2.1.2]**

Operating an unfair annual leave approval procedure between January 2018 and August 2019.

[Direct Discrimination on the grounds of Race, Sex & Age]

[Against 1st, 2nd, 3rd & 4th Respondents];

[Comparators: Hypothetical & Dr Sohail].

9.3. **Issue 3 [2.1.3]**

Excluding the Claimant from the EXCEL awards on 3 July 2019.

[Direct Discrimination on the grounds of Race, Sex & Age]

[Against 1st, 3rd & 4th Respondents]

[Comparators: Hypothetical & all Excel reward recipients]

9.4. **Issue 4 [2.1.4]**

Bullying by colleagues including the 3rd and 4th Respondent and Dr Iftikhar Sohail, Specialty Doctor by reason of the following treatment:

[Direct Discrimination on the grounds of Race, Sex & Age]

[Against 1st, 3rd & 4th Respondents]:

[Comparators: Hypothetical only]

9.4.1. **Issue 4.1 [2.1.4]**

The unfair management of annual leave by 4th Respondent;

9.4.2. **Issue 4.2 [2.1.4]**

Not allowing the Claimant to attend an examination as an examiner;

9.4.3. **Issue 4.3 [2.1.4]**

Unfair allocation of annual leave and study leave;

9.4.4. **Issue 4.4 [2.1.4]**

The 3rd Respondent's failure to engage with the Claimant's annual leave concerns;

9.4.5. **Issue 4.5 [2.1.4]**

Dr Sohail's refusal to accept he owed the Claimant two shifts instead of one shift following a shift swap;

9.4.6. **Issue 4.6 [2.1.4]**

The 4th Respondent's alleging bullying of the Claimant on 12th July 2019 following the Claimant's decision not to perform an episiotomy (repair of a tear);

9.4.7. **Issue 4.7 [2.1.4]**

The use of 5 Datix reports to raise concerns about the Claimant's capability and performance.

9.5. **Issue 5 [2.1.5]**

Favouring of Dr Sohail over the Claimant by 4th Respondent by deliberately disadvantaging of the Claimant in relation to staff rotas.

[Direct Discrimination on the grounds of Race, Sex & Age]

[Against 1st & 4th Respondents]

[Comparators: Hypothetical & Dr Sohail].

9.6. **Issue 6 [2.1.6]**

Treatment of the Claimant by 3rd Respondent in relation to the Claimant's application for an SAS Tutor post;

[Direct Discrimination on the grounds of Race, Sex & Age]

[Against 1st, 3rd & 4th Respondents]

[Comparators: Hypothetical & Dr Aravindan].

9.7. Issue 7 [2.1.7]

Deliberate disadvantaging of the Claimant in relation to staff rotas. (This is a repeat of the factual allegation at Issue 5 above).

[Direct Discrimination on the grounds of Race, Sex & Age]

[Against 1st, 3rd & 4th Respondents]:

[Comparators: Hypothetical, Dr Sohail, Dr Elkinder, Dr Akol & Dr Misra].

9.8. Issue 8 [2.1.8]

The 1st Respondent failed to adequately address, without unreasonable delay, the Claimant's grievances including allegations of bullying against the 3rd and 4th Respondents, and Dr Iftikhar Sohail, Specialty Doctor, on the following occasions:

[Direct Discrimination on the grounds of Race, Sex & Age]

[Against 1st Respondent]

[Comparators: Hypothetical only]:

9.8.1. Issue 8.1 [2.1.8]

11th November 2018.

9.8.2. Issue 8.2 [2.1.8]

12th March 2019

9.8.3. Issue 8.3 [2.1.8]

15th April 2019

9.8.4. Issue 8.4 [2.1.8]

25th April 2019

9.8.5. Issue 8.5 [2.1.8]

19th June 2020

9.8.6. Issue 8.6 [2.1.8]

17th July 2020

9.8.7. **Issue 8.7 [2.1.8]**

3rd September 2020

9.9. **Issue 9 [2.1.9]**

The 1st Respondent failed to adequately communicate with the Claimant during the grievance processes;

[Direct Discrimination on the grounds of Race, Sex & Age]

[Against 1st Respondent]

[Comparators: Hypothetical only]

9.10. **Issue 10 [2.1.10]**

Unreasonable restrictions being imposed on the Claimant's practice by the 1st and 2nd Respondent on 3 August 2020, 7 October 2020, 5 December 2022 and 31 January 2022;

[Direct Discrimination on the grounds of Race, Sex & Age]

[Victimisation following protected act on 10 December 2021]

[Against 1st & 2nd Respondents]

[Comparators: Hypothetical only]

9.11. **Issue 11 [2.1.11]**

The 1st and 2nd Respondents' failure to follow 1st Respondent's own Policy and the national MHPS Guidance related to restriction / exclusion, namely:

[Direct Discrimination on the grounds of Race, Sex & Age]

[Against 1st & 2nd Respondents]

[Comparators: Hypothetical, Dr Elkinder, Dr Akol & Dr Erinale]

9.11.1. **Issue 11.1 [2.1.11.1]**

the imposition of restrictions

9.11.2. **Issue 11.2 [2.1.11.2]**

the effective exclusion by means of 'restrictions'

9.11.3. **Issue 11.3 [2.1.11.3]**

the failure to appoint and give the Claimant access to a non-executive director (Designated Board Member);

9.11.4. **Issue 11.4 [2.1.11.4]**

the inadequate and irregular reviews of the restrictions / exclusion;

9.11.5. **Issue 11.5 [2.1.11.5]**

the lack of communication in relation to restriction / exclusion;

9.11.6. **Issue 11.6 [2.1.11.6]**

the lack of an adequate, proper, fair and timely investigation.

9.12. **Issue 12 [2.1.12]**

The MHPS investigation report dated January 2021 was inadequate and unfair, including an inadequate selection of witnesses without consultation or notification to the Claimant;

[Direct Discrimination on the grounds of Race, Sex & Age]

[Against 1st & 2nd Respondents]

[Comparators: Hypothetical only]

9.13. **Issue 13 [2.1.13]**

The 1st and 2nd Respondent failed to provide the Claimant with adequate supervision or support during the time that her practice was restricted;

[Direct Discrimination on the grounds of Race, Sex & Age]

[Against 1st & 2nd Respondents]

[Comparators: Hypothetical only]

9.14. **Issue 14 [2.1.14]** The 2nd Respondent's behaviour towards the Claimant was harsh and intimidating in meetings and correspondence, such as:

[Direct Discrimination on the grounds of Race, Sex & Age]

[Victimisation following protected act on 10 December 2021]

[Against 1st & 2nd Respondents]
[Comparators: Hypothetical only]

9.14.1. **Issue 14.1 [2.1.14.1]**

13 July 2021 correspondence relating to 13 July 2021 meeting.

9.14.2. **Issue 14.2 [2.1.14.2]**

1 November 2021 correspondence relating to 26 October 2021 meeting;

9.14.3. **Issue 14.3 [2.1.14.3]**

17 January 2022 correspondence, relating to 5 January 2022 meeting;

9.14.4. **Issue 14.4 [2.1.14.4]**

7 March 2022 correspondence relating to 3 March 2022 meeting;

9.14.5. **Issue 14.5 [2.1.14.5]**

28 March 2022 correspondence relating to 28 March 2022 meeting;

9.14.6. **Issue 14.5 [2.1.14.5]**

9 May 2022 correspondence relating to 26th April 2022 meeting.

9.15. **Issue 15.1 [2.1.15]**

The commissioning of the Claimant's behavioural assessment report (dated 26 April 2021, re-issued 3 June 2021)

[Direct Discrimination on the grounds of Race, Sex & Age]

[Against 1st & 2nd Respondents]

[Comparators: Hypothetical, Dr Elkind, Dr Khaire & Dr Datta]

9.16. **Issue 15.2 [2.1.15]**

The content of the report itself.

[Direct Discrimination on the grounds of Race, Sex & Age]

[Against 1st & 2nd Respondents]

[Comparators: Hypothetical, Dr Elkinder, Dr Khaire & Dr Datta]

9.17. **Issue 15.3 [2.1.15]**

The weaponisation of the content of the report against the Claimant;

[Direct Discrimination on the grounds of Race, Sex & Age]

[Against 1st & 2nd Respondents]

[Comparators: Hypothetical, Dr Elkinder, Dr Khaire & Dr Datta]

9.18. **Issue 16.1 [2.1.16]**

The First and Second Respondent's insistence on sharing flawed information with prospective external placements before they could take place.

[Direct Discrimination on the grounds of Race, Sex & Age]

[Against 1st & 2nd Respondents]

[Comparators: Hypothetical only]

9.19. **Issue 16.2 [2.1.16]**

The First and Second Respondent's failure to indicate the duration of the placement to the Claimant;

[Direct Discrimination on the grounds of Race, Sex & Age]

[Against 1st & 2nd Respondents]

[Comparators: Hypothetical only]

9.20. **Issue 17 [2.1.17]**

The requirement contained within the letter dated 19 December 2022, for the Claimant to respond to the Management Statement of Case the same day.

This allegation was dismissed by the Tribunal on withdrawal by the Claimant.

9.21. Issue 18 [2.1.18]

The Claimant being given inadequate time to prepare for the hearing in January 2023;

[Victimisation following protected act on 10 December 2021]

[Victimisation following protected act on 13 December 2022]

[Direct Discrimination on the grounds of Race, Sex & Age]

[Against 1st & 2nd Respondents]

[Comparators: Hypothetical only]

9.22. Issue 19 [2.1.19]

The Management Statement of Case, dated 19 December 2022, being inaccurate;

[Direct Discrimination on the grounds of Race, Sex & Age]

[Victimisation following protected act on 10 December 2021]

[Victimisation following protected act on 13 December 2022]

[Against 1st & 2nd Respondents]

[Comparators: Hypothetical only]

9.23. Issue 20 [2.1.20]

On 20 December 2022, the First Respondent refusing the Claimant's request for her lawyer to accompany her to the January 2023 disciplinary hearing;

[Direct Discrimination on the grounds of Race, Sex & Age]

[Against 1st Respondent]

[Comparators: Hypothetical only]

9.24. Issue 21 [2.1.21]

The decision to proceed with the MHPS process following the Claimant's resignation on 23 December 2022; and,

[Direct Discrimination on the grounds of Race, Sex & Age]

[Against 1st & 2nd Respondents]

[Comparators: Hypothetical only]

9.25. Issue 22 [2.1.22]

The First and Second Respondent's letter dated 19 January 2023 was inaccurate.

[Direct Discrimination on the grounds of Race, Sex & Age]

Against 1st & 2nd Respondents]

[Comparators: Hypothetical only]

10. Are the comparators in the same or not materially different circumstances to the Claimant?
11. Did the Respondent treat the Claimant less favourably than the comparators?
12. If so, was the less favourable treatment because of race, age and / or sex?

Harassment related to Race (s26 EqA) Issues [4.2.1 & 4.2.2]

13. The Claimant withdrew her claims of harassment related to race, which were dismissed by the Tribunal on withdrawal.

Victimisation (s27 EqA)

14. Did the Claimant do a protected act as follows?

14.1. Issue PA1 [5.1.1]

Within the Claimant's grievance appeal hearing on 10 December 2021;

14.2. Issue PA2 [5.2.2]

Within the Claimant's letter of 13 December 2022;

15. Did the Respondent believe that the Claimant had done or may do a protected act as a result of the communications outlined above?

16. In relation to the following detriments outlined above: All detriments above post-dating the protected acts.
17. If the Claimant was subject to any or all of the above detriments, was this because she had carried out the protected act or acts or because the Respondent believed that she had done or may do a protected act?

Constructive Unfair Dismissal (s95(1)(c) ERA)

18. Did conduct on the part of the Respondent amount to a fundamental breach of contract such as to have entitled the Claimant to have treated himself/herself as constructively dismissed? The Claimant relies on all detriments pre-dating the resignation.
19. Did the Claimant waive any breach and affirm the contract?
20. Was the principal reason for the Claimant's resignation the above alleged breaches of contract?

Jurisdiction – Time

21. Have the Claimant's claims of direct age, sex and race discrimination, racial harassment and victimisation been brought within three months of the acts complained of, taking into account the effect of the 'stop the clock' provisions in respect of early conciliation? (EqA 2010, ss 123(1)(a) and 140B)).
22. In respect of the Claimant's complaints which are based on the Respondent's failure to do something, when is the Respondent to be treated as having decided those things? (EqA 2010, s 123(4))
23. In respect of any complaints which are out of time, do they form part of a continuing act, taken together with acts which are in time? (EqA 2010, s123(3)(a))

24. If the complaints were not submitted in time, would it be just and equitable to extend time? (EqA 2010, s123(1)(b)).

Applications by the Parties.

25. There were two applications made by the parties, both of which the Tribunal refused, as follows:
- 25.1. An application by the Claimant, made at the outset of the hearing to amend the Issue from the List of Issues: from '*the failure to appoint and give the Claimant access to a non-executive director (Designated Board Member)*'³ to '*the failure to ~~appoint and~~ give the Claimant access to an effective non-executive director (designated Board Member)*'. (Showing the proposed tracked changes); and,
- 25.2. An application made by the Respondent, after the close of evidence from both sides, to adduce additional documentation said to be relevant to the issue of whether the Claimant had been paid for a shift she had undertaken for another Trust whilst on sick leave from the Respondent.
26. The Claimant's original drafting of this issue alleged that no designated Board Member had been appointed by the Trust for the Claimant to make representations to regarding the processes that the Claimant was being put through. It was clear however that Julie Houlder had been appointed and had been emailed by the Claimant [763]. Ms Houlder did not respond. Accordingly the Claimant wished to amend the issue so that it read that the Respondent had failed to provide an effective designated Board Member. All that the Respondent needed to do the answer the originally drafted Issue was show that a designated Board Member had been appointed. The email at [763] established that fact. The amendment, made on the first morning of the

³ Issue Number 2.1.11.3 in the parties original List of Issues [104] numbered 7.11.3 in this Judgment (at paragraph 7 hereof).

hearing would have required, if allowed, an explanation from Ms Houlder for her non-response and an answer to the charge that she had been an ineffective appointment. Ms Houlder was not being called as a witness and that explanation was not before the Tribunal. The Respondent had no need to call that evidence on the originally drafted List of Issues. Ms Houlder could not fairly be expected to attend this hearing without any notice at all. The Claimant provided no explanation for why this application had not been made sufficiently early enough for Ms Houlder to respond. We were concerned that the time listed for the hearing was going to be sufficient with the currently assembled witnesses, and that the introduction of a further witness would jeopardise the hearing window. The balancing of the hardship and injustice of refusing the amendment verses the balance of the hardship and injustice of allowing the amendment tipped in the Respondent's favour and accordingly the application to amend was refused.

27. We refused the Respondent's application to adduce further documents after the evidence had closed and immediately prior to the delivery of closing arguments on similar grounds that to allow it would have been unfair. It was a potentially prejudicial document that the Claimant had not had the opportunity to explain in her witness statement and had not been cross examined on. We concluded that it would not be fair to include it in our deliberations and it would have not been fair to recall the Claimant to give evidence on it 'on the hoof'. The application was denied on the grounds that it had been made too late for its inclusion to be fair.

The Evidence

28. We were provided with the following documents:
- 28.1. an agreed trial bundle which ran to 3021 pages;
 - 28.2. the correct version of a letter setting out discussions at a MHPS Investigation Review meeting held on 26th October 2021 (numbered 2575a to 2575d);

- 28.3. an additional bundle of documents provided by the Claimant, running to 14 pages (numbered 3022 to 3035);
 - 28.4. the Respondent's first additional bundle of documents running to 29 pages (numbered 3036 to 3064);
 - 28.5. the Respondent's second additional bundle of documents running to 7 pages (numbered 3065 to 3071) including the Claimant's referral to the GMC;
 - 28.6. the Respondent's third additional bundle of documents running to 6 pages (numbered 3071b to 3075);
 - 28.7. an agreed Cast List;
 - 28.8. an agreed Chronology of Events;
 - 28.9. a schedule of defined hypothetical comparators setting out the definition contended for by both parties;
 - 28.10. a set of written Closing Submissions prepared by the Respondent.
29. We were provided with the following witness statements:
- 29.1. The Claimant's 1st witness statement (running to 935 paragraphs);
 - 29.2. The Claimant's 2nd witness statement (running to 32 paragraphs);
 - 29.3. The 2nd Respondent's witness statement (running to 257 paragraphs);
 - 29.4. The 3rd Respondent's witness statement (running to 89 paragraphs);
 - 29.5. The 4th Respondent's witness statement (running to 62 paragraphs);
 - 29.6. The witness statement of Dr Rupin Somaiya (running to 41 paragraphs);
 - 29.7. The witness statement of Dr Eamonn Breslin (running to 41 paragraphs);
 - 29.8. The witness statement of Gertie Nic Philip (running to 59 paragraphs);
 - 29.9. The witness statement of Natalie Green (running to 123 paragraphs).
30. Each of the witnesses gave evidence under Oath and was subject to cross examination.

Findings of Fact

31. We have not recited every fact in this case, or sought to resolve every dispute between the parties. We have limited our analysis to the facts that were relevant to the Issues that we were tasked to resolve. We made the following findings of fact on the basis of the material before us, taking into account contemporaneous documents, where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on the balance of probabilities, taking into account its assessment of the credibility of the witnesses and the consistency of their evidence with the surrounding facts. Findings of fact related to a specific issue that we have been tasked to resolve are set out in our Conclusions section below.

32. The Claimant commenced employment with the 1st Respondent on 6th August 2008 in the role of speciality Doctor in the 1st Respondent's Obstetrics and Gynaecology department [115]. The Claimant's line manager was Dr Neena Navaneetham. Dr Navaneetham is a Consultant Obstetrician and Gynaecologist. She became the 1st Respondent's Clinical Service Lead in 2015.

33. In December of 2017, Mr Gary Lawrence, the 3rd Respondent, received a grievance from the Claimant [572-574]. The grievance raised 4 concerns that the Claimant had with Dr Navaneetham, including that the rota allocation was being unfairly managed by Dr Navaneetham and that Dr Navaneetham was not letting the Claimant take her annual leave. Following an informal grievance meeting on 22nd January 2018 between the Claimant, Mr. Lawrence and Dr Navaneetham, Mr. Lawrence wrote to the Claimant on 6th April 2028 to address the Claimant's concerns [575]. Problems persisted for the Claimant and on 24th July 2028 she emailed Faye Rose about her annual leave entitlement [577]. She asserted that Dr Navaneetham never approved her annual leave requests and that in 2018 she had only been able to take 12 days of her 25 day accrued entitlement. The Claimant met with Dr Catherine Free (the 1st Respondent's Managing Director) on 29th October 2018 [579]

and it was agreed that the Claimant would raise her concerns with Jane Sibson, the General Manager.

34. The Claimant did then raise with Jane Sibson her concerns that she was still being prevented from taking her annual leave and that the allocation of shifts was still unfair **[582]**.
35. On 19th December 2018 the Claimant and Dr Sohail exchanged texts regarding a disagreement over the number of shifts that Dr Sohail owed the Claimant after she had undertaken some of his shifts **[589]**.
36. On 12th March 2019 the Claimant reiterated her concerns to Dr Lawrence and Jane Sibson that Dr Navaneetham was still preventing her from taking her annual leave **[607]**. On 2nd April 2019 Dr Navaneetham filed a grievance against the Claimant **[741]**. On 9th April 2019 Dr Lawrence and Jane Sibson met with the Claimant **[611]**. He stated that the harassment and bullying complaints would be dealt with separately. He allowed the Claimant to carry over 5 days holiday and said he would consider examples when others in the ward had been allowed to take leave at the same time.
37. The Respondents' position was that for patient safety reasons only one person on the team could be away at any one time. As such it was important to book annual leave early, which the Claimant did not do. Her applications were refused because others had already booked leave for the same period. We found the Respondents' explanation of how and when the Claimant could take her annual leave to be confusing and we have no doubt that the Claimant did not fully understand it either, through no fault of her own. The booking system is out of sync and restrictive. The Claimant's annual leave ran from 1st April each year. However she was not allowed to book leave until 1st October (in order to prevent the August new starters finding that all of the annual leave had been booked by the time they started). This means that the Claimant had to book dates in two different leave years. If for any reason she did not make a booking in the first few days of October, the dates would be booked by others with the effect that the Claimant accrued annual leave but was unable

to take it. This system was complex, unwieldy and it did make the process of taking leave difficult. It did cause the Claimant to lose days that she had accrued but was not allowed to take. We would invite the Respondent to look carefully at its annual leave policy and improve it, and its implementation.

38. Over the course of 2019 and 2020 the Claimant was involved in the care of patients. On 2nd July 2020 Claire Price, Associate Director of Midwifery, alerted Dr Free of 5 patient cases in which questions had been raised about the level of care provided by the Claimant **[728]**.
39. The first case related to care provided on 22nd February 2019, right in the middle of the Claimant's efforts to resolve her annual leave concerns. It involved a uterine rupture and was logged as incident number 33219 (patient A). The patient, having had a caesarean section for her first birth, wanted a vaginal birth for her second child. The patient care concerns raised were that the Claimant did not follow local guidelines, did not complete the induction planner adequately, did not record discussions with other doctors in the patient notes, prescribed an incorrect and potentially dangerous dose of prostin, and did not tell the patient that the success rate for vaginal birth after caesarean was less than 40% and as such the patient was at a much greater risk of a uterine rupture, which, had the patient known, may well have influenced her birth choice **[2708]**. In essence the concern is that Patient A opted for an induced vaginal birth without having had the risk of a rupture properly explained. When the patient did suffer the rupture the Claimant was quick to assist and arrange the medical intervention that was necessary.
40. On 3rd July 2019 the Claimant walked past a room, and on glancing through the window saw some people celebrating, having been awarded an Excel award. The Claimant later found out that the award was being made to the team that worked to repair Patient A's uterine rupture **[693]**. Whilst the Claimant was not part of the theatre staff, she was part of the wider team, and she felt (notwithstanding the concerns that had been raised about her level of care) she should have been invited to and included in the award celebrations.

41. The Claimant prepared a grievance statement dated 1st August 2019 **[629]**. This reiterated the Claimant's concerns over annual leave allocation. She also raised a grievance over the Excel Award celebrations on 3rd July 2019 from which she believed she had been excluded. The Claimant commenced a period of sickness absence the next day, on 4th July, and cited (i) her annual leave issues and (ii) being excluded from the award celebration, to Occupational Health as key reasons for her work related stress **[636]**. Dr Basheer noted that the Claimant was medically fit and that her issues were work related and not medical.

42. Whilst on sick leave on the grounds that she was too ill to attend work, on 3rd August 2019 the Claimant did provide locum services to The Mid Yorkshire Hospitals NHS Trust. The 1st Respondent found out when the Mid Yorkshire NHS Trust contacted it and asked for compliancy paperwork for the Claimant, after the locum service that the Claimant had provided. In an email dated 20th August 2019 Rupin Somaiya, the 1st Respondent's Deputy Medical Director warned the Claimant that working for another Trust whilst on sick leave from the 1st Respondent was a disciplinary offence likely to amount to fraud and gross misconduct **[641]**. At a review meeting on 30th August 2019 Dr Somaiya repeatedly asked the Claimant whether she had worked for another Trust whilst claiming sick pay, and the Claimant repeatedly denied having provided any such service. In cross examination the Claimant asserted that she had been up front and told Dr Somaiya of her locum work with Mid Yorkshire. In his oral evidence Dr Somaiya refuted any suggestion that the Claimant had admitted working for Yorkshire NHS Trust. We prefer the evidence of Dr Somaiya and find that the Claimant was not truthful in the answers she gave him on 30th August 2019, and, accordingly not truthful to us in evidence on this issue.

43. Finally on this point we note that the Claimant attended a hearing before Dr Free on 2nd October 2019 **[657]** in which she accepted that she had worked a locum shift for another Trust whilst on paid sick leave. As the allegation was admitted the Claimant was given a First Written Warning by way of sanction.

44. On the 3rd December 2019 Dr Somaiya wrote to the Claimant with the outcome of her grievance against Dr Navaneetham [662], which he dismissed. The Claimant asserted that she never received that outcome [786]. Given that the Claimant's union representative, Peter Jackson, continued to press for the grievance outcome during January and February 2020 [671] we are minded to conclude that the original grievance dismissal letter was not received by the Claimant. The Claimant did not actually receive a decision on her grievance until 7th May 2020 [679]. Notwithstanding the delay caused by the Respondent believing it had sent out the decision, we conclude that the 1st Respondent's process for receiving, investigating, determining and sending out a decision on the Claimant's grievance was wholly inadequate and took far too long. We invite the 1st Respondent to look closely at its processes and do what it can to ensure that delays of the type that beleaguered this grievance are avoided in the future.
45. We think 2020 saw a steady decline in the relationship between the Claimant and the Respondents. The Claimant continued to raise and/or appeal a number of grievances or complaints (for example at [765] and [821]). There were four more patient concern incidents, with three occurring within one week and two on the same day, 17th March 2020. The earlier patient safety concern, on 10th March 2020, for Patient D, incident 43731, resulted in the baby suffering a hypoxic brain injury during delivery. The Claimant had not undertaken the delivery but had been reviewing the patient's progress prior to delivery. As stated in paragraph 38 above, on 2nd July 2020 Claire Price, Associate Director of Midwifery, alerted Dr Free of 5 patient care cases in which questions had been raised about the level of care provided by the Claimant [728].
46. On 12th July 2020 the Claimant and Dr Navaneetham had a public disagreement over whether an episiotomy was required for a patient [707]. Dr Navaneetham, in front of junior doctors, berated the Claimant for not performing the procedure in order to reduce the chance of a tear. Dr Navaneetham accepted that her choice of words and manner had not been

acceptable and we found that Dr Navaneetham's behaviour towards the Claimant had been bullying in nature.

47. On 3rd August 2020 Dr Free imposed clinical restrictions on the Claimant's practice, pending the resolution of the patient safety concerns that had been raised [738]. Those restrictions were that the Claimant would no longer working on the labour suite and not working on call, that her outpatient clinics required Consultant supervision and she could not perform any surgery on her own.
48. On 7th August 2020 the Claimant's appeal against the dismissal of her grievance was heard [750]. It was adjourned and on 10th August 2020 the Claimant resubmitted her grounds of appeal [765]. On 20th August the appeal hearing was reconvened and on 9th September 2020 the Claimant received the appeal outcome [830].
49. On 15th September 2020 Dr Free sent to the Claimant the Terms of Reference for the patient care investigation [1341]. The letter confirmed that Eamonn Breslin from University Hospitals Leicester NHS Trust had been appointed investigator. The terms of reference contained 5 points:
 - 49.1. To investigate whether Dr Khin followed the Trusts guidelines and policies;
 - 49.2. To investigate whether Dr Khin discussed and escalated cases appropriately with her supervising consultant;
 - 49.3. To investigate whether Dr Khin has reflected appropriately on any learning arising from the above incidents;
 - 49.4. To investigate whether Doctor Chin's behaviour was in line with the Trusts COMPACT specifically, participating in and supporting team decisions, providing and accepting personal and professional feedback, incorporating clinical and non-clinical staff including managers and team working, behave in a manner consistent with team goals and learning from mistakes.

50. In October Gertie Nic Philip commissioned an external investigation of all of the Claimant's grievances **[1871]**.
51. On 7th October 2020 Doctor Free imposed additional restrictions on the Claimant's practise **[853]**, namely, that she must only work in clinic when a Consultant is present or immediately available and at the end of clinic she must discuss with the Consultant the cases she had seen.
52. Between October 2020 and January 2021 Dr Breslin undertook his investigation into the patient concerns. His report was shared with the Claimant on 3rd February 2021 **[1804]**. Dr Breslin interviewed the Claimant and Mr Lawrence. Mr Breslin agreed to interview two additional witnesses selected by the Claimant. He elected not to interview all of the 7 individuals that the Claimant thought would assist in exonerating her. The Claimant, whilst accepting a recommendation made by NHS Resolution that she undergo a behavioural assessment, set out her concerns with Dr Breslin's investigation. She complained **[1816]** that:
 - 52.1. Dr Lawrence and Dr Navaneetham had been interviewed at the Trusts suggestion. The Claimant felt that both individuals would not be fair in their evidence given that both had been the subject of grievance investigations commenced by the Claimant.
 - 52.2. Dr Navaneetham had not worked with the Claimant for a number of years and was thus ill suited to comment on the Claimant's teamworking skills.
 - 52.3. Dr Lawrence had branded the Claimant a 'loose cannon' who was 'rude' and that 'no-one liked her'. In addition the Claimant felt that Dr Lawrence was ultimately responsible for the uterine rupture case (patient A).
 - 52.4. 5 witnesses suggested by the Claimant to clear her name were not interviewed by Dr Breslin.
53. We were concerned by Dr Breslin's failure to interview all of the witnesses that the Claimant thought would assist her. The outcome of Dr Breslin's

investigation could have led to permanent restrictions placed on the Claimant's practice, suspension, transfer, dismissal and/or be potentially career ending. We consider that the decision not to interview all of the witnesses that the Claimant wished to have heard undermined the fairness of his investigation and had the potential to result in a flawed and unfair investigation. To arbitrarily restrict a Doctor from calling evidence in an investigation as important as this strikes us as unfair.

54. On 10th March 2021 the Claimant undertook a behavioural assessment and the report was completed by Claire Keogh, Occupational Psychologist, on 26th April 2021 [1849]. Ms Keogh reached the following conclusions:

'She [the Claimant] gave the impression of a stoical, hard-working and well-intentioned individual but one who might potentially be at risk of being misunderstood owing to cultural differences and a degree of social awkwardness. Less sophisticated than others in terms of her interpersonal communication skills, she has a tendency to be open and unguarded. She does not appear to find it easy to convey her thinking or intentions clearly and concisely. With her patients, Dr Khin is assiduous and determined to do what she can support patient choice, it appears. That she has a good success rate in this and is valued by patients and midwives for her skills, but in the process she comes across as less aware of the wider context around each intervention. This appears to have impacted significantly on her perceived effectiveness as a team member. She tends to view people with suspicion and, given any choice, may prefer to avoid potentially difficult encounters.

Her account suggests that she values the status of an SAS doctor and believes that she has the skills and experience to act autonomously. Her belief that is unlikely to help her address her colleagues concerns regarding her apparent independence.

Dr Khin's self-awareness is not well developed and she may not be sufficiently alert to the disparity between the impact she intends and the impact that is actually felt by others or have the skill to remedy it if she did have that insight. She comes across as more focused on action rather than reflection, and although she spoke of reflecting in appraisal meetings, the outcome of this appears to lack the depth and insight. She came across as embittered by her experiences, focused on resolving

grievances, returning to full practise, but gave less indication of her motivations towards self-development.

The psychometric data indicated that she might struggle in roles where she is responsible for leading or developing others. Her interpersonal style is relatively introverted, and she's likely to be happier delivering the task rather than developing the relationships needed to empower and motivate others. She is extremely direct in their communication style but not especially structured and thus her instructions may lack sufficient focus and clarity to be helpful for those who need guidance.

She came across as naive about the rights of senior figures to challenge her and somewhat resentful that this might be the case. The overall impression was of a practitioner who values her independence and feels it is justified, but who may as the consequence pay less attention to the importance of shared responsibility and accountability that underpins the principles of supervision and reference to others'.

55. On 28th June 2021 the Claimant received the independent investigation into her grievances against Dr Navaneetham, the Ibex Gale report **[1871]**. The report contained the following conclusions:
- 55.1. There was no evidence that Dr Sohail had bullied or picked on the Claimant;
 - 55.2. There was no evidence that Dr Lawrence had bullied the Claimant;
 - 55.3. Whilst there was no evidence that Dr Navaneetham had bullied, harassed or victimised the Claimant, Dr Navaneetham had been overly critical of the Claimant on 12th July 2020 in front of her peers. Both the Claimant and Dr Navaneetham's behaviour on that occasion may be deemed unacceptable under the COMPACT agreement;
 - 55.4. The Claimant's work allocation was service led, but influenced by the agreement that the Claimant would not work with Dr Navaneetham. There was no evidence that Dr Sohail's work allocation was tainted by favouritism.
56. Paragraphs 225-226 of the report **[1921-1922]** set out the following on the issue of shift allocation:

'Dr Sohail and Dr Mishra have had more shifts on the Labour ward based on the period that we reviewed. The time spent by Dr Mishra was almost double than that spent by Dr Khin. Dr Sohail, in comparison, spent approximately 1/3 more time on the Labour ward than Dr Khin for the same period. In the case of Dr Mishra, this is to support her training to advance as a Registrar. However, Dr Sohail has more shifts on the labour ward than Dr Khin and is not training as a registrar. We find that the most likely reason for this is that Dr Sohail works frequently with Dr Navaneetham'.

57. On the same day Dr Free asked the Claimant to attend a meeting to discuss the Ibox Gale report and the report of Dr Breslin **[2460]**.
58. On 7th July 2021, the claimant appealed the outcome of her grievance. **[2462-2466 & 2469]**. She disputed the conclusions of the grievance outcome and said that the way she was being treated had got worse.
59. The Claimant met with Dr Free on the 13 July 2021 regarding the behavioural assessment report and the Breslin report. They agreed that they would discuss both reports after the conclusion of her grievance appeal **[2557-2558]**. Ultimately though, to avoid delay Dr Free and the Claimant met to discuss the reports at a 'Maintaining High Professional Standards in the Modern NHS' (MHPS) review meeting held on 26th October 2021, which was prior to the grievance appeal **[2572-2572]**. The issue over managing the Respondent's concerns regarding the Claimant's practice and lack of reflection and the Claimant's outstanding grievance against her supervisors was difficult. Dr Free said *'appreciating that an outcome to the grievance should be known in November, I ask you to think about how you can move forward and work with colleagues positively and this can be completely remedied. Given the concerns regarding your practise and the fact that, due to the grievance, the MHPS process has not been concluded, the restrictions must remain in place'*.
60. The Management Statement of Case for the Grievance Appeal was presented by Gertie Nic Philb **[2470]**. It referred to the Claimant's assertion that the annual leave, study leave and rota allocation processes were examples of bullying, harassment and victimisation. Gertie Nic Philb concluded *'there was no evidence that Doctor Navaneethan had engaged in behaviours that may be*

deemed bullying, harassment, victimisation or discrimination of Dr Khin. And as such, I did not uphold the remainder of her grievance’.

61. The hearing of the Claimant’s grievance appeal took place on 10th December 2021 **[2471-2477 & 2591-2596]**. During the hearing the Claimant said:

‘What is my difference? I am only female. No other Asian backgrounds so I feel discriminated against. I’m the only woman, the oldest person not in gin. Like the others, I’m not white. This is characteristic based discrimination.’

62. As such the grievance appeal meeting raised a complaint about discrimination and this qualified as a protected act, as defined by s27(2) **EgA**. The Appeal was rejected by letter dated 31st December 2021 **[2603-2609]**. On the rota allocation point Stephen Collman, the Trust’s Chief Operating Officer, found that the Claimant had a higher percentage of clinic work, but this was service led, and not influenced by favouritism. The regard to Dr Navaneetham the report acknowledged her behaviour on 12th July 2020, but also that the Claimant’s behaviour had breached the Trust’s COMPACT agreement. The other grievance appeal points were rejected. Mr Collman concluded:

‘Listening to what you had to say during the grievance appeal hearing, it was clear to me the relationships between you and your colleagues have fundamentally broken down. ... I do not believe this is due to bullying or discriminatory behaviour, but instead is as a result of poor working relationships resulting in an inability to communicate and resolve conflict at the local level. This results in you feeling that you have no option to pursue matters through the formal grievance process, which in turn strengthens the feelings of mistrust between you and your colleagues.’

63. On 5th January 2022 the Claimant attended a further meeting with Dr Free **[2613]**. She confirmed that as the grievance process was now completed, she could now make a decision on the MHPS process. Dr Free discussed the Claimant’s case with NHS Resolution on 11th January 2022 **[2616]**. Paul Hutchins advised Dr Free that the dismissal of the Claimant’s grievance

appeal was unlikely to be an acceptable conclusion for the Claimant. He also noted that the behavioural assessment suggested the Claimant would be unlikely to be able to move on. Mr Hutchings recommended either a secondment to another Trust or a final capability hearing. On 25th January 2022 Dr Free informed the Claimant that she was looking for external placements for the Claimant **[2621]**.

64. The next day, on 26th January 2022, the Claimant emailed Dr Free to state that she was considering resigning from her employment with the Respondent **[2623]**. The email stated, '*I will be leaving the Trust very soon as Dr Free advise (sic). Please accept my apology for surrendering my post as SAS tutor*'. There was a further discussion about arranging a secondment with another Trust on 3rd March 2022 **[2635]**. Dr Free confirmed that she had had positive responses from a number of Trusts to taking the Claimant on secondment. The Claimant said she would like to go to University Hospital for Coventry and Warwickshire (UHCW).
65. On 16th March 2022 Dr Free asked for permission to send to UHCW the Claimant's Case Investigation and Behavioural Assessment reports. This was considered essential to enable UHCW to understand the nature of the secondment and how to best support the Claimant in order to develop an action plan with an external supervisor that would enable the practice restrictions to be lifted **[2637]**.
66. A further review meeting was held on 28th March 2022 between the Claimant and Dr Free **[2638]**. The Claimant did not consent to the sharing of the reports with UHCW, as she felt that they were prejudicial and created a negative perception of the Claimant. The meeting ended with Dr Free accepting the Claimant's denial of permission to send the reports to UHCW. Dr Free said she would consider her next steps. As Dr Free felt that any Trust accepting the Claimant on secondment would need to know about the restrictions in place and the history of the relationship, the Claimant's refusal to share the reports effectively ended the secondment discussions. In reality, the only other option was a final capability hearing.

67. The Claimant attended a further Occupational Health consultation on 13th April 2022 [2644]. The report noted that the Claimant was in work, but had been on restricted duties for two years, and was currently only undertaking outpatient clinics. Dr Basheer concluded that the Claimant was fit to continue working in her current restricted role.
68. On 26th April 2022 the Claimant attended a MHPS investigation review meeting to discuss her restrictions on practice [2648]. A concern was raised that the restrictions were no longer robust. This led, on 9th May 2022, Dr Free to impose a further restriction that she could only work in clinic when a Consultant is present in the clinic. Dr Free completed a clinical performance assessment for the Claimant on 4th May 2022 [2655]. On 24th May 2022 the Claimant attended another MHPS Investigation review meeting [2690]. The Claimant questioned the purpose of a clinical performance assessment. On 8th June 2022 NHS Resolution concluded that a clinical performance assessment should not be offered [2694] on two principal grounds. Firstly, it would not add appreciably to the matters already known, and secondly, the Claimant's practice was now so restricted that there was limited clinical work to assess.
69. On 31st August 2022 Free issued the Case Manager report for the MHPS investigation, titled 'Case Managers report into concerns raised in relation to Dr Nyo Khin, Specialist doctor in Obstetrics and Gynaecology [2703]. The report noted '*... that Doctor Khin's areas of difficulty included communication and influencing, decision making and team working with limited self-awareness. ... Factors preventing remediability were that Dr Khin does not have well developed in self-insight and her motivation for self-development was unclear*'. The report concluded that a formal conduct and capability hearing should proceed, having set out the five patient concerns, summarised below:
- 69.1. Inc 33219: no records taken of discussions with Consultant or the advice received;
- 69.2. Inc 43172: not escalating concerns to a Consultant:

- 69.3. Inc 43135: taking a patient to theatre for a trial of instrumental delivery without an anaesthetist or escalating to a Consultant;
- 69.4. Inc 43731: no records taken of discussions with Consultant or the advice received;
- 69.5. Inc 44375: Case discussed appropriately with the Consultant.
70. The Claimant attended further review meetings with Dr Free on 1st and 29th September 2022 and 3rd November 2022. The Claimant was told of the capability hearing. She felt ignored and that anything she said would be construed negatively.
71. On 22nd November 2022 the Respondent's Clinical Negligence solicitors raised a concern regarding the Claimant's ability to obtain proper consent from patients for procedures due to difficulties in understanding what she was saying (she spoke with a strong Myanmar accent) and her use of medical terminology and abbreviations that were unlikely to be understood by the patient [2733]. This led to a further restriction from practice on 5th December 2022 [2735]. The Claimant was removed from all clinical practices to undertake audit and other non-patient facing activities [2735]. On the same day Dr Free sent to the Claimant the invitation to the formal capability hearing [2737].
72. On 13th December 2022 the Claimant wrote to Dr Free to complain about the whole plan for the capability hearing [2748]. On 19th December 2022 Dr Free submitted the Case Management Statement of Case to the Claimant [2758]. The complaint sent on 13th December qualified as a protected act pursuant to s27(2) EqA as it made an allegation that a person had contravened the EqA. She said in her concluding section:

'I made some mistakes, but I was not treated equal as any others. In fact, I was given totally discriminating treatment and excessive punishment. I will not be treated like this if I had different characteristics, ie white, male, young.'

73. On 23rd December 2022 the Claimant submitted her resignation **[2815]**. The Claimant referred to a history of bullying and an inadequate grievance and grievance appeal process. She referred to retaliations that had occurred and the restrictions imposed on her practice and referenced the insistence that the secondment Trust be sent details of her case and case history prior to the secondment. The Claimant asserted that younger, white and male colleagues would have been treated better than she had been. She concluded by saying, *'taken one by one or in combination, the Trust's actions and omissions have destroyed my trust and confidence in them as an employer'*.
74. On 28th December 2022 Dr Free asked her to reconsider **[2818]**. The Claimant stuck to her guns in her emailed response on 29th December 2022 **[2819]** and 4th January 2023 **[2828]**. Natalie Green wrote to the Claimant to explain that the capability hearing would proceed in any event and encouraged the Claimant to engage in the process **[2830]**. On 19th January 2023 Dr Free set out a detailed response to the Claimant's resignation letter **[2831]**. She rejected any suggestion of a fundamental breach of trust on her part. On 3rd February 2023 Dr Free confirmed her acceptance of the Claimant's resignation **[2858]**.
75. The capability hearing proceeded in the Claimant's absence on 14th and 16th February 2023 **[2875 & 2946]**. The Claimant elected not to attend the hearing. On 14th March 2023 the Respondent wrote to the Trust with the outcome of the hearing. Conclusions were reached on all of the patient concerns and on all of the concerns raised by the Claimant. Had the Claimant remained employed, she would have received a Final Written Warning **[2987]**. The following was said in conclusion:

'The panel appreciates that you have found the MHPS process, including the lengthy restrictions on your practise, very difficult. However, the Panel is satisfied that it was reasonable for Dr Free to instigate the investigation and that the restrictions put in place and the support provided to you were reasonable in all the circumstances. The Panel has not found evidence that you have been discriminated against or victimised during this process. As has been identified throughout this

outcome, the panel did not have the opportunity to talk to you about your concerns as you did not attend the hearing.

You tendered your resignation in your letter to Doctor Free dated 23rd December 2022 and your employment with George Eliot Hospital NHS Trust was terminated on the 26th January 2023. As you are no longer employed by the trust, the panel has no power to issue a sanction. However, the panel felt it was appropriate for your ongoing practise that it consider carefully what sanction it would have imposed had you remained in employment. In doing this, the panel took into account your long service with the trust since 2008 and your previously clean disciplinary record.

The panel has concluded that had you remained in employment with George Eliot Hospital NHS Trust, the findings respect to the proven allegations and the concerns in relation to your level of reflection and learning are of sufficient seriousness for us to have issued you with a final written warning which would have remained on your file for a period of 12 months.'

76. On 13th February 2023 Dr Free referred the Claimant to the GMC [2873]. Dr Free set out the patient's concerns and the Claimant's lack of reflection. She noted that the Claimant had resigned from the Trust on 23rd December 2022, effective on 26th January 2023. She said of the Claimant '*she is currently unfettered and may actively be seeking employment. She has stated she will not participate in or attend the capability hearing and has not communicated with me for some time. There are significant concerns about her lack of insight and for potential patient safety risk if she were to work unsupervised. On that basis, we agreed referral to the GMC would be the appropriate action at the moment.*
77. The GMC reached its conclusions on Dr Free's referral nearly one year later on 4th February 2024 [3012]. It concluded '*the Assistant Registrar is assured that the concerns do not raise questions about your fitness to practise. We will therefore not take the matter any further and will close the complaint with no further action.*

78. The report also noted '*Doctor Khin has since worked at Royal Stoke Hospital between January and September 2023 and during this time completed her appraisal, which was signed off as satisfactory with no concerns. Dr Khin received positive feedback from her colleagues and her supervisor. Dr Khin has reflected on the previous incidents and attended a CTG Master class course in October 2023. Therefore, on balance, I've not seen anything that could potentially call Doctor Khin's fitness to practise into question*'.
79. We now turn to consider the relevant law, as follows

The Relevant Law

Time limits – Discrimination

80. Conduct extending over a period: There is an important difference between an act which is continuing and an act which has continuing consequences: **Barclays Bank Plc v Kapur** [1991] ICR 208, p213G-p214E.
81. In **Hendricks v Commissioner of Police for the Metropolis** [2003] ICR 530 (para. 52) the Court of Appeal said that the concepts of policy, rule, practice, scheme or regime should not be treated as a complete and constricting statement of the indicia of an act extending over a period and, on the facts in that case it was said that:
- 'The focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed*'.
82. It is a Claimant's burden to persuade a tribunal that it is just and equitable to extend time: **Robertson v Bexley Community Centre** [2003] IRLR 434. The exercise of the discretion to extend time is a wide one and it is the

exception rather than the rule: **Robertson** (paras. 24 and 25). When considering its discretion whether to extend time, a tribunal may have regard to the checklist contained in s.33 Limitation Act 1980 (**British Coal Corporation v Keeble** [1997] IRLR 336):

- 82.1. The length and reasons for the delay;
 - 82.2. The extent to which the cogency of the evidence is likely to be affected by the delay;
 - 82.3. The extent to which the party sued had cooperated with any requests for information;
 - 82.4. The promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;
 - 82.5. The steps taken by the Claimant to obtain appropriate professional advice once he or she know of the possibility of taking action.
83. The application of **Keeble** is subject to two important considerations:
- 83.1. A tribunal is not required to go through every one of the **Keeble** factors: **London Borough of Southwark v Afolabi** [2003] ICR 800 (para. 33);
 - 83.2. In **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23, LJ Underhill was of the view that (para. 37):

'...Keeble did no more than suggest that a comparison with the requirements of section 33 might help "illuminate" the task of the tribunal by setting out a checklist of potentially relevant factors. It certainly did not say that that list should be used as a framework for any decision. However, that is how it has too often been read, and "the Keeble factors" and "the Keeble principles" still regularly feature as the starting-point for tribunals' approach to decision under section 123(1)(b). I do not regard this as healthy. Of course the two discretions are, in Holland J's phrase, "not dissimilar", so it is unsurprising that most of the factors mentioned in section 33 may be relevant also, though to varying degrees, in the context of a discrimination claim; and I do not doubt that many tribunals over the years have found Keeble helpful. But rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may also occur where a tribunal refers to a genuinely relevant factor but uses inappropriate Keeble-derived language...The best approach for a tribunal in considering the

exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular... "the length of, and the reasons for, the delay. If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking.

84. As to the reason for any delay, the absence of any evidence as to the reason for a delay does not mean that a tribunal is bound to refuse an extension of time: **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] IRLR 1050 (para. 25); **Concentrix CVG Intelligent Contract Limited v Obi** [2023] IRLR 35 (para. 50).

85. In **Edomobi v La Retraite RC Girls School** UKEAT/0180/16 Laing J observed:

I find it difficult to see how a Claimant can discharge the burden of showing that it is just and equitable to extend time if he or she simply does not explain the delay, nor do I understand the supposed distinction in principle between a case in which the Claimant does not explain the delay and a case where he or she does so but is disbelieved. In neither case, in my judgment, is there material on which the ET can exercise its discretion to extend time. If there is no explanation for the delay, it is hard to see how the supposedly strong merits of a claim can rescue a Claimant from the consequences of any delay. (para. 31).

86. The strength or otherwise of a claim may be a relevant factor to consider when determining whether to extend time: **Lupetti v Wrens Old House** [1984] ICR 348.

87. The prejudice to a Respondent in losing a limitation defence is a relevant factor for a tribunal to take into account when deciding whether to extend time or not: **Miller v Ministry of Justice** UKEAT/0003/15 (para.13).

88. The early conciliation extension provisions will not apply if primary limitation expired before early conciliation commenced (Day A): **Pearce v Bank of America Merrill Lynch** UKEAT/0067/19 (para. 23).

Direct discrimination

89. In **Efobi v Royal Mail Group Ltd** [2021] IRLR 811 the Supreme Court held that:

*This means that the claimant has the burden of proving, on the balance of probabilities, those matters in which he or she wishes the tribunal to find as facts from which an inference could properly be drawn (in the absence of any other explanation) that an unlawful act was committed. This is not the whole picture since, as discussed, along with those facts which the Claimant proves, the tribunal must also take account of any facts proved by the Respondent which would prevent the necessary inference from being drawn. But that does not alter the position that, under s.126(2) of the 2010 Act just as under the old provisions, the initial burden of proof is on the claimant to prove facts which are sufficient to shift the burden of proof to the Respondent (para. 30). In **Qureshi v Victoria University of Manchester** [2001] the EAT (in dealing with a claim of race discrimination) set out the following process to be followed (pp873-874):*

As the industrial Tribunal has to resolve disputes of fact about what happened and why it happened, it is always important to identify clearly and arrange in proper order the main issues for the decision, for example:

(a) Did the act complained of actually occur? In some cases, there will be a conflict of direct oral evidence. The Tribunal will have to decide who to believe. If it does not believe the application and his witnesses, the application has failed to discharge the burden of proving the act complained of and the case will fail at that point. If the applicant is believed, he

has brought his application in time and, if not, is it just and equitable to extend the time?

(b) If the act complained of is in time, was there a difference in race involving the application?

(c) If a difference in race was involved, was the applicant treated less favourably than the alleged discriminator treated or would have treated other persons of a different racial group in the same case, or not materially different, relevant circumstances?

(d) If there was a difference in treatment involving persons of a different race, was that treatment "on racial grounds"?

Were racial grounds an effective cause of the difference in treatment?

What explanation of the less favourable treatment is given by the Respondent?

90. A tribunal may sometimes be able to go straight to the 'reason why' question – **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285:
91. The bare facts of difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal could conclude, on the balance of probabilities, the respondent had committed an unlawful act of discrimination: **Madarassy v Nomura International Plc** [2007] ICR 867 (para. 56)
92. Unreasonable treatment is not of itself sufficient as a basis for an inference of discrimination so as to shift the burden of proof: **Glasgow City Council v Zafar** [1988] ICR 120 (p124A-B).
93. In **Chief Constable of Kent Constabulary v Bowler** UKEAT/0214/16 (para. 97) the EAT stated:

*...Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic. That does not mean that the fact of unreasonable treatment is irrelevant. As Elias (P) (as he then was) explained in **Bahl v the Law Society** [2003] IRLR 640 (at [101]). "The significance of the fact that the treatment is unreasonable is that a tribunal will be more readily in practice reject the explanation given than it would if the treatment were reasonable. In short, it goes to credibility. If the tribunal does not accept the reason given by the alleged discriminator, it may be open to it to infer discrimination. But it will depend upon why it has rejected the reason that he has given, and whether the primary facts it finds provide another and cogent explanation for the conduct. Persons who have not in fact discriminated on the prohibited grounds may nonetheless give a false reason for the behaviour. They may rightly consider, for example, that the true reason casts them in a less favourable light, perhaps because it discloses incompetence or insensitivity. If the findings of the tribunal suggest that there is such an explanation, then the fact that the alleged discriminator has been less than frank in the witness box when giving evidence will provide little, if any, evidence to support a finding of unlawful discrimination itself."*

94. The individual employee who is accused of discrimination must have been motivated by the protected characteristic and there is no basis on which that employee's act can be discriminatory on the basis on someone else's motivation: **Reynolds v CLFIS (UK) Ltd** [2015] ICR 1010 (para. 36).
95. The legal framework in respect of comparators was recently reviewed by Cavanagh J in **Martin v The Board of Governors of St Francis Xavier 6th Form College** EA-2021-001354-BA (paras. 54-65).

Constructive unfair dismissal

96. In **London Borough of Waltham Forest v Omilaju** [2005] ICR 481 the Court of Appeal summarised the law on constructive unfair dismissal. The following basic propositions of law can be derived from the authorities:

1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27.

2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, Malik v Bank of Credit and Commerce International SA [1997] IRLR 462, 464 (Lord Nicholls) and 468 (Lord Steyn). I shall refer to this as 'the implied term of trust and confidence'.

3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347, 350. The very essence of the breach of the implied term is that it is

'calculated or likely to destroy or seriously damage the relationship' (emphasis added).

4. *The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in **Malik** at p.464, the conduct relied on as constituting the breach must 'impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer' (emphasis added).*

5. *A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para [480] in Harvey on Industrial Relations and Employment Law: '[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship.'*

15. *The last straw principle has been explained in a number of cases, perhaps most clearly in **Lewis v Motorworld Garages Ltd** [1985] IRLR 465. Neill LJ said (p.468) that 'therepudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term' of trust and confidence. Glidewell LJ said at p.469: '(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to*

*the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? (See **Woods v W M Car Services (Peterborough) Ltd** [1982] IRLR 413.) This is the “last straw” situation.'*

16. Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things (more elegantly expressed in the maxim 'de minimis non curat lex') is of general application.

19. A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase 'an act in a series' in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

97. The activity of the respondent, subject to the criticism, must be without cause or justification in order for it to constitute the relevant breach: **BG v O'Brien** [2001] IRLR 496.
98. In **Kaur v Leeds Teaching Hospitals NHS Trust** [2019] 1 ICR the Court of Appeal has provided guidance on the operation of the final straw doctrine:

*42 First, the “last straw doctrine” is relevant only to cases where the repudiation relied on by the employee takes the form of a cumulative breach of the kind described in the passages which Dyson LJ quotes from Harvey on Industrial Relations and Employment Law and from the judgment of Glidewell LJ in **Lewis v Motorworld Garages Ltd** [1986] ICR 157. It does not, obviously, have any application to a case where the repudiation consists of a*

one-off serious breach of contract. I make this point because it was sometimes used in this case as if it were simply a synonym for "the act of repudiation". I think it will conduce to clear thinking if representatives and tribunals start from the position that the ultimate issue is always whether the employee has resigned in response to a repudiatory breach of contract, and refer to "the last straw" only where the doctrine has a role to play.

*43 Secondly, the italicised sentences in para 21 of Dyson LJ's judgment in **Omilaju** are concerned with the issue of affirmation. That issue may arise in the context of a cumulative breach because in many such cases the employer's conduct will have crossed the Malik threshold at some earlier point than that at which the employee finally resigns; and, on ordinary principles, if he or she does not resign promptly at that point but "soldiers on" they will be held to have affirmed the contract. However the point which Dyson LJ is making in these sentences is that if the conduct in question is continued by a further act or acts, in response to which the employee does resign, he or she can still rely on the totality of the conduct in order to establish a breach of the Malik term. Glidewell LJ had already made substantially the same point in Lewis, at p 170: "This case raises another issue of principle which, so far as I can ascertain, has not yet been considered by this court. If the employer is in breach of an express term of a contract of employment, of such seriousness that the employee would be justified in leaving and claiming constructive dismissal, but the employee does not leave and accepts the altered terms of employment; and if subsequently a series of actions by the employer might constitute together a breach of the implied obligation of trust and confidence; is the employee then entitled to treat the original action by the employer which was a breach of the express terms of the contract as a part-the start-of the series of actions which, taken together with the employer's other actions, might cumulatively amount to a breach of the implied terms? In my judgment the answer to this question is clearly 'yes'." Although Glidewell LJ is there referring to a situation where the earlier act is a repudiatory breach of an express term, the same logic necessarily applies to a series of earlier acts which cumulatively cross the Malik threshold; and that is what Dyson LJ holds. I will refer to the employer's further act in such a case as "reviving" the employee's right to terminate: I will have to consider below a possible objection to that terminology, but, as will appear, I regard it as perfectly apt.*

*44 It is obvious why the position as stated in **Omilaju** [2005] ICR 481 is right in principle. In a case of this kind the repudiatory nature of the employer's conduct consists precisely in the accumulation of a series of acts and omissions which are not repudiatory if viewed in isolation. It would be extraordinary if, by failing to object at the first moment that the conduct reached the Malik threshold, the employee lost the right ever to rely on all conduct up to that point: when the threshold had been reached would of course be a matter of assessment in every case, and no one would know whether the employee had jumped either too early or too late until a tribunal ruled. Such a situation would be both unfair and unworkable.*

45 Thirdly, even when correctly used in the context of a cumulative breach, there are two theoretically distinct legal effects to which the "last straw" label can be applied. The first is where the legal significance of the final act in the series is that the employer's conduct had not previously crossed the Malik threshold: in such a case the breaking of the camel's back consists in the repudiation of the contract. In the second situation, the employer's conduct has already crossed that threshold at an earlier stage, but the employee has soldiered on until the later act which triggers his resignation: in this case, by contrast, the breaking of the camel's back consists in the employee's decision to accept, the legal significance of the last straw being that it revives his or her right to do so. I have thought it right to spell out this theoretical distinction because Lewis J does so in his judgment in **Addenbrooke v Princess Alexandra Hospital NHS Trust**, 2 December 2014, which I discuss below; but I am bound to say that I do not think that it is of practical significance in the usual case. If the tribunal considers the employer's conduct as a whole to have been repudiatory and the final act to have been part of that conduct (applying the Omilaju test), it should not normally matter whether it had crossed the Malik threshold at some earlier stage: even if it had, and the employee affirmed the contract by not resigning at that point, the effect of the final act is to revive his or her right to do so.

46 Fourthly, the "last straw" image may in some cases not be wholly apt. At the risk of labouring the obvious, the point made by the proverb is that the additional weight that renders the load too heavy may be quite small in itself. Although that point is valuable in the legal context, and is the particular point discussed in **Omilaju**, it will not arise in every cumulative breach case. There will in such a case always, by definition, be a final act which causes the employee to resign, but it will not necessarily be trivial: it may be a whole extra bale of straw. Indeed in some cases it may be heavy enough to break the camel's back by itself (i.e. to constitute a repudiation in its own right), in which case the fact that there were previous breaches may be irrelevant, even though the claimant seeks to rely on them just in case (or for their prejudicial effect).

99. The authorities on affirmation have been considered recently in **Brooks v Leisure Employment Services Ltd** EA-2022-000630-AS (paras. 24-30).
100. In **Western Excavation (ECC) Ltd v Sharp** [1978] 27 Lord Denning set out the applicable contract test to claims of constructive unfair dismissal:
101. In **W E Cox Toner (International) Ltd v Crook** [1981] OCR 823 it was said:

...If one party ("the guilty party") commits a repudiatory breach of the contract, the other party ("the innocent party") can choose one of two courses: he can

affirm the contract and insist on its further performance or he can accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses: if he once affirms the contract, his right to accept the repudiation is at an end. But he is not bound to elect within a reasonable or any other time. Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation... (para. 26).

102. On affirmation, in **Bournemouth University Higher Education Corporation v Buckland** [2010] ICR 908, Jacob LJ stated:

...a word about affirmation in the context of employment contracts. When an employer commits a repudiatory breach there is naturally enormous pressure put on the employee. If he or she just ups and goes they have no job and the uncomfortable prospect of having to claim damages and unfair dismissal. If he or she stays there is a risk that they will be taken to have affirmed. Ideally a wronged employee who stays on for a bit whilst he or she considered their position would say so expressly. But even that would be difficult and it is not realistic to suppose it will happen very often. For that reason the law looks carefully at the facts before deciding whether there has really been an affirmation. (para. 54).

103. In **Chindove v William Morrisons Supermarkets Plc** UAEAT/0201/13, the Employment Appeal Tribunal, in reference to Lord Denning's reasoning on delay at paragraph 15 in **Western Excavation** emphasised that:

...the matter is not one of time in isolation. The principle is whether the employee has demonstrated that he has made the choice. He will do so by conduct; generally by continuing to work in the job from which he need not, if he accepted the employer's repudiation as discharging him from his obligations, have had to do.

*He may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time. The reference to time is because if, in the usual case, the employee is at work, then by continuing to work for a time longer than the time within which he might reasonably be expected to exercise his right, he is demonstrating by his conduct that he does not wish to do so. But there is no automatic time; all depends upon the context. Part of that context is the employee's position. As Jacob LJ observed in the case of **Buckland v Bournemouth University Higher Education Corporation** [2010] EWCA Civ 121, deciding to resign is for many, if not most, employees a serious matter. It will require them to give*

up a job which may provide them with their income, their families with support, and be a source of status to him in his community. His mortgage, his regular expenses, may depend upon it and his economic opportunities for work elsewhere may be slim. There may, on the other hand, be employees who are far less constrained, people who can quite easily obtain employment elsewhere, to whom those considerations do not apply with the same force. It would be entirely unsurprising if the first took much longer to decide on such a dramatic life change as leaving employment which had been occupied for some eight or nine or ten years than it would be in the latter case, particularly if the employment were of much shorter duration. In other words, it all depends upon the context and not upon any strict time test. (para. 26).

104. In **Kulkarni v Milton Keynes Hospital NHS Trust** [2009] IRLR the Court of Appeal held that a under the MHPS policy a doctor was not permitted to bring an independent legally qualified person to an MHPS process. The Court of Appeal also made obiter comments about the right to legal representation under Article 6, which was subsequently discounted in **Mattu v University Hospitals of Coventry and Warwickshire NHS Trust** [2012] IRLR 661.
105. The Medical Profession (Responsible Officers) Regulations 2010 imposes statutory obligations on responsible officers.

Our Conclusions

106. Before we set out our conclusions on each factual issue, it is necessary to make reach some broader conclusions, which will affect more than one individual issue. We do so as follows:

The broader conclusions.

107. **Time.** The Claimant notified the 1st Respondent of a dispute on 13th January 2023 and obtained her Early Conciliation certificate on 16th January 2023 **[1]**. The Claimant notified the 2nd, 3rd & 4th Respondents of a dispute on 10th February 2023 and obtained her Early Conciliation certificates on the same day **[2-4]**. The Claimant presented her Claim Form on 10th February 2023 **[5]**.

108. Accordingly any allegations against the 1st Respondent that pre-date 14th October 2022 (three months less one day from the notification to ACAS) and any allegations against the 2nd, 3rd & 4th Respondents that pre-date 11th November 2022 (three months less one day from the subsequent notifications to ACAS) are out of time, unless they form part of a single continuing act of discrimination (with the last incident within that single act occurring on or after the above mentioned dates) or unless we exercise our discretion to extend time.
109. In considering whether it would be just and equitable to extend time we made the following findings of fact:

109.1. The Claimant was advised, throughout, by Peter Jackson from the British Medical Association. He wrote to Gertie NicPhilip on 21st May 2020 [704], which was two and a half years before the point at which the Claimant's claims became statute barred on time grounds. In discussing delays with the Claimant's grievance he stated, *'I would suggest also that this may be a case where the failure to deal in process and substance with Dr Khin's genuine grievances may constitute a breach of trust and confidence, which would also be a fundamental breach of contract'*. This demonstrates a working knowledge of constructive unfair dismissal law. On the balance of probabilities we conclude that Mr Jackson was also likely to be aware of the time limits for presenting claims and also likely to have discussed those with the Claimant. Dr Khin accepted that Mr Jackson had discussed his email [704] with her before it was sent.

109.2. In cross examination (just prior to lunch on day 4) the Claimant told us *'I had background knowledge of employment tribunals. I had knowledge of the right not to be discriminated against on the grounds of age, sex or race. This is my basic knowledge. I knew of it long before May 2020. Also aware of the right not to be constructively dismissed. Yes, as background, long before May 2020'*.

109.3. The Claimant said that at that stage (May 2020) she was looking for resolution and did not mention discrimination.

110. Some of the Claimant's claims were presented in time. The earliest of the out of time complaints was 1 year and 3 months out of time. The oldest was presented 3 years and 3 months out of time. The onus lies on the Claimant to satisfy us that time should be extended on just and equitable grounds. We note that:

110.1. The Claimant has provided no explanation for the reasons for her delay other than seeking a resolution internally. We consider that this is insufficient justification for such a long period of delay.

110.2. We accept that the cogency of the oral evidence will be degraded for incidents which occurred as long ago as 2018, 2019 and 2020 in a trial not heard until June 2024.

110.3. There is no suggestion that the Respondent has not co-operated with requests for information.

110.4. On the balance of probabilities we conclude that the Claimant was aware of the facts of each allegation as and when they occurred, and was aware of her rights by at least May 2020, some two and half years before the earliest dates that the allegations could have been in time. There was no promptness of action by the Claimant.

110.5. We have also found that the Claimant was in receipt, from at least May 2020 of trade union advice from the BMA, which included legal advice.

111. In the circumstances we consider that it would not be just and equitable to extend time for the necessary period (between 1 year and 3 months for the earliest complaint and between 3 years and 3 months for the latest complaint). Had we faced a valid complaint which was up to 3 months out of time, we

would have considered extending time for that period. There was, however, no such complaint.

112. In the event that any complaints are upheld we shall consider at that stage whether they can be said to be part of a single continuing act of discrimination, with the last incident in time, such that all incidents within the single continuing act would have been presented in time pursuant to s123(3)(a) **Equality Act 2010**.
113. **Age.** For the purposes of the Claimant's age discrimination, she places herself in, and relies on, as pleaded at paragraph 7 of her Particulars of Claim [18] the age group 'over 60'. She compares herself with the those that are aged under 60. The Claimant was born on 6th June 1960 [5]. Accordingly the Claimant's 60th birthday was 6th June 2020. A key consequence of this is that for any alleged detrimental act that occurred prior to 6th June 2020 the Claimant was not over 60. She was in the same age group as the group that she asks us to conclude was treated more favourably.
114. Accordingly any age discrimination allegation that is based on being over 60, that occurred prior to 6th June 2020, whilst the Claimant was under 60, must fail. These include all of the 2018 and 2019 age discrimination allegations, and the first half of the age discrimination allegations raised in 2020.
115. **The Protected Acts.** The first protected act relied on by the Claimant is the grievance appeal hearing conducted on 10th December 2021 [2591]. During the course of that meeting the Claimant said [2592]:
- 'What is my difference? I am only female, no other Asian backgrounds so I feel discriminated against from the only woman, the oldest person, not Indian like the others. I'm not white. This is the characteristic based discrimination.'*
116. It is clear from this passage that Claimant's grievance appeal did make a complaint about discrimination and accordingly it qualifies as a protected act,

as defined in s27(2)(d) **Equality Act 2010** in that it makes an allegation (in this case not express) that the Respondent has contravened the Equality Act.

117. The second protected act relied on by the Claimant is her response to Dr Free's Capability Report. The response was dated 13th December 2022 [2748]. The response ran for 6 pages and raised a number of issues and complaints. The final page contained a four item summary of why the Claimant objected to the whole Capability process. The third item stated as follows [2753]:

'I made some mistakes but I was not treated equal as any others. In fact, I was given totally discriminating treatment and excessive punishment. I will not be treated like this if I have different characteristics, ie white. Male. Young' (sic).

118. It is clear from this passage that the Claimant's response to the capability report did make a complaint about discrimination and accordingly it qualifies as a protected act, as defined in s27(2)(d) **Equality Act 2010** in that it makes an allegation (in this case not express) that the Respondent has contravened the Equality Act.
119. Accordingly we find that both acts qualify for the protection offered by s27 **Equality Act 2010**. We shall consider the acts of detriment in due course, but do so against the backdrop of a finding that the acts qualify under s27.
120. **Credibility.** The Claimant possessed a tenacity to shut out other points of view that was so embedded in her that it adversely affected her ability to understand and reflect on her experiences and to consider the possibility that other non-discriminatory factors may have been the cause of her treatment. Ms Keogh concluded that the Claimant was quick to jump to the wrong conclusions about matters she had complained about, and we are minded to agree. The driver behind the restrictions placed upon the Claimant's clinical practice was a concern that she could not reflect upon concerns and change her practices to accommodate those concerns.

121. The issue of the Claimant taking on a locum shift for another Trust whilst on sick leave from the Respondent damaged the Claimant's credibility and the Trust that we could place on what she told us. In her statement she accepted misleading Dr Somaiya during the 30th August 2019 meeting over whether she worked for and was paid by another Trust [NNK668] whilst on sick leave. However, in oral evidence before us she insisted to us that she had been open and up front with Dr Somaiya about her locum shift. When I asked Dr Somaiya about that meeting he denied that the Claimant had told him the truth but her working whilst on sick leave. We prefer the evidence of Dr Somaiya on this point. As a result we were cautious of accepting the Claimant's account generally unless it was supported by other evidence or not contested by the Respondent's witnesses.
122. The above stated broader conclusions did impact our findings of the specific issues. Turning then to the specific issues:

The specific Issues.

123. **Issue 1 [2.1.1] The failure to grant and provide the Claimant her full 34 day annual leave entitlement for the August 2018 to August 2019 leave year.** The Claimant's annual leave entitlement was 32 days, pursuant to clause 24 of her Contract of employment [122]. The Claimant only took 20 days, leaving 12 accrued but not taken [613]. Gary Lawrence allowed the Claimant to take 7 days carried over [622]. The Claimant appealed this decision and on appeal she offered 5 days' pay in lieu [832]. This was in excess of the leave that the Claimant was due [GL88.4.1]⁴.
124. There was a failure to grant the Claimant her full 34 days annual leave for August 2018-August 2019 Leave year. As a matter of fact this allegation is made out. Taking all of the evidence into account we conclude, on the balance of probabilities, that the reason for failure was the Claimant's failure

⁴ Initials and a number refers to a paragraph number with that individual's witness statement

to book her annual leave in accordance with the Department's process. This was 'first come first serve' from 1st October. Whereas the Claimant had successfully taken all her annual leave in prior years, in the relevant year she did not attempt to book any dates until 18th October, over two weeks after the window to do so opened. As only 1 SAS doctor was allowed off at a time, by the time the Claimant sought to book holiday in January 2019 those dates could not be accommodated.

125. We conclude that the Claimant has not done enough to establish facts from which we conclude that her sex, race & age was reason for her failure to take her full annual leave. The Claimant agreed **[NNK68]** that other Doctors worked closer (in terms of proximity) to Dr Navaneetham and as such it was easier for them to book their holiday. The reason for the Claimant's failure to take all of her annual leave was her failure to book it in accordance with Department's booking process.
126. This failure ended at the end of the leave year in August 2019. It did not continue past that point. As such, this allegation was 3 years and 2 months out of time. We concluded that it would not be just and equitable to extend time for that period. According this issue fails against all Respondents and is dismissed.
127. **Issue 2 [2.1.2] Operating an unfair annual leave approval procedure between January 2018 and August 2019.** This is a rephrasing of the same complaint in Issue 1. We were told that different departments operated different leave procedures. In the Claimant's department the window for booking annual leave opened on 1st October. This date was chosen to give any new starters (typically in August) an opportunity to find their feet before having to deal with booking annual leave. The Claimant has failed to identify anything unfair about it and accordingly this application fails on its facts.
128. The Claimant asserts that the unfair procedure occurred between August 2018 and August 2019. This allegation was 3 years and 2 months out of time.

We concluded that it would not be just and equitable to extend time for that period. According this issue fails against all Respondents and is dismissed.

129. **Issue 3 [2.1.3] Excluding the Claimant from the EXCEL awards on 3 July 2019.** The Claimant was excluded from an Excel award ceremony to recognise the Theatre work done on a patient, who was one of the five patients for whom concerns had been raised about the quality of the Claimant's care (referred to as Incident 33219). The evidence established that the decision to arrange the award ceremony and the decision on who to invite as award recipients was made by Jane Sibson, General Manager. Accordingly this claim fails against Gary Lawrence, the 3rd Respondent.
130. In determining this claim against 1st Respondent, we note that the 1st Respondent has not called Jane Sibson as a witness. Mr Lawrence told the investigator, Dr Rupin Somaiya, that the Claimant's exclusion from the 23 award recipients was an oversight by Jane Sibson [652] and that she would apologise to the Claimant and give her a separate award. We understand that this did not happen. However, Gary Lawrence told us in evidence that the Claimant was not part of theatre team whose activities won the award, so her exclusion was not an oversight. Notwithstanding this contradictory explanation, we accept Mr Lawrence's evidence that Jane Sibson had told him that she had only included names those involved in theatre and it was an oversight that the Claimant (who was not involved in Theatre) was excluded. This explanation, which on the balance of probabilities we accept, has nothing to do with the Claimant's age, race or sex.
131. The patient was one of 5 patients that had had patient safety concerns raised on the Datix recording system. In evidence the Claimant initially agreed that the reason for her exclusion from the award ceremony was not age, sex, race, but then revised that answer to say that it was race because Donna Edgar had been involved in a prior nomination and had excluded the Claimant. The Claimant did not have any evidence to back this assertion up, and in any event we found that the decision maker on this point was Jane Sibson.

132. We also accepted the evidence that the 23 award recipients were broad range of nationalities European & British Indian (although not Myanmar) and a broad range of ages and mix of sexes. We conclude that the Claimant has not done enough to establish facts from which we conclude that her sex, race & age was reason for her omission from the award ceremony and accordingly this claim fails.
133. We note that this event, occurring on 3rd July 2019 was 3 years and 3 months out of time when the Claimant presented her Claim Form. For the reasons stated above we do not consider that it would have been just and equitable to extend time by that period, to allow that claim to proceed.
134. **Issue 4 [2.1.4] Bullying by colleagues including the 3rd and 4th Respondent and Dr Iftikhar Sohail, Specialty Doctor.** Neither the Claimant's Claim Form nor the Agreed List of Issues identified exactly what the bullying allegations were. As close as the Particulars of Claim came to doing so was paragraph 16 [21] which stated that the matters relied on as bullying were identified as the matters raised by the Claimant in her various grievances submitted in November 2018 [581], March 2019 [608], April 2019 [610], June 2020 [720], July 2020 [707, 718-719] and Sept 2020 [821]. During discussions with Counsel at the outset of the case, the bullying allegations were so confirmed. Accordingly we have considered each complaint in turn, as sub-issues of **Issue 4**, follows:
135. **Issue 4.1 [2.1.4] In her November 2018 grievance [581] the Claimant complained about the unfair management of annual leave rota allocation by Dr Navaneetham.** The Annual Leave complaint the same complaint raised in Issue 1 and Issue 2 above. The Rota allocation complaint is the same complaint raised in Issue 7 below. For the reasons set out therein we do not consider that the Claimant's failure to take her annual leave during the August 2018 to August 2019 annual leave year to amount to bullying and we do not consider the rota allocation to amount to bullying. Accordingly the Claimant has failed to prove facts from which we could conclude that she was bullied in either her annual leave or rota allocation and that such bullying could be

discrimination on the grounds of her age, sex or race. Accordingly this allegation fails.

136. November 2018 is 4 years and 1 month out of time. For the reasons stated above we would not have exercised our discretion to extend time by that period to allow this complaint to proceed.
137. **Issue 4.2 [2.1.4] In her March 2019 grievance [608] the Claimant complained that she had asked for study leave and not been allowed it.** Two other doctors had taken study for the purpose of taking examinations. The Claimant was not taking any examinations, but was looking to attend an examination as an examiner. Jane Sibson reviewed this complaint and found that the Claimant was told that as two others were away that day taking examinations, she could take leave for the purpose of attending as an examiner on another occasion. We consider that there is a distinction between asking for study leave to take an examination, and asking for it to invigilate an examination. Priority must fall to those taking examinations. In the circumstances the Claimant has failed to show that this decision amounted to bullying, let alone discrimination on the grounds of her sex, race or age. This allegation fails on its facts.
138. This complaint was raised on 12th March 2019 [607] making it's presentation 3 years and 7 months out of time. For the reasons already stated we would not not extended time to allow it's presentation on just and equitable grounds.
139. **Issue 4.3 [2.1.4] This bullying complaint was raised on 15th April 2019 [613], it related to the unfair allocation of annual leave.** For the reasons set out already we do not consider that the Claimant's failure to take her annual leave during the August 2018 to August 2019 annual leave year to amount to bullying and we do not consider the rota allocation to amount to bullying. Accordingly the Claimant has failed to proof facts from which we could conclude that she was bullied in either her annual leave or rota allocation and that such bullying could be discrimination on the grounds of her age, sex or race. Accordingly this allegation fails.

140. This complaint was raised on 15th April 2019 [607] making it's presentation 3 years and 6 months out of time. For the reasons already stated we would not not extended time to allow it's presentation on just and equitable grounds.
141. **Issue 4.4 [2.1.4] The Complaint's grievance regarding the 3rd Respondent's failure to engage with the her annual leave concerns was raised by way of letter dated 25th April 2019.** This letter [614-615] follows on from the attempt made by Gary Lawrence to explain the Claimant's Annual Leave entitlement and booking process. It is clear that the Claimant did not understand the explanation, and frankly, neither did we. The Claimant quite properly challenged the explanation she had been given. Mr Lawrence's response is at [616]. He does not provide the Claimant with a substantive response to her concerns over her Annual Leave and Study Leave entitlement. Instead he sought to passing off the entire issue to mediation. He does not do any of the steps he promised to do in his previous reply (ie get clarity from Human Resources on the Claimant's entitlement, carry forward or the current operational policy, and/or writing the current operational policy down).
142. Mr Lawrence's decision to refer to mediation failed to address the Claimant's grievance and this allegation is made out on its facts. This was not a breakdown in personalities, of the type which mediation would assist, it was a question of explaining an unnecessarily complicated Annual Leave process, We conclude that Gary Lawrence washed his hands of that task. He also failed to implement any of the HR assistance in explaining the process that he offered the Claimant earlier.
143. Our task is to determine whether that failure amounted to bullying of the Claimant, and, if it did, whether the reason for it was the Claimant's sex, race or age. In our Judgment, the explanation for this is, on the balance of probabilities, because the Annual Leave booking system, with multiple Annual Leave year start dates for multiple doctors, and booking windows opening on a date that bears no relation to the relevant Annual Leave year, is complicated

and we don't feel Gary Lawrence understood it well enough to explain it. This reason, which does the 1st Respondent no credit at all, had nothing to do with the Claimant age, sex or race and did not amount to bullying.

144. This complaint was raised on 29th April 2019 [614] making it's presentation 3 years and 6 months out of time. For the reasons already stated we would not not extended time to allow it's presentation on just and equitable grounds.
145. **Issue 4.5 [2.1.4] Dr Sohail's refusal to accept he owed the Claimant two shifts instead of one shift following a shift swap.** This was a grievance raised to Gertie Nic Philib on 19th June 2019 [720-721], principally about Dr Sohail and the disagreement that the Claimant had over how many shifts he owed her. She also raised matters that had previously been raised such as Gary Lawrence's response to the SAS Tutor appointment, favouritism within the department by Dr Navaneetham and patient safety. The text exchanges between Dr Sohail and the Claimant are at [589-601]. The exchanges debate whether Dr Sohail owed Claimant one or two shifts. Their communications get tetchy. We find that this was a disagreement between two doctors over the number of shifts that were owed. The Claimant believed she had covered two prior shifts of Dr Sohail and was accordingly entitled to have him cover two of her shifts, whereas Dr Sohail believed only one shift had been covered by the Claimant and accordingly only one was owed back.
146. On its facts this allegation is made out. However, the Claimant invites to conclude that Dr Sohail's stance on this issue was bullying and that the reason for it was the Claimant's sex, race or age. The Claimant has not adduced evidence from which we conclude that the disagreement was bullying, let alone bullying on the grounds of sex, race or age. We have seen nothing to suggest that at all. It is more likely that Dr Sohail did not wish to work two of the Claimant's shifts if only one was owed. Accordingly this allegation fails.

147. This complaint was raised on June 2019 [720] making it's presentation 3 years and 4 months out of time. For the reasons already stated we would not not extended time to allow it's presentation on just and equitable grounds.
148. **Issue 4.6 [2.1.4] The 4th Respondent's alleging bullying of the Claimant on 12th July 2019 following the Claimant's decision not to perform an episiotomy (repair of a tear).** This incident relates to a public berating of the Claimant by Dr Navaneetham on 12th July 2019 in respect of a clinical decision taken by the Claimant not to perform an episiotomy on a patient, in order to avoid a tear. The Claimant's account of the incident was set out in a bullying complaint that she made on the 17th July 2019 to Gertie Nic Philib [718] in which she said,

'I went into the handover room while all the doctors, Dr Akol, Dr Carson, Dr Nancy was still with Dr Navaneetham. She asked me why I didn't do the episiotomy. I answered because she didn't need it. Then she asked, 'Did she have a tear?' I answered no. Dr Navaneetham wouldn't stop. She kept asking me how do you know the patient didn't have a third degree tear? She wouldn't stop. She kept telling me I was wrong. I said as we disagree about the fact, then you can raise it later, but she would not stop. Doctor Navaneetham said it straight to my face 'I wouldn't say you did it well because you didn't do it well. What you did was wrong'. It was in front of the above junior doctors.

149. The Respondent's investigation of the incident [NN49] found that Dr Navaneetham had been overly critical of the Claimant, but that this was not a repeat incident. Dr Navaneetham did clearly challenge the Claimant on 12th July, in front of Junior Doctors. She did so because she disagreed with the appropriate clinical care given to a patient. Dr Navaneetham accepted in evidence that she could have acted differently [NN38]. We find that the Claimant was challenged inappropriately by Dr Navaneetham and that the challenge, in front of other Junior Doctors, was bullying in its nature. However, we accept Dr Navaneetham's explanation as to why she reacted as she did. The Claimant has failed to show how we could conclude that her sex, race and age might have been the motivation for the act of bullying and we accept

Dr Navaneetham's explanation that her reaction as not motivated by sex, race or age.

150. This incident, occurring on 12th July 2019, was presented three years and 3 months and for the reasons stated it would not be just and equitable to extend time.
151. **Issue 4.7 [2.1.4] The use of 5 Datix reports to raise concerns about the Claimant's capability and performance.** On 2nd July 2020 Claire Price, Associate Director of Midwifery raised concerns relating to 5 serious incidents involving Dr Khin **[728]**, namely (i) Incident 33219 Uterine rupture on 20th February 2020, (ii) Incident 43172 Management of a 30+3 week pregnancy on 17th March 2020, (iii) Incident 43135 Forceps Delivery/ Inadequate pain relief, (iv) Incident 43731 Hypoxic Ischaemic Encephalopathy grade 3 on 4th May 2020 and (v) Incident 44375 Artificial Rupture of Membranes on 28th May 2020. The concerns related to a failure to follow Trust policy, a failure to escalate to a Consultant and a lack of reflection or learning **[2705]**.
152. The identification of sub-optimal care by the Claimant in respect of 5 patients is not an act of bullying. Donna Edgar and Claire Price, a midwife raised concerns and these were appropriate to raise and the act of so doing was driven by patient safety concerns and not bullying or discrimination. This allegation fails.
153. **Issue 5 [2.1.5] and Issue 7 [2.1.7] Favouring of Dr Sohail over the Claimant by 4th Respondent by deliberately disadvantaging of the Claimant in relation to staff rotas and Deliberate disadvantaging of the Claimant in relation to staff rotas.** Both Counsel accepted that Issues 5 and 7 raised the same point and could be dealt with together. The Claimant's Particulars of Claim (para 16 **[21]**) does not identify time frame over which the Claimant asserts she was disadvantaged by the rota allegation. She first raised it in a grievance said to be dated December 2017 / January 2018 **[572]**. In her statement the Claimant relies on the rotas between 8th January 2018 and 25th December 2022 **[NNK41, 45, 60]**. The Claimant's rota sheets for the

whole period occupied some 247 pages of the Trial Bundle [249 - 496]. However, the Claimant did not adduce any evidence of unfairness in a specific rota allocation and did not put that case to any witness cross examination.

154. Gertie Nic Philib commissioned Ibex Gale to undertake an independent investigation into the Claimant's concerns [1871]. The Ibex Gale report (which the Respondent accepted) is evidence of a disparity of rota allocation for the period that Ibex Gale were asked to consider, namely between January and August 2020. In that period, Dr Misra received double the labour ward allocation than the Claimant and Dr Sohail received 1/3 more labour ward shifts during that period [1921]. For that period there was an unequal allocation of labour ward shifts. There was no evidence from anyone to assert a different allocation at other times not analysed by Ibex Gale. In the circumstances we find balance of probabilities that the disparity was likely to have persisted throughout the whole of the period. In the circumstances the fact of this allegation is made out.
155. As to the Respondent's explanation every doctor, including the Claimant, has a 20% allocation to the labour ward, which was the minimum. Dr Misra was training to become a registrar which necessitated increased labour ward experience. This had nothing whatsoever to do with the Claimant's sex, race and age. The position with Dr Sohail is not as clear. The Ibex Gale conclusion on the reasons why Dr Sohail and 1/3 more labour ward shifts than the Claimant is somewhat unsatisfactory, namely (i) that Dr Sohail works more closely with Dr Navaneetham, (ii) that Claimant does not wish to work with Dr Navaneetham. In addition, (iii) Dr Navaneetham asserted in cross examination that Dr Sohail was training to become an Associate Specialist and this was why Sohail had a greater number of Labour Ward rotas.
156. Taking all of the evidence together we find, on the balance of probabilities, that all three reasons are true: Dr Sohail was working more closely with Dr Navaneetham and this did to influence rota allocation. Dr Sohail was training to be an associate specialist and would have asked for and benefitted from the additional labour ward shifts. We also accept that the Claimant did not like

to work with Dr Navaneetham, and had told her that she (the Claimant) was willing to work in any rota. Gary Lawrence confirmed his point in his oral evidence.

157. The alleged discriminator, Dr Navaneethan was also female. She in same age group as the Claimant. At the time of her grievance the Claimant was not in the 'over 60' age group that she asserts was the victim of age discrimination. Dr Navaneetham, like the Claimant, also had an ethnic minority background (albeit Indian, not Myanmar). There was a disparity in shift allocation to the Claimant's detriment, however the reasons for it had nothing to do with the Claimant's sex, age or race and this allegation fails.
158. On the Claimant's case the disparity in labour ward shift allocation continued through to December 2022. As stated above, we accept this evidence. On that basis the complaints about the rota allocations in November 2022 and December 2022 would have been presented in time. We would have found that, had the rota allocations been discriminatory, that they formed part of one single act of discrimination and thus we would have concluded that all of the rota allocation complaints to have been presented in time.
159. **Issue 6 [2.1.6] Treatment of the Claimant by 3rd Respondent in relation to the Claimant's application for an SAS Tutor post on 25th February 2020.** Raman Sankara offered the Claimant the SAS Tutor role for George Eliot Hosipital on 25th February 2020 [666]. Gary Lawrence responded by email on the same day, asking '*can you be specific about the responsibilities of the role? Dr Khin does not have any capacity with her job plan as it stands – she is on a 13 PA [Programmed Activities] contract*'. It is this response that is the subject of this complaint. We find as a fact that Gary Lawrence did reply in those terms, as set out [666]. Mr Lawrence queried whether the Claimant could take on the role, and as such we consider that it was detrimental treatment.
160. However reason for it, which we accept, was Mr Lawrence's concern that the Claimant already had 13 PAs. The Claimant accepted 13.5 PAs is the

absolute maximum (she could not agree more) [1943]. Given that she was already at capacity we find that this was a legitimate work capacity concern for Mr Lawrence to raise, as it would appear that accepting the SAS Tutor role would be too much. This reason had nothing to do with Claimant's sex, race or age and accordingly, this allegation fails.

161. **Issue 7 [2.1.7] Deliberate disadvantaging of the Claimant in relation to staff rotas.** This has been considered with issue 5 above.

162. **Issue 8 [2.1.8] The 1st Respondent failed to adequately address, without unreasonable delay, the Claimant's grievances including allegations of bullying against the 3rd and 4th Respondents, and Dr Iftikhar Sohail, Specialty Doctor.** In considering Issue 8 and its sub-issues there is some factual overlap with Issue 4 and its sub-issues (considered above). In Issue 4 we were tasked with considering the substance of the complaints raised by the Claimant in a number of separate grievances, whether the incidents occurred and, if so, whether they were discriminatory. Now, in Issue 8 we are tasked with determining whether the Respondents failed to address the Claimant's grievances, or failed to address them without delay. If we conclude that the Respondent did so fail, we need to consider the reason why. Accordingly we revisit each grievance in turn:
 163. **Issue 8.1 [2.1.8] The 1st Respondent failed to adequately address, without unreasonable delay, the grievance raised on 11th November 2018 [581].** The meeting to discuss this grievance took place on 9th April 2019 [611]. Jane Sibson conducted the hearing of the Claimant's grievance. She concluded that there was no case to answer. Neither party has produced direct evidence of when the grievance decision was reached. Various witnesses confirmed that Jane Sibson dismissed the Claimant's grievance. There is no evidence as to when. Dr Navaneetham confirmed that Jane Sibson found no case to answer as part of the evidence that she gave to the complaint against her on 19th December 2019 [742]. As such all that we can conclude is that the grievance was raised on 11th November 2018, the meeting to determine it was held 5 months later on 9th April 2019 and that at some

point unknown between that date and 11th December 2019, Jane Sibson concluded the grievance by dismissing it.

164. Accordingly we conclude that the grievance was addressed. We were concerned by the 5 month delay between the lodging of the grievance and the meeting to consider it. Jane Sibson was not called as a witness and we were given no explanation for that delay by the Respondent. We can reach no conclusions as to when the decision was reached and communicated by Jane Sibson as no party has adduced any evidence on that point, save that it had happened by December 2019.
165. The Claimant has not proved facts from which we could conclude that the Respondent failed to address this grievance without delay, let alone facts from which we could conclude that any delay caused by the Claimant's sex, race or age. This allegation fails.
166. Even if we were to assume that the grievance was not completed until December 2019, which is when Doctor Navaneetham stated in defending a separate grievance that it Jane Sibson had determined the complaint, this date would still be 2 years and 11 months out of time. For the reasons already stated we would not have extended time on just and equitable grounds for such a long period of time.
167. **Issue 8.2 [2.1.8] The 1st Respondent failed to adequately address, without unreasonable delay, the Grievance raised on 12th March 2019 [607].** The Claimant lodged this grievance on 12th March 2019 [607]. The meeting to determine it was held on 9th April 2019 [611] less than four weeks later. Mr Lawrence attended on behalf of the Respondent with Jane Sibson. Mr Lawrence states [GL21] that he believed the Claimant to be satisfied with explanation provided to her on 9th April 2019 meeting. The grievance concerned problems taking annual leave and study leave. Claimant had wished to take study leave to attend an examination as an invigilator. The study leave rules [790] stated that courses had to be approved by the College Tutor, Mr Okojie, and by the Rota Co-Ordinator, Dr Navaneethan and were

allocated on a 'first come, first serve' basis. The Claimant was told that as two other Doctors were away that day taking examinations, that is the Claimant wished to attend as examiner, she could do so on another occasion.

168. The Claimant has failed to establish on the facts that the grievance was not addressed, or not addressed without reasonable delay. This allegation fails on its facts.
169. The grievance was addressed on 9th April 2019 [611]. Thus it was 3 years and 6 months out of time at the point that the Claimant commenced her litigation. For the reasons stated we would not have extended time on just and equitable grounds for that period of time.
170. **Issue 8.3 [2.1.8] The 1st Respondent failed to adequately address, without unreasonable delay, the Grievance raised on 15th April 2019 [613].** The Claimant's grievance was dated 15th April 2019 [613]. It raises continued concerns over Annual Leave and Study Leave. Gary Lawrence responded the next day, on 16th April 2019 [612]. In the circumstances, we conclude that Mr Lawrence's explanation was a timely one (the following day) however we do not consider that the Claimant understood it, because it was not clearly or adequately expressed. Mr Lawrence appeared to say that in order for the Claimant to book annual leave for 1st August 2019, she would have to book it on 1st October 2018, even if it came out of her 2019 annual leave allowance. We did not find this explanation to be clearly expressed. Employees had different leave years, the Claimant's ran from 1st August to 31st July, yet she could only book from 1st October. This means that for any leave that the Claimant wished to take in August and September, she had to book that leave in October of the year before, not using that year's leave allowance (because that year's leave did not extend past 31st July, but instead it out of her allowance for the following year. Mr Lawrence's explanation did not adequately address her concerns or explain the system in a way that could be understood. We therefore find, despite being responded to quickly, that this allegation is made out on its facts because the Claimant's concern was not adequately addressed by Mr Lawrence.

171. The Claimant has failed to evidence facts from which we could conclude a discriminatory explanation. We conclude that Mr Lawrence did not fully understand the process (or at least not sufficiently to be able to explain it to the Claimant) and this was the reason that it was not adequately addressed by the Respondent.
172. The grievance was addressed on 15th April 2019 [613]. Thus it was 3 years and 6 months out of time at the point that the Claimant commenced her litigation. For the reasons stated we would not have extended time on just and equitable grounds for that period of time.
173. **Issue 8.4 [2.1.8] The 1st Respondent failed to adequately address, without unreasonable delay, the Grievance raised on 25th April 2019 [614-615].** This letter [614-615]. Gary Lawrence's response was sent on 30th April 2019, only a couple of days later [616]. It is a swift response, however Gary Lawrence does not provide the Claimant with a substantive response to her concerns over her Annual Leave and Study Leave entitlement. Instead he is passing off the entire issue to mediation. He does not do any of the steps he promised to do in his previous reply (get clarity from HR on the Claimant's AL entitlement, carry forward or the current operational policy, and/or writing the current operational policy down). His decision to refer to mediation failed to address the Claimant's grievance and this allegation is therefore made out on its facts.
174. Gary Lawrence was a weak manager of the doctors in his department and he told us he did not like and sought to avoid confrontation. We find that the Claimant's race did not create communication difficulties but that Mr Lawrence was less willing to engage with the Claimant to seek a resolution. He accused the Claimant reiterating her points and that he had less willingness to engage with her. Gary Lawrence said when cross examined why he did not provide a full explanation in his response that '*he could have to be fair, I never explained*' and '*reflecting on it there would have been the opportunity to explain things more, there was a conviction that the Claimant's way was right,*

and that he knew the Claimant would not accept his responses'. Gary Lawrence's explanation for this failing is that he does not like confrontation and that Claimant did not give up in pressing her case. This incident reveals a lack of adequate management by Gary Lawrence, but not one that was tainted by race. The allegation that discrimination played a part in the failure to adequately address this grievance fails.

175. **Issue 8.5 [2.1.8] The 1st Respondent failed to adequately address, without unreasonable delay, the Grievance raised on 19th June 2020 [720-721].** Gertie Nic Philib responded to this grievance on the same day that it was raised [718]. In Issue 4.5 above we have already concluded that the Claimant did not limit this to the Dr Solhail shift swap issue, but expanded it to raise a number of other issues as well. Faced with so many points, a referral to mediation was an understandable response that was neither bullying or tainted by discrimination. In the circumstances the allegation that this grievance was not addressed, or not addressed without unreasonable delay, fails on its facts.
176. **Issue 8.6 [2.1.8] The 1st Respondent failed to adequately address, without unreasonable delay, the Grievance raised on 17th July 2020 [717-718].** This was a continuation of the NNK's discussions with GNP [717-718] in which the Claimant raised new allegations of bullying against Dr Navaneethan arising out of a discussion on 12th July 2020 in which Dr Navaneethan criticised the Claimant over her decision not to perform a episiotomy (repairing a tear) on a patient after a difficult birth, in front of junior doctors. Gertie Nic Philib replied on the same day suggesting a meeting between the Claimant and Gary Lawrence [716] to set out her bullying concerns regarding Dr Navaneetham's treatment of her on 12th July. Claimant responded on 21st July stating that she did not want to see Gary Lawrence about this [715]. Ms Nic Philib then offers, by reply, a mediation and an Occupational Health referral [714]. The Claimant asks about a formal grievance in the event that a mediation did not proceed. On 1st August 2019 the Respondent held the Claimant's grievance appeal. There was no delay on the part of Gertie Nic Philib in responding to this grievance and this allegation fails on its facts.

177. **Issue 8.7 [2.1.8] The 1st Respondent failed to adequately address, without unreasonable delay, the Grievance raised on 3rd September 2020 [822].** This was a concern about bullying raised by the Claimant, in relation to the 5 Datix reports which were used to raise concerns regarding the Claimant's capability and the treatment of her patients. Ms Nic Philib responds on 20.9.20 (just over two weeks later) suggesting an external investigation. We note that grievance timescales require a response within 7 days and a conclusion within 4 weeks [2054]. However, we also note that this was occurring during Coronavirus pandemic. This was the Claimant's 8th grievance complaint, which raised overlapping concerns and was making the Claimant harder to manage. We do not think, in the circumstances that this delay was unreasonable or discriminatory. We also note that the Claimant was agreeable to an external investigator, Ibex Gale, being appointed. In the circumstances whilst there was a short delay in response, we conclude that this delay has nothing whatsoever to do with any of the Claimant's protected characteristics.
178. We also note that this issue was raised 2 years and 1 month out of time. For the reasons stated above we would not have exercised our discretion on just and equitable grounds to extend time for this allegation to proceed.
179. **Issue 9 [2.1.9] The 1st Respondent failed to adequately communicate with the Claimant during the grievance processes.** It was confirmed during closing submissions with both parties that this allegation was referring to the same grievances raised in issues 8.1 to 8.7 above, as set out in paragraph 16 of the Particulars of Claim [21]. The Tribunal's Judgment on those issues is set out at 8.1 to 8.7 above and are not repeated here.
180. **Issue 10 [2.1.10] Unreasonable restrictions being imposed on the Claimant's practice by the 1st and 2nd Respondent on 3 August 2020, 7 October 2020, 5 December 2022 and 31 January 2022.** Dr Free was informed of patient safety concerns regarding the Claimant by Claire Price, from 5 different cases. The concerns raised had similar themes, namely failing

to follow guidance, failing to escalate to consultant, and operating outside the scope of practice [726]. Dr Free's original restrictions were set out in her letter of 3rd August 2020 [738]. They were not to work on the labour suite or on call until further notice; all outpatient and gynecological surgery was to be under the supervision of a Consultant and the Claimant was not to undertake surgery on her own.

181. Dr Free imposes further practice restrictions on 9.10.20 [853] namely only working in clinic when a Consultant is present or immediately available. On 5th December 2022 further concerns arose regarding communication difficulties in that patients were finding it difficult to understand what the Claimant was saying to them because she used terminology and abbreviations that patients were unlikely to understand, such that it could not be said informed consent to a procedure had been obtained [2745].
182. Dr Free did place restrictions on the Claimant's practice. To that extent this allegation is made out on its facts. However, we reject the assertion that those restrictions were unreasonable, given the serious patient safety concerns that had been raised. We also find that the reason for the restrictions was patient safety and this reason had nothing whatsoever to do with sex, race or age. In the circumstances this allegation fails and is dismissed. We also note that the ability to impose restrictions on practice was more favourable than a suspension, which would have been the only alternative.
183. We should say that we consider the imposition of restrictions to be one single act, extending over a period between 3rd August 2020 and 31st March 2023. The last restriction was 'in time' and thus we would have treated all of the restrictions as having been presented in time, had this issue succeeded.
184. **Issue 11 [2.1.11]** The 1st and 2nd Respondents' failure to follow 1st Respondent's own Policy and the national MHPS Guidance related to restriction / exclusion. The NHS national guidance, 'Maintaining High Professional Standards in the Modern NHS' (MHPS) not provided to Tribunal, but key concepts repeated in 1st Respondent's policies. The MHPS was

incorporated by clause 6.2.2 of 1st Respondent's Disciplinary Policy [944]. There is a distinction between excluding from practice (suspension) and managing the risk to patients (restrictions). The Claimant never excluded from work. Under the policy, alternatives to suspension included supervision, restriction from certain clinical duties, restriction to administrative duties or sick leave for investigating specific health problems, and consideration of an Action Plan, and advice from the PPA. Turning to the specific allegations of failure, namely:

185. **Issue 11.1 [2.1.11.1]** the imposition of restrictions. The Claimant has failed to establish that the restrictions procedure was not followed and this allegation fails on its facts.
186. **Issue 11.2 [2.1.11.2]** the effective exclusion by means of 'restrictions'. This allegation is not made out on its facts. The Claimant was not excluded or suspended from work, effective or otherwise. She continued to practice, albeit with restrictions. The assertion that she was excluded is not made out and is dismissed.
187. **Issue 11.3 [2.1.11.3]** the failure to appoint and give the Claimant access to a non-executive director (Designated Board Member). Practitioners can make representations to a Designated Board Member with regard to exclusion or the investigation of a case [946]. Julie Houlder was the Trust's Designated Board Member. The original Lofl 2.1.11.3 was the subject of an amendment application made by the Claimant at the start of the case. It stated 'the failure to appoint and give the Claimant access to an effective non-executive director (designated Board Member). The Claimant's application to amend was refused as it was left too late and would have required Julie Houlder to give evidence, who was not before the Tribunal. The Claimant plainly did have access to Julie Houlder, as she emailed her on 9th August 2020 [763] but she did not make any representations with regard to the investigation of her case, or ask for help or assistance, she simply informed Julie Houlder that she was being investigated. Whilst we would have expected some sort of response from Ms Houlder, the Claimant's email did not seek a response. The fact of

the email is evidence that the Respondent had given the Claimant access to a non-executive director (Designated Board Member). This allegation, as originally pleaded, fails and is dismissed.

188. **Issue 11.4 [2.1.11.4]** the inadequate and irregular reviews of the restrictions / exclusion. The Policy requires a review of an exclusion, not a review of restrictions. That said, as a matter of fact, restrictions were reviewed by Dr Free on 9th October 2020 [853]. This allegations fails on its facts.
189. **Issue 11.5 [2.1.11.5]** the lack of communication in relation to restriction / exclusion. The Restrictions communicated by Dr Free to the Claimant on 3rd August 2020 and 9th October 2020. This allegations fails on its facts.
190. **Issue 11.6 [2.1.11.6]** the lack of an adequate, proper, fair and timely investigation. The policy requirements at 6.1.3 of Policy [943] are that that the investigation should be completed in 4 weeks and submit their report within a further 5 days. The Case Investigation Report was completed in January 2021 [911]. The Terms of Reference were set out in a letter to Dr Khin on 15th September 2020 [1341]. Thus the investigation was to be completed by 13th October 2020 with the report submitted by 20th October 2020. The deadlines for the investigation and report were therefore missed. Dr Breslin notes that extensions were sought and granted by Dr Free on the grounds of arranging the necessary interviews, the effect of the Covid pandemic and the clinical workload of Dr Breslin [918]. The report was not submitted until January 2021. The allegation that the report was not timely and in accordance with 1st Respondent's policy is made out. What was the reason? The Claimant not shown facts from which we could conclude discrimination was the reason and we accept the Respondent's explanation for the delay. We shall deal with whether the process was adequate, proper and fair in the next issue.
191. **Issue 12 [2.1.12]** **The MHPS investigation report dated January 2021 was inadequate and unfair, including an inadequate selection of witnesses without consultation or notification to the Claimant.** Eamonn Breslin stated on 1st November 2020 that his investigation would be into the care of 5

women. It was to establish facts and to do so from the patient records only [865]. He stated in his witness evidence that he was only looking into TOR 3&4⁵ [1342-1343], to investigate whether Dr Khin had reflected appropriately whether her behaviours in line with COMPACT. The COMPACT is the agreement between the Hospital and its staff [1108] sets out standards of behaviours expected of all staff. The TOR stated that the investigator has a discretion to determine how best to investigate the concerns [1343].

192. Mr Breslin considered the disciplinary policy on the conduct of investigations [941-944]. He determined to choose 2 of 7 witnesses proposed by the Claimant to assess TOR 3&4. The Claimant's criticism of his report is set out in her letter of 15th February 2021 [1816]. She complains that she identified 7 witnesses for Dr Breslin to speak to regarding TOR3-4 yet he only interviewed two witnesses. She also asserts that the witnesses chosen by him, namely Gary Lawrence and Neena Navanetham, had been the subject of prior grievances raised by the Claimant and thus they would not be impartial in Mr Breslin's investigation.
193. We find that that the Claimant did not know who had been interviewed until after the report, and that this was, in an investigation that had the capacity to be career ending, inadequate and unfair. In the circumstances we consider that this allegation has been made out on its facts.
194. However, Dr Breslin's explanation is that he has the ultimate discretion as to how to conduct his investigation (correct) and he exercised that it what he considered to be fair, given time constraints and issues. We do accept this explanation, which has nothing to do with sex, race or age, even though we consider it to have been unfair. We conclude that it would have been adopted by Mr Breslin regardless of the characteristics of the Doctor he was investigating. In the circumstances, detriment 12 is dismissed.

⁵ Terms of Reference 3 & 4

195. This allegation was presented 1 year and 9 months out of time. For the reasons stated above we would not have exercised our discretion to extend time for such a long period of time.
196. **Issue 13 [2.1.13] The 1st and 2nd Respondent failed to provide the Claimant with adequate supervision or support during the time that her practice was restricted.** The Claimant did raise concerns regarding a lack of support during her restrictions, which was discussed with Caroline Free at a meeting between them on 28th March 2022 [2638]. Dr Free acknowledged the imposition that restrictions had on the Claimant and the supervising Consultants, and Dr Free agreed to review the arrangements. She subsequently moved to Consultants being present or immediately available. Dr Free also offered external placement with another Trust, which could not progress as the Claimant did not consent to release of information about her situation to that Trust. Dr Free offered other support in connection with her wellbeing, but the Claimant did not identify any additional support as necessary. There was no other case asserted by Claimant as to what a lack of support looked like. We find that Dr Free did amend the restrictions and did offer what support she could, which the Claimant did not take up. In the circumstances this allegation fails on its facts.
197. We consider all of the restrictions placed on the Claimant to be a single continuing act. The last restriction was placed within time and thus we would have treated this allegation to have been raised in time, had we upheld it.
198. **Issue 14 [2.1.14] The 2nd Respondent's behaviour towards the Claimant was harsh and intimidating in meetings and correspondence.** The Claimant has led very little evidence to illustrate on how or why the meetings held with her and the correspondence relating to each meeting was harsh and intimidating. In dealing with each meeting in turn:
199. **Issue 14.1 [2.1.14.1] The 2nd Respondent's behaviour towards the Claimant was harsh and intimidating in the meeting on 13th July 2021 and its related correspondence dated 13th July 2021.** The Claimant does

not allege meeting 13th July 2021 was harsh or intimidating [NNK708-710]. In oral evidence the Claimant told us that the meeting on 26th October 2021 was harsh only. In cross examination she did not pursue any allegations in respect of the 5 remaining meetings / letters. Counsel for Claimant referred to Dr Free's tone. Caroline Free denied that she was harsh or intimidating [CF231(ix)] and we have no evidence to gainsay that rebuttal. The letter confirming meeting of 13th July 20221 is at [2557]. In our judgment there is nothing wrong with it. Accordingly this allegation fails on its facts.

200. **Issue 14.2 [2.1.14.2] The 2nd Respondent's behaviour towards the Claimant was harsh and intimidating in the meeting on 26th October 2021 and its related correspondence dated 1st November 2021.** The letter confirming the meeting outcome was misdated 1st November 2020 [2775a]. The correct date was 1 November 2021. In our judgment there is nothing harsh or intimidating about the letter on 1st November 2021. The meeting itself had been arranged to review the outcome of the MHPS investigation into the patient concerns that had been raised. The Claimant discussed the patient concerns with Dr Free and articulated her concerns. Dr Free explained why she felt restrictions had to remain in place, as the Claimant had referred to situations when she would act outside patient guidelines without escalating matters to a Consultant. Dr Free made the point that she was trying to keep the Claimant in practice and not excluding her, which remained a final option. Dr Free sets out her recollection of the meeting at [CF78-89]. We accept that account and find that there was nothing harsh or intimidating about either the meeting or the follow up letter. Accordingly this allegation fails on its fact.
201. **Issue 14.3 [2.1.14.3] The 2nd Respondent's behaviour towards the Claimant was harsh and intimidating in the meeting on 5th January 2022 and its related correspondence dated 17th January.** The letter confirming this meeting is at [2613]. The meeting was another MHPS Investigation Review meeting. Dr Free discussed the grievance process that had run along side the MHPS investigation process, and whether the Claimant felt that she could work with the individuals that she had named in her grievance. Dr Free was concerned about lifting restrictions if the Claimant could not give her

reassurance on that point. The Claimant indicated that she did not think that Dr Navaneetham would treat her fairly. The Claimant confirmed that there had been a breakdown in trust between herself and Dr Navaneetham, her Clinical Director. A further meeting was arranged for 25th January 2022. We accept this account and find that there was nothing harsh or intimidating about either the meeting or the follow up letter. Accordingly this allegation fails on its fact.

202. **Issue 14.4 [2.1.14.4] The 2nd Respondent's behaviour towards the Claimant was harsh and intimidating in the meeting on 3rd March 2022 and its related correspondence dated 7th March 2022.** The letter confirming the outcome of this meeting is at [2613]. At this meeting Dr Free discussed the possibility that the Claimant undertook the necessary training to return to unrestricted practice at another NHS Trust. The Claimant had asked how long it would last for and Dr Free had not been able to give a precise figure, but had indicated that any external placement would be for at least 6 months. Dr Free confirmed that three Trusts had been approached and all three responded positively to the Claimant joining them on a placement. Dr Free explained that working with a new Trust would enable neutral feedback from colleagues that had no been subject to any grievance process. The Claimant choose a potential Trust to work with. There was, we find, absolutely no evidence that either the meeting itself, or the follow up letter were conducted in a way that can in any way whatsoever be considered intimidating and/or harsh. In the circumstances this allegation fails on its facts.

203. **Issue 14.5 [2.1.14.5] The 2nd Respondent's behaviour towards the Claimant was harsh and intimidating in the meeting on 28th March 2022 and its related correspondence also dated 28th March 2022.** The letter confirming the outcome of this meeting is at [2638]. The evidence reveals that there was more friction at this meeting than the others that we have considered so far. Dr Free repeated that an external placement was designed to assist the Claimant back to full unrestricted work in a neutral environment. The Claimant commented that she believed the real reason was to set her up for a disciplinary hearing. Dr Free tried to assure her that this was not the case. The Claimant asked for the assessment to continue at the George Eliot, however NHS

Resolution had determined that the Claimant's grievance process had become a barrier to a local resolution. Dr Free explained that the placement Trust would need to see a copy of the investigation report and the Claimant refused to give her permission for its release. Dr Free said that refusing to allow the placement Trust to see the investigation report (in other words to know why the Claimant needed assistance in removing the clinical restrictions) effectively ruled out the option of an external placement and, in those circumstances Dr Free would need to review her remaining options. Whilst there was friction in this meeting, there was, we find, absolutely no evidence that either the meeting itself, or the follow up letter were conducted in a way that can in any way whatsoever be considered intimidating and/or harsh. In the circumstances this allegation fails on its facts.

204. **Issue 14.6 [2.1.14.6] The 2nd Respondent's behaviour towards the Claimant was harsh and intimidating in the meeting on 26th April 2022 and its related correspondence dated 9th May 2022.** The letter confirming the outcome of this meeting is at [2648]. Again, there was some degree of friction at this meeting. Dr Free began by asking the Claimant how she was, and the Claimant said she was ok. Dr Free said that following the non-progression of the external placement, the next stage would be a capability meeting. There was some discussion about the level of clinical support that the Claimant was currently supporting, and whether it remained robust. Dr Free reiterated that the restrictions remained not to punish the Claimant but to ensure patient safety. The Claimant commented that Dr Free was not supporting her, and Dr Free stated that she was doing all that she could to provide support. The letter concluded with the details of a number of support services available to the Claimant. Whilst there was friction in this meeting, there was, we find, absolutely no evidence that either the meeting itself, or the follow up letter were conducted in a way that can in any way whatsoever be considered intimidating and/or harsh. In the circumstances this allegation fails on its facts.
205. These investigation review meetings took place over a period of time. They all concerned Dr Free's conduct at the meeting and how they those meetings were recorded. We consider all of the meetings to be one continuing act. The

earliest was 1 year and 3 months out of time. The most recent was three months out of time. As such of these meeting allegations were presented out of time. For the reasons stated we would not have extended time on just and equitable basis for the necessary period for the allegations to have been in time.

206. **Issue 15.1 [2.1.15] The commissioning of the Claimant's behavioural assessment report (dated 26 April 2021, re-issued 3 June 2021).** This allegation is made against the 1st and 2nd Respondents. Dr Erinale, Dr Khaire and Dr Datta are relied on as actual comparators. The Case Investigation Report reached conclusions on each Terms Of Reference, but did not contain any proposals or recommendations, sanctions or retraining. Dr Free liaised with NHS Resolution (a body set up to provide advice, learning and resolution for NHS staff in respect of their practices) and Practitioner Performance Advice (PPA).
207. Paul Hutchins, from the PPA, explored a behavioural assessment with the Claimant and then recommended it to the Claimant and Dr Free. He noted that the Assessment could only proceed with the Claimant's agreement [1806-1807]. Dr Free noted that the Claimant felt she did not have much choice [1817]. Dr Free stated that the report, if obtained, would help inform her decision as Case Manager on the next steps [1807]. The Claimant agreed to have the behavioural assessment, stating that she was not in a position to argue with NHS Resolution [1816]. The Behavioural Report was then commissioned, which was a detrimental act. However, we find as a fact that Dr Free's motives for commissioning the report was that she was following the advice of PPA. This had nothing whatsoever to do with the Claimant's sex, race or age. This allegation fails on its facts.
208. We note that this allegation was presented 1 year and 9 months out of time. For the reasons stated above we would not have extended time to allow it to proceed.

209. **Issue 15.2 [2.1.15] The content of the behavioural assessment report itself.** This was also presented against 1st and 2nd Respondents and relied on the same comparators as Issue 15.1 above. The report was completed by Claire Keogh on 26th April 2021 **[1849]**. Ms Keogh's Conclusions **[1852]** struck us as having been prepared by a professional. They are balanced and offered in good faith. The report referred to factual conclusions that cultural differences may have played a part in a lack of communication skills (namely deference shown to more senior colleagues) and notes the patients did not always understand the Claimant's medical advice due to her accent. That said, there is nothing in Ms Keogh's report to indicate that the Claimant's sex, race or age played any part in the content of the report or its conclusions. Accordingly this allegation fails on its facts.
210. We note that this allegation was presented 1 year and 4 months out of time. For the reasons stated above we would not have extended time to allow it to proceed.
211. **Issue 15.3 [2.1.15] The weaponisation of the content of the behavioural assessment report against the Claimant.** This was also presented against 1st and 2nd Respondents and relied on the same comparators as Issue 15.1 above. Dr Free's Case Manager Report was dated 31st August 2022 **[2703]**. Caroline Free recites negative conclusions within the behavioural report **[2706]**. We felt that this was not a balanced summary of the report, as it quoted the factors preventing the Claimant's remediability but made no reference the factors supporting her remediability, notwithstanding the fact that Dr Keogh referred to both **[1853]**. Dr Free quotes extensively from the Behavioural Assessment report in the decision section of her case manager's report **[2712-2713]** which, we conclude, having had sight of the full report, is one-sided and does not portray the full extent of the report's conclusions, which we considered were more balanced. The conclusions are used to justify a full conduct and capability hearing. As matter of fact therefore the allegation of weaponising the report's conclusions is made out.

212. However we conclude that patient safety is the motivating factor for Caroline Free, not Claimant's sex, race or age. The Claimant has failed to adduce facts from which we could conclude that her sex, race or age could have been the reason. Accordingly this allegation fails.
213. We note that this allegation was presented 1 year and 4 months out of time. For the reasons stated above we would not have extended time to allow it to proceed.
214. **Issue 16.1 [2.1.16] The First and Second Respondent's insistence on sharing flawed information with prospective external placements before they could take place.** This is presented against the 1st and 2nd Respondents and relies on a hypothetical comparator only. Dr Free did make it clear (at [2707]) that for an external placement to happen, the receiving Trust would need to have sight of Case Investigation Report [911]. As such the Trust did require the report to be shared with the placement Trust. We have already found as a fact that the report was inadequate and unfair by reason of the witness interview choices made by Eamonn Breslin, and as such it could be described as flawed. This explanation is made out on its facts.
215. However, Dr Free's explanation is that forwarding the report to the Trust that has agreed to offer an external placement is necessary for a Remedial Action plan to be put in place at the placement Trust. We accept this explanation. For the Claimant to benefit from the placement the Consultants at the new Trust would need to know what the issues were that needed remedial action. This explanation for nothing to do with the Claimant's sex, race or age and accordingly the allegation fails.
216. We note that this allegation was presented 1 year and 9 months out of time. For the reasons stated above we would not have extended time to allow it to proceed.

217. **Issue 16.2 [2.1.16] The First and Second Respondent's failure to indicate the duration of the placement to the Claimant.** This is presented against the 1st and 2nd Respondents and relies on a hypothetical comparator only. Dr Free told us in her witness evidence (CF231xi) that she indicated a 6 month placement and did not indicate the placement would be open ended. In her statement she refers to her response to the Claimant's resignation, dated 19th January 2023 [2831] in which she states that she indicated a 6 month not open ended placement [2846]. Dr Free refers to a placement as an option in an email dated 25th January 2022, but not how long it would last for [2621]. She did indicate to at the review meeting on 3rd March 2022 [2635] that whilst she could not say exactly how long it would last, she would expect it to be for at a least 6 months dependent upon the agreed action plan. This allegation is not made out on its facts and is dismissed.
218. We note that this allegation was presented 1 year and 9 months out of time. For the reasons stated above we would not have extended time to allow it to proceed.
219. **Issue 17 [2.1.17] The requirement contained within the letter dated 19 December 2022, for the Claimant to respond to the Management Statement of Case the same day.** This allegation was dismissed by the Tribunal on withdrawal by the Claimant.
220. **Issue 18 [2.1.18] The Claimant being given inadequate time to prepare for the hearing in January 2023.** This is relied on as an act of direct discrimination for sex, race and age. It is also relied on as victimisation following discrimination complaints made on 10 December 2021 and 13 December 2022. It has been presented against the 1st and 2nd Respondent and relies on a hypothetical comparator only. This allegation was presented in time.
221. The Claimant was first notified that a Capability Hearing will be arranged on 31st August 2022 [2714]. On 5th December 2022 Claimant invited to a capability hearing arranged for 5th-6th January 2023 and provided with all of the allegations that she was to face [2737]. This was one month before the

hearing. The Claimant confirmed she had access to the patient notes [2741]. She was given until 12th December 2022 to object to the panel members (no objection received). The Claimant was told to provide a list of witnesses by 2nd January 2023 and was told that both sides had to submit their statement of case by 19th December 2022.

222. Had the capability hearing proceeded on 5th January 2023, the Claimant would have had one calendar month to prepare for the hearing. The Claimant received the Management statement of case on 19th December 2022, as stated [2758], and resigned on 23rd December 2022 [2815]. The Claimant stated that she has had inadequate time to prepare for the hearing. On 30th December 2022 Dr Free stated that the hearing would be rescheduled [2820]. On 23rd January 2023 the Claimant was notified of the re-arranged hearing on 14th February 2023 [2853]. The Claimant was originally given 4 weeks to prepare and after she complained that the Management Statement of Case (sent on 19th December 2022) gave her insufficient time to prepare, the meeting was pushed back by additional 6 weeks. In the circumstances this allegation fails on its facts.
223. **Issue 19 [2.1.19] The Management Statement of Case, dated 19 December 2022, being inaccurate.** This is relied on as an act of direct discrimination for sex, race and age. It is also relied on as victimisation following discrimination complaints made on 10 December 2021 and 13 December 2022. It has been presented against the 1st and 2nd Respondent and relies on a hypothetical comparator only. This allegation was presented in time.
224. The Claimant has not provided any evidence in her witness statement as to what she asserts was inaccurate within the Management statement of case. The date of the VBAC policy was changed from 2017 to 2020. The core substance of the policy had not changed. No other case has been identified or put to the Respondent's witnesses. In the circumstances this issue fails on its facts.

225. The Claimant accepted in cross examination that the protected acts played no part in her treatment. She also failed to put that case to any of the Respondent's witnesses. Notwithstanding our finding that two protected acts occurred, the Claimant has not proven that her treatment was in any way caused by those acts and accordingly the victimisation claims fail.
226. **Issue 20 [2.1.20] On 20 December 2022, the First Respondent refusing the Claimant's request for her lawyer to accompany her to the January 2023 disciplinary hearing.** This is said to be age, race and sex discrimination. The complaint is against the 1st Respondent only and a hypothetical comparator is relied on. This claim was presented in time.
227. The Respondent did refuse to allow the Claimant to attend the capability hearing with a lawyer [2813]. This allegation made out on its facts. However, we accept the Respondent's explanation for it. The rule was pursuant to the Respondent's policy and common practice [959]. We find that the refusal was because of the rule and that it had nothing to do with the Claimant's age, race or sex.
228. **Issue 21 [2.1.21] The decision to proceed with the MHPS process following the Claimant's resignation on 23 December 2022.** This is said to be age, race and sex discrimination. The complaint is against the 1st and 2nd Respondents only and a hypothetical comparator is relied on. This claim was presented in time.
229. This allegation is factually correct. The Respondent's explanation for it was patient safety, namely that the issues of the Claimant's capability needed to be resolved in order to protect patient safety, albeit at a different or new NHS Trust. In the event a final written warning was given. Had the Claimant not resigned she would still be in the Respondent's employment. Whilst it was not an issue before us, the outcome was referred to the GMC, again for patient safety reasons. We accept this explanation. Neither has anything whatsoever to do with Claimant's age, sex or race. The Claimant has failed to prove facts from which we conclude race, age or sex was the reason for proceeding with

the conduct hearing after the Claimant had resigned and accordingly this allegation fails.

230. **Issue 22 [2.1.22] The First and Second Respondent's letter dated 19 January 2023 was inaccurate.** This is said to be age, race and sex discrimination. The complaint is against the 1st and 2nd Respondents only and a hypothetical comparator is relied on. This claim was presented in time.
231. The letter appeared in the bundle at **[2831-2852]**. Dr Khin asserted in her Particulars of Claim **[24]** that the letter contained inaccuracies. She refers to it in her witness statement at **[NNK899]** but she does not say, in evidence, what was inaccurate about it. Dr Free was cross examined on only one inaccuracy, namely the date of the VBAC policy. She stated that the date was changed from 2017 to 2020 when the error was pointed out and that the core substance of the policy had not changed. We find that the letter was not inaccurate, save for that date which was corrected. In the circumstances this allegation fails on its facts.
232. **Constructive Dismissal.** Finally, we turn to the Claimant's claim of constrictive dismissal. We remind ourselves of the issues:
- 232.1. Did conduct on the part of the Respondent amount to a fundamental breach of contract such as to have entitled the Claimant to have treated himself/herself as constructively dismissed? The Claimant relies on all detriments pre-dating the resignation.
- 232.2. Did the Claimant waive any breach and affirm the contract?
- 232.3. Was the principal reason for the Claimant's resignation the above alleged breaches of contract?
233. As we concluded in our findings of fact, the Claimant referred to a number of matters that had caused her to resign, in particular the Claimant referred to:

- 233.1. to a history of bullying;
 - 233.2. an inadequate grievance and grievance appeal process;
 - 233.3. retaliations that had occurred;
 - 233.4. the restrictions imposed on her practice;
 - 233.5. the insistence that the secondment Trust be sent details of her case and case history prior to the secondment.
234. The Claimant asserted that younger, white and male colleagues would have been treated better than she had been. She concluded by saying, *'taken one by one or in combination, the Trust's actions and omissions have destroyed my trust and confidence in them as an employer'*.
235. We concluded that only one allegation of bullying occurred and/or was upheld by the Respondent, namely the manner in which Dr Navaneetham castigated the Claimant in front of junior Doctors in 12th May 2020. This had nothing to do with any of the Claimant's protected characteristics. The Trust also concluded and we accept that the Claimant's behaviour at the time was also contract to the Trust's COMPACT agreement. We consider that this was resolved at the time and that it played no part in the Claimant's decision to resign, some two and a half years later. The Claimant raised 8 grievances in total. We noted a couple that took longer than we would have hoped, but in the context of the complexity of and number of the issues raised we do not conclude that the resolution of the grievances seriously damaged or destroyed trust and confidence.
236. We dismissed any claim of victimisation and/or retaliations.
237. We concluded that the restrictions on practice and the insistence that any secondment Trust be provided with a full picture of the Claimant's situation were both lawful and appropriate steps for the Respondent to take. Both were with cause and/or justification. As such we reject any argument that either was capable of amounting to a breach of contract.
238. We find that the actual reason for the Claimant's resignation, at the time that she did it, was because she was about to attend the final capability hearing.

Calling the Claimant to such a hearing was not a breach of contract. It was the next step in the Respondent's processes and pursuant to policy. The Claimant had decided, quite incorrectly, that she was about to be dismissed and she elected to 'jump' before she was 'pushed'. Ultimately however the Respondent addressed the matters raised at the Capability hearing with care, and issued the Claimant with a final written warning. She would not have been dismissed had she stayed.

239. Accordingly we reject the Claimant's claim of constructive unfair dismissal.

Conclusion.

240. In the circumstances the Judgment of the Employment Tribunal is:

240.1. The Claimant's claim of constructive unfair dismissal, pursuant to s98 **ERA** is dismissed.

240.2. The Claimant's claims of direct race discrimination pursuant to s13 **EqA** is dismissed.

240.3. The Claimant's claims of direct age discrimination pursuant to s13 **EqA** is dismissed.

240.4. The Claimant's claims of direct sex discrimination pursuant to s13 **EqA** is dismissed.

240.5. The Claimant's claim of harassment pursuant to s26 **EqA** related to her race is dismissed on withdrawal by the Claimant.

240.6. The Claimant's claim of victimisation pursuant to s27 **EqA** is dismissed.

241. We have some concluding observations:

242. **To the Claimant:** We understand why you were frustrated with how you were being line-managed by Dr Navaneetham, regarding rota's and annual leave and why it was necessary to raise a grievance. However, we have not been able to conclude that discrimination played any part in that process. Similarly, we found that concern for patient safety, not discrimination, was the driver behind how you were managed in the later stages of this process. We wish you the best and we note with pleasure the GMC conclusion that you remain fit to practice, having demonstrated self-reflection since leaving the 1st Respondent and working at a new Trust.
243. **To the Respondents:** Whilst we have dismissed all of the Claims against, we did not along the way that the annual leave system operated by Dr Navaneethan was difficult to understand and implement. We would invite you to look at it again and make improvements to how it is implemented and understood to avoid a similar sense of grievance in others.
244. **To both parties:** We apologise for the delay in reaching this decision. This has been caused in part by the size of the task involved and the challenges of securing the necessary time to deliberate with members and then the time collate the decision. In this case it took too long and we apologise for that.

Employment Judge Gidney

27th October 2024

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