**EMPLOYMENT TRIBUNALS**

| **Claimant** | | **Respondent** |
|---|---|---|
| Miss S Williams | **v** | St. Luke's Hospice |

**Heard at**: Watford Employment Tribunal
(Days 1, 2 , 4 and 6 in person, Days 3 and 5 by CVP and Day 7 discussion in chambers)

**On**: 4 – 8 December 2023 and 10 – 11 January 2024
**Before:** Employment Judge Coll
**Members:** Mr. Dykes
Mrs. Sood

**Appearances**
**For the Claimant:** In person
**For the Respondent:** Mr. Sonaike, Counsel instructed by Markel Law LLP

## RESERVED JUDGMENT

1. The claims of race related harassment concerning allegation 5a) and 5b) are out of time and it is not just and equitable to extend time. Accordingly, these claims are dismissed.

2. The other claim of race related harassment (allegation 5c) is not well founded and is dismissed.

3. All claims of direct race discrimination (allegations 5c and 13a – j & l) are not well founded and are dismissed.

## REASONS

1. Following a period of conciliation which lasted from 31 March 2021 to 26 April 2021, the claimant presented a claim form on 26 May 2021 by which she alleged race related harassment and direct race discrimination.

2. The claim arises out of the claimant's employment by the respondent as In Patient Unit ("IPU") Clinical Manager between 27 January 2020 and 24 April 2021. The claimant was told that her employment was terminated because her post was redundant.

3. The respondent entered a grounds of response on 17 August 2021.

### The hearing

4. At this 7 day hearing we have had the benefit of hearing oral evidence from seven witnesses: the claimant, Mrs. Ursula Reeve (the former Director of Patient Services), Ms. Sangita Solanki, clerk to the Wellness Centre and temporary ward clerk in the IPU, Ms. Alpana Malde (the former Chief Executive Officer, "CEO"), Ms. Natalia Villazan (the former HR Director), Dr.

Charles Daniels, Medical Director and Ms. Lindsay Bennister, CEO. 4 of the witnesses adopted in evidence written statements which had been exchanged in advance and were cross examined upon them. The current HR Director was also in attendance.

5. The parties had cooperated on a joint bundle of documents which consisted of 485 pages and a witness bundle of 48 pages. Page numbers in the joint bundle are referred to as [1] to [485] as appropriate. During the first day of the hearing, the respondent provided a full version of a document at [103], which had a page missing.

6. The respondent had issued witness summons with respect to Ms. Malde and Ms. Villazan. The claimant had attempted to obtain a witness summons for Mrs. Solanki but had failed due to not having her home address. After brief submissions, Mr. Sonaike agreed that the respondent would disclose Mrs. Solanki's home address to the Tribunal. The witness summons was served on Mrs. Solanki and she duly attended.

7. It was not possible to complete Mrs. Reeve's evidence on Day 2. She subsequently became unwell and could not attend to complete her oral evidence in person. She was able to attend via a remote video link on Day 4.

8. At the start of Day 3, Mr. Sonaike raised an issue. He indicated that the mini-pupil had said that one of the Tribunal panel members had been asleep. He had made enquiries and found this to be supported by one of the intended witnesses, Ms. Bennister and by the HR director. A mini-hearing took place with the mini-pupil, Ms. Bennister and the HR director giving oral evidence. The claimant's friend had been in attendance earlier in the week but was not able to come on Day 3. The claimant reported what her friend had observed. Submissions followed. The Tribunal rose to deliberate. An oral judgment was delivered. The conclusion was that based on the oral evidence of all the witnesses, the panel member in question had given the appearance of falling asleep momentarily but had jerked herself awake. She had not been asleep even momentarily.

9. After this, the claimant raised an issue. Mr. Sonaike had telephoned Mrs. Solanki the night of Day 2 and asked her what she was going to say. The claimant asked the Tribunal to make findings about whether this was acceptable or not. We heard submissions. The conclusion was that there is no property in a witness and therefore Mr. Sonaike was permitted to speak to Mrs. Solanki. It would have been better etiquette to have raised it in advance with the claimant to avoid her having the surprise of this discovery and the need therefore to consider this at some length during the hearing.

## The issues

10. The issues in the case remained as set out in the case summary of Judge Price as found at [63 – 65 ] and are not replicated here. In referring to her race, the claimant identified that this meant that she was a black woman [ET1 18]. In their schedule of redundancies, the respondent referred to the claimant's race as "Black Caribbean".

11. The CMO recorded that at the claimant's date of termination, she would not have had the right not to be unfairly dismissed because of lack of two years continuous service. It should also be noted that allegation 13k) was not being pursued *("Did Alpana Malde dismiss the claimant on 23 April 2021?")* The claimant referred to Martin Hill . Manager of the Wellbeing Centre, as her comparator for a number of her allegations.

## The Law applicable to the issues

12. The claimant complains of a number of breaches of the Equality Act 2010 (hereafter referred to as the EQA). Sections of that Act which are relevant to the issues in this case include:

13. Section 13 (1) of the EQA, which reads:

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

14. Section 26 which, so far as relevant, provides as follows:

> "(1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (2) A also harasses B if –
>
> (a) A engages in unwanted conduct of a sexual nature, and
> (b) the conduct has the purpose or effect referred to in subsection (1)(b).
>
> (3) A also harasses B if
>
> (a) A or another person engages in unwanted conduct of a sexual nature or that is related to (…) sex,
> (b) the conduct has the purpose or effect referred to in subsection (1)(b) and
> (c) because of B's rejection of or submission to the conduct, A treats B less favorably than A would treat B if B had not rejected or submitted to the conduct.
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
>
> (a) the perception of B;
> (b) the other circumstances of the case;
> (c) whether it is reasonable for the conduct to have that effect."

15. Section 39(2), on the rights of employees and application which, so far as material, provides that an employer must not discriminate against an employee

> "(a) As to B's terms of employment;
> (b) In the way A affords B access, or in not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
> (c) By dismissing B;
> (b) By subjecting B to any other detriment."

16. Section 109 on the liability of employers and principals provides as follows:

> "(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.
> (2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval."

17. Section 136, which applies to all claims brought before the Employment Tribunal under the EQA, reads (so far as material):

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

18. What is and what is not harassment is extremely fact sensitive. So, in Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336 EAT at paragraph 22, Underhill P said:

> "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (…), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

19. The importance of giving full weight to the words of the section when deciding whether the claimant's dignity was violated or whether a hostile, degrading, humiliating or offensive environment was created for him was reinforced in Grant v HM Land Registry [2011] IRLR 748 CA. Elias LJ said, at paragraph 47:

> "Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

20. Furthermore, in Weeks v Newham College of Further Education [2012] EqLR 788 EAT, Langstaff P said:

> "17....Thus, although we would entirely accept that a single act or a single passage of actions may be so significant that its effect is to create the proscribed environment, we also must recognise that it does not follow that in every case that a single act is in itself necessarily sufficient and requires such a finding.
>
> ...
>
> 21. However, it must be remembered that the word is 'environment'. An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the office or staffroom concerned."

21. In Pemberton v Inwood [2018] EWCA Civ 564; [2018] ICR 1291, Underhill LJ set out guidance on the relevant approach to a claim under section 26 of the EQA as follows [at para 88]:

> "In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have

> suffered the effect in question (the subjective question) and (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

22. The EAT provided guidance on ways in which actions might be "related to" the protected characteristic relied on in Bakkali v Greater Manchester Buses (South) Ltd [2018] ICR 1481 EAT paragraph 31

> "Conduct can be "related to" a relevant characteristic even if it is not "because of" that characteristic. It is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a claimant. However, "related to" such a characteristic includes a wider category of conduct. A decision on whether conduct is related to such a characteristic requires a broader inquiry. In my judgment the change in the statutory ingredients of harassment requires a more intense focus on the context of the offending words or behaviour. As [counsel] submitted, "the mental processes" of the alleged harasser will be relevant to the question of whether the conduct complained of was related to a protected characteristic of the claimant. It was said that without such evidence the Tribunal should have found the complaint of harassment established. However, such evidence from the alleged perpetrator is not essential to the determination of the issue. A tribunal will determine the complaint on the material before it including evidence of the context in which the conduct complained of took place."

23. The definition of 'detriment' in s.212(1) EQA means that if particular conduct has been found to be harassment, it is not possible for it also to amount to a detriment within s.39(2)(d) EQA (for example) for the purposes of a direct discrimination claim. In other words, although it can be argued that a particular act is unlawful harassment and, that if it is not it is unlawful discrimination, a claimant will not succeed on both claims in relation to a single act.

24. Although the law anticipates a two-stage test to the issue of direct discrimination, it is not necessary artificially to separate the evidence adduced by the two parties when making findings of fact (Madarassy v Nomura International plc [2007] ICR 867 CA). We should consider the whole of the evidence when making our findings of fact and if the reason for the treatment is unclear following those findings, then we will need to apply the provisions of s.136 in order to reach a conclusion on that issue.

25. Although the structure of the EQA invites us to consider whether there was less favourable treatment of the claimant compared with another employee in materially identical circumstances, and also whether that treatment was because of the protected characteristic concerned, those two issues are often factually and evidentially linked (Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL). This is particularly the case where the claimant relies upon a hypothetical comparator. If we find that the reason for the treatment complained of was not that of race, but some other reason, then that is likely to be a strong indicator as to whether or not that treatment was less favourable than an appropriate comparator would have been subjected to.

26. The application of the burden of proof in direct discrimination claims has been explained in a number of cases, most notably in the guidelines annexed to the judgment in Igen Ltd v Wong [2005] ICR 931 CA. In that case, the Court was considering the previously applicable provisions of s.63A of the Sex Discrimination Act 1975 but the guidance is still applicable to the equivalent provision of the EQA.

27. When deciding whether or not the claimant has been the victim of direct race discrimination, the Employment Tribunal must consider whether she has satisfied us, on the balance of probabilities, of facts from which we could decide, in the absence of any other explanation, that the incidents occurred as alleged, that they amounted to less favourable treatment than an actual or hypothetical comparator did or would have received and that the reason for the treatment was race. If we are so satisfied, we must find that discrimination has occurred unless the respondent proves by cogent evidence that the reason for their action was not that of race.

28. The provisions of s.136 have been considered by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054 UKSC – and more recently in Efobi v Royal Mail Group Ltd [2021] ICR 1263 UKSC. Where the Tribunal is in a position to make positive findings on the evidence one way or the other, the burden of proof provisions are unlikely to have a bearing upon the outcome. However, it is recognized that the task of identifying whether the reason for the treatment requires the Tribunal to look into the mind of the alleged perpetrator. This contrasts with the intention of the perpetrator, they may not have intended to discriminate but still may have been materially influenced by considerations of, in the present case, race. The burden of proof provisions may be of assistance if there are considerations of subconscious wrongdoing but the Tribunal needs to take care that findings of subconscious wrongdoing are evidence based.

29. More recently, in Field v Steve Pye & Co (KL) Ltd [2022] EAT 68; [2022] IRLR 948 EAT, HHJ James Tayler addressed the question of whether it is permissible to move directly to the second stage of the test for discrimination. He pointed out that where there is significant evidence that could establish that there has been discrimination, it cannot be ignored and a decision to move directly to the question of the reason for a particular act that should be explained. In effect, the basis for doing so would be that the Tribunal had assumed that the claimant had passed the stage one Igen test. He recommended that where there is evidence that could indicate discrimination, there was much to be said for properly grappling with the evidence and deciding whether it is or is not sufficient to switch the burden of disproving discrimination to the respondent.

## Findings of fact and of credibility

30. The standard of proof that I apply when making my findings of fact is that of the balance of probabilities. Where it was necessary to resolve conflicting factual accounts, I have done so by making a judgement about the credibility or otherwise, of the witnesses I have heard from based on their overall consistency and the consistency of accounts given on different occasions compared with contemporaneous documents where they exist. Where it has not been possible to rely on the credibility of any of the witnesses on a particular point, I have relied on the contemporaneous documents, of which there are many in the bundle.

31. I took into account all of the evidence presented to me, both documentary and oral. I also took account of the closing submissions of both parties.

32. I do not record all of the evidence in these reasons, but only my principal findings of fact, those necessary to enable me to reach conclusions on the issues before me.

### Credibility of witnesses

33. We turn first to the witnesses who were the subjects of witness summons. Their evidence was entirely credible and we placed great weight upon it.

    33.1 Mrs. Solanki still works for the respondent. Mrs. Solanki gave clear evidence that her concerns were restricted to one occasion. She was unequivocal in her response that she did not want to make a grievance about her concerns.

    33.2 Ms. Villazan gave clear straightforward evidence.

    33.3 Ms. Malde was measured and objective in her answers.

34. CD's evidence was not entirely credible. First, he apologised to the claimant stating that he had not realised that she had been upset at his comment. We did not find this lack of awareness plausible in someone so experienced in and committed to equality and diversity. Secondly, in cross-examination, Dr. Daniels was not direct but skirted around the issue or avoided answering questions.

35. Mrs. Reeve was thorough in answering questions. For example, she explained that her preferred technique was "*a softly-softly approach*" which she said explained why no performance issues had been raised with the claimant. Even when questions were painful for her, she sought to answer them in detail.

36. Ms. Bennister gave straightforward answers. She had not been involved as CEO but rather as a volunteer and trustee.

37. The claimant answered to the best of her ability. It was apparent that as a self-representing individual, this was an understandably stressful experience and at times, between the claimant and Mrs. Reeve, there was significant tension as Mrs. Reeve was confronted. We found the claimant's evidence was particularly clear in relation to allegation 5a: CD's comment. With other allegations, the documentary evidence was of the greatest assistance in making findings of fact.

## Background

*The respondent*

38. The respondent is the local hospice for a London borough ("the Borough"). It is a Charitable Trust which is overseen by a board of voluntary Trustees. It was founded by local communities in 1984 and has been providing free expert end of life day care for the people in the Borough since then, with specialist care in its In-Patient Unit ("IPU") since 2000. The IPU cares for people in their final days, provides intensive care to help get symptoms under control or gives respite care. Two thirds of the respondent's care is now provided in the comfort of peoples' homes, as it takes the view that this is where most people would like to be looked after.

39. The care provided by the respondent is free of charge and available to all. In addition to Home Care and its IPU, alongside outpatient clinics, it provides a range of care intended to support people's wellbeing via the Wellbeing Centre, including patient and family support, complementary therapy and physiotherapy services. The respondent operates a 24-hour helpline and referral service, the Single Point of Access, which is run by a dedicated team of expert nurses who can give advice, provide rapid response in times of crisis and effectively co-ordinate care, from arranging prescriptions, to getting vital equipment delivered, to avoid people having to go to hospital and to enable them to stay comfortably in their home. The respondent also has a more specialist community team who can manage more complex needs, and provides an extensive education offering, teaching nursing degree modules, providing

training and shadowing opportunities for GPs, junior doctors, nurses, healthcare assistants, care home staff and paramedics.

40. Organisation charts show the structure within IPU [413] and the respondent, including that of Patient Services [129]. Patient Services had 5 direct reports – the claimant (IPU Clinical Manager), Martin Hill (Wellbeing Service Manager), LG (Specialist Palliative Care Community Team Manager), KP (Hospice Home Care Manager) and JD (Education and Professional Development Manager).

41. Prior to the Covid pandemic, the respondent employed 164 members of staff and was supported by 875 volunteers who wished to support the best possible end of life care for local people. The respondent received approximately 40% of its funding from the NHS, with the rest being raised through fundraising.

*The claimant's post*

42. The claimant had applied for the nursing post to head up the IPU (IPU Clinical Manager) which was a supervisory role at Band 7. IPU was a service within Patient Services, which Mrs. Reeve led as Director of Patient Services. Mrs. Reeve ran the selection process for IPU Clinical Manager. During the selection, Mrs. Reeve decided that the claimant would be suitable for IPU Clinical Manager but at Band 8, which entailed the addition of managerial responsibilities [see 78 – 82 for job description dated 27 January 2021 and 83 – 88 for an undated job description and person specification]. Mrs. Reeve knew that this was the claimant's first managerial (as opposed to supervisory) role and that she had development needs which she discussed with the claimant prior to appointment. Mrs. Reeve took this step because she had been impressed by the claimant and considered that she had the necessary potential. The claimant was assisted by the IPU Ward Sister, a Band 7 post held by Rachel Nakannga. A job description for the Ward Manager IPU, Band 7, dated February 2021 is at [454 – 460].

43. The job consisted of 2 days on the unit nursing (i.e. direct patient care) and 3 days managerial. Managerial duties included managing the following staff: IPU Registered Nurses, Healthcare Assistants, IPU Clinical Volunteers, Ward Clerk and the Housekeeping Manager. Managerial also covered strategic responsibilities e.g. developing and implementing a strategy for expanding the unit and being infection control lead. This entailed in part working with Mrs. Reeve and the Medical Director to shape the future vision and to promote the role of the hospice [see 83 – 88 for an undated job description and person specification which lists direct and indirect reporting relationships and managerial duties].

*Impact of Covid-19 and change of balance of duties*

44. The claimant's employment commenced on 27 January 2020. The claimant experienced a chest infection and cold, which resulted in some absences in February 2020. The claimant was absent from 19 March to 3 April 2020 due to self-isolation; the Tribunal noted that her absence was shortly after the Government's announcement on 16 March 2020 that due to Covid-19, non-essential contact and travel should be stopped.

45. Covid-19 resulted in an increase in the IPU's bed occupancy to 12, something which Mrs. Reeve achieved the claimant's absence. Covid-19 also necessitated the self-isolation of various nursing staff and the need to accept weekend and out of hours ' admissions, which in turn led to an increased need for more hands-on nursing care. As such the claimant was asked to increase her clinical days to 5 per week to be part of the hands-on workforce to cover staff shortages and increased operational needs. All of Mrs. Reeve's direct reports who had healthcare expertise were asked to provide more direct patient care and to reduce management time in order to support essential services. Mrs. Reeve herself undertook some hands-on care.

*The claimant's relationship with Mrs. Reeve*

46. Mrs. Reeve felt that she had established a good relationship with the claimant, as evidenced by their social media messages. The Tribunal considered that this had been the case until October 2020, when the claimant had revealed to Mrs. Reeve that she was thinking about leaving the respondent.

47. Mrs. Reeve's style was to avoid a confrontation with staff who were not doing their job as envisaged. She came across as patient, firm and supportive but possibly a more direct style might have enabled the claimant to do something to allay Mrs. Reeve's misgivings. Mrs. Reeve had realised gradually that the claimant's absences in February and 19 March 2020 to 4 April 2020 had affected her ability to tackle the strategic elements of the job. The claimant having expected a balance between managerial (time in the office) and nursing duties found herself 100% on the IPU ward and in reaction, retreated to the office. We find that the combination of a few absences and Covid-19 meant that the claimant was never allowed by circumstances to do the job in her job description. From the claimant's perspective, the Tribunal could recognised that the wonderful job for which she had joined the respondent never materialised.

*Probationary period*

48. The contract of employment contained a 6 month probationary period. Mrs. Reeve held a monthly probation meeting to review progress and targets. The first probation meeting with the claimant took place on 27 February 2020 [423]. This was a one page form identifying 7 objectives, at least 3 of which should be achieved within the probationary period (i.e. by 26 July 2020). Dates were attached to objectives save for the first objective since that was to run throughout ("*undertake 2 clinical shifts per week as part of IPU rota. Ongoing. Providing hands on care and expert advice covering the service as a priority. Working opposite Band 7 sister on clinical days").* The second probation meeting took place on 24 April 2020 [428 – 430]. Mrs. Reeve noted: *"It has been unfortunate that S has had 2 periods of sickness since commencing & the Covid crisis hit us. This has meant that, whilst S has made a good start, we both have not had time to assess how she is progressing/settling in. Therefore we have agreed to extend the probation period by 1 month. This will bring us to August 2020"* [429]. Emails involving CG, Director of Human Resources, Mrs. Reeve and the claimant discuss the length of the extension [426 – 427]. The probation assessment form at the end of the extended probationary period is at [113 – 114]. Confirmation of one month's extension to 27 August 2020 is at [97].

**Harassment (s26 EQA)**

*Allegation 5a Dr. Daniels' comment*

*Did the conduct happen [paragraph 5 of issues 64]?*

49. Dr. Daniels has been for the last 25 years and remains a consultant in Palliative Medicine employed by the London Northwest University Hospitals Trust. He is the Medical Director at the respondent, responsible for providing medical leadership and operational management of the medical team and has held this position since October 1998 (25 years). Dr. Daniels has published in several peer reviewed journals, spoken at numerous national and international conferences and participated in a number of expert advisory panels.

50. The claimant and Dr Daniels had a number of conversations together. They had work-related conversations in the IPU when he was covering for his colleague. They had other conversations, sometimes in his office where she sat at his colleague's desk and sometimes in the garden room. On other occasions, they would meet in the corridor and have a conversation.

51. In August 2020, Dr Daniels made the following comment which is not in dispute:

*"Simone, why were the slaves brought to America and not England considering that it was geographically closer to Africa?*

52. The comment took place in a corridor which is not in dispute (see Dr Daniels' witness statement ("CD") at paragraph 15, his oral evidence and the claimant's witness statement at paragraph 6. The claimant refers to the "hallway" [paragraph 6] which is the same as "the corridor".

53. We therefore find that the conduct happened.

*Was the conduct related to the claimant's race [paragraph 6 of issues 64]?*

54. The conduct was unequivocally related to the claimant's race through its reference to "slaves" in "Africa".

*Was Dr. Daniels' purpose to violate the claimant's dignity or to create an intimidating, hostile, degrading, offensive or humiliating environment for her?*

55. There is a dispute on the facts about the content of these conversations prior to the comment in August 2020. Dr. Daniels said they had discussions about the challenges she was facing in managing the IPU nursing team [CD paragraph 16]. The claimant agreed and characterised their relationship as "*all about these kind of matters*". On the other hand, Dr. Daniels stated, this had led to a type of friendship and talking about life outside work [CD paragraph 16] and conversations about racism [CD paragraph 17]. He gave the impression in his oral evidence that they spent significant amounts of time having detailed discussions about race and equality.

56. Dr. Daniels further stated that the claimant had confided in him an incident where her son had been stopped and harassed by the police sitting in his car with friends outside her house and she had gone outside to challenge the police [CD paragraph 17]. He repeated this in oral evidence; this had moved their relationship to something deeper in which they discussed race, power and equality.

57. The claimant said that the incident with her son and the police had never happened. We preferred the claimant's evidence that this incident had not happened because first, she walked away after this conversation (which Dr. Daniels accepted). Secondly, she was cross- examined intensely on this but never wavered. The claimant walked away after this conversation which Dr. Daniels accepted. Given that we reject that there had been such a confidence, we also rejected the context which Dr. Daniels says existed and created a new climate or intimacy in which his comment was found to be acceptable.

58. Dr. Daniels said he had the impression this was not a problem for the claimant [CD paragraph 18]. We do not accept Dr. Daniels' account of the claimant's reaction. Further, we do not accept Dr. Daniels' account that this was impliedly wanted conduct i.e. part of an ongoing discussion about racism and inequality as evidenced by her alleged disclosure about an incident with her son and the police. This was unwanted conduct as shown by her subsequent behaviour towards Dr. Daniels; she walked away immediately and they never had any more conversations again together other than about clinical issues (which was something her job required her to do).

59. The Tribunal find it hard to believe that that comment would ever have been appropriate to make in that context. The fact that it was said in a public place (a corridor) made it even less appropriate.

60. Dr. Daniel stated that there was no intention to cause the claimant upset. He denied the purpose of violating her dignity [CD paragraph 19]. There is not sufficient evidence for the Tribunal to conclude that this was Dr. Daniel's purpose.

*If not, was the effect of the conduct to violate the claimant's dignity or to create an intimidating, hostile, degrading, offensive or humiliating environment for her?*

61. The claimant did not tell anyone about this in writing via email or social media. It was implied by the respondent that this meant that the effect of the conduct therefore did not violate the claimant's dignity etc.

62. We do not accept this and we find another more plausible explanation why the claimant did not commit her reaction to writing. The claimant was still on probation. Dr. Daniels was a very senior person in the organization. The claimant said in oral evidence that she had told a colleague at work. The Tribunal can accept that the claimant would not want to disclose the identity of this colleague, given that this individual still works for the respondent.

63. The claimant also said that she had told her family. The Tribunal find it reasonable that the claimant would have wanted to discuss the comment with family contemporaneously but not wished to put anything in writing to them. It would be more customary not to send a message to family other than to say an urgent discussion was needed and support. We accept there were good reasons therefore for there being no documentary evidence of her reaction to this comment.

64. We prefer the claimant's evidence that she was uncomfortable, angry and hurt at the suggestion that her forefathers and foremothers should have been brought to England as slaves to make it a quick trip and not that it should never have happened. We also accept that the claimant did not feel empowered to tell Dr. Daniels of her reactions. It was reasonable that this comment had the effect of violating her dignity because it was a shocking statement to make, in particular for its assumptions about her ancestors and its callousness. For all these reasons, we find that the effect was to violate her dignity and that it was reasonable to have this effect.

*Time limits re allegation 5a*

65. The claimant's employment was terminated on 23 April 2021. Early conciliation started on 31 March 2021 and ended on 26 April 2021. The claim form was presented on 26 May 2021. The CMO recorded that any acts or omissions which occurred before 1 January 2021 would be out of time unless:

    65.1 They were part of a continuing act which ended on 1 January 2021 or

    65.2 The claim concerning those acts or omissions had been presented within 3 months of those acts or omissions or

    65.3 It was just and equitable for the Tribunal to allow those complaints to be presented out of time and determined on their merits" [CMO paragraph 42 1 – 4].

66. As this act took place in August 2020, it should have been presented within 3 months i.e. by some date in November 2020. The claimant lodged her claim 9 months after the act and 6 months late. The claimant was therefore out of time and not compliant with the requirement in paragraph 65.2 above. The Tribunal will consider below whether this was part of a continuing act which ended on 1 January 2021 having made findings about all of the allegations.

*Whether just and equitable to extend time*

67. When asked about the reason for the delay, the claimant said that she had followed the advice of the RCN. The Tribunal considered whether it was just and equitable to allow this complaint and made the following findings of fact:

68. The claimant raised a grievance on 15 January 2021 which was investigated by an external consultant who produced a report. The grievance raised on 15 January 2021 did not refer to Dr. Daniels' comment.

69. The claimant had obtained a representative (Louise Wilson) from the Royal College of Nursing ("RCN") before 18 January 2021 as she said Ms. Wilson would be available for a meeting on 18 January 2021. We are aware of this from the claimant's undated letter [143].

70. The claimant was accompanied by Ms. Wilson to the Grievance investigation meeting on 5 February 2021. At this meeting, the claimant made a number of other allegations which appear in the addendum to the Grievance Report [dated February 2021 at 187] and which included reference to this comment as "*The Medical Director asking SW a question about the logistics of transporting slaves to Africa".* A record of this interview is dated 8 February 2021 and appears at [151 – 162]. At paragraph 23, the claimant lists the witnesses which she wished the investigating consultant to interview which included Dr. Daniels [162].

71. In short, any allegation against this comment was not raised until 5 February 2021. The consultant recommended that the respondent took appropriate action in relation to this (and the other newly raised allegations) since it was not within the terms of her investigation. The claimant was provided with the investigation report in a letter dated 17 February 2021 from the Director of Finance and Facilities and Interim Head of Retail [198 & see 129 structure diagram for his position]. He said that he had recommended that the respondent took appropriate action separately in relation to "*additional issues and concerns about inappropriate behaviours on the basis of your race from other colleagues within the Hospice*".

72. We accept that the claimant had delayed in telling anyone because she was worried about the repercussions to her career. In particular, her worries stemmed from:

    72.1 The seniority of Dr. Daniels.

    72.2 He was a respected and well-known figure in the hospice sector UK wide.

    72.3 Given his influence and reputation, she felt raising a grievance against him would damage her career in the hospice sector. She said to us that she would never be able to work in the hospice sector again (now).

    72.4 The claimant only felt able to risk any repercussions because her job was at risk of redundancy on 4 January 2021 and she had the opportunity to speak to a professional outside the organization.

73. Mrs. Reeve's response to a grievance against her was informative in revealing the unforgiving climate in which the claimant would have needed to lodge a grievance against Dr. Daniels. Mrs. Reeve said that the claimant's grievance against her, if upheld, would put her current and future employment at risk. If the claimant's grievance were not upheld, Mrs. Reeve would insist that the claimant was disciplined for making malicious and vexatious accusations. This shows that the organization was not a temperate and understanding environment. It was plausible that the claimant would be very reluctant to tell anyone about this allegation against Dr Daniels.

74. Nevertheless, the Tribunal also had to make and take note of other findings:

74.1 Two events on 4 January 2021 gave rise to the grievance on 15 January 2021: the risk of redundancy and furlough.

74.2 The 15 January 2021 grievance did not contain this comment by Dr. Daniels as a ground of grievance. Her grievance related solely to the conduct of Mrs. Reeve and her decision to put the claimant's position at risk of redundancy and to furlough her on 4 January 2021.

74.3 On 5 February 2021, the claimant explained that she had mentioned this comment and other acts and omissions as background facts about the respondent to explain why her grievance complaints were because of her race.

74.4 The RCN representative was involved from at least 18 January 2021. She is unlikely to have failed to tell the claimant about the correct time limits.

75. Ms. Wilson was also present at the Grievance Appeal Hearing on 16 March 2021. The Grievance Appeal Hearing outcome was conveyed to the claimant on 25 March 2021. On 29 March 2021, the claimant contact Ms. Wilson to ask her to move forward with the legal team. It would appear that the claimant waited until the conclusion of the grievance procedure to prepare for making a claim at the Tribunal.

75.1 Ms. Wilson advised the claimant to lodge a grievance about Dr. Daniels' comment.

76. The Tribunal concluded that it was not just and equitable to extend time, having weighed up the following factors:

76.1 The merits of the claim which were good (as set out above) but which are not sufficient in themselves to make it just and equitable to extend time.

76.2 Prejudice to the respondent. There was none since Dr. Daniels said he could remember.

76.3 The length of time after the act complained of – 9 months.

76.4 Being 6 months late in lodging her claim which is an extensive and very significant delay

76.5 The unexplained delay of a month after ACAS had concluded early conciliation.

76.6 The claimant's reason for the delay was that she had relied on the RCN whose advice was alleged to have been to lodge a grievance, exhaust the grievance procedure, then go to ACAS for an early conciliation certificate and then lodge a claim. The Tribunal are aware that a claimant is not entitled to wait for a grievance procedure to conclude (see *Robinson v Post Office)*; it is not enough in itself to be delayed in issuing because a claimant was following internal procedures. This is not a good reason.

76.7 In any event, this was not the reason since the claimant did not follow the RCN's advice. The claimant did not lodge a grievance about Dr. Daniels' comment at any time.

*5b 15 August 2020 Mrs. Reeve comment*

77. This consists of two parts. First, Mrs. Reeve is alleged to have told the claimant that an unnamed member of staff said that the claimant was unapproachable. The member of staff referred to was Mrs. Solanki, a clinical administrator in the Wellbeing Centre who worked for

Mr. Hill and was redeployed into the IPU as ward clerk. The Wellbeing Centre had been closed because of the pandemic.

78. Secondly, the claimant wrote back to Mrs. Reeve suggesting that the respondent need to do some work on diversity and understanding differences. The claimant alleged that Mrs. Reeve responded to this in agreement but went on to book only the claimant on communication courses.

*Accusation of unapproachability - did the conduct happen [paragraph 5 of issues at 64]?*

79. In Mrs. Reeve's witness statement, she said that Mrs. Solanki had wanted to take a grievance out concerning inappropriate behaviour by the claimant and Martin Hill had advised her to discuss with Mrs. Reeve [UR paragraph 69]. The claimant had asked Mrs. Solanki if she wanted to apply for a job as clerk on the IPU. Mrs. Solanki had said yes. Over the weekend, Mrs. Solanki had reconsidered and, on the Monday, she told the claimant that she would not apply. The claimant said "*what*", held up her hand as if indicating not to speak with her and walked away.

80. In her oral evidence, Mrs. Solanki was adamant that she told Mrs. Reeve that she did not want to raise a grievance against the claimant and did not raise a grievance. It was more about how the claimant had talked to her. Instead, Mrs. Reeve raised the possibility of bringing a grievance.

81. We prefer Mrs. Solanki's evidence. Something happened between Mrs. Solanki and the claimant but it was not at the level that Mrs. Solanki wanted to do anything about it formally.

82. Mrs. Reeve mentioned Mrs. Solanki in the probationary period interview on 4 August 2020. Mrs. Reeve said to the claimant "*you don't always perceive how people see you. People don't know how to approach you but when they do, they find it okay*". Mrs. Reeve said that she did not say that the claimant was unapproachable but that people perceived her to be. Mrs. Reeve said: "*RN (the Band 7 staff nurse who reported directly to the claimant) felt she could not talk to you. Depended what mood you were in. Sometimes they (your staff) would leave you alone. Other times, you were approachable*".

83. The Tribunal find that Mrs. Reeve had said to the claimant in a roundabout way that she was unapproachable. She had tried to be tactful but had failed to soften the impact of her feedback.

*Was the conduct related to the claimant's race [paragraph 6 of issues 64]?*

84. We find that Mrs. Reeve said this about unapproachability because she had based it on things staff had said to her. Essentially, some staff found the claimant difficult to gauge and to read and for that reason, they found it difficult to approach her e.g. Mrs. Solanki. We find that this comment was therefore not due to the claimant's race. Given our conclusion, it is not necessary to answer questions 7 – 8 of the CMO [64].

*Booked on courses – did the conduct happen [paragraph 5 of issues at 64]?*

85. Mrs. Reeve booked the claimant to go on course related to communication and personality styles/emotional intelligence [para 72] in light of the discussion with Mrs. Solanki.

*Was the conduct related to the claimant's race [paragraph 6 of issues at 64]?*

86. This was nothing to do with race because there is evidence to demonstrate there were issues that could be resolved through training. The claimant was inexperienced in her role as a middle manager (of 27 staff) and she had had little opportunity to perform as a middle manager

because of absence and the pandemic. Given our conclusion, it is not necessary to answer questions 7 – 8 of the CMO [64].

*5c 9 February 2021 Mrs. Reeve comment*

*Did the conduct happen [paragraph 5 of issues at 64]?*

87. Mrs. Reeve did say that she believed the claimant had a hearing and memory problem. The conduct therefore happened.

*Was the conduct related to the claimant's race [paragraph 6 of issues 64]?*

88. This arose when the claimant said that Mrs. Reeve had told her that she was redundant on 4 January 2021 rather than telling her that she was "at risk of redundancy". Mrs. Reeve told the external consultant that she believed that this was due to the claimant having a hearing or memory impairment. To support this assertion, Mrs. Reeve referred to an incident in the past where she said that the claimant had said a member of her staff had told her that she was cured of her mental illness (and therefore there was no need to make reasonable adjustments). Mrs. Reeve told the external consultant that this staff member had told her that she had said she was managing her condition so well that she was feeling well but not that she was cured [189]. Mrs. Reeve considered that this was an (earlier) example of a hearing or memory impairment.

89. This was not due to the claimant's race but rather to drawing an inference from two examples, which logically could have been correct. There are alternative equally logical explanations. With regard to not hearing the word "risk", the stress of hearing such news could have led the claimant not to hear every word. As the letter confirming Mrs. Reeve's announcement included the word "risk", we find it more likely than not that Mrs. Reeve said the word "risk". With regard to the staff member who had mental health problems, the different accounts could have been because the staff member in question told the claimant and Mrs. Reeve different versions.

90. Mrs. Reeve's interpretation (that this was due to hearing or memory impairment, not due to stress or inconsistency on the part of the staff member) was arguably though the most obvious explanation. For that reason, we do not find the conduct related to the claimant's race.

91. Given our conclusion, it is not necessary to answer questions 7 – 8 of the CMO [64].

**Direct race discrimination – Part 1 (ss13 and 39(2) EQA 2010) re 5a – 5c if not harassment.**

92. We have found 5a to be harassment but it was out of time and not just and equitable to extend time. That claim is therefore dismissed.

93. That leaves 5b and 5c for consideration under Direct Race Discrimination. 5b is also out of time and the same reasons apply to 5b as to 5a as to why it would not be just and equitable to extend time.

*Did the conduct at 5c occur?*

94. The conduct in 5c occurred: Mrs. Reeve did say to the consultant during the course of the grievance investigation that she believed that the claimant had a hearing or memory problem [189].

*Did the respondent treat the claimant less favourably than it treated a comparator not of her race or colour (Martin Hill )?*

95. There is no evidence that the respondent would not have attributed a hearing or memory impairment to Martin Hill in the same circumstances. In addition, the claimant did not make any submissions which helped us to make this finding.

*If yes, can the claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of her race or colour?*

96. If we are wrong about the previous question, the claimant did not offer or prove primary facts from the which the Tribunal could properly and fairly conclude that the difference in treatment was because of her race or colour.

*If so, can the respondent prove a non-discriminatory reason for the treatment complained of?*

97. It is not necessary to consider this given that the claimant has not proved primary facts (see paragraph 96 above).

**Direct Race Discrimination – Part 2 (ss 13 and 39(2) EQA 2010)**

98. The Tribunal notes that allegations 13a to f are out of time. Thus if the claimant were to succeed in any of those Direct Race Discrimination claims, the Tribunal would need to consider a) whether it was just and equitable to extend and b) whether they formed part of a continuing act which ended on or after 1 January 2021.

**13a. April 2020 Mrs. Reeve requiring the claimant to work with Covid-19 patients**

*Did the conduct at 13a occur?*

99. Mrs. Reeve required the claimant to work with Covid-19 patients.

*Did the respondent treat the claimant less favourably than it treated a comparator not of her race or colour (Martin Hill )?*

100. Mrs. Reeve required every other member of the nursing staff (apart from MW whose husband was clinically vulnerable) to work with Covid patients regardless of their ethnic background. Martin Hill was not a member of nursing staff.

*If yes, can the claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of her race or colour?*

101. The answer to the above was no. In any event, the claimant did not offer or prove primary facts from the which the Tribunal could properly and fairly conclude that the difference in treatment was because of her race or colour.

*If yes, can the respondent prove a non-discriminatory reason for the treatment complained of?*

102. Although the two questions above have not been answered as a yes, the respondent has proved a non-discriminatory reason for the treatment complained of. In April 2020, Mrs. Reeve did not have the knowledge that BAME staff were most at risk of contracting the virus. First, she could not have gained this knowledge through research as this was not available until later in the year, possibly the summer. Secondly, even a few months later (at the end of July 2020) Mrs. Reeve would have had no way of being aware of a higher risk to BAME staff through the claimant alerting her. The claimant herself completed a risk assessment dated 24 July 2020 in which she left the box blank asking about particular risks to herself from Covid [99] and the box blank asking her to record her final risk assessment recording [100].

*Conclusion*

103. This claim of direct race discrimination is therefore not well-founded and is dismissed.

**13b April 2020 Mrs. Reeve not undertaking Risk Assessment**

*Did the conduct at 13b occur?*

104. Mrs. Reeve did not carry out a risk assessment before the claimant returned to work on 4 April 2020.

*Did the respondent treat the claimant less favourably than it treated a comparator not of her race or colour (Martin Hill )?*

105. No, Mrs. Reeve did not carry out a risk assessment on any member of the nursing staff until July 2020 when all were included.

*If yes, can the claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of her race or colour?*

106. The answer to the above was no.

*Conclusion*

107. This claim of direct race discrimination is therefore not well-founded and is dismissed.

**13c 26 May 2020 Mrs. Reeve's Text(s) about Return to Work**

*Did the conduct at 13c occur?*

108. Yes, Mrs. Reeve sent the claimant a WhatsApp message on 26 March 2020 enquiring when she would come back asking her to step up and be an example to others [96]. There appear to have been a number of texts but we only have one. At that point, the claimant had been off with Covid for about a week.

*Did the respondent treat the claimant less favourably than it treated a comparator not of her race or colour (Martin Hill )?*

109. No, clinical work took priority over management. We find the wording of Mrs. Reeve's comments in the text to show that they applied to all managers and people in leadership roles. This is because Mrs. Reeve asked all managers and leaders to do clinical shifts because of the business needs during the pandemic. In addition, Mrs. Reeve allowed the claimant to say that she did not consider it appropriate to be on clinical shifts with the phrase "*if you feel that this is not for you*". The claimant did not say that this was not for her.

*If yes, can the claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of her race or colour?*

110. The answer to the above was no.

*Conclusion*

111. This claim of direct race discrimination is therefore not well-founded and is dismissed.

**13d May 2020 Mrs. Reeve's and allocation of Working from Home ("WFH")**

*Did the conduct at 13d occur?*

112. Yes, Mrs. Reeve did not offer a WFH day until after Martin Hill had returned to work from furlough in May 2020.

*Did the respondent treat the claimant less favourably than it treated a comparator not of her race or colour (Martin Hill )?*

113. No. No-one was offered WFH opportunities until all were offered WFH. On Martin Hill 's chart, the two dates before May 2020 marked as WFH were a) a site visit b) a piece of work he needed to concentrate on which he could better do at home [105-112]. The claimant was offered WFH from about 11 May 2020 and the same amount of WFH as everyone else [289 & 290].

*If yes, can the claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of her race or colour?*

114. The answer to the above was no.

*Conclusion*

115. This claim of direct race discrimination is therefore not well-founded and is dismissed.

**13e August 2020 Mrs. Reeve's Extension of Probationary Period**

*Did the conduct at 13e occur?*

116. The probation period originally ran for six months from 27 January 2020 to 26 July 2020. Mrs. Reeve extended it by one month and it ended on 26 August 2020 [113 – 114]. The claimant has included in her allegation that Mrs. Reeve intended to extend it by 3 months but intervention from HR resulted in a one-month extension. Mrs. Reeve said that she was the one who had intervened and asked HR to permit the extension to be no more than one month. The emails between Mrs. Reeve, the claimant and the HR Director do not show clearly whose idea that was.

*Did the respondent treat the claimant less favourably than it treated a comparator not of her race or colour (Martin Hill )?*

117. Martin Hill 's probationary period was not extended. Martin Hill 's probation meeting records for his first and second meeting respectively dated 4 February 2020 and 11 March 2020 are at [422 & 424 – 425]. He completed his probationary period on 9 June 2020 after 5 months [431 & 432].

*If yes, can the claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of her race or colour?*

118. The claimant offered the following primary facts from the which the Tribunal could properly and fairly conclude that the difference in treatment was because of her race or colour:

    118.1 Martin Hill started work in early January 2020. He was furloughed for a significant part of his probationary period (for 33 days) only returning to work in May 2020; Mrs. Reeve did not dispute the figure put forward by the claimant.

    118.2 The claimant had been absent in the period 27 January 2020 to 3 April 2020 for only 18 days. Mrs. Reeve did not dispute this figure.

    118.3 Regardless of his previous experience as a manager, it was not likely with that length of absence that he could a) have achieved his targets b) to an excellent standard by the date

at which the decision was taken to end his probationary period and confirm his appointment (9 June 2020).

*If yes, can the respondent prove a non-discriminatory reason for the treatment complained of?*

119. The respondent has provided the following as a non-discriminatory reason for the treatment complained of. Martin Hill was an experienced manager in a post which had existed before and had an excellent performance reflected in a number of assessments [422 – 424 Probation meeting at the end of month 2 on 11 March 2020]. The respondent's case was that in contrast, the claimant was in a newly created post, had not been a manager before and her performance was good (not excellent). Mrs. Reeve had also taken account of what she considered a significant absence, a failure to achieve any of her strategic goals of, and the fact that the claimant was not spending sufficient time on IPU, preferring to spend time in her office.

120. The claimant accepted that she was new to management. The claimant did not challenge her performance scores in the probationary assessments. The claimant did not accept that this was a newly created role. We find that it was newly created role. We accept Mrs. Reeve's description of the role [Mrs. Reeve paragraphs 11 – 12] as reflected in the job description. In particular, the strategic and managerial elements were new and included implementing developmental change. Prior to the claimant's appointment, Margaret Wilcock had been performing it at Band 7, overseeing IPU as the clinical lead but having no managerial responsibilities.

*Conclusion*

121. This claim of direct race discrimination is therefore not well-founded and is dismissed.

**13f 10 December 2020 Mrs. Reeve's email concerning purchase of intravenous pump**

*Did the conduct at 13 occur?*

122. Yes, on 10 December 2020 at 8.12 am, Mrs. Reeve sent an email to the claimant stating that "*I have asked MW and JD to nag you incessantly on Friday until the pump is sorted! They are under strict orders to remind you every 15 mins. And I thought you loved shopping!"* [477].

*Did the respondent treat the claimant less favourably than it treated a comparator not of her race or colour?*

123. On the evidence before us, it is difficult to say. MW and JD were Caucasian and one of them a direct report of the claimant. JD was a peer since she reported directly to Mrs. Reeve.

*If yes, can the claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of her race or colour?*

124. If the answer to the above is yes, the claimant did not offer or prove primary facts from the which the Tribunal could properly and fairly conclude that the difference in treatment was because of her race or colour.

*If yes, can the respondent prove a non-discriminatory reason for the treatment complained of?*

125. Although the question above has not been answered as a yes, the respondent has proved a non-discriminatory reason for the treatment complained of. The claimant was at home self-isolating. Mrs. Reeve, MW and JD were in Mrs. Reeve's office when they had prior to the email, had a shared telephone conversation between Mrs. Reeve, the claimant, MW and JD about the purchase of these IV pumps. It was the claimant's responsibility to purchase 2 IV pumps

but she had delayed from September 2020 to 9 December 2020. There was a good reason why the IV pumps needed to be purchased by 31 December 2020 as that was when the budget ended. The email in itself has two problems. First, Mrs. Reeve had intended to make the reminder light-hearted with humour (see the exclamation mark and the comment about loving shopping) but this had not translated into writing. Secondly, she had told a junior member of staff and a peer to remind the claimant which amounted to publicly declaring that the claimant was not doing her job. We find that Mrs. Reeve, worried about the potential loss of money to buy these pumps, would have said the same regardless of the ethnic background of MW, JD and the claimant.

*Conclusion*

126. This claim of direct race discrimination is therefore not well-founded and is dismissed.

**13g 4 January 2021 Mrs. Reeve furloughing the claimant**

*Did the conduct at 13g occur?*

127. Yes, Mrs. Reeve furloughed the claimant on 4 January 2021. The allegation is about the fact of being furloughed and not the duration (until 4 April 2021, reviewed on a monthly basis).

*Did the respondent treat the claimant less favourably than it treated a comparator not of her race or colour (Martin Hill )?*

128. Mrs. Reeve furloughed others who had requested this because of their circumstances. Mrs. Reeve understood the claimant to have requested to be furloughed once the level of pay was confirmed.

*If yes, can the claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of her race or colour?*

129. The answer to the above was no. In any event, the claimant did not offer or prove primary facts from the which the Tribunal could properly and fairly conclude that the difference in treatment was because of her race or colour.

*If yes, can the respondent prove a non-discriminatory reason for the treatment complained of?*

130. Although the two questions above have not been answered as a yes, the respondent has proved a non-discriminatory reason for the treatment complained of. On 2 January 2021, in a text, the claimant mentioned that her mother had had a cardiac event and was in Accident & Emergency. She initiated a discussion about furlough herself in the text: "*Are you still looking for people to furlough?* [130]. Mrs. Reeve was very sympathetic, and also knew that the claimant's had passed away at the end of December 2020. At [131], Mrs. Reeve said "*you are having a tough time, aren't you?"* The claimant asked whether pay would be 100%. Mrs. Reeve said she would check. Mrs. Reeve confirmed on 3 January 2021 that pay would be 100% up to 30 January 2021. The claimant had questions about job stability and pay levels in February through to April 2021. At [132] Mrs. Reeve explained that there was no certainty and the position would be reviewed. Mrs. Reeve made it clear that the decision was the claimant's [132]. Mrs. Reeve ended the text by saying: "*we can chat more then and get HR advice if you want".* The claimant came into work on 4 January 2021, as per the work rota. The respondent therefore put the claimant on furlough entirely at her request.

131. We reminded ourselves that we needed to keep separate the fact that on 4 January 2021, the claimant was told by Mrs. Reeve in a meeting that the Clinical Manager role in IPU was at risk

of redundancy. On the facts before us, it was open to the claimant to say that she now did not want to go on furlough, since nothing had been agreed prior to 4 January 2021.

*Conclusion*

132. This claim of direct race discrimination is therefore not well-founded and is dismissed.

**13h 9 February 2021 Natalia Villazan and/or Mrs. Reeve giving false reasons for redundancy**

*Did the conduct at 13h occur?*

133. The reasons given by Natalia Villazan and/or Mrs. Reeve for redundancy were not false.

*Did the respondent treat the claimant less favourably than it treated a comparator not of her race or colour (Martin Hill )?*

134. No, the schedule of 10 posts ceasing to exist shows that 2 postholders were Black Caribbean and the remainder White British, Welsh or Irish or some other White background. Of the 7 employees made redundant, 2 were Black Caribbean and had a White background [240].

*If yes, can the claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of her race or colour?*

135. The answer to the above was no. In any event, the claimant did not offer or prove primary facts from the which the Tribunal could properly and fairly conclude that the difference in treatment was because of her race or colour.

*If yes, can the respondent prove a non-discriminatory reason for the treatment complained of?*

136. Although the two questions above have not been answered as a yes, the respondent has proved a non-discriminatory reason for the treatment complained of. The respondent had well-founded not false reasons. We accepted Alpana Malde's analysis of the commercial problems caused by the pandemic. The retail sector had closed and fundraising had been curtailed because it was difficult to run fundraising events during the pandemic. As 60% of their revenue was from the shops and fund-raising, the respondent had to engage in a cost-cutting exercise which was based on a thorough analysis of tasks, revenue and costs.

137. The respondent has shown that the responsibilities in the IPU Clinical Manager post had been transferred to other posts for good business reasons or had been achieved:

137.1 Quality improvement was led by the QI nurse [192].

137.2 Management of infection control was led by the IC nurse [192].

137.3 Housekeeping management was led by the IC service. After the local housekeeper in the IPU had left, the locally distributed housekeeping service had been disbanded and there were no longer any locally managed housekeepers. Instead, there was a centralized housekeeping department, which had been moved to IC in 2020 [193].

137.4 Co-ordination of all referrals created a direct link between the hospice and outside world. Due to the fact that the navigator needed to be constantly available on the telephone, the respondent moved this duty and the collection of statistics from the IPU Clinical Manager to the navigator.

137.5 Admission and discharge planning were led by the navigator and PFSS. Admission was only a part of the claimant's job. Admission was carried out by a daily MDT decision of

doctors and nurses (which a Band 5 -7 nurse could do; it did not require a Band 8 nurse). Social workers could undertake discharge [191]. Any registered nurse could fill in the fast-track form.

137.6 Strategic development of the IPU was led by Director of Patient Services – Mrs. Reeve. The strategic objective at the date of the claimant's appointment had been to increase the number of beds. The bed number had been increased to 12 beds by the time the claimant had returned to work on 4 April 2020 [178]

137.7 Management of volunteers was led by the HR and volunteering [194]. There were only two volunteers left. One had been shielding since March 2020 and there had been no further recruitment due to the pandemic.

137.8 The 2 days of clinical work could be done by a Band 6 or 7 nurse.

*Conclusion*

138. This claim of direct race discrimination is therefore not well-founded and is dismissed.

**13i April 2021 Natalia Villazan - flawed redundancy process in treating claimant's post as stand-alone?**

*Did the conduct at 13 occur?*

139. The respondent treated the claimant's post as a stand-alone post and impliedly failed to put her in a selection pool with others and in particular with RN, the Band 7 IPU Staff Nurse.

*Did the respondent treat the claimant less favourably than it treated a comparator not of her race or colour?*

140. No other post undertook 2 days of clinical duties and 3 days of managerial/strategic duties.

*If yes, can the claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of her race or colour?*

141. The answer to the above was no. In any event, the claimant did not offer or prove primary facts from the which the Tribunal could properly and fairly conclude that the difference in treatment was because of her race or colour.

*If yes, can the respondent prove a non-discriminatory reason for the treatment complained of?*

142. Although the two questions above have not been answered as a yes, the respondent has proved a non-discriminatory reason for the treatment complained of. RN's post did not contain managerial elements. For example, it did not require her to develop nurses or change working practices. The management of the other 26 staff in IPU was to be taken on by Mrs. Reeve. The reason for her treatment therefore (not being put into a selection pool) was because of the nature of her post.

*Conclusion*

143. This claim of direct race discrimination is therefore not well-founded and is dismissed.

**13j April 2021 Natalia Villazan – flawed redundancy process in only offering Band 5 nurse as alternative?**

*Did the conduct at 13 occur?*

144. The claimant was only offered the Band 5 nurse as a suitable alternative.

*Did the respondent treat the claimant less favourably than it treated a comparator not of her race or colour?*

145. No. The claimant was offered only posts which were vacant.

*If yes, can the claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of her race or colour?*

146. The answer to the above was no. In any event, the claimant did not offer or prove primary facts from the which the Tribunal could properly and fairly conclude that the difference in treatment was because of her race or colour.

*If yes, can the respondent prove a non-discriminatory reason for the treatment complained of?*

147. Although the two questions above have not been answered as a yes, the respondent has proved a non-discriminatory reason for the treatment complained of. The only permanent vacant post was a Band 5 nurse. Bank Band 6 was not a suitable alternative since it was a zero hours job without any security or certainty. The RCN representative rejected this as a suitable alternative. The Band 7 post (held by RN) was not a suitable alternative. If it had been considered such, it would have required "bumping". The respondent analysed the situation and legitimately found that it would be more expensive to make RN redundant since she had 10 years' service. As the redundancy was driven by a cost cutting exercise, the respondent had to choose the financially most cost- effective route. It would have thus been counter intuitive and made poor economic sense to bump RN out of her post and put the claimant in it.

*Conclusion*

148. This claim of direct race discrimination is therefore not well-founded and is dismissed.

**13l 23 April 2021 Alpana Malde refusing the claimant's request to take up Band 5 nurse?**

13l *Did the conduct at 13 occur?*

149. It is correct that Alpana Malde refused the claimant's request to take up the Band 5 nurse post because she missed the deadline for responding by under an hour. This post was subsequently offered during the redundancy hearing and not accepted by the claimant [243]. Her RCN representative did not think that it was a suitable alternative.

*Did the respondent treat the claimant less favourably than it treated a comparator not of her race or colour (Martin Hill )?*

150. No, because the post was offered to her.

*If yes, can the claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of her race or colour?*

151. The answer to the above was no. In any event, the claimant did not offer or prove primary facts from the which the Tribunal could properly and fairly conclude that the difference in treatment was because of her race or colour. The burden of disproving race discrimination therefore does not transfer to the respondent.

*Conclusion*

152. This claim of direct race discrimination is therefore not well-founded and is dismissed.

## Conclusions

153. We concluded in respect of the harassment claims, only 5a was well-founded. It was, however, out of time and not just and equitable to extend time. We concluded that in respect of the direct discrimination claims, that none were well-founded.

154. For that reason, 5a does not form part of a continuing act which ended on or after 1 January 2021 as there is no act or omission on or after that date to which 5a can attach.

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Employment Judge Coll

Date: … 18 March 2024……..

Sent to the parties on: 20 March 2024

For the Tribunal Office