**Case No: 2600735/2017**

# EMPLOYMENT TRIBUNALS

**Claimant:** **Miss S Dube**

**Respondent:** **Nottingham University Hospital NHS Trust**

**Heard at:** **Nottingham**

**On:** **Tuesday 16 January and Tuesday 13 February 2018**

**Before:** **Employment Judge Faulkner (sitting alone)**

**Representation:** **Claimant – in person**
**Respondent - Mr N Cooksey (Counsel)**

# PRELIMINARY HEARING

# JUDGMENT

1.Using the numbering in the chronological Schedule of allegations ("the Schedule"), the following complaints of victimisation are dismissed on withdrawal by the Claimant:

a. Allegation 4;
b. Allegation 22; and
c. Allegation 28.

2. Using the numbering in the Schedule the following complaints have no reasonable prospect of success and are hereby struck out:

a. The complaint of victimisation in relation to allegation 3;
b. The complaint of direct discrimination in relation to allegation 4;
c. Allegation 15;
d. Allegation 17;
e. The first part of allegation 22, namely that on an ongoing basis until she left the Respondent's employment the Claimant was turned away when she reported problems, such that she felt unable to report even bullying behaviour for fear of "getting told off and embarrassed" and that this was direct discrimination;

f. The complaint of victimisation in relation to allegation 23;
g. The complaint of direct discrimination in relation to allegation 23 in so far as it relates to staff speaking a language other than English;
h. The complaint of harassment in relation to allegation 25;
i. The complaint of direct discrimination in allegation 25 relating to Pelly Wilson not taking action when the Claimant complained about a student;
j. The complaint of direct discrimination in relation to allegation 27;
k. The complaint of direct discrimination in allegation 29 relating to management "making it clear they wanted to appoint Matthew John as a permanent Band 7 before Pelly Wilson did her secondment"
l. The complaint of harassment in relation to allegation 33;
m. Allegation 35;
n. Allegation 37;
o. Allegation 42;
p. Allegation 43;
q. Allegation 49 in so far as it relates to the Claimant's complaint of unfair dismissal;
r. Allegation 53;
s. The complaint of harassment in relation to allegation 56; and
t. Allegation 57.

3. Using the numbering in the Schedule allegations 1, 2, 3, 10, 18, 22, 23, 24, 25, 34, 36 and 52 are struck out on the basis that they were brought after the end of the period of 3 months starting with the date of the acts to which they respectively relate and not within such other period as the Tribunal thinks just and equitable.

4. The Claimant's complaint of unfair dismissal has little reasonable prospect of success and the Claimant is accordingly ordered to pay a deposit of £1,000 as a condition of continuing to advance it.

5. The Claimant's complaint of breach of contract (wrongful dismissal) has little reasonable prospect of success and the Claimant is accordingly ordered to pay a deposit of £500 as a condition of continuing to advance it.

6. Using the numbering in the Schedule, the following complaints have little reasonable prospect of success and the Claimant is accordingly ordered to pay the deposits indicated below as a condition of continuing to advance them:

a. Allegation 32 - £1,000;
b. The complaint of direct discrimination at allegation 33 - £1,000;
c. The complaint of victimisation at allegation 47 - £1,000;
d. The complaint of direct discrimination at allegation 48 - £1,000;
e. Allegation 50 - £1,000;
f. The complaint of victimisation at allegation 54 - £1,000;
g. The complaint of harassment at allegation 55 - £1,000;
h. The complaint of victimisation at allegation 56 - £1,000; and
i. The complaint of direct discrimination at allegation 56 - £1,000.

# REASONS

## Complaints

1. On 22 June 2017, the Claimant submitted to the Employment Tribunal complaints of unfair dismissal (she claims that she was constructively dismissed, relying on breach of the implied term of trust and confidence), breach of contract (relating to notice) and race discrimination. Further details are set out below. The Respondent denies the allegations in their entirety, including a denial that the Claimant was dismissed.

## Issues

2. The issues to be decided at this Preliminary Hearing were as follows, identified by Employment Judge Clark at a Telephone Preliminary Hearing before him on 21 November 2017:

a. Whether any of the complaints have no reasonable prospect of success and should be struck out accordingly.

b. Whether, alternatively or in addition, any of the complaints have little reasonable prospect of success such that the Claimant should be required to pay a deposit as a condition of continuing with them.

c. Whether any or all of the complaints of race discrimination were submitted to the Tribunal after the end of the period of three months starting with the date of the act to which the complaint relates, taking into account the effect of ACAS Early Conciliation and that conduct extending over a period is to be treated as done at the end of the period;

d. If so, whether any or all of them were submitted within such other period as the Tribunal thinks just and equitable.

## Procedural matters

3. It was evident to me from the outset of this Hearing, and indeed to the parties, that even to obtain a most basic overview of the Claimant's fifty-seven allegations so as to be able to determine the issues identified above would require more than one day. The Hearing therefore took place over two days. We proceeded, as indicated by Employment Judge Clark, principally on the basis of submissions from the parties in relation to the allegations, which even given the factual cross-over between a number of them was a necessarily time-intensive process. On the second day I heard evidence from the Claimant on the matter of time limits and regarding her financial means, the latter being relevant of course to the question of deposit orders. I also heard closing general submissions from both parties and received written submissions from Mr Cooksey.

4. The parties had agreed a bundle of around 250 pages. References in these Reasons to page numbers are to that bundle. Before the Hearing began I had read the pleadings (pages 2 to 42), Employment Judge Clark's Case Management Summary (pages 45 to 48), the Claimant's Scott Schedule (pages

52 to 63), her complaint to her trade union dated 28 October 2016 (pages 73 to 85), her witness statement prepared for this Hearing dated 18 December 2017 (pages 168 to 183) and the messages exchanged between the Claimant and her former colleague Pelly Wilson (pages 195 to 230). I made clear, particularly given the nature of this Hearing, that it was the parties' responsibility to draw my attention to any other documents they wished me to consider, and not my responsibility to search for them. The Hearing proceeded on the basis of a consideration of Mr Cooksey's very helpful chronological (but otherwise unchanged) version of the Claimant's Scott Schedule – see pages 63A to 63R ("the Schedule"). The numbering of the Claimant's allegations in the Judgment above and in these Reasons adopts the numbering in that version of the Schedule.

5. The Schedule was provided by the Respondent to the Claimant on the day before this Hearing, together with a small number of further documents, one of which appears at pages 237 to 238. It is in effect a two-page statement addressing one of the core factual issues in the case, namely the arrangements for a staff secondment rota. It was prepared by Nicola Audas, one of the Respondent's managerial employees and the subject of a number of the Claimant's complaints. There was some discussion about whether it should be admitted to the bundle. After taking some time during an adjournment to read it, the Claimant confirmed that she understood it, and would be able to say during the Hearing where she disagreed with its contents and why. On that basis, I was prepared to admit the document, being wholly satisfied that there was no prejudice to the Claimant in my doing so. I shall refer back to the document, and its significance in the context of a preliminary hearing, in my analysis below. Of course, as it turned out the Claimant had further opportunity to consider the document between the two dates on which this Hearing took place.

6. Before we began our assessment of the Claimant's allegations, I explained to her in outline the nature of direct discrimination, indirect discrimination, victimisation and harassment under the Equality Act 2010 ("the Act"). I also outlined the requirements for establishing a complaint of constructive unfair dismissal, including the issue of affirmation which was a significant feature of the Respondent's submissions at this Hearing. I made clear to the parties that it was not the purpose of the Preliminary Hearing to consider the detailed substance of the complaints, the purpose being to obtain an overall view of the case, though it was of course necessary for me to understand some of the details in order to decide the agreed preliminary issues.

7. We then turned to consider the Claimant's allegations in turn. Rather than detail the allegations and the parties' submissions in relation to each of them here (as "findings of fact") and then refer to them again in my analysis of the issues I am required to decide, I will set out some brief background facts, summarise the relevant law and then address the Claimant's allegations in my analysis. That will I hope keep these Reasons to something approaching manageable length. My findings of fact under the heading below are therefore limited to outlining the basic framework of the case, and the Claimant's evidence in respect of time limits and her financial means.

## Facts

8. The Claimant, who is of Black African race and Zimbabwean nationality, was employed by the Respondent from 19 September 2005 until her resignation effective from 12 February 2017. She was employed as a registered nurse in the Respondent's Cardiac Intensive Care Unit ("the Unit"), at Band 5.

9. As already indicated, many of the Claimant's complaints of race discrimination, and indeed much of the factual matrix she relies on for her complaint that she was unfairly dismissed, concern the arrangements the Respondent put in place for staff secondments. Specifically, from 2015, the Respondent arranged for Band 5 nurses to undertake four-month secondments into Band 6 roles. The Claimant's complaints include: lack of communication with her about, and being denied information concerning, those arrangements; the allied allegation of a lack of transparency about the arrangements; others being told about their opportunity to undertake a secondment when she was not; those others thus being in a better position than her to obtain permanent Band 6 positions when a vacancy arose despite assurances that this would not be the case; and all of this notwithstanding her assertion that she was better qualified and more experienced than many or all of these colleagues. Nicola Audas, a manager in the Unit, is the principal subject of the Claimant's complaints in this regard, along with her deputy, Lucy Lenehan. In essence, the Claimant says that Ms Audas gave secondments to and encouraged promotion opportunities for those who were in her favoured circle of friends, none of whom were Black African. There are other allegations of discrimination which relate to similar subject matter, such as other secondment or promotion opportunities, and the Respondent's failure to deal with the Claimant's complaints about these issues.

10. There are in addition a multiplicity of further allegations of race discrimination covering a wide range of different subject matters and made against a number of other employees of the Respondent. The Schedule also includes a number of allegations of victimisation and harassment. Although Employment Judge Clark's Case Management Summary indicated in relation to the former that the Claimant was not in fact pursuing complaints of victimisation, the Claimant stated at this Hearing that she was. With little resistance from Mr Cooksey and given that the Claimant is not legally trained or represented, I was prepared to hear submissions on prospects and time limit issues in relation to the asserted complaints of harassment and victimisation as well as those of direct discrimination. Some of the matters which the Claimant relies upon for her various discrimination complaints are also said to have contributed to the Claimant's decision to resign. There are also a number of her allegations which relate to her constructive dismissal claim only. As Employment Judge Clark noted, not all of the Claimant's allegations of race discrimination are said to have contributed to her decision to resign. It is not entirely clear therefore whether the Claimant's case that the Respondent was in breach of the duty of trust and confidence relies entirely on her case that she was discriminated against or whether it is in fact free-standing from the discrimination allegations. I return to this in my concluding comments.

11. As the Case Management Summary indicated, the Claimant's complaints of race discrimination cover a considerable period of time, going back as far as the start of her employment in 2005. Her employment having terminated on 12 February 2017, she contacted ACAS in respect of Early Conciliation on 3 May

2017. The Early Conciliation Certificate was issued on 26 May 2017 (page 1), and the Claimant's Claim Form (ET1) was received at the Tribunal on 22 June 2017.

12. The Claimant's evidence is that she always knew discrimination was unlawful, from when her employment began in 2005. She also knew of the phrase "unfair dismissal" though did not know much about it. She had access to the Respondent's policies via its intranet, including that relating to Dignity at Work, but does not recall consulting the policies on equality and discrimination. She says she had "little idea" that if she was mistreated it could result in legal action.

13. She was a member of a trade union, UNISON, before she began working for the Respondent and throughout her employment. She first contacted the union for advice regarding a colleague called Kevin Ullah (see allegation 3) in August 2014 and contacted it again in early 2016 after the Respondent told her that her work with students would have to be observed by the university (see allegation 25). In respect of both occasions she says that they were not interested in her concerns and so their discussions did not extend to them advising her about legal proceedings. She contacted them about the secondment issues in October 2016 (see paragraph 42 onwards in her statement at pages 176 – 177) but describes a similarly unhelpful experience. On 8 November 2016 (see page 177) she met a matron, Sarah Mack, who in summary advised her to contact HR. After email correspondence this eventually led to her meeting with a member of the Respondent's Human Resources team, Rebecca Hatch, on 5 December 2016. As appears from allegations 47 and 48 (see below), the Claimant says Ms Hatch agreed to look into the concerns but in fact did not come back to her. The Claimant says (page 179) that "I waited for Rebecca every day", chasing her on 16 January 2017 (page 180), which led to an email from Ms Hatch on 24 January 2017 saying she found it hard to relay the Claimant's concerns. Eventually, the Claimant met with the Respondent to discuss a number of her complaints on 30 March 2017, a few weeks after her employment terminated. The Respondent's letter deciding that the complaints should not be upheld was eventually sent to the Claimant on 18 May 2017 (pages 158 – 165).

14. The Claimant prepared her Claim Form (ET1) having searched online for assistance after she left the Respondent and having been told when she rang someone for advice that she should contact ACAS. It was as a result of that, or in any event at some point after termination, that she found out about the right to bring a complaint to the Tribunal. She says that she was too distressed to research her options regarding legal action prior to this call, though she has done some reading since her claim was presented. She says that she did not know about time limits at this point.

15. The Claimant gave a number of reasons as to why she did not research her legal rights prior to termination of her employment. She says that she hoped things could be resolved and "go back to normal", seeing her difficulties with the Respondent as an "internal issue". This was so even though her allegations concern events going back to 2005 through until just before she left. She also says that she felt vulnerable and did not want to suffer what she felt would be further disadvantage by challenging the Respondent ("reporting problems" as she put it) through taking legal action whilst still employed; she felt "intimidated". Based on paragraph 13 of her statement, Mr Cooksey suggested that as far back

as 2015 she knew the secondment issue was not going to be resolved internally, but the Claimant rejected that, stating that she had not spoken about it internally at that point.

16. The Claimant had a five-week sickness absence from work from the end of July 2016, but no other significant time away from her duties. She had no serious health issues, even though she was not well, hence immediately being able to start her new job after leaving the Respondent in February 2017. She says she had no idea what should be stated in her resignation and did not research her legal position at the time as she was feeling vulnerable. She first realised there was a three-month time limit some considerable time after she left the Respondent's employment.

17. The Claimant has remained working in the NHS, earning on average £1,800 net per month. She has negligible agency earnings. She has total savings of £50,000 and owns her own property purchased in 2007 for around £120,000, which is mortgaged currently at about £90,000. Her other debts total around £3,600. She has no dependents though she does support her parents in Zimbabwe to the tune of around $300 every six months. In answer to my question about her ability to pay potentially multiple deposits, the Claimant said that whether she would pay a particular deposit would depend on the allegation it relates to.

## The law

### Striking out

18. The possibility of striking out Tribunal complaints is provided for by rule 37(1)(a) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. In **Eszias v North Glamorgan NHS Trust [2007] EWCA Civ. 330**, the Court of Appeal dealt with an appeal against the strike out of a claim that a dismissal was automatically unfair because the reason for it was that the employee had made protected disclosures. At paragraph 4, Maurice Kay LJ stated that a tribunal "should be alert to provide protection in the face of an application that has little or no reasonable prospect of success but it must also exercise appropriate caution before making an order that will prevent an employee from proceeding to trial in a case which on the face of the papers involves serious and sensitive issues". At paragraph 26 he reflected on what is meant by "reasonable prospect of success" and stated that it requires "a realistic as opposed to merely fanciful prospect of success". At paragraph 29 he went on to say, "It would only be in an exceptional case that an application ... will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts as sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation". He then referred to the decision in **Anyanwu** (see below) and advocated an approach which recognises the importance of hearing full evidence before making decisions as to merits.

19. In **Anyanwu v South Bank Student Union [2001] ICR 391** the House of Lords (Lord Steyn) underlined in relation to discrimination cases "the importance of not striking out such claims as an abuse of process except in the most obvious and plainest cases", going on to state that "discrimination cases are generally fact sensitive and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of the claim being

examined on the merits or de-merits of its particular facts is a matter of high public interest". Similar sentiments were expressed by Lord Hope of Craighead: "discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence ... The risk of injustice is minimised if the answers to [questions of law] are deferred until all the facts are out".

20. This approach was reiterated by the Employment Appeal Tribunal in a discrimination case, **Zeb v Xerox (UK) Ltd and others [2016] UKEAT/0091/15,** in which Simler P said that the strike-out power "has rightly been described as a draconian one, and case law cautions Employment Tribunals against striking out a claim in all but the clearest cases, particularly where that claim involves or might involve allegations of discrimination". It has also been reiterated in an automatically unfair dismissal case, **Morgan v Royal Mencap Society [2016] UKEAT/0272/15** - "where there is a dispute of fact, unless there are very strong reasons for concluding that the claimant's view of the facts is simply unsustainable, a resolution of that conflict of fact is likely to be required before the case can be dismissed without a hearing".

21. In light of these authorities, the power to strike out discrimination complaints in particular should be exercised very carefully. Establishing "no reasonable prospect of success" is a high threshold for a respondent to get over. A Preliminary Hearing should not involve the conduct of a mini-trial, hearing evidence and resolving factual disputes. Rather, the approach to be taken is to assume that the Claimant's case is established at its highest, unless for example there are contemporaneous documents of the sort referred to in **Eszias** which the Claimant could not reasonably hope to contradict at a Final Hearing.

**Deposits**

22. Rule 39 of the Rules of Procedure provides an alternative to striking out complaints, and states "*Where at a preliminary hearing ... the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ... to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument*". If the deposit is not paid by the required date, the complaint is struck out. If it is paid, and then the Tribunal – usually at the Final Hearing – finds against a claimant for substantially the reason given in the deposit order, the claimant is treated as having acted unreasonably in pursuing it, unless the contrary is shown, and the deposit is paid to the other party. Otherwise it is refunded.

23. In deciding whether to make a deposit order, as well as considering legal difficulties with a claimant's case the Tribunal may consider the likelihood of a party being able to establish the essential facts on which they rely, thereby forming a provisional view of the strength of the case. **Wright v Nipponkoa Insurance (Europe) Ltd UKEAT/0113/14** makes clear that separate deposit orders can be made in respect of various arguments or allegations in a particular case. This is subject to an overall assessment of the proportionality of the total sum, given the requirement in rule 39 to have regard to the financial means of the person paying the deposit(s) before such an order is made. In **Hemdan v Ishmail [2017] IRLR 228,** Simler P described the purpose of rule 39 as being to identify complaints with little reasonable prospect of success and discourage their pursuit by requiring a sum to be paid and creating a risk of costs if the complaint is nevertheless pursued

but fails on the ground identified in the deposit order. The purpose is "emphatically not" however to "make it difficult to access justice or to effect a strike out through the back door". In other words, the deposit order must be one which the claimant can comply with.

24. It is necessary to say something about the substantive law in relation to each of the Claimant's complaints, to put into context the considerations of prospects of success. I summarise below therefore the key features of each such complaint; the summaries are not intended to be a comprehensive statement of the law.

**Direct discrimination**

25. Section 39 of the Act provides, so far as relevant, "*(2) An employer (A) must not discriminate against an employee of A's (B)— … (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service; //(d) by subjecting B to any other detriment*". Section 13 of the Act provides, again so far as relevant, "*(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat* others". The protected characteristic relied upon in this case is race, which according to section 9 of the Act includes nationality and ethnic or national origins. Section 23 provides, as far as relevant, "*(1) On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case*".

26. The fundamental question in a direct discrimination complaint is the reason why the Claimant was treated as she was. As Lord Nicholls said in the decision of the House of Lords in **Nagarajan v London Regional Transport [1999] IRLR 572** "this is the crucial question". Lord Nicholls also observed that in most cases answering this question will call for some consideration of the mental processes (conscious or otherwise) of the alleged discriminator. Whilst in some cases, the ground, or the reason, for the treatment complained of is inherent in the act itself, in other cases – such as **Nagarajan** – the act complained of is not in itself discriminatory but is rendered discriminatory by the mental processes which led the alleged discriminator to act as they did. Establishing the decision-maker's mental processes is not always easy. What tribunals must do is draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances. In **Amnesty International v Ahmed [2009] IRLR 884**, it was said that, "… The basic question in a direct discrimination case is what is or are the "ground" or "grounds" for the treatment complained of". In determining the reason why the alleged discriminator acted as they did, the tribunal does not have to be satisfied that the protected characteristic was the only or main reason for the treatment. It is enough for the protected characteristic to be significant in the sense of being more than trivial (again, **Nagarajan**).

**Harassment**

27. Section 40 of the Act renders harassment of an employee unlawful. Section 26 defines it as follows:

"*(1) A person (A) harasses another (B) if - //(a) A engages in unwanted conduct related to a relevant protected characteristic [here, race], 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 …*

*(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*".

**Victimisation**

28. Section 39(4) of the Act says that, "*An employer (A) must not victimise an employee of A's (B): … (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service; // … (d) by subjecting B to any other detriment*". Section 27 defines victimisation as follows:

"*(1) A person (A) victimises another person (B) if A subjects B to a detriment because - //(a) B does a protected act, or //(b) A believes that B has done, or may do, a protected act.*

*(2) Each of the following is a protected act - //(a) bringing proceedings under this Act; //(b) giving evidence or information in connection with proceedings under this Act; //(c) doing any other thing for the purposes of or in connection with this Act; (d) making an allegation (whether or not express) that A or another person has contravened this Act*".

29. There is case law to suggest that a protected act need not be an act of the Claimant herself – see **Thompson v London Central Bus Company [2016] IRLR 9.** As to whether a complainant has done "any other thing for the purposes of or in connection with [the Act]", this is to be given a broad interpretation – **Aziz v Trinity Street Taxis Ltd [1998] IRLR 204.** No comparator is required for the purposes of a victimisation complaint, but the protected act must be the reason or part of the reason why the Claimant was treated as she was – **Greater Manchester Police v Bailey [2017] EWCA Civ. 425.**

**Burden of proof**

30. In determining discrimination complaints, Tribunals typically adopt a two-stage approach, reflecting section 136 of the Act. The first stage involves asking whether the claimant has established facts from which the Tribunal could decide, in the absence of any other explanation, that there has been discrimination. The second stage asks, if so, whether the respondent has established that it did not discriminate. As was held in **Madarassy v Nomura International plc [2007] IRLR 246** "could conclude" refers to what a reasonable tribunal could properly conclude from all evidence before it. In considering what inferences or conclusions can thus be drawn, the tribunal must assume that there is no adequate explanation for those facts. It is important however for the Tribunal to bear in mind that it was also said in **Madarassy** that "the bare facts of a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which an employment tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination". The something "more" which **Madarassy** says is needed may not be especially significant and

may emerge for example from the context considered by the Tribunal in making its findings of fact.

**Time limits**

31. Section 123(1) of the Equality Act 2010 provides that proceedings on a complaint under Section 120 may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the Employment Tribunal thinks just and equitable. Section 123(3) says that for the purposes of this section conduct extending over a period is to be treated as done at the end of the period, and failure to do something is to be treated as occurring when the person in question decided on it. Section 123(4) says that in the absence of evidence to the contrary a person is to be taken to decide on failure to do something, (a) when they do an act inconsistent with doing it or otherwise (b) "*on the expiry of the period in which [they] might reasonably have been expected to do it*".

32. Mr Cooksey referred to a number cases on time limits including **Aziz -v- FDA [2010] EWCA Civ. 304** and **Hendricks -v- Metropolitan Police Commissioner [2003] IRLR 96**. These were decisions which clarified the approach which is required at preliminary hearings in considering whether matters complained of which took place more than three months before a claim was presented to the Tribunal could be said to be conduct over a period ending within that three-month timescale. The case of **Aziz -v- FDA** was a Court of Appeal decision. According to this case, the required approach is to ask whether the Claimant has a reasonably arguable basis for her contention that her complaints of discrimination are so linked as to be continuing acts or such as to constitute an ongoing state of affairs. Although there are obvious cost savings where out of time complaints are disposed of at a preliminary stage, a claimant must not be barred from pursuing an issue to a final hearing where there is an arguable case. The Court in **Aziz** also accepted the force of the submission that an omission can be continuing.

33. A continuing effect on an employee is not of itself sufficient to establish a continuing act. In **Hendricks** it was said that the question is whether there is an ongoing situation or continuing state of affairs in which the claimant was less favourably treated and for which the respondent is responsible. **Hendricks** too concerned a preliminary hearing. The Court of Appeal acknowledged that the burden is on a claimant to prove a continuing act, and noted at paragraph 49 that a claimant may not succeed in proving the alleged incidents actually occurred or that, if they did, that they add up to more than isolated and unconnected acts, but that nevertheless it was too soon (at the preliminary hearing) to say that the complaints had been brought too late. That too seems to me to show the approach to be taken at the preliminary stage. The burden is on the Claimant to prove that the numerous alleged acts of discrimination took place and were linked in the required manner, but the general rule is that the Preliminary Hearing is not the place to make findings of fact on these substantive issues where matters are in substantial dispute; that is a role for the Tribunal dealing with the Final Hearing.

34. Mr Cooksey specifically asked me to consider the Court of Appeal's decision in **Sougrin v Haringey Health Authority [1992] ICR 650.** That case concerned a decision not to regrade a nurse, which she said was an act of race discrimination and which had an ongoing effect on her pay. The Court drew a

distinction, rehearsed in several authorities, between the act complained of (the refusal to upgrade) and a policy or rule not to upgrade black nurses; there was no complaint alleging the latter. The refusal to regrade was therefore a one-off event, which took place at a particular point in time, and the lower pay was simply a continuing consequence of that refusal. Ascertaining the act(s) complained of is therefore clearly crucial.

35. The provision for extending time where it is just and equitable to do so gives to tribunals wider scope than the test of reasonable practicability which applies for example in unfair dismissal cases. Nevertheless, there is no presumption that it will be – **Robertson v Bexley Community Centre (trading as Leisure Link) [2003] IRLR 434**. In **British Coal Corporation v Keeble [1997] IRLR 336**, it was held that similar considerations arise in this context as would be relevant under the Limitation Act 1980, namely the prejudice which each party would suffer as a result of granting or refusing an extension, and all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

36. Since the Preliminary Hearing concluded, the Court of Appeal handed down its decision in **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640.** Leggatt LJ said that Parliament has given tribunals "the widest possible discretion" in deciding whether to extend time in discrimination cases. Notwithstanding **Keeble** there is no list of factors which a tribunal must have regard to, though the length of and reasons for delay, and whether delay prejudices a respondent for example by preventing or inhibiting it from investigating the claim whilst matters were fresh, will almost always be relevant factors. At paragraph 25 he said that there is no reason to read into the statutory language any requirement that the Tribunal must be satisfied that there are good reasons for the delay, let alone that time cannot be extended in the absence of an explanation of delay from the Claimant. At most, he said, whether any explanation or reason is offered and the nature of them are relevant matters to which the Tribunal should have regard.

**Unfair dismissal**

37. Section 95(1)(c) Employment Rights Act 1996 ("ERA") provides that an employee is dismissed for unfair dismissal purposes if "the employee terminates the contract … (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct". Widely known as "constructive dismissal", the test for establishing dismissal in these circumstances is that given in **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221**. It is not necessary to refer to this and subsequent approving authorities in detail. It is sufficient to say that they make clear that in order to establish constructive dismissal there must be a repudiatory breach of contract by the Respondent – in other words, conduct going to the root of the contract or which shows that the Respondent no longer intends to be bound by it; the Claimant must have resigned in response to that breach; and if the Claimant has affirmed the contract after the breach, which may for example arise as a result of delay in resigning, constructive dismissal will not be made out.

38. The Claimant relies on the key implied term of trust and confidence. The term is implied into every contract of employment to the effect that an employer will not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties (**Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, Malik v BCCI SA (in liquidation) [1997] ICR 606**). **Malik** concerned a case of improper conduct of the employer's business, which it was held was capable of infringing the implied term. It is therefore clear that such conduct does not have to be expressly directed at the employee who claims that the term has been breached.

39. The Claimant argues that there was a series of issues which taken together destroyed her trust and confidence in the Respondent. Any breach of the trust and confidence term is fundamental and repudiatory (**Morrow v Safeway Stores plc [2002] IRLR 9**). Whether there has been a breach has to be judged objectively: in the **Woods** case, it was said that Tribunals must "look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is that the employee cannot be expected to put up with it".

40. It is also well-established that the matter which finally results in the employee deciding to resign (usually referred to as "the final straw"), does not have to be of itself a fundamental breach of contract, and in fact does not even have to be blameworthy behaviour by the employer at all. It must nevertheless be an act in a series whose cumulative effect is to breach the implied term, and must contribute something to that breach, however slight, although what it adds may be relatively insignificant. An entirely innocuous act will not be sufficient – **Omilaju v Waltham Forest London BC [2005] ICR 481**. **Omilaju** says in relation to final straw cases, "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 … 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 … it must contribute something to that breach, although what it adds may be relatively insignificant … If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach … there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect".

41. It must also be considered whether a claimant has affirmed the contract after any breach, because if she has done so, any right to accept a respondent's repudiation of the contract by resigning and claiming to have been constructively dismissed is lost in relation to that breach. Affirmation can be express, or it can be implied from a claimant's conduct, where she acts in a way which is only consistent with the continued existence of the contract. Delay can be evidence of affirmation, but in **W E Cox Toner (International Ltd) v Crook [1981] ICR 823,** the EAT held that mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; though if it is prolonged it may be evidence of an implied affirmation.

42. Another decision handed down after this Hearing concluded, **Pets at Home Limited v MacKenzie [2018] UKEAT/0146** considered the question of

affirmation and final straws. The EAT referred to and approved its earlier decision in **Vairea v Reed Business Information Ltd UKEAT/0177/15,** in which it was said, "I think when a contract has been affirmed a previous breach cannot be "revived". The appearance of a "revival" no doubt arises when the breach is anticipatory or can be regarded as "continuous" or where the factual matrix of the earlier breach is repeated after affirmation but then the real analysis is not one of "revival" but of a new breach entitling the innocent party to make a second election. The same holds good in the context of the implied term as to mutual trust and confidence. There the scale does not remain loaded and ready to be tipped by adding another "straw"; it has been emptied by the affirmation and the new straw lands in an empty scale. In other words, there cannot be more than one "last straw". If a party affirms after the "last straw" then the breach as to mutual trust and confidence cannot be "revived" by a further "last straw"".

## Analysis

43. It is important to reiterate that my analysis of the Claimant's case takes it at its highest as I am required to do at this preliminary stage. It should not be assumed therefore that the summary of the Claimant's various allegations below is in any sense binding on the Tribunal dealing with the Final Hearing, based as it necessarily is on a cursory assessment. The allegation numbers are based on the Schedule.

### Unfair dismissal

44. I begin my analysis with the unfair dismissal complaint. It is agreed there are no time limit issues; taking account of ACAS Early Conciliation, the complaint was brought in time. The issue for me to consider therefore is whether any or all of the various allegations and arguments the Claimant relies on have no or little reasonable prospect of success. This includes whether any allegations or arguments have little or no reasonable prospect of being found to have contributed to the alleged breach of trust and confidence on which the Claimant relies to establish that she was dismissed. The Respondent's main arguments are first that some of the allegations by their very nature could not reasonably be said to have contributed to the alleged breach, and secondly that in relation to some or all of the allegations the Claimant plainly affirmed the contract. I begin with those allegations related to the secondment opportunities and similar matters, before turning to the others.

#### *Secondment/promotion opportunities*

45. At allegations 7 to 9 the Claimant makes general allegations about the four-month secondment opportunities, describing a state of affairs that she says existed from 2015 until her resignation. Thus, at allegation 7 she says there was no transparency about or discussion with her regarding the four-month secondment opportunity, such that she completely lost trust and confidence in Ms Audas. At allegation 8 she says that as Ms Audas promoted others who had joined the Unit after the Claimant, she was "pushed down" and her chance of being left in charge of junior staff while the charge nurse was away disappeared. Then at allegation 9 she says that she was unable to apply for Band 6 roles as those whom managers (principally Ms Audas) liked were told to apply (the Claimant was not) and it was generally known what the outcomes would be.

46. The Claimant then makes a number of specific allegations picking up on these themes. At allegation 13 she says that in September 2015, her colleague Julie Paxton (who is of white ethnicity) informed the Claimant that she had been told to get ready for secondment, though she had declined the opportunity. At allegation 16, also related to September 2015, the Claimant says she found out from her colleague Ayesha Langley that Ms Audas had wanted to give a different secondment opportunity, namely a 6-month secondment at Band 7, to three white employees but when they refused she had no alternative but to give them to two other colleagues, Matthew John (who is of Indian ethnicity) and Pelly Wilson who like the Claimant is Zimbabwean and of black African ethnicity. The Claimant says this sounded to her like race discrimination.

47. At allegation 20 it is said that in November 2015 another colleague, Pui Hepplewhite, who is of Chinese ethnicity, told the Claimant that she had been approached, it appears by Ms Audas, and told to apply for a permanent Band 6 role. She got the job. Also related to 2015, at allegation 21 it is said that Ms Audas had informed the Claimant that having undertaken a mentorship course was a compulsory requirement when applying for a Band 6 role, but in November of that year, a colleague Ayesha Langley was appointed without having done so. The Claimant did not apply for the role in question, though she says it was not advertised.

48. Moving on to 2016, the Claimant says at allegation 29 that on 26 March she was informed by another colleague Bindhu Kallumkal, who is of Indian ethnicity, that Ms Audas had asked her to undertake the four-month secondment. On the same date (allegation 30) the Claimant was informed by Bindhu Kallumkal that staff had been condemning management for indicating that an employee called Matthew John would be given a permanent Band 7 position before Pelly Wilson, the other person in contention for the role, had done her Band 7 secondment. The Claimant says she “completely lost faith and confidence” in management as it became clear to her that they did not want black nurses to progress.

49. Allegation 35 is that on 26 July 2016 the Claimant discovered that Pelly Wilson was not informed, whilst on her Band 7 secondment and therefore part of the management team at the time, why a colleague called Guy Massey was still wearing a Band 6 uniform notwithstanding that he had completed his Band 6 secondment. The Claimant “again lost faith in the management” because this was another example of people of the Claimant’s race being treated differently.

50. At allegation 45 it is said that on 8 November 2016, following interviews for Band 6 roles she was informed by her colleague Bindhu Pillai that Ms Audas had said that Guy Massey and Ayesha Langley had been appointed as they had more experience, thus confirming the Claimant’s view that being on the four-month secondment created an advantage when it came to applying for promotion. The Claimant did not apply for these roles; she says she could not compete for them because she did not get the secondment opportunity.

51. Although not described in the schedule as part of the unfair dismissal case, given the broad nature of allegations 7 to 9, I should also note allegation 46, where the Claimant says she was informed by Bindhu Pillai, who is of Indian ethnicity, in December 2016 that Ms Audas’ deputy, Lucy Lenehan, had told her that her secondment would start in March 2018. Finally, at allegations 47 and 48 it is said that at the meeting with Ms Hatch on 5 December 2016 referred to

above Ms Hatch raised her voice with the Claimant when the Claimant sought to raise with her concerns about the secondment and recruitment issues (specifically that Ayesha Langley had been promoted without undertaking a course in mentorship), in a manner which the Claimant took as a warning not to speak to anyone about the problems. She goes on to say that Ms Hatch then did nothing about what the Claimant had said to her. The Claimant raises a similar point at allegation 54, saying with reference to her further conversation with Ms Hatch on 16 January 2017 that the failure to act "completely destroyed all trust and confidence" in the Respondent. This was the date on which the Claimant submitted her resignation.

52. The Respondent makes a number of points in support of its case that the allegations just outlined should be struck out or made subject to deposit orders. I will deal with these in turn.

53. First of all, in relation to the broad allegations at numbers 7 to 9 and in relation for example to the specific allegation at number 21, the Respondent points to the written explanation prepared by Ms Audas of how the four-month secondment worked, and why particular individuals were given particular opportunities to undertake the secondment and/or for permanent promotions. This explanation is at pages 237 to 238 and was prepared by Ms Audas for this Preliminary Hearing. In relation to the general arrangements for the four-month secondment, the statement says that it was prepared on a "first come, first served" basis, that the Claimant had a position within the resulting list and that all those who had expressed interest were told that they had secured a place. In relation to specific issues, the statement offers particular reasons why arrangements were made as they were, of an operational nature for example. It would not be appropriate however to strike out the relevant allegations or make them subject to a deposit order based on this statement. The Claimant contests Ms Audas' evidence, for example that the Claimant was informed she had secured a place on the rotation. Put simply, this is evidence which has not been tested; the place to do so would be a Final Hearing.

54. Secondly, in relation to allegation 45 the Respondent says that it appointed to the Band 6 roles people with more experience than the Claimant, though again that is a matter of evidence and the Claimant's point is that they only had more experience because they had been on secondment. The Respondent also says that certain allegations, in particular numbers 16 and 45, cannot contribute to a breach of trust and confidence as they did not relate directly to the Claimant who did not apply for the roles. It is clear however from the **Malik** decision that an employer's conduct does not have to be directed at an employee to contribute to, or of itself be, a breach of trust and confidence. I would not therefore strike out or order deposits on this basis.

55. Thirdly, in relation to allegation 54 the Respondent points out that the Claimant was in the process of looking for another job at the time she spoke with Ms Hatch in January 2017. Plainly, having looked for another role is not necessarily inconsistent with one's trust and confidence having been breached and that being the reason for one's resignation. I would not be prepared to strike out or order a deposit on this basis either.

56. I do think however that it is appropriate to strike out allegation 35. Again, the Respondent relies on Ms Audas' statement at page 238 as the explanation of

why Mr Massey was still wearing his Band 6 uniform having completed his secondment, and as I have said Ms Audas' statement is evidence which has not been tested at the preliminary stage. I nevertheless agree with Mr Cooksey that it is speculation on the Claimant's part that Ms Wilson had not been given an explanation of this because of her race. Of course, anything is a possibility, but it has to be more than a fanciful one, and it seems to me that there is no reasonable prospect of the Claimant establishing as a factual matter that this was the case, not least given that she does not say that this was Ms Wilson's own conclusion, but her own based on what she had heard. The Claimant faces a further difficulty with this allegation, one which impacts on her claim of unfair dismissal more broadly; that is the question of affirmation.

57. This is the principal basis on which the Respondent challenges the prospects of the Claimant's unfair dismissal complaint being established in relation to the Band 6 secondment arrangements and the concomitant opportunities for promotion. Mr Cooksey refers to the Claimant's statement prepared for the Tribunal case, at paragraph 13 (page 170), in which she says that by the end of 2015 she had lost hope and realised there was no point applying for a Band 6 role as it was clear Ms Audas did not want anything to do with her. This is consistent with the Claimant's statements taken from the Schedule and referred to above, namely that in March 2016 (allegation 29) and July 2016 (allegation 35) she lost trust and confidence in the Respondent.

58. As Mr Cooksey points out, if the way in which the Respondent dealt with secondment and promotion opportunities was, or could contribute to, a breach of trust and confidence (which is of course denied) it was something which was repeated over a considerable period of time. The Claimant said in submissions she had no choice but to stay with the Respondent as she needed the income. Nevertheless, whilst delay of itself is not necessarily evidence of affirmation, in this case over a lengthy period the Claimant continued to work, be paid, take leave, deliver training, receive training, and she applied for a clinical educator role (see below) – though she says she did that only to establish that she would not be appointed. It is also far from clear that she reserved her position or worked under protest. As a result, although the Claimant says that protesting was unacceptable to the Respondent, there must be a significant risk that the Tribunal at the Final Hearing will find that if there were breaches of contract in this regard the Claimant affirmed the contract on a regular basis, at least until the final events outlined above in December 2016. I cannot conclude that there is no reasonable prospect for the Claimant in this regard, not least because the question of affirmation requires a fuller assessment of the evidence than is possible at the preliminary stage, but it is clear that a deposit will have to be paid as a condition of the Claimant continuing to advance her case that a number of matters prior to December 2016 contributed to the alleged breach of trust and confidence for the reasons I have given.

59. As to matters from December 2016 onwards, Mr Cooksey submitted that the Claimant's best case is that the last act contributing to the breach of trust and confidence was in that month when she found out that yet another person had been given the secondment opportunity (allegation 46). She resigned around 6 weeks later; he says that given the history of what had happened regarding the secondment, she did not need that long. One could add to allegation 46 the Claimant's December 2016 discussions with Ms Hatch (allegations 47, 48 and 54), which on the Claimant's case extended to the date on which she resigned,

16 January 2017. It is far less likely, though not at all inconceivable, that the Tribunal at the Final Hearing would find that over a short period of time such as this and whilst waiting for Ms Hatch's response, the Claimant had affirmed the contract. There is however a different issue for the Claimant at this point. As made clear in **Vairea** and reiterated in **MacKenzie,** if a contract is affirmed previous breaches, or "straws", do not fall to be weighed in the balance in determining whether there has been a fundamental breach of contract, specifically here a breach of trust and confidence. Again, I am not willing to strike out these allegations, or the unfair dismissal complaint as a whole, because the weight of these matters needs to be properly assessed. Nevertheless, it seems to me that the Claimant has little reasonable prospect of persuading a Tribunal at final hearing that learning of one colleague undertaking the four-month secondment, Ms Hatch's conduct at the meeting on 5 December and the delay in coming back to the Claimant following that meeting is sufficient to amount to a fundamental breach of her contract of employment on whatever basis. That too points to the need for a deposit to be paid as a condition of the Claimant continuing to advance her complaint of unfair dismissal.

***Other matters***

60. The Claimant relies on a number of other allegations which are unrelated to secondment and promotion opportunities but which she says nevertheless contributed to trust and confidence being undermined or destroyed.

61. At allegation 17 she says that on 21 October 2015, Ms Audas informed another member of staff that she and a colleague were going to London to hear a presentation from another colleague called Pamela Makwehe, who is Black African, on the subject of the experiences of ethnic minority nurses. Ms Audas is alleged to have said they were going to see if Pamela "was not going to backbite them", in other words whether Ms Makwehe would say anything negative about management. The Claimant says that this made her think Ms Audas was not honest. Whilst as I have made clear, conduct does not have to be directed at an employee to contribute to a breach of trust and confidence, it is very difficult to understand the Claimant's case in this regard and taking Ms Audas' words at face value it is difficult to see how they could sensibly be said to mean that she was not honest. For those reasons alone, I cannot see how there is any reasonable prospect of a Tribunal agreeing that this contributed to a breach of trust and confidence. There are also the affirmation problems already outlined. I conclude that this allegation should be struck out.

62. At allegation 26 the Claimant says that on 12 February 2016 she informed a more senior colleague than her, Christopher Green, that staff who were not trained on something called an ABG machine were being given access to it by other staff, whilst the Claimant herself did not agree to do so, which she says "made people hate [her]". Mr Green said he would inform the relevant managers but did not do so, causing the Claimant to lose faith in him. Failure to take action regarding an employee's concerns could of course contribute to a breach of trust and confidence. I return to affirmation issues in my summary below.

63. At allegation 27 the Claimant says that on 1 March 2016 she asked Ms Audas to assist her with renewal of the balloon pump policy "if you get time". She says that Ms Audas responded along the lines of "No, no" and throughout the renewal process did not check on how the Claimant and the person assisting her,

John Campbell, were getting on. She says Ms Audas "did not want to hear" her. An allegation of an unsupportive manager, whether that affected only the Claimant or others also, could contribute to a breach of trust and confidence. The Respondent says the Claimant affirmed the contract by continuing to work on the policy renewal. I return to affirmation issues in my summary below.

64. At allegation 37 the Claimant says that on 20 August 2016 she was texted by Julie Paxton whilst on sick leave. Ms Paxton informed her that she had been on a horrible shift with the clique which the Claimant observed within the team, including Ms Audas and Mr Green. This "really scared" the Claimant when she thought about returning to work as, she says, it evidenced an "inappropriate" and "intimidating" environment. The example she gave of that environment was that Mr Green would sometimes not respond when the Claimant said good morning. Whilst I repeat that conduct does not have to have been directed at the Claimant to contribute to a breach of her trust and confidence, it is difficult to see how Ms Paxton's report of one difficult shift and Mr Green's occasional failure to acknowledge the Claimant could sensibly be said to so contribute. On this basis, I conclude that this allegation should be struck out as having no reasonable prospect of success.

65. At allegation 38 it is said that between September 2016 and February 2017 the Claimant was several times allocated duties using a new piece of medical equipment called a pacing box, which she was not trained on. She says she could not refuse to carry out the duties even though she was concerned about safety issues and felt unsupported. Other colleagues – Kate Buryne and Ms Paxton – were trained but were themselves also unsure. The Respondent says that if there was in this case a breach of trust and confidence, it was with reasonable and proper cause as it had to stagger the training. That is however a matter of evidence which requires to be tested. The Respondent also says that the Claimant affirmed the contract by actually looking after the patients. Whilst given the dates which frame this allegation, on the face of it the general affirmation issues I have outlined do not arise, I agree with the Respondent that it seems likely a Tribunal would find that the Claimant's specific actions affirmed the contract in this regard, such that there is little reasonable prospect of it finding that these events contributed to a breach of trust and confidence. Again therefore, it is clear that a deposit should be paid if the Claimant is to continue to advance her complaint of unfair dismissal.

66. At allegation 39 the Claimant says that on 21 September 2016 Mr Green failed to conduct a return to work interview when the Claimant requested it after having been absent because of sickness for 5 weeks. She says she "lost confidence in him and was worried if [she] was going to manage work". The Respondent says there was no need to repeat what Ms Audas knew from attendance management meetings she had held with the Claimant though again that is an evidential matter that would need to be fully rehearsed. Nevertheless, the Respondent also points out that this was not an ongoing failure, as the interview would be required within a fixed period of the Claimant's return, thus meaning the Claimant affirmed the contract. I return to this in my summary below.

67. The remaining allegations the Claimant relies on for her unfair dismissal complaint can be dealt with briefly, as it is plain in my view that none have any reasonable prospect of success. Allegation 49 is that on 13 December 2016 she

asked Lucy Lenehan for her appraisal report. Ms Lenehan asked if the Claimant was looking for a job elsewhere and when the Claimant confirmed she was Ms Lenehan said nothing further. The Respondent says that by any objective measure this cannot contribute to a breach of trust and confidence. I agree – there is no reasonable prospect of persuading a Tribunal that it did; there is no obligation on an employer to enquire about an employee's job search and failure to do so is in no sense improper. Allegation 53 is that from 16 January 2017 to her last working day, Ms Audas did not want to be near the Claimant or say anything to her after she found out the Claimant was leaving. The Respondent says that by any objective measure this cannot contribute to a breach of trust and confidence. I agree again – there is no reasonable prospect of persuading a Tribunal that it did, given that no employer is obliged to deal with anything other than the required formalities in relation to a departing employee. There is the additional point that the Claimant had already resigned before these alleged omissions arose. Finally, at allegation 57 the Claimant complains about the card presented to her by colleagues on 11 February 2017, specifically that Deborah Sands wrote "I hope you find happiness in your new job". As the Respondent points out, that is also too late to contribute to any breach of trust and confidence. By any objective measure it is manifestly not capable of so contributing in any event. This allegation must be struck out.

68. I have made clear which allegations fall to be struck out. In summary in relation to the remainder, I find that the Claimant has little reasonable prospect of establishing:

a. that she did not affirm the contract of employment in relation to the allegations which cover the period before December 2016 – this includes allegations 26, 27 and 39;

b. that the events from then onwards were sufficient to constitute a breach of trust and confidence or otherwise a fundamental breach of contract; and

c. that she did not affirm the contract of employment in relation to allegation 38.

I will return to the amount of any deposit that should therefore be ordered in my general summary at the conclusion of these Reasons.

**Victimisation**

69. Allegation 3 is the first allegation of victimisation, going back to August 2014. The background is said to be complaints about alleged bullying behaviour by a senior colleague, Kevin Ullah. Another colleague, Helen Lushpenko-Brown, allegedly informed the Claimant that Ms Audas was aware the Claimant was one of the people who had complained about Mr Ullah's behaviour but suggested Ms Audas might not wish to hear what the Claimant had to say about it. Even allowing for the broad interpretation in **Trinity Street Taxis** I am unable to see any case put forward by the Claimant that there was a protected act in relation to which Ms Audas is supposed to have made this comment. It is not alleged that the Claimant had complained that Mr Ullah's behaviour was because of race (indeed, someone else, not of the Claimant's race, also complained about Mr Ullah) or that she had done any other protected act which this comment was in some way a response to. I can reach no other conclusion than that the complaint has no reasonable prospect of success as a victimisation complaint and to that

extent must be struck out. I will return to it separately as a complaint of direct discrimination below.

70. There is no need to detail allegations 4, 22 or 28 as the Claimant conceded these were not complaints of victimisation and so they are dismissed as victimisation complaints on withdrawal. They are also allegations of direct discrimination – see below.

71. Allegation 15 is that in September 2015 the Claimant informed Ms Audas that she had missed some training she was due to undertake because of being given excessive work by Matthew John. Ms Audas did not allow her to finish her explanation of her concerns and said, "We don't work like that here". The Claimant says she "did not have the guts" to tell Ms Audas that Mr John was overloading her with work because of her race. There having been a protected act is expressly disclaimed in relation to the conversation with Ms Audas, and there is no argument put forward by the Claimant to say that there had been a previous protected act based on which it is said Ms Audas responded as she did. It must be concluded therefore that this allegation has no reasonable prospect of success as a victimisation complaint and should be struck out accordingly. I return to it as a direct discrimination complaint below.

72. No date is specified for allegation 23, the Claimant saying it was an "ongoing" issue. She complains of Asian colleagues speaking a language other than English for example when conducting patient handover. The Claimant says she reported this "years back [to Ms Audas] and came out of the office embarrassed" as Ms Audas did not want to hear about it. Although related to language and therefore in that sense to race, I do not see how the Claimant's report to Ms Audas was doing something "for the purposes of or connected with" the Act, even on a generous interpretation of that phrase. There is therefore no protected act suggested by the Claimant, whether on the occasion of the report or otherwise, based on which she alleges Ms Audas made her comments or refused to hear the Claimant' concerns. This complaint too must therefore be struck out as a complaint of victimisation. Again, I return to it as a complaint of direct discrimination below.

73. Allegations 47 and 54 are detailed above in the context of unfair dismissal. The Claimant added in this context that Ms Hatch raised her voice when she found out that the Claimant had not raised her concerns with Tracy Keane (Deputy Clinical Lead). The Claimant says she cannot remember the exact words she used about being excluded from secondment opportunities, saying that she "may have mentioned" discrimination. There is nothing more therefore than the most tentative suggestion that there was a protected act either on this occasion or previously which was a factor in Ms Hatch's alleged acts or omissions. Given the importance of not striking out discrimination complaints in all but the clearest cases, I am prepared to give the Claimant some benefit of the doubt as it may be that she will be able to establish a protected act in this instance. It is plain however, based on the Claimant's own submission, that there is little reasonable prospect of success of her establishing the facts necessary to make out these allegations, such that it is appropriate to order her to pay a deposit to proceed with them as victimisation complaints. I return to time limit issues separately below.

74. The final allegation of victimisation is number 56, namely that on 10 February 2017 the Claimant realised that the night shift of 13 February, meant to be her last shift with the Respondent, had been removed. Her belief is that this was a decision taken by Matthew John. It is unclear what protected act she relies on. She says that Ms Hatch "could figure out what was happening" and thus I take her to be relying on that detailed at allegations 47 and 54 above, i.e. that Mr John would have known of her allegation of discrimination because of what she had said to Ms Hatch. The same analysis applies in relation to allegations 47 and 54 and therefore again a deposit must be paid in order to proceed with this allegation as a victimisation complaint. Given the date it relates to, there is no time limit issue.

**Harassment**

75. The first allegation of harassment is number 3, the details of which are set out above. The Claimant says Ms Audas criticised her for complaining about Mr Ullah, which it might be said could just about establish the environment required by section 26 of the Act, and she also says that Ms Audas was willing to entertain a complaint about Mr Ullah from someone else. Even taking the cautious approach enjoined by the case law, the very best that can be said of this allegation is that it has little reasonable prospect of success in that it is not at all plain the basis on which the Claimant says that Ms Audas' behaviour in not wanting to hear the Claimant's complaint was related to the Claimant's race in the required sense. On its own merits I would therefore say it has little reasonable prospect of success. There are also time limit issues to consider which I deal with below.

76. Allegation 25 is that on 12 February 2016 the Claimant was informed by Mr Green that when working with students she would now have someone from the university observing her. This had arisen from the Claimant's polite refusal to allow a student to go to the pharmacy during a night shift, which had apparently upset the student and led to her reporting it. The Claimant felt she was being disciplined because the student cried, and furthermore does not suggest that Mr Green's conversation with her was related to her race. On that basis this allegation has no reasonable prospect of success and must be struck out as an allegation of harassment. I return to it as an allegation of direct discrimination below.

77. Allegation 33 is that on15 June 2016, following the Claimant's interview on the previous day in respect of a clinical educator role, she was informed by Ayesha Langley in the corridor how she had performed even though Ms Langley had not been part of the interview panel. The unwanted conduct was Ms Langley getting involved in an issue that the Claimant felt did not concern her, but the Claimant could not say how it was related to her race. She said she had never thought about that. Clearly therefore this allegation has no reasonable prospect of success, and so falls to be struck out as a complaint of harassment. I return to it below as an allegation of direct discrimination.

78. Allegation 52 is that on an unspecified date in 2016, Deborah Sands and others laughed loudly as the Claimant left the staff room. She did not hear what was said. When she raised it with Lucy Lenehan, Ms Lenehan did not deny that the laughter was directed at the Claimant, just telling her to forget it. The Claimant says the conduct in question was related to her race because all of the

group involved were white. Whilst it is quite possible an incident whereby a group of employees laughs at another would create the requisite environment, and whilst the language itself would not necessarily have to be related to race in order to be harassment as defined by section 26 of the Act (laughing at the Claimant because of her race, for example, would be enough) the Claimant is not able to say with any confidence what was said nor that the laughter was directed at her. The Claimant has little reasonable prospect therefore of establishing at a Final Hearing the facts necessary to make out this allegation. As a result, on its own merits, I would order that a deposit be paid to continue with it. There are however time limit issues to consider as well. I deal with these below.

79. Allegation 55 is that on 17 January 2017 after the Claimant had resigned, Matthew John informed her that her last working day would be 13 February even though that fell beyond her notice period. He emphasised that she was not permitted to take annual leave during her notice period as she was needed on the unit, though he put her under pressure to take leave on 17 January itself. The Claimant describes this as Mr John using his authority and that an Indian employee (Mr John is Indian) would not have been treated in this way. Whilst the conduct could just about be said to have created the requisite environment – on a generous interpretation it might be said that it created a hostile environment for example – it is difficult to see how it could be said to have been related to race. Given the Claimant's explanation however and given the cautious approach I am required to take, I would be prepared to step back from striking out this allegation and order a deposit to be paid to continue with it. There are however time limit issues to consider as well. These are dealt with below.

80. The final allegation of harassment is number 56, which relates to 10 February 2017 and is detailed above. The Claimant said she did not know how the conduct was related to race, making only the most general of suggestions. On her own account therefore, it must be concluded that this allegation of harassment has no reasonable prospect of success and must be struck out. I return to it as an allegation of direct discrimination below.

**Direct race discrimination**

***Secondment/promotion opportunities***

81. The Claimant's complaints of direct discrimination in relation to secondment and promotion opportunities are in outline as follows:

a. an absence of communication to her of when her opportunity to undertake the four-month secondment would come, others being told ahead of time;

b. the related allegation of lack of transparency about the selection for secondments, her having told Ms Lenehan before the secondments started that she would be interested;

c. being excluded from the secondment by contrast with colleagues who had less experience and who were less well-qualified; and

d. the fact that despite assurances to the contrary this affected her prospects of securing a permanent Band 6 role – in particular, others were invited to apply for Band 6 roles and she was not.

Essentially, the Claimant says that she was treated less favourably in these respects than her colleagues who were close to Ms Audas (and to Ms Lenehan as Ms Audas' assistant).

82. Turning to the detail, allegations 5, 6 and 8 are general allegations related to the four-month secondment, all said to apply to the period from 2015 through to the Claimant's resignation. Allegation 5 concerns lack of transparency and the Claimant being denied knowledge of when her turn would come, whilst allegation 6 concerns lack of communication and the disadvantage for promotion opportunities. Both reference other staff going on secondment. Allegation 8 is outlined above.

83. Allegation 9 is also referred to above, the Claimant's case being that from 2015 until she left she was unable to apply for a Band 6 role as managers did not like her. Those liked by and close to Ms Audas, who were White or Asian, were invited to apply for such roles and it became widely known who would get a particular job before any interviews took place. The Claimant says she felt Ms Audas was "pushing [her] away". The specific occasions she says she is referring to were in October 2015 and November 2016. In relation to the latter the Claimant says she did not apply for the role because she felt she would not be able to compete with two candidates who had been given secondment opportunities.

84. Allegation 11 is that in September 2015 the Claimant asked Ms Audas where she was in the list for Band 6 rotations and was told "I don't know". The Claimant says she was scared by the tone of Ms Audas' voice and felt unable to enquire further. The Respondent says this was a one-off incident as no further such request was made. This is what the allegation itself clearly says, but it does seem to me to bear significant resemblance to allegations 31 and 40 (see below) as well as being bound up with the broader complaints about not being given a secondment opportunity. I return to the question of any connection between these allegations for time limit purposes below.

85. Allegation 12 is identical to allegation 13 detailed above, except that it is put as an allegation of direct race discrimination, namely that in September 2015 Julie Paxton was told by Ms Audas to prepare for a four-month secondment, and no such offer had been made to the Claimant. Allegation 28 is essentially identical to the first part of allegation 29 detailed above, namely that on 23 March 2016 Bindhu Kallumkal was asked by Ms Audas to undertake the four-month secondment and the Claimant was not. The balance of allegation 29 repeats allegation 30 detailed above, namely that on 26 March 2016 Ms Audas made clear Mr John should be appointed above Ms Wilson as a permanent Band 7. I do not see how that part of allegation 29 can be said to be less favourable treatment of the Claimant and therefore as an allegation of direct discrimination it must be struck out as having no reasonable prospect of success.

86. Allegation 31 is that after she had been told Bindhu Kallumkal had been offered the opportunity for a Band 6 secondment, the Claimant asked Ms Audas on 7 April 2016 if the list for the secondments had enough people, getting the reply, in an annoyed manner, "You are on my list". The Claimant says this is another example of Ms Audas not wanting to talk to her about the matter whilst being happy to talk with others.

87. Allegation 32 is also very arguably part of this overall picture. The Claimant says that on 23 May 2016 she contacted Ms Lenehan having been invited by her to do so in connection with being supported in her application for a clinical educator role. Ms Lenehan promised to come back to the Claimant, but never did. The Claimant says she "feels" that Ms Lenehan supported another candidate for the role, Anna Milton-Thompson, and she could not see any reason for that. Putting aside time limit issues for the moment and noting that I will return to the Respondent's general submissions below, I do not say that on its face this allegation has no reasonable prospect of success. The Claimant says she could not see the reason for Ms Lenehan's actions, a comment which could conceivably be read as saying that race was not the reason, but it seems clear the Claimant's point is that she alleges it was because of her race on the basis that no other reason was apparent to her. I must note however that the Claimant engages in speculation as to whether Ms Lenehan supported Ms Milton-Thompson and has no evidence for her assertion that she did. On that basis, purely in terms of the Claimant establishing the factual basis of her case, I find that this allegation has little reasonable prospect of success and so the Claimant should pay a deposit as a condition of continuing to pursue it.

88. Allegation 33 is also very arguably part of the broad issue of promotion opportunities. The facts are already stated above. The complaint is that on 15 June 2016 Ms Langley did, and Ms Audas did not, provide feedback to the Claimant about her interview. The Claimant says that Ms Audas "probably" gave feedback to other candidates who were "in her group". That is clearly speculation. The Claimant "suspects" Ms Audas talked about her interview performance outside of the formal process – again, this is speculation. Whilst I do not strike it out in the absence of having considered the detailed evidence, there seems to me to be little reasonable prospect of the Claimant establishing the factual basis for this allegation and a deposit should be paid accordingly as a condition of the Claimant continuing to pursue it.

89. Allegations 40 to 42 relate to the Claimant's appraisal meeting with Ms Lenehan on 8 October 2016. Allegation 40 is that when the Claimant asked where she was on the secondment waiting list, Ms Lenehan (who allegedly denied knowledge, the Claimant believes disingenuously because of her close working relationship with Ms Audas) said that she would speak with Ms Audas but did not come back with an answer. Allegation 41 is that Ms Lenehan did not state in the record of the meeting that the Claimant had informed her she would not apply for a Band 6 role in November 2016 because she knew managers would give the role to someone who had been seconded. She says that Ms Lenehan did not want a black African voice heard and would have recorded the comment if it had been made by someone not of the Claimant's race. The Respondent says, quite possibly with some justification, that not everything is recorded in an appraisal document, but that is a matter of evidence and not for consideration at this Preliminary Hearing. This is confirmed by the fact that the Claimant disputes that she said what is actually recorded by Ms Lenehan, namely that the Claimant did not "feel it [a Band 6 role] was right for her at this stage".

90. Allegation 42 is that at her appraisal meeting the Claimant requested the opportunity to do "benchmarking", i.e. assessment of colleagues' work. It is alleged that Ms Audas subsequently stipulated benchmarking experience as a requirement for undertaking a Band 6 secondment (not the four-month

secondment but a separate opportunity), the Claimant believes in order to stop her applying. She was not going to apply for this secondment anyway, there being what the Claimant says were the usual rumours that someone else would get it. She says that the detriment she suffered is not understanding the requirements for the role. On the basis that what the Claimant alleges as a detriment in this respect is wholly unclear, that she did in fact on the face of the allegation know that benchmarking was a requirement and given that it is certainly not for me to second-guess the nature of the allegation, I find that it has no reasonable prospect of success and should be struck out.

91. Allegation 44 is that on 19 October 2016, another colleague of the Claimant's, Ms Jojjy Joseph, who is Indian, informed her that she would be starting the four-month Band 6 secondment in December. The Claimant says Ms Joseph was the third Indian to be given the secondment opportunity, even though she had joined the Unit after the Claimant and was less qualified than her. The Respondent relies on its explanation that the secondment opportunities were provided on a "first come, first served" basis. As I have said, whilst it may well be able to establish a defence on these grounds, this is a matter of contested evidence to be considered at a Final Hearing. Again, I return to time limit issues below.

92. Allegation 45 relates to 8 November 2016. The facts are already set out above. Mr Massey and Ms Pillai got the jobs, both having been on secondment; the Claimant says she did not have the opportunity to apply for it, because she had not. The Respondent says they got the jobs because of greater experience but that is again a matter of evidence to be tested at final hearing. It also says there was no detriment as the Claimant did not apply; her case is that she did not do so because of the exclusion from the secondment opportunity, thus effectively being prevented from applying. I return to this point below in addressing the Respondent's general submissions on these complaints.

93. Allegation 46 is that in December 2016 the Claimant was informed by Bindhu Pillai, a colleague of Indian race, that Ms Lenehan had told her that her secondment would start in March 2018. The Claimant says that she was the only senior Band 5 nurse who was waiting for a secondment opportunity without knowing when her turn would come.

94. The facts of allegation 48 are set out above, relating to 5 December 2016. The complaint is about Ms Hatch's failure to respond to the Claimant's stated concerns about secondments and promotions. The Claimant was unable to articulate with whom she compared her treatment in this regard, though she pointed to her earlier complaint about Kevin Ullah (see allegation 3 above and below) as evidence, she says, of the fact that others' complaints were dealt with properly and hers were not. She says she does not know whether Ms Hatch's failure to respond was because of her race or another reason. On that basis alone, whilst I would not strike out this allegation because race does not have to be the sole factor in an act or omission in order for there to be unlawful race discrimination, on the Claimant's own stated case it must have little reasonable prospect of success, the Claimant herself offering no more than a suggestion as to the reason for Ms Hatch's actions or omissions. The Claimant must therefore pay a deposit as a condition of continuing to pursue this allegation.

95. Finally, allegation 51 is that in December 2016, at the time when Anna Milton-Thompson was to go on leave, Ms Audas omitted to approach the Claimant to

see if she was interested in covering the role, even though the Claimant had been the only other person to show an interest in the role when Ms Milton-Thompson was herself interviewed for it. The Claimant compares this to Ms Audas' practice of regularly approaching others, such as Julie Paxton and Pui Hepplewhite, when opportunities arose. The Respondent says this is explained by operational reasons, but that is a matter of evidence for a final hearing.

96. As I have already indicated, in addressing the specific allegations outlined above the Respondent makes a number of general submissions in support of its case that they should be struck out or made subject to deposit orders. Putting aside for the moment the question of time limits, it is appropriate to deal with those general submissions at this point:

a. The Respondent characterises the Claimant's case as being that Ms Audas (and Ms Lenehan) acted as they did because of friendship and not because of considerations of race, allegation 37 related to Ms Paxton being said to be specific evidence of that. The Respondent may be able to establish that at a Final Hearing on the evidence, but by itself at this preliminary stage it cannot lead to the complaints being struck out, nor does it suffice to require a deposit order in my judgment for at least three reasons. First, race only has to be a significant factor in the alleged acts and omissions; it does not have to be the predominant factor. Secondly, the Claimant's case is that the group excluded people of her race, which is plainly an allegation of race discrimination. Thirdly, it is clear that not all white people would have to be included in the group in order for the Claimant to establish that she was discriminated against because of her race.

b. The Respondent says that the Claimant's case in relation to the allegations outlined above has evolved from her complaint to the Respondent which was dealt with in May 2017, through her Claim Form, witness statement and even her submissions at this Hearing, so that by the time of this Hearing the Claimant was referring to a hierarchy of race, with white employees most preferred by Ms Audas, black Africans least preferred and Asians somewhere in between – something she had not said before. The evolution of the case, if such it is, may well be an important factor in the deliberations of a Tribunal at the final hearing stage, but again is not enough to mean that the complaints should be struck out or made subject to deposits as it is plainly something that has to be tested on the evidence, including by cross-examination of the Claimant. That is beyond the scope of this Preliminary Hearing.

c. The Respondent says that where the Claimant did not apply for a particular role (see allegation 9) there can have been no less favourable treatment and no detriment. Again, the Respondent is entitled to make those submissions at the Final Hearing, and it will be a matter for the Tribunal at that stage, but as I understand it the Claimant's case is that the Respondent omitted to encourage her to apply for roles unlike her colleagues who were not black African. An omission can of course be less favourable treatment under the Act. On the face of it, and without intending any comment whatsoever on the substantive merits, this type of allegation falls squarely within section 39(2)(b) of the Act.

d. The Respondent says the Claimant has not put forward any basis for her case that the treatment she complains of was because of her race. Indeed, that column in the Schedule is blank. The Respondent argues that in respect of many, if not all, of her allegations, the Claimant has put forward nothing more

than a difference in treatment and a difference in race, which it says is insufficient for a prima facie case of direct discrimination. I have indicated already where the way in which the Claimant puts her allegation means that it falls to be struck out. I am however reluctant to do so where there are evidential disputes, not least because as the case law makes clear the mental processes of the alleged discriminator are crucial to the "reason why" question, which is in turn a crucial issue in all direct discrimination cases. Moreover, whilst it is certainly not for me to make Claimant's case, taking the broad overview necessary at this preliminary stage, it might be said that the often elusive "something more" could be discerned from the general context of the case, for example the difference in experience and qualifications the Claimant asserts when comparing herself to those who were seconded or promoted. The Respondent says that those others were on a par with the Claimant in these respects, and/or that there were operational reasons for particular decisions. All of that may be a complete answer to the Claimant's case, but it is a question to be decided after hearing more detailed evidence.

e. At paragraph 92 of his written submissions Mr Cooksey refers to the experience of Pelly Wilson, which he says shows that there was no discrimination against the Claimant because as a black African Ms Wilson was in fact promoted and was in fact asked to apply for promotion. The Claimant puts a different slant on Ms Wilson's position as seen above, though she does say (for example at paragraph 34 of her witness statement, page 175) that Ms Wilson was better treated than her because of her higher grade. Again, the Respondent is perfectly entitled to draw attention to these matters, but they are by no means a complete answer to the Claimant's complaints; they are one factor the Tribunal will need to take into account in assessing all of the evidence and making its decision at the Final Hearing.

97. For the reasons given, I am not prepared to strike out or order deposits in relation to these allegations except where stated above. I return to time limits below.

***Other issues***

98. The remaining allegations of direct discrimination are very varied both in terms of when the relevant events are said to have occurred and their subject matter.

99. Allegation 1 is that at the start of the Claimant's employment in 2005, Ms Audas touched and felt the skin on her arm whilst teaching the Claimant on the assessment of blanching on skin. The Claimant was offended but felt she could not say anything. It is alleged that on 22 March 2016 Ms Audas walked up to the Claimant and started touching the skin on her arm. The Claimant felt Ms Audas was making fun of her, and no explanation or apology was offered. The Claimant refers to Ms Hatch not acting on the Claimant raising this with her in December 2016 but does not say that this was also an act of race discrimination. She believes Ms Audas' actions were acts of race discrimination because she felt Ms Audas believed the Claimant's skin would feel different to that of everyone else, and never saw her do it to others. There are clearly time limit issues with this allegation, particularly that relating to 2005 – see below.

100. Allegation 2 is that some time in 2008 Ms Audas informed another member of staff that she did not want the Claimant to obtain a supply of a particular hand cream, though other departments did so for staff who could not use the standard product. The Claimant could not understand Ms Audas' actions and says she would not have done it if it were one of her circle of friends. Mr Cooksey suggested that this explanation means that it cannot have been race discrimination as race is not said to be the reason for the treatment. As indicated above, that is not of itself a ground for strike out or a deposit order as the Claimant's case is that the alleged exclusion from and inclusion in the group was because of race. I agree with Mr Cooksey however that this allegation raises clear time limit issues, as it relates to events 6 years before the next alleged act of discrimination in August 2014. I return to time limits below.

101. Allegation 3, related to August 2014, is outlined above. The alleged discrimination is said to be Ms Audas not supporting the Claimant when she was bullied by Mr Ullah and criticising her for her response to Mr Ullah's alleged actions, whilst by contrast listening to others who had also complained about him. The Respondent says the Claimant's case is based on hearsay and raises nothing other than a difference in treatment and difference in status. That would not in my judgment provide a basis on which to strike out the allegation or make a deposit order as the nature of the evidence relied on by the Claimant would be something to be examined properly at a final hearing, and in the overall context of the case the other allegations may provide the "something more" if proven. Nevertheless, there are again time limit issues. As Mr Cooksey says, this is a discrete act, with Ms Audas as the only link to anything else – again, see below.

102. Allegation 4 is that in each of December 2014, 2015 and 2016 Ms Lenehan gave Christmas presents to the Claimant and three colleagues (two White British and one Indian) at a time when others, but not the Claimant, were getting promoted or being given information on when they would be seconded to Band 6. The Claimant says it was an attempt to stop her saying negative things about the Respondent. I agree with the Respondent that there is plainly no less favourable treatment and it also appears on the Claimant's own case that race is expressly not the reason for the treatment except perhaps on the most generous interpretation. This allegation must be struck out as having no reasonable prospect of success.

103. Allegation 10 is that on 15 July 2015 the Claimant missed two-hour mandatory training as Matthew John gave her more work than her colleagues. It is related to allegation 14, concerned with 21 September 2015, when she asked Mr John why she was always busy when others were relaxing. She says he told her that work wouldn't get done if he gave it to someone else, which the Claimant says was not fair. Again, there are clear time limit issues – see below.

104. I have already outlined allegation 15, which relates to September 2015 and Ms Audas' comment, "We don't work like that here" before the Claimant could finish raising her concern about Mr John. I agree with Respondent that it is difficult to see the less favourable treatment in this allegation; none is suggested by the Claimant, and it is certainly not for me to guess what it is. I see no prospect therefore of the Claimant establishing her case in this regard and on that basis, it should be struck out. I would in any event have struck it out as out of time for the reasons given below.

105. At allegation18 the Claimant says that on 21 October 2015 she asked Ms Audas for time to complete something called the "cardiac output package", which is a detailed heart assessment and part of the Claimant's training. She received no answer. On 22 October she asked Lucy Lenehan about it and was denied the time, and yet Deborah Sands had been given the time to do the work on the same day. There are again clear time limit issues to be considered – see below.

106. At allegation 22, without specifying a date, the Claimant says that on an ongoing basis until she left she was turned away when she reported problems on the Unit, such that she felt unable to report even bullying behaviour for fear of "getting told off and embarrassed". That is far too general an allegation for the Respondent to be expected to meet, and on that basis the general allegation should be struck out as having no reasonable prospect of success. The Claimant specifically cites an incident in September 2016 when she reported a patient's relative who had been aggressive to her and her colleague, Sylvy George. The Claimant alleges that Ms Audas listened to Ms George but said to the Claimant when the Claimant went to see her, "She [the relative] was ok with me yesterday". The Respondent says that the Claimant cites no more than a difference in status and a difference in treatment, though given the general context of everything else that is alleged to have been happening at around this time I would not have deemed it appropriate to strike out this allegation or order a deposit on that basis. Nevertheless, the Claimant does face considerable difficulty in my judgment in establishing that Ms Audas' reported comment is evidence of not wanting to hear her concerns – by contrast with her treatment of Ms George. On that basis the allegation has little reasonable prospect of success on its merits. There are also time limit issues – see below.

107. The facts of allegation 23 are detailed above; the Claimant says it relates to the period 2010 to the date of termination of her employment. She says that when she first raised with Ms Audas in 2010 the issue of colleagues speaking languages other than English, Ms Audas just looked at her; she says nothing was done about it. The Respondent says the Claimant's race is clearly not why the colleagues spoke a language other than English and that others not of the Claimant's race were similarly affected. I agree and therefore that part of this allegation must be struck out. As for Ms Audas not addressing the Claimant's concern, there are clear time limit issues given the concern was raised in 2010 and under section 123(4)(b) of the Act Ms Audas could reasonably have been expected to address it within a few months at most and more probably within weeks. I return to time limits below.

108. Allegation 24 is that on 18 January 2016 the Claimant asked to be retrained on something called NG Flocare, it was agreed she would be sent for training, but her request was not granted and so she was not up to date even though she was expected to train others. The Respondent says there may be many reasons why the request was not followed through, but a Preliminary Hearing is not the place to test those reasons. Further however, it is agreed that the Claimant was trained on other devices before delivering training which very much suggests non-discriminatory reasons were the likely explanation for what happened in this instance. Whilst it cannot be said at this preliminary stage without examining the relevant evidence that the case is hopeless, the broader context does suggest this allegation has little reasonable prospect of success. On its merits therefore, a deposit would have to be paid to proceed with it. I return to time limit issues below.

109. The facts of allegation 25 have already been outlined, related to 12 February 2016. The Claimant's complaint is that the arrangement that she would be observed by the university was made without the Respondent hearing her version of what had happened. The Respondent relies on its general argument of there being no more than a difference in status and treatment. Again, given that the general context might possibly provide the "something more" I would not be prepared to strike out or order a deposit on this basis. There are however time limit issues to consider. As for the second part of this allegation, namely that Pelly Wilson took no action when the Claimant reported the student to her for putting inappropriate footwear on a patient, as the Respondent points out Ms Wilson is also black African. Whilst of course that is by no means an absolute defence, the Claimant herself gave the explanation that Ms Wilson did not "have the guts" to speak to the student. That provides a reason for Ms Wilson's actions other than race which must mean this part of the allegation has no reasonable prospect of success and should be struck out.

110. The facts of allegation 27 have already been stated, related to 1 March 2016. The Claimant says it was direct discrimination because no-one else was refused help. As the Respondent points out, Ms Audas saying "No, no" is highly unlikely to evidence discrimination, particularly in the context of the Claimant asking for help "if you have time". It is also the case that John Campbell, who is white, was in the same position as the Claimant in having to work on the policy renewal without Ms Audas' support. I find that this allegation therefore has no reasonable prospect of success and should be struck out.

111. At allegation 34 the Claimant complains that Ms Lenehan had emailed her to arrange her appraisal meeting for 23 June but did not go ahead with it on that day. The Claimant believes that instead Ms Lenehan spent time with Ms Milton-Thompson, without informing or explaining the situation to the Claimant. Around 15 September Ms Lenehan rearranged the meeting for 22 September, but again it did not happen. The Respondent says that pressure of work on the Unit often leads to meetings being cancelled, though again that is to stray towards substantive evidence. Nevertheless, it is agreed that the meeting was eventually held on 8 October. The issue is the delays and cancellations but it does appear clear that Ms Lenehan was not avoiding the meeting and for that reason I see little reasonable prospect of this allegation succeeding on its merits and another deposit order would be appropriate. I return to time limit issues below.

112. At allegation 36 it is said that on 2 August 2016, Christopher Green instructed the Claimant to join the tissue viability team "as there was a lot of work to do". The Claimant alleges that Mr Green had previously said she could join the infection control team but did not in fact want her on that team because of her race, giving Deborah Sands a place on it later on. She further alleges that, partly as a result of placing her within the tissue viability team, Mr Green assigned her too much work and did not help her when she raised concerns about that; she says the work she was required to do could have been given to other Band 6 nurses. The Respondent says there were staffing shortages (see page 67) but that is a matter of evidence. It is nevertheless agreed that whilst the Claimant did move on to the tissue viability team she did not carry out any work in that capacity. On its face therefore, this allegation appears to me to have little reasonable prospect of success and so as to its merits a deposit would be ordered accordingly. I return to time limit issues below.

113. Allegation 43 is that on 11 October 2016 Ms Lenehan asked the Claimant to provide some training, for which she was the designated trainer, without warning or time to prepare, causing the Claimant's other work to back up for when she returned. It appears the organiser of the training, Ms Milton-Thompson, had not made the necessary arrangements for it. The Respondent says the allegation is speculative, the reason for the request being obvious – so that the training could be carried out – and that there is no indicator that the request was because of race. There was clearly nothing improper about the request itself, given the Claimant was the designated trainer. As for the context in which it was made, it seems that even on the Claimant's own case the explanation for what happened is Ms Milton-Thompson's failure to organise the training correctly. For these reasons this allegation has no reasonable prospect of success and must be struck out.

114. Allegation 50 is that on 13 December 2016 Ms Milton-Thompson sent an email to the Claimant and a number of colleagues (see pages 94 to 98) setting out what were called "staff link" roles but omitting the Claimant from the list even though she had several relevant duties. The Claimant replied and a further email was sent, on 16 December 2016, identifying one such role for the Claimant. The Claimant says there was a failure to recognise her even though she was carrying out relevant work. The Respondent says that the emails at pages 94 to 96 speak for themselves as the initial email says expressly that the list was out of date and inaccurate – that was the purpose of the email. Taking the cautious approach enjoined by the case law, there could always be another explanation for such events, but I agree that the explanation for what happened appears to be that set out on face of the initial email and therefore there is little reasonable prospect of the Claimant establishing race discrimination in this regard. Again therefore, a deposit order would be appropriate. I return to time limits below.

115. Allegation 52 concerns an incident on an unspecified date in 2016 as detailed above. The Claimant says she had never heard anyone else laughed at. For the reasons given above, the Claimant has little reasonable prospect of establishing at a Final Hearing the facts necessary to make out this allegation. On its own merits therefore, I would order that a deposit be paid to continue with it. There are however time limit issues to consider as well. I deal with these below.

116. Allegation 55 is also detailed above; it relates to 17 January 2017. In the end the Claimant did not work on 13 February. The Respondent says there was no detriment, but in relation to being told to take annual leave on 17 January the Claimant says that she had slept during that day (having worked the night before) thinking she would be working that evening; that may well fall within the broad understanding of detriment. As for having to work until 13 February, I do not take the Claimant as saying that she agreed she was needed on the Unit on that day; rather she sets out what she says she was told by Mr John. The Respondent says the Claimant is merely speculating that Indian staff would not have been treated the same and that there is no evidence that Mr John's actions were in some way because of the Claimant's race. In the broad context of the Claimant's complaints generally however, which may provide the "something more", I would not be prepared to strike out this allegation or order a deposit on this basis. Time limit issues are dealt with below.

117. Allegation 56 is detailed above. It concerns the Claimant finding out on 10 February 2017 that her last shift had been cancelled. The Claimant could not say how this was connected to her race, except that Mr John did not like her because of her race and treated Indian colleagues better. Whilst there are no time limit issues, on the Claimant's own explanation this allegation has little reasonable prospect of success and a deposit should be ordered accordingly.

118. Allegation 57 is also detailed above. The Claimant says Ms Sands "knew something" but did not think that this means what was written in the leaving card was "directly" discrimination. As the Respondent points out, the Claimant alleges no discrimination and no detriment in this regard. This allegation must be struck out as having no reasonable prospect of success.

**Time limits**

119. Turning to time limits, I deal first with the allegations relating to secondment and promotion opportunities. They are all those allegations of direct discrimination grouped as such above, together with allegations 47 and 54 as allegations of victimisation.

120. The Respondent says that the Claimant's case in this regard is analogous to that in **Sougrin,** which as noted above distinguished between a policy or rule of not upgrading black nurses and a one-off event of not regrading the employee in that case. I agree that this is not a case whereby there is said to have been a policy or rule which disadvantaged black African staff. The Claimant does refer to a group of staff being favoured by Ms Audas in various different respects related to secondments and promotion and says that this was on the grounds of race; she also says in some of her more general allegations that this was the case from 2015 until her departure. Nevertheless, when one reads her Claim Form, the Schedule, her witness statement and so on, what one reads is clearly a set of complaints about a number of acts rather than a case that there was a policy or rule which meant that she was denied the secondments and everything that went with that. That is clear from the summary of the various allegations I have set out.

121. The first question that follows therefore is whether those acts are such that the Claimant has a reasonably arguable basis for her contention that her complaints of discrimination are so linked as to be continuing acts. I have no hesitation in concluding that she does. What the Claimant puts forward is the regular occurrence of events which she says disadvantaged her on the common subject of secondment and promotion opportunities, involving principally Ms Audas and Ms Lenehan, and to a lesser extent Ms Hatch. On any assessment, although of course the Tribunal at a Final Hearing may decide that they were no more than isolated acts, that is a reasonably arguable basis for linking these allegations together as a continuing act. I should add that there is no inconsistency of course between that conclusion and my finding that the Tribunal at final hearing is likely to conclude for unfair dismissal purposes that if the contract of employment was fundamentally breached it was subsequently affirmed. The two issues fall to be considered separately in the context of two different types of complaint.

122. These allegations of discrimination stretch from September 2015 to 16 January 2017, the latter date relating to allegation 54 which is a complaint of victimisation. In the absence of allegation 54, given that Ms Hatch did not get back to the Claimant until they spoke again on 16 January 2017 and that the

Respondent did not respond to her complaints by the time she left its employment, section 123(4)(b) of the Act would in all likelihood mean that the Respondent could reasonably have been expected to deal with the Claimant's complaints within a couple of months of the meeting with Ms Hatch on 5 December 2016 at the outside. Either way, and even accounting for ACAS Early Conciliation, the Claimant presented her complaints of discrimination in this regard after the end of the period of 3 months starting with the date of the act to which the complaint relates. The next question therefore is whether she did so within such other period as I think just and equitable.

123. Having regard to the approach set out by the Court of Appeal in **Morgan**, I conclude that she did for the following reasons:

a. The Claimant advanced a number of reasons as to why her complaint was presented late. These were in summary: ignorance of her rights and in particular employment tribunal time limits; the hope that matters would be resolved internally – her focus was on trying to stay at work and do her job until in her words it all became too much; and her fear of challenging the Respondent even after she handed in her resignation – she described feeling distressed at having decided to leave a job she had held for 11 years. Mr Cooksey says that there should be no extension of time as the Claimant did nothing to appraise herself of her rights, despite access to the Respondent's policies and to a trade union. It seems amply clear however, without making any judgment as to why, that the Claimant's relationship with her trade union was not a constructive one and it also seems clear that the union did not advise her of Tribunal time limits. Accordingly, the Claimant did not secure advice on such matters until after the termination of her employment; it was not suggested that the Respondent's policies provided such information. She acted with reasonable promptness thereafter in preparing and presenting her complaints. It was also reasonable in my judgment for her to continue with the hope and expectation that her disputes with her employer of 11 years might be resolved internally even after she gave notice – a conclusion which is reinforced by the fact that her complaints were given detailed consideration even after her employment terminated – and therefore reasonable to delay focussing on an alternative course until after she had left the organisation.

b. Secondly, given my conclusion as to the reasonably arguable basis for there having been a continuing act, the delay in bringing the complaints is not substantial. Even if I were to say that time should begin to run from some time in December 2016 (which would not be correct in my view), the complaints were presented only two months out of time. The correct approach in my view is to take into account the victimisation complaint pleaded as allegation 54, or otherwise to allow for the time in which the Respondent could reasonably have been expected to respond to the Claimant's internal complaints, say to mid-January 2017 to account for the Christmas break. Allowing for about a month's extension to the usual time limit to account for ACAS Early Conciliation, the complaints were therefore presented little more than a month out of time. That is not a substantial period.

c. The connected and crucial point is that of prejudice to the Respondent and to the ability to conduct a Final Hearing which considers the events to which these allegations relate, which by the time of that Hearing may be between

two and three years past. The Respondent suggested no grounds on which it would be prejudiced by an extension of time. Broadly speaking that was in my view quite correct in the circumstances of the case. It investigated the Claimant's complaints in April and May 2017; it is fair to assume it will be able to rely on the contents of that investigation in compiling its defence. It is also clearly able to articulate its case at least in respect of the four-month secondment issues, as evidenced by the statement put forward by Ms Audas for this Preliminary Hearing. There is therefore no suggestion that the cogency of the evidence will be impaired by the slight delay in the complaints being made to the Tribunal. As a subsidiary point, I note that if she pays the requisite deposit, the Claimant will in any event be permitted to argue a case of unfair dismissal which will essentially be based on the same facts. If she does, then the Respondent will be required to answer a similar case anyway. There is therefore no prejudice to the Respondent, by contrast with the substantial prejudice to the Claimant if she were unable to pursue her case.

124. For all of those reasons, I find that the allegations of victimisation numbered 47 and 54, and of direct discrimination numbered 5, 6, 8, 9, 11, 12, 28, 31, 32, 33, 40, 41, 44, 45, 46, 48 and 51 were presented in such further time after the usual time limit as was just and equitable and – subject to payment of deposits in relation to both of the victimisation allegations and in relation to the direct discrimination allegations numbered 32, 33 and 48 – should be considered at a Final Hearing.

125. The picture is very different when one turns to consider the Claimant's other allegations of direct discrimination and harassment, i.e. those not related to secondment and promotion opportunities (there are no remaining complaints of victimisation to consider in this group). Excluding for the moment allegations 50, 55 and 56, as I have already indicated what one sees is a multiplicity of very different issues – they include the Claimant not being given hand cream, not being trained, not having complaints dealt with (unrelated to secondment and promotion), being laughed at in the staff room and her appraisal being delayed. One also sees a variety of different employees of the Respondent against whom the allegations are made – Ms Audas features again, as does Ms Lenehan, but in addition there are complaints regarding Mr John and Mr Green. The latest of these allegations – numbers 22 and 34 – relate to September 2016 and allegation 36 relates to August 2016. The latest one before that – the first part of allegation 34 – concerns June 2016, a whole year before the complaints were presented to the Tribunal, and many of the others relate to dates substantially earlier than that.

126. The Claimant says that these allegations too concern acts which were continuous with each other and indeed with the allegations concerning secondment and promotion. She says it was the same people in the same group who were mainly responsible for the discrimination she alleges took place. Others like Matthew John were outside of the group as such, but she says she could not report him to management, and the group around it, because she "kept being pushed away" by management and that group and so Mr John felt able to treat her inappropriately. She accepted in closing submissions however that some of the issues she raises were isolated problems.

127. That it seems to me is the characterisation of all of them, including allegations 22, 34 and 36. The alleged involvement of Ms Audas in some of them is not enough in my judgment to give the Claimant a reasonably arguable basis to connect them to each other or to the allegations concerning secondment and

promotion, given their very disparate subject matter and in some cases the substantial periods of time between the acts complained of. Further, the complaints about these matters were not presented within such further period beyond the normal time limit as I think just and equitable. This is so for three reasons. First, the grounds for the delay by the Claimant do not equate to those outlined above in relation to the secondment and promotion issues, in that she had not by September 2016 consulted formally with her trade union on anything other than isolated concerns – her meeting with the union representative was not until the end of October – and neither had she begun to explore formal resolution of her complaints with the Respondent, which began only in November 2016. Secondly, the delays are more substantial, in some cases many years, but at least many months. Thirdly and related to that, although as noted the Respondent did not put forward any arguments as to prejudice, it is clear from its letter to the Claimant in May 2017 that in relation to allegations 1, 2, 10, 18 and 52 the Respondent had difficulty in being able to investigate them. On these grounds, each of allegations 1, 2, 3, 10, 18, 22, 23, 24, 25, 34, 36 and 52 are struck out on the basis that they were not presented to the Tribunal in time.

128. That leaves allegations 50, 55 and 56. Allegation 56 was presented in time and should proceed to be considered at a Final Hearing, subject to payment of a deposit if it is to be considered as a victimisation complaint. Allegation 55, like 56, concerns Mr John and is of similar substance, such that there is a reasonably arguable basis for the two to be connected. It too is therefore in time and should be considered at a Final Hearing, subject to payment of a deposit if it is to be considered as a harassment complaint. Allegation 50 concerns Ms Milton-Thompson's conduct on 13 December 2016. For the reasons given in relation to the secondment and promotion issues, I am prepared to extend time in relation to this allegation and so, subject to payment of a deposit, it too should proceed to be considered at a Final Hearing.

**Deposits**

129. The final matter to consider is the amount of the deposits which the Claimant should be ordered to pay. Of the surviving allegations of discrimination, deposits fall to be ordered in respect of nine. There is also the complaint of unfair dismissal and my analysis of the difficulties the Claimant faces in that regard, which in turn affects the breach of contract complaint. I am conscious of the judgment in **Hemdan** to the effect that whilst deposit orders should discourage claimants from pursuing complaints with little reasonable prospect, they should not amount to strike out orders by the back door and must therefore be capable of being complied with. I must also stand back and consider the overall picture.

130. Given my analysis, it is plainly right to signal to the Claimant the need to consider very carefully those matters she wishes to take to a final hearing. That is also fair to the Respondent, as a means of potentially limiting the matters it is required to deal with on the substantive evidence. The Claimant's income is not insubstantial but is nevertheless relatively modest. On the basis of her income alone I would have been minded to order deposits amounting to a fairly low overall sum. Her savings are however substantial, and whilst of course one would not wish to see them depleted as it is to her credit that she has saved to that level, ordering several deposits does give her a choice as to which, if any, allegations to pursue. She is clearly able to afford, if it is important to her to do so, quite a substantial sum overall.

131. I cannot distinguish, nor would it be appropriate to do so, between the strength of the various allegations of discrimination in relation to which I have found there to be little reasonable prospect of success. On that basis, I order the Claimant to pay £1,000 as a deposit to continue to pursue each of the following, making a total of £9,000 if she pays the deposit in relation to each:

a. Each of allegations 47, 54 and 56 in so far as pursued as allegations of victimisation;

b. Allegation 55 in so far as pursued as an allegation of harassment;

c. Each of the following allegations of direct discrimination – 32, 33, 48, 50 and 56.

132. I also judge it appropriate to require the Claimant to pay one deposit of £1,000 to continue with her complaint of unfair dismissal given the various issues I have identified in relation to that. The same issues, which essentially mean there is little reasonable prospect of the Claimant establishing that she was dismissed, mean that her complaint of breach of contract (wrongful dismissal) also has little reasonable prospect of success. That complaint is of limited financial value, and therefore I would order a deposit of £500 to be paid in order to pursue this particular complaint. This makes an overall total of £10,500 should the Claimant choose to pay each deposit, which is a substantial amount of course but not beyond the Claimant's means to pay if that is how she chooses to proceed.

133. This matter will now be listed for a Telephone Preliminary Hearing as clearly case management orders are required to get the case ready for the Final Hearing and to fix dates for that Hearing. It may be, though of course it is for the Respondent to decide, that orders for limited further particulars will be required, for example to clarify whether the Claimant relies on race discrimination as the breach of trust and confidence, or whether she says there was such a breach whether or not she was discriminated against.

134. As I indicated at the end of the Hearing, annual leave and other professional commitments were likely to create some delay in writing my Judgment and Reasons. It has also been a lengthy task to do so. I nevertheless apologise to the parties for the delay, and trust that the matter can now progress promptly to a Final Hearing if it is not possible for them to resolve it otherwise.

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Employment Judge Faulkner
Date: 13 April 2018

JUDGMENT SENT TO THE PARTIES ON
14 April 2018
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FOR THE TRIBUNAL OFFICE