

Reserved judgment



EMPLOYMENT TRIBUNALS

Between:

Claimant: Dr Vivienne Lyfar-Cissé
First Respondent: Western Sussex Hospitals NHS Foundation Trust
Second Respondent: Brighton and Sussex University Hospitals NHS Trust
Third Respondent: Marianne Griffiths
Fourth Respondent: Evelyn Barker

**Heard at London South Employment Tribunal on 19-21 & 25-27
September 2018**

Before Employment Judge Baron

Lay Members: Ms S Campbell and Mr S Goodden

Representation:

Claimant: *Althea Brown*
Respondent: *Thomas Kibling*

JUDGMENT

It is the unanimous judgment of the Tribunal that the claims by the Claimant be dismissed.

REASONS

Introduction and overview

- 1 I must first of all apologise to the parties for the delay in being able to issue this judgment. This has been caused by the length of the oral hearing and consequent substantial volume of evidence, the commitments of the lay members outside of the Tribunal, and not least the very severe shortage of judicial resources.

- 2 We will refer to the First Respondent as 'WSH' and the Second Respondent as 'BSUH' (or simply as 'the Trust' where appropriate), and we will refer to Mrs Griffiths and Mrs Barker by their names.
- 3 The principal matter which caused these proceedings to be initiated was the dismissal of the Claimant from the employment of BSUH with effect from 27 September 2016. The claims being made by the Claimant are of 'ordinary' unfair dismissal, and also of automatic unfair dismissal on the basis that the reason (or principal) for the dismissal was that she had made protected disclosures. The Claimant also alleges that the dismissal was an act of victimisation within section 27 of the Equality Act 2010. The Claimant further alleges that she was caused detriments short of dismissal by reason of having made protected disclosures, which detriments are also alleged to be acts of victimisation. We set out the agreed list of issues in full below.
- 4 WSH is involved in this matter as each of Mrs Griffiths and Mrs Barker were employed by WSH. In broad terms that Trust took over the management of BSUH from 1 April 2017. Fuller details are set out below.
- 5 Evidence on behalf of the Respondents was given first. We heard from the following in this order:
 - Marion Griffiths – CEO of WSH and from 1 April 2017 BSUH also;
 - Evelyn Barker – Interim CEO of BSUH from 23 January to 31 March 2017 and then MD of BSUH from 1 April 2017;
 - Michael Viggers – Chairman of WSH from January 2012 and then also Chairman of BSUH from 1 April 2017;
 - Dr George Findlay – Chief Medical Officer and Deputy CEO of WSH from January 2014 and then also of BSUH from 1 April 2017.
- 6 The Claimant gave evidence and did not call any other witnesses. We must comment on the Claimant's witness statement. Miss Brown described it as being both 'comprehensive' and also dealing 'concisely with the issues.' We do not recognise the second description. The statement was of 92 pages containing 316 paragraphs. It goes far beyond evidence of facts, and contains much of what could be considered as arguments, representations and submissions. That has made our task more difficult than it need have been. What we have done is to make our findings of fact on a provisional basis, and then re-read the Claimant's statement to ascertain if there were any items of factual evidence which we had overlooked. We have not sought to comment on each of the arguments put forward by the Claimant as she was represented by counsel at this hearing.
- 7 We had an agreed set of bundles of just over 2,000 pages, and the Claimant had provided a supplemental bundle. Some further documents were added during the hearing by agreement and we do not consider it necessary to record the details. We have only taken into account those documents, or parts of documents, to which we were referred.

List of issues

- 8 The following is the list of issues agreed between the solicitors for the parties:

UNFAIR DISMISSAL

1. What was the reason for the dismissal –
 - (i) The requirement of Regulation 5
 - (ii) Because C's conduct meant it was not credible for her to continue in her role
2. Were each or either of (i) and (ii) above potentially fair reasons within s.98(2) i.e. SOSR?¹
3. Was the principal reason one of the automatically unfair grounds – s.103A?
4. Did the Respondents carry out a reasonable investigation?
5. Did the Respondents carry out a reasonable decision-making process?
6. Had the Respondents predetermined the decision to dismiss C?
7. Did the decision makers genuinely believe that C should be dismissed by reason of 1(i) or 1(ii) above?
8. Was dismissal by reason of 1(i) and 1(ii) within the range of reasonable responses reasonable in all the circumstances?
9. If the dismissal of C was unfair because of the procedural failing, should there be a reduction in the amount of compensation to reflect the chance that there would have been a fair dismissal if the dismissal had not been procedurally unfair?

VICTIMISATION

10. Did R subject C to a detriment because she had done any of the following protected acts:
 - (i) 2007 ET Claim no 3100282/2005 (RD)
 - (ii) 2008 ET Claims no 3103597/2007 RD & V, 3103721/2008, 3102646/2008
 - (iii) 2013 ET Claims no 3101768/2012, 3102563/2012, 310338/2012 (RD & V)
 - (iv) 2015 ET Claims no 2302458/2015 (RD & V)
 - (v) 2017 ET Claims no 2300700/2017 (RD & V)²
11. Did the Respondents have knowledge of these protected acts at the material time?

Further protected acts relied on

12. C relies on the following protected acts:

¹ See below as to 'SOSR' being within section 98(1) and not section 98(2).

² Wrongly noted as 2200700/2017 in the agreed list of issues.

- (i) Email to Fourth Respondent dated 31 March 2017
- (ii) Email to Fourth Respondent and Helen Weatherill dated 25 April 2017
- (iii) Letter to Third Respondent dated 15 May 2017
- (iv) Letter to Third Respondent dated 17 May 2017
- (v) Letter to Third Respondent dated 7 June 2017
- (vi) Notes for meeting dated 14 June 2017
- (vii) Grounds of Appeal dated 17 July 2017

13. In so far as the matters relied on are protected acts, did the Rs subject C to the following detriments related to the making of the protected acts set out above:

- (i) A misinterpretation of Regulation 5 by deciding it applied to her in her role
- (ii) Submitting her to an investigation/decision making process outside the R's own disciplinary procedures
- (iii) Having a predetermined decision to dismiss
- (iv) Conducting an investigation which was outside the band of reasonable responses
- (v) By reason of the findings made in the disciplinary process that C was unfit for her role
- (vi) Setting aside and/or increasing the disciplinary sanction of final written warning
- (vii) By failing to comply with the ACAS code of Practice on Disciplinary and Grievance Procedures
- (viii) By C being dismissed

WHISTLEBLOWING/PIDA

14. Were any or all of the following protected/qualifying disclosures because, in the reasonable belief of C, they contained information tending to show that the C's employer had failed or was likely to fail to comply with a legal obligation related to race equality:

- (i) July 2008 publication of the South East Coast (SEC) BME Network.
- (ii) October 2015 BME Network disclosure to CQC concerning racism within the Second Respondent which contributed to the Second Respondent being placed in special measures
- (iii) March 2016 BME Network disclosure to CQC concerning racism within the Second Respondent which contributed to the Second Respondent being placed in special measures
- (iv) June 2016 BME Network disclosure to CQC concerning racism within the Second Respondent which contributed to the Second Respondent being placed in special measures
- (v) September 2016 BME Network disclosure to CQC concerning racism within the Second Respondent which contributed to the Second Respondent being placed in special measures

- (vi) 26 January 2017 C presented the WRES report to the Second Respondent's Trust Board highlighting continuing disadvantage suffered by BME staff
- (vii) 9 February 2017 C presented the WRES report to Brighton and Hove CCG highlighting continuing disadvantage suffered by BME staff
- (viii) 13 April 2017 C presented an update to Brighton and Hove CCG highlighting continuing disadvantage suffered by BME staff
- (ix) 24 April 2017 C organised a focus group session with CQC and BME Network highlighting the discrimination of BME staff including the discrimination of BME staff working in the Facilities Estates department
- (x) 25 April 2017 C reported to the Fourth Respondent that C had advised CQC regarding the failings set out above

15. Did C suffer the following detriments:

- (i) A misinterpretation of Regulation 5 by deciding it applied to her in her role
- (ii) Submitting her to an investigation/decision making process outside the R's own disciplinary procedures
- (iii) Having a predetermined decision to dismiss
- (iv) Conducting an investigation which was outside the band of reasonable responses
- (v) By reason of the findings made in the disciplinary process that C was unfit for her role
- (vi) Setting aside and/or increasing the disciplinary sanction of final written warning
- (vii) By failing to comply with the ACAS code of Practice on Disciplinary and Grievance Procedures
- (viii) By C being dismissed

Regulated Activities Regulations

9 The interpretation of these regulations formed a material part of the decision to dismiss the Claimant and were referred to at length during this hearing. The regulations are the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 made under the Health 2008 Act. We reproduce those provisions of the 2008 Act mentioned by Mr Kibling in his closing submissions:

8 "Regulated activity"

(1) In this Part "regulated activity" means an activity of a prescribed kind.

(2) An activity may be prescribed for the purposes of subsection (1) only if--

- (a) the activity involves, or is connected with, the provision of health or social care in, or in relation to, England, and

20 Regulation of regulated activities

- (1) The Secretary of State must by regulations impose requirements that the Secretary of State considers necessary to secure that services provided in the carrying on of regulated activities cause no avoidable harm to the persons for whom the services are provided.
- (2) The Secretary of State may by regulations impose any other requirements in relation to regulated activities that the Secretary of State thinks fit for the purposes of this Chapter, including in particular provision with a view to--
 - (a) securing that any service provided in the carrying on of a regulated activity is of appropriate quality, and
 - (b) securing the health, safety and welfare of persons for whom any such service is provided.
- (3) Regulations under this section may in particular--
 - (a) make provision as to the persons who are fit to carry on or manage a regulated activity;

10 The material provisions of the 2014 Regulations are set out below.

**Part 2
Regulated Activities**

3 Prescribed activities

- (1) Subject to paragraphs (3) and (4), the activities specified in Schedule 1 are prescribed as regulated activities for the purposes of section 8(1) of the Act.
- (2) An activity which is ancillary to, or is carried on wholly or mainly in relation to, a regulated activity shall be treated as part of that activity.
- (3) An activity is only a regulated activity if it is carried on in England.
- (4) The activities specified in Schedule 2 are not regulated activities.

Requirements in Relation to Regulated Activities

Section 1

Requirements relating to persons carrying on or managing a regulated activity

5 Fit and proper persons: directors

- (1) This regulation applies where the service provider is a body other than a partnership.
- (2) Unless the individual satisfies all the requirements set out in paragraph (3), a service provider must not appoint or have in place an individual--
 - (a) as a director of the service provider, or
 - (b) performing the functions of, or functions equivalent or similar to the functions of, such a director.
- (3) The requirements referred to in paragraph (2) are that--
 - (a) the individual is of good character,
 - (b) the individual has the qualifications, competence, skills and experience which are necessary for the relevant office or position or the work for which they are employed,
 - (c) the individual is able by reason of their health, after reasonable adjustments are made, of properly performing tasks which are intrinsic to the office or position for which they are appointed or to the work for which they are employed,
 - (d) the individual has not been responsible for, been privy to, contributed to or facilitated any serious misconduct or mismanagement (whether unlawful or not) in the course of carrying on a regulated activity or providing a service elsewhere which, if provided in England, would be a regulated activity, and
 - (e) none of the grounds of unfitness specified in Part 1 of Schedule 4 apply to the individual.
- (4) In assessing an individual's character for the purposes of paragraph (3)(a), the matters considered must include those listed in Part 2 of Schedule 4.
- (5) The following information must be available to be supplied to the Commission in relation to each individual who holds an office or position referred to in paragraph (2)(a) or (b)--
 - (a) the information specified in Schedule 3, and

- (b) such other information as is required to be kept by the service provider under any enactment which is relevant to that individual.
- (6) Where an individual who holds an office or position referred to in paragraph (2)(a) or (b) no longer meets the requirements in paragraph (3), the service provider must--
- (a) take such action as is necessary and proportionate to ensure that the office or position in question is held by an individual who meets such requirements, and
- (b) if the individual is a health care professional, social worker or other professional registered with a health care or social care regulator, inform the regulator in question.
- 11 Schedule 1 to the Regulations defining 'regulated activities' is extensive. We gratefully adopt the summary in Mr Kibling's submissions of those activities as 'including all of the day to day activities intrinsic in running an acute hospital and undertaken by [WSH and BSUH] including, for example: the treatment of diseases and injuries; surgical procedures; diagnostic and screening services; and maternity provision.'
- 12 The CQC has published a Guidance to the Regulations.³ The note relating to regulation 5(2) states:
- For NHS bodies it applies to executive and non-executive, permanent, interim and associate positions, irrespective of their voting rights. The requirement will also apply to equivalent director posts in other providers, including trustees of charitable bodies and members of the governing bodies of unincorporated associations.
- 13 The CQC also issued a document entitled 'regulation 5: Fit and proper persons: directors'.⁴ Mr Kibling drew our attention to the following paragraph:
- The provider will have to ensure that it complies with the regulations by not having an unfit director in place. Ultimately, it is for providers to determine which individuals fall within the scope of the regulation, and for CQC to take a view on whether this has been done effectively.
- 14 There was yet a further document in the bundle apparently issued by NHS Employers, NHS Confederation, and NHS Providers.⁵ That document stated specifically that the provisions of the 2014 Regulations covered persons appointed to an executive director level post (including associate director) and also non-executive directors.
- 15 Mr Kibling also referred in his submissions to other documents, but in our view, they do not differ materially from the Guidance or the NHS Employers document.
- 16 We were shown an extract from the minutes of the Appointment and Remuneration Committee meeting of WSH held on 4 March 2015.⁶ A paper had been prepared concerning the above regulations. The minutes record that a 'Declaration of Interest and Fit and Proper Person Process' was to be adopted as in the paper which was to cover 'all Board Member, Chiefs of Service and those staff holding a "Director" role' but in addition

³ [1296]

⁴ [1412]

⁵ [1433]

⁶ [1542]

it was to be extended to cover those with 'Director' in their title as they were often in attendance at Board or Board Committees.

- 17 We make further mention below concerning the application of the Regulations to the Claimant, but it is important to note this history of the consideration of them in WSH as well as the documents to which we have referred above.

Policies and other documents

- 18 BSUH had several policies and other documents to which we were referred. There was an Equality, Diversity and Human Rights Policy.⁷ Its contents are much as expected in such a document. We were only referred specifically to paragraph 5.8 which provides as follows:

All allegations of discrimination will be investigated in accordance to the Dignity at Work Procedure and the Disciplinary Policy and Procedures.

The Trust has a zero tolerance approach to discrimination and any behaviour or action which goes against the essence or letter of the Equality, Diversity and Human Rights Policy will normally constitute gross misconduct liable to disciplinary action, which may include dismissal.

- 19 BSUH also had an Investigation Policy and Procedure⁸ and a Disciplinary Policy and Procedure⁹ although we cannot trace having been specifically referred to either of those policies. BSUH also had an Employment Checks Policy.¹⁰ In the Introduction it is stated that the Policy was designed to ensure that BSUH complied with 'all relevant legislation' and specific mention was made of the 2014 Regulations. Our attention was drawn to the following in paragraph 5.3.1:

The 'Fit and Proper Person Test' as outlined below applies to Executive Directors and Non-Executive Directors.

There was then set out in that sub-paragraph a summary of the regulatory provisions. There is nothing further as to the applicability of the Regulations.

The facts

- 20 In making our findings of fact we have concentrated on the issues as agreed above. It is not appropriate to record all the evidence we heard, nor to make findings of fact on every issue raised before us. We have to deal with the matter in a proportionate manner.
- 21 BSUH is a NHS Trust running two principal hospitals, one in Brighton and the other in Haywards Heath. The Royal Sussex County Hospital in Brighton is a centre for emergency care. The Trust employs over 7,000 people on its two sites.
- 22 The Claimant was employed by BSUH from 1985. She is a clinical biochemist and was awarded a PhD in 1991. For about four years from 2009 the Claimant was seconded to work part time on a race equality

⁷ Provided as a separate document.

⁸ [1581]

⁹ [1559]

¹⁰ [1449]

programme for BSUH. In October 2014 the Claimant became Associate Director of Transformation on a full-time basis reporting directly to the CEO.

- 23 We were provided with a document containing the terms and conditions of that role. The appointment was in Band 9 and the Claimant's salary as at October 2014 was shown as £89,640, and she accepted in cross-examination that it was now in excess of £100,000. The Claimant was one of only nine employees in Band 9. No details of the role were included. We mention below a document prepared by the Claimant setting out what she said were her objectives in the role.¹¹ That document was sent to Mrs Barker on 13 March 2017. There were twelve numbered objectives. The first sentence reads as follows:

As agreed with Dr Fairfield my main objective is to progress the Race Equality Workforce Engagement Strategy and the Race Equality Patient Engagement Strategy until the new Board is in place.

- 24 The list of 12 objectives mentioned matters relating to BME staff. Included in the list as an objective was to 'chair local BME Network and arrange BME Network Meetings and Focus group sessions with CQC'. The Claimant was further to 'organise the BME Network office'.

- 25 In the document the Claimant added the following at the end:

As mentioned during the meeting I have an agreement with the Trust whereby I have four days a month to pursue the work of the NHS BME Network. This agreement has been honoured by all CEOs since it was first established with the CEO Mr Selbie in 2010.

- 26 In her statement the Claimant said that she had operational lead for race equality.¹² In that capacity she developed the Workforce Race Equality Standard Strategy mentioned below. That was also one of her objectives.

- 27 The Claimant has been the Chair of the South East Coast BME Network in the past and is the current Chair of the national BME Network. She described the role of the BME Networks as seeking 'to hold NHS organisations to account to deliver on their statutory obligations concerning race equality.' In her witness statement the Claimant summarised the role of the BME Networks as being the promotion of good race relations and the elimination of racial discrimination for employees and health service users.

- 28 On 26 September 2011 a Memorandum of Understanding was signed by the then Chief Executive of BSUH and by the Claimant in her two capacities as Chair of the BSUH BME Network and the Chair of the ten extant BSUH Race Equality Commission.¹³ It contained nine numbered paragraphs, and in paragraph number 9 there were twelve measures of success. The Claimant told us that that document was prepared as part of a settlement of a previous claim which she had brought to the Tribunal.

¹¹ [605]

¹² § 32. See also [800] being a witness statement by the Claimant for the purposes of an earlier claim.

¹³ [197]

The document is aspirational but clearly relates only to BSUH. The first paragraph is as follows:

The parties recognise the strong moral and business case for race equality and its positive impact on employer-employee and patient care. The parties hereby commit to work together to promote race equality, challenge discrimination and deliver above and beyond minimum legislative requirements.

- 29 The following were the final four measures of success:
- A year-on-year reduction in the number of race-related complaints and associated Employment Tribunals. When complaints are received, whether they be from patients or staff, the parties will aim to achieve positive outcomes;
 - Effective performance management arrangements for delivery of race equality;
 - An effective definition of zero tolerance on racial harassment and robust application by BSUH managers where inappropriate behaviour arises; and
 - Compliance with statutory requirements on race equality and the standards expected by national bodies.
- 30 The first alleged protected disclosure occurred as long ago as 2008. The Claimant referred in her witness statement to having been the author of a document entitled 'South East Coast BME Network Race Equality Review'. The Claimant contends that it is reasonable to assume that Mrs Griffiths was aware of the Claimant's activities in connection with the BME Network. Mrs Griffiths said in her witness statement that if she had read the report or press coverage of it she did not connect it with the Claimant.¹⁴ We accept that evidence.
- 31 The Claimant alleges as issues 14(ii) to 14(iv) that in October 2015, and also in March June and September 2016 the BME Network made disclosures to the CQC concerning racism in BSUH.¹⁵ We cannot trace any evidence on the point other than a general assertion in paragraph 265 of the Claimant's statement that she had consistently raised equality concerns with the CQC. We cannot uphold the factual allegation being made in this claim,
- 32 Between 2004 and February 2017 the Claimant had presented five claims to the Tribunal against BSUH. None of the new management from WSH mentioned below had had any involvement in those proceedings. The fact of those claims having been made became known to Mrs Barker on 13 March 2017 as mentioned below. I was aware that one or more of those claims had not been concluded at the time of this hearing, and I have ensured that both the lay members and I did not obtain any information about them save as mentioned in evidence.
- 33 In 2016 the Claimant was the subject of disciplinary proceedings. We were provided with a copy of a long letter of 13 pages sent to the Claimant by Rachel Cashman, the Director of Strategy and Commercial Development

¹⁴ Paragraph 40

¹⁵ We note that the allegations are that any disclosures were by the BME Network, rather than the Claimant specifically.

for BSUH, dated 11 November 2016 stating the outcome of the disciplinary process.¹⁶ It is necessary to go into some details of the matter.

- 34 There were three sets of allegations. The first related to the Claimant's alleged conduct towards, and alleged comments made to, Mr W, a white man. The allegations were of threatening or abusive conduct, racially discriminatory conduct and harassment, and also of victimisation. Two of the four specific allegations were upheld. The main factual allegation was that the Claimant had said that Mr W was everything she despised in a white manager.
- 35 The second set of allegations related to Ms B. There were seventeen factual allegations in all.¹⁷ As we understand it the allegations related principally to comments and actions relating to the sexual orientation of Ms B, and to also to an alleged breach of confidentiality concerning the contents of a grievance raised by Ms B. The allegations were of bullying, harassment, discrimination and victimisation.
- 36 The third allegation was that the Claimant had failed without reasonable excuse to comply with a management instruction to participate in an investigation being carried out by Henrietta Hill QC which included investigations concerning complaints made by the Claimant.
- 37 We reproduce the text from the letter of 11 November 2016 under the rubric of 'Outcome':

Drawing all this together, I have not upheld a large number of allegations and where there has been a conflict of evidence or I cannot be sure, I have given you the benefit of that. However I have:

- Upheld three allegations related to Ms B based on your 12 August 2014 email. You breached her confidentiality, acted in a way that amounts to bullying and you victimised her by seeking to interfere with the investigation of her grievance.
- Upheld the allegation that you fail to comply with a reasonable instruction to participate in the Hill investigation.
- Upheld an allegation that you discriminated against [Mr W] on 5 May 2016 by making negative remark about him because he is white and you acted in a way that amounts to harassment related to [Mr W's] race.

- 38 The remainder of the letter under the rubric of 'Sanction' is also important, but too lengthy to set out in full. The first two paragraphs are as follows:

I went into the disciplinary hearing feeling sympathetic to you due to my perception that perhaps employee relations policies were not always well applied in light of the recent CQC report¹⁸ and I was sensitive to historic corporate behaviour and about how an individual might be impacted. But what was apparent from day 1 is that your approach is one of hostility towards the Trust's management. Nothing you said during the hearing changed this view and your approach throughout (including for example by your constant references to [Mr W] as a serial liar and your continued negative commentary about my character and that of Dr Mark Smith, your unwarranted attacks on Ms Hill QC and negative view of the Trust's management and your

¹⁶ [378]

¹⁷ See [270]

¹⁸ Mentioned below

accusations that an outcome decision had been reached before the hearing had taken place) illustrate the severity of the breakdown in relations between you and the Trust.

I am aware because you told me that there had been long-standing issues and range of complaints, grievances and litigation around employment. I accept you have been discriminated against before and the Trust has accepted that and apologised with a resetting of the relationship with you in around 2009. Since then it is clear that from your perspective there have been problems. Whilst my focus has been on the current cases and allegations in considering what action to impose, not on past issues or complaints, it is clear that the context in which these cases are considered is important. However, historic issues and even instances where you have been wronged or the Trust's culture has not always supported you do not mean the Trust can or should accept behaviour by you which it would not accept from others.

- 39 Having said that the two allegations of discrimination were very serious the decision as to sanction was that a final written warning be issued, valid for a period of 12 months. For completeness we add that the Claimant appealed against the outcome, and the appeal was not upheld. The appeal decision was set out in a letter of 4 January 2017.
- 40 In April 2016 there was an inspection by the Care Quality Commission ('CQC') because of its 'concerns about the Trust's ability to provide safe, effective, responsive and well led care.'¹⁹ The outcome of that inspection is an important element in this claim. The 'headline' finding was that the Trust was 'Inadequate' overall. The Trust was rated as 'Inadequate' in three categories, and 'Requires improvement' in the other two. The 'Inadequate' answer was provided to the question: 'Are services at this trust well-led?'
- 41 The CQC listed nine bullet points in the section relating to quality of leadership. There were criticisms of the Trust board, the executive team and the HR department. We quote three of the bullet points from the CQC report to which our attention was specifically drawn:
- Staff in general reported a culture of bullying and harassment and a lack of equal opportunity. Staff survey results for the last two years supported this. Staff from BME and protected characteristics groups reported that bullying, harassment and discrimination was rife in the organisation with inequality of opportunity. Data from the workforce race equality standard support this. Staff reported that inconsistent application of human resource policies and advice contributed to inequality and division within the workforce and led to a lack of performance and behaviour management within the organisation. These cultural issues had been long-standing within the trust without effective board action.
 - The culture at RSCH was one where poor performance in some areas was tolerated and 50% of staff said in the staff survey they had not reported the last time they were bullied or harassed.
 - BME staff felt there was a culture of fear and doing the wrong thing. They told us this was divisive and did not lead to a healthy workplace where everyone was treated equally.
- 42 We have also noted a further bullet point at the top of page 25 of the report saying that the 'culture of the trust was exceptionally challenging' and

¹⁹ See the summary of findings.

referring to a 'fractured and damaged approach to equality and diversity.' The report recommended as follows:

- Develop and implement a people strategy that leads to cultural change. This must address the current persistence of bullying and harassment, inequality of opportunity afforded all staff, but notably those who have protected characteristics, and the acceptance of poor behaviour whilst also providing the board clear oversight of delivery.²⁰

43 The report also contained a paragraph on page 27 under the heading of 'Leadership of the trust including FFPR' which included the following sentence:

- The trust had appropriate policy and process to ensure requirements of the Fit and Proper Persons Act were met.

The point made by the Claimant in this respect was that there was no equivalent statement in the report by the CQC into WSH dated 20 April 2016.²¹

44 There was a separate section commencing on page 28 headed 'Culture and diversity within the trust'. There was reference to the 2015 NHS Workforce and Race Equality Standard report, and the findings of that report. That section also contained the following points:

- In 2015 the trust initiated a race equality workforce engagement strategy. This race equality programme was jointly chaired by the chief executive and the associate director of transformation (who is also chair of the BME network). The strategy had an innovative structure that afforded ownership of eight work streams between BME leads and senior managers and clinicians. A structure of meetings was initiated and a series of workforce analysis exercises completed.
- Unfortunately this strategy has now fallen into disarray amidst a culture of disciplinary action and grievance placing any progress at significant risk. This risk does not appear to have been acknowledged by the board.

45 Following the CQC report NHS Improvement placed BSUH in Special Measures in respect of both the quality of care and also financial management. As noted above, the 'quality of care' includes leadership and management. The Trust was required to undertake specific actions and provide a report. BSUH drew up what was described as an 'Integrated Recovery Plan'.²² Of more importance for present purposes discussions took place between BSUH and WSH, promoted by NHS Improvement, for the WSH executive team to take over at BSUH on a long-term basis. An interim arrangement was made for WSH to act as 'buddy' to BSUH 'supporting the trust to deliver on its requirements under both types of special measures.'²³ At this time also, Mrs Griffiths had discussions with Alan Thorne, the lead CQC inspector. Mrs Griffiths told us that '[h]is view

²⁰ The reference to 'those who have protected characteristics' does not of course make sense as all employees have various protected characteristics.

²¹ [228]

²² [1656]

²³ [376]

was that the poor culture was directly related to leadership and reflected long-term problems with leadership style and consistency coupled with failures around governance and process.²⁴

- 46 The final Agreement between WSH and BSUH was dated 31 March 2017, but we refer to it here for convenience.²⁵ The document records that its purpose was to extend and expand the collaboration between the two Trusts. The Agreement provided for Mr Viggers, the Chair of WSH, to be appointed as the Chair of BSUH, and for Mrs Griffiths, the then CEO of WSH, to become the CEO of BSUH also. It also provided for other senior appointments to be common across the two Trusts. Mrs Barker had started as the Interim CEO of BSUH on 23 January 2017. From 1 April 2017 she became the Managing Director of BSUH.
- 47 Our attention was drawn particularly to clause 6.3:
- WSH will use all reasonable endeavours to ensure that WSH staff, or other persons engaged by WSH, who are providing the Support comply in all material respects with the appropriate policies and procedures of BSUH which are notified to WSH from time to time.
- 48 A BSUH board meeting was to be held on 26 January 2017 at which the Claimant was to present the Workforce Race Equality Standard & Action Plan ('WRES'). Although we did not hear detailed evidence on the matter it is our understanding that there is an overall NHS Workforce Race Equality Standard with which individual Trusts (and other NHS organisations) must comply.
- 49 The documentation is not absolutely clear. It appears that the Claimant prepared a three page paper for the Board which had an Executive Summary.²⁶ Attached to that was a document headed 'NHS Workforce Race Equality Standard – 2016 Report and Action Plan' consisting of 32 pages.²⁷ That also has a (different) Executive Summary. The Claimant was shown as the author of the document and as being Associate Director of Transformation.
- 50 The three page document stated in its introductory paragraph as follows:
- The aim of the objective of the WRES is to compare the experience of BME staff and white staff with the aim of closing the gaps highlighted by the metrics and other factors or data of concern included in the report by an agreed action plan.
- 51 The summary in that document contained 13 bullet points, the general tenor of which was that BME staff were being disadvantaged. The penultimate paragraph stated as follows:
- Other factors / data taken into consideration include the findings of institutional racism reported by the CQC in August 2016.

²⁴ Statement § 26

²⁵ [1713]

²⁶ [447]

²⁷ [495]

- 52 At the end of the three page document the action required by the Board was stated to be that it was being 'asked to discuss and note the content of the Workforce Race Equality Standard.'
- 53 The three page document was sent to Dominic Ford, the Director of Corporate Governance and Board Secretary, who wrote to the Claimant on 23 January 2017 saying that the phrase 'institutional racism' had not been used by the CQC. The Claimant replied saying that a former CEO, Duncan Selbie, had 'admitted publicly that BSUH was institutionally racist and this fact features in the ongoing discussions between the CQC and the BME Network.'²⁸ There was no evidence before us that the CQC had made 'findings of institutional racism'.
- 54 Mrs Barker and the Claimant first met each other when Mrs Barker left the board meeting to invite the Claimant to join the meeting to present the WRES. The Claimant made a presentation using a PowerPoint deck of 18 slides.²⁹ We do not need to go into the details because they are not material save that it was her presentation, **and** her name and position as Associate Director of Transformation are shown on the opening slide. The Claimant alleges that the presentation of the report was a protected disclosure.³⁰
- 55 In cross-examination Mrs Barker described the attitude of the Claimant at that meeting as being confrontational and smug, and that she was not conciliatory particularly in relation to non-executive members of the board. She also said that the matters referred to in the next paragraph caused her concern as to whether she could trust the Claimant.s
- 56 Following the Board meeting the Claimant wrote to Mr Kildare, the Interim Chairman of BSUH, on 30 January 2017 asking that the Board reconsiders its decision not to publish the WRES report.³¹ The letter records that unnamed BME members of the BME Network had informed Mr Thorne of the CQC of the decision. A copy of that letter was sent to Mr Thorne, Mrs Barker, and Soline Jerram, the Director of Quality and Patient Safety in the Brighton and Hove CCG. Mr Kildare replied on the same day expressing surprise and disappointment that an inaccurate account of the Board discussion had been shared with others outside BSUH. He said that the Board had agreed to publish the WRES but that the action plan would need to be discussed with the WSH leadership team.³² The Claimant then replied disputing that the Board had agreed to publish the WRES at the meeting, but thanking Mr Kildare for confirming that it was to be published.³³

²⁸ [435]

²⁹ [490]

³⁰ Issue 14(vi)

³¹ [470]

³² [472]

³³ [473]

- 57 The Claimant alleges that on 9 February 2017 the Claimant also presented the report to the local CCG.³⁴ We cannot trace any evidence to that effect.
- 58 Ms B had been seconded to work elsewhere in the NHS. On 23 February 2017 she sent an email to Helen Weatherill, the HR Director of BSUH, in the following terms:³⁵
- I need to know what is going on with the closure of my complaint. I see that someone is right back in her role of race equality lead which is just shocking to me. How can it be that she can be found guilty of bullying, victimisation, and racism and is still able to lead on race. I was expecting her to come back and be stripped of her race role and be working in Biochemistry again. Has the trust not learned anything? She would do it all over again. What a waste of money, resources, time, and heartache. Three years I have fought for justice and the trust has buckled. It makes no sense to me. I am not happy and would like time with the new CEO – Marianne – to discuss my complaint case. I am still a Trust employee and will not rest until BSUH is a safe environment LGBT staff and patients.
- 59 Ms B sent a further email in similar terms to Ms Weatherill on 2 March 2017.³⁶ That email was copied to Mrs Barker and others. Mr Kildare wrote to Ms B on the same day informing her that the allegations which she had made against the Claimant had been upheld, but that he was not able to provide any further details by reason of confidentiality.³⁷
- 60 A meeting was arranged between the Claimant and Mrs Barker on 8 March 2017. Mrs Barker did not at that time have a clear understanding of the relationship of the Claimant's role as Associate Director of Transformation with her role of Chair of the BME Network. The perception that Mrs Barker was left with after the meeting was that the Claimant had been rude and aggressive, and that she had an unduly high opinion of herself.³⁸ Following the meeting the Claimant sent an email to Mrs Barker to which there were two attachments.³⁹ The first was the document mentioned above with the Claimant's summary of her objectives and mentioning her role with the NHS BME Network. The second was essentially a brief CV and a history of the Claimant's employment by BSUH.
- 61 The history disclosed that the Claimant had presented five claims to the Employment Tribunal alleging race discrimination, with some of the claims alleging victimisation also. The Claimant noted that at the time there were three claims which had not been concluded. The Claimant mentioned the disciplinary proceedings against her relating to Ms B and Mr W and stated that on 10 February 2017 she had submitted her fifth claim to the Tribunal 'for discrimination on the grounds of my race and victimisation concerning all matters subsequent to Ms Hill QC's findings in August 2015.' Those five claims are the ones referred to in paragraph numbered 10 in the list

³⁴ Issue 14(vii)

³⁵ [580]

³⁶ [599]

³⁷ [591]

³⁸ The notes made by Mrs Barker are at [595]

³⁹ [601]

of issues above. Mrs Barker was concerned by what she read and asked for details of the 2016 disciplinary proceedings to be provided to her.

- 62 There was a meeting of senior leaders on 28 March 2017 in anticipation of WSH taking over the management of BSUH. The evidence of Dr Findlay was that following a question from the floor he referred to there being a need for a change of culture and a need to move away from grievances and disciplinary processes towards more professional discussions and early dialogue. Mrs Griffiths gave similar evidence and said in cross-examination that the Claimant had agreed with Dr Findlay at the time. It was the Claimant's evidence that what was said was that there was to be a clamping down on the lodging of grievances and Tribunal claims. We note that in the Memorandum of Understanding mentioned above which had been signed by the Claimant one of the measures of success was said to be:

A year-on-year reduction in the number of race related complaints and associated Employment Tribunals. When complaints are received, whether they be from patients or staff, the parties will aim to achieve positive outcomes.

- 63 That accords with the aims as expressed by Dr Findlay. We prefer the evidence of Dr Findlay and Mrs Griffiths. Apart from anything else, it is simply not possible for an employer to 'clamp down' on claims to the Tribunal.
- 64 Ms B had sent a further email to Mrs Barker on 9 March 2017 asking for a meeting or a 'chat on the phone to discuss [her] concerns.'⁴⁰ A meeting was arranged for 29 March 2017. At that meeting Ms B told Mrs Barker that there had been a finding that she had been discriminated against and victimised by the Claimant at a BME Network meeting, and that she was very upset that the Claimant was still in a leadership position. Ms B sent an email to Mrs Barker following that meeting, thanking her for it and saying that she felt that BSUH had failed to comply with the duty to protect her as an employee.⁴¹
- 65 On 31 March 2017 the Claimant sent an email to Mrs Barker which the Claimant says was the first protected act for the purposes of the claims of victimisation in addition to the initiation of Tribunal proceedings.⁴² That email was sent by the Claimant in her capacity as the Chair of the BME Network. In the email the Claimant invited Mrs Barker to a meeting of the BME Network on 24 April 2017 which would include 'a Focus Group session with CQC before lunch.' The text which appears to us to be relevant is as follows:

As you are aware BSUH is in part in special measures because of its failure to deliver on its statutory obligations concerning race equality. It is a fact that in my absence last year race relations has deteriorated further and I am saddened by the unacceptable level of discrimination

⁴⁰ [599]

⁴¹ [612]

⁴² [616]

our members have been subjected to on the grounds of their race more recently.⁴³ Many of these members will be sharing their experiences with CQC on the day to demonstrate the current reality at BSUH.

66 We record that on 1 April 2017 WSH took over the management of BSUH as already mentioned above.

67 We were referred in the witness statements of the Claimant and Mrs Barker to emails of early April 2017.⁴⁴ Although the details are not relevant, they concern the date for the Claimant to 'arrange a Focus group session directly with CQC for the BME Network.'⁴⁵ The material points are two. The first is that Mrs Barker informed the Claimant that it was her role as the Managing Director to liaise with the CQC about a visit. The second is that on 12 April 2017 the Claimant wrote to Mr Thorne of the CQC saying that Mrs Barker's position as to her role was 'bizarre'. Mrs Barker wrote to the Claimant on 18 April 2017 saying that she had spoken to Mr Thorne and all had been clarified. Miss Brown said in her written submissions that the Claimant contended that following this exchange (and presumably also because of the exchange) Mrs Barker decided to consider the Claimant's history with BSUH and the concerns of Ms B. We reject that submission and find that had simply been a misunderstanding which did not cause Mrs Barker any concern. As she said in cross-examination, it was 'not an issue.'

68 Mrs Barker pointed out in her evidence that any issue as to the Claimant's suitability for her post was eclipsed at that time by the responsibility of running the two large BSUH hospitals, and of putting in place a new leadership team. That is evidence which we can fully accept.

69 The Claimant alleges that on 13 April 2017 she 'presented an update to Brighton and Hove CCG highlighting continuing disadvantage suffered by BME staff.'⁴⁶ As before, we are unable to trace any evidence to support this allegation.

70 Following having met with Ms B, Mrs Barker had obtained a copy of the disciplinary and appeal outcome letters arising from the disciplinary proceedings against the Claimant relating to Ms B and Mr W. Mrs Barker sent an email to Mrs Griffiths on 21 April 2017 to which were attached a copy of those documents.⁴⁷ After setting out the background. In that email Mrs Barker said as follows:

You will see that a number of allegations were not upheld but there were allegations of bullying and discrimination upheld against and the finding that she had not cooperated with trust investigation.

As is well known to you, the CQC's findings on leadership at Brighton were negative to say the least and culture/equality issues are identified. This was further highlighted in our 2016 staff

⁴³ We record that in the document setting out her history of employment the Claimant stated that she had been absent from work from 6 October 2015 until 14 March 2016.

⁴⁴ [649] to [662]

⁴⁵ [662]

⁴⁶ Issue 14(viii)

⁴⁷ [686]

survey results. In light of the current work to address leadership issues and where [the Claimant] has responsibilities on race equality, I have concerns about the situation. In particular whether the findings against [the Claimant] realistically must call into question her ability to have a leadership role on equality issues and equally, if there are fit and proper person issues that we are required to address. I have not raised this with her as yet but my view is that it needs to be at least addressed as an issue.

71 It is notable that Mrs Barker did not send to Mrs Griffiths a copy of the Claimant's history with BSUH giving details of the previous claims made to the Tribunal, nor did Mrs Barker make any mention of those matters in her email save to say that there had been a 'serious disciplinary finding against' the Claimant which was then the subject of a claim to the Tribunal.

72 As a result of having received Mrs Barker's email Mrs Griffiths wrote to Dr Findlay on 25 April 2017 and forwarded the email to him.⁴⁸ Mrs Griffiths suggested he meet with the Claimant 'to discuss the issues and understand her position.' Mrs Griffiths requested that the matter be given priority and be approached in a formal manner.

73 Dr Findlay then wrote a two page letter to the Claimant on 25 April 2017.⁴⁹ Dr Findlay recorded the concerns expressed by the CQC concerning the culture at BSUH and 'what it saw as a fractured and damaged approach to equality and diversity'. He also said that the Claimant's role as Associate Director of Transformation was 'a senior leadership role, with specific responsibilities for developing and promoting the Trust's agenda around race equality.' Dr Findlay then referred to the disciplinary proceedings against the Claimant. He requested that the Claimant meet him on 2 May 2017 to discuss two concerns. The first was that the findings of the disciplinary process 'may call into question if it is tenable for you to continue in your current role with responsibility for providing leadership on important equality issues, that BSUH must address. In other words, whether being found to have acted in the way you have is fundamentally incompatible with such a role.' The second issue related to the Respondent's conduct in relation to the 2014 Regulations concerning the fit and proper person requirement. Dr Findlay suggested that it would be helpful if the Claimant were to provide in advance of the meeting 'any written reflections about the findings made against you.' No such reflections were provided.

74 The Claimant replied later that day saying as follows:

I am concerned that your request does not appear to follow any of the existing Trust policies. The matters to which you refer have all been considered under Trust policy and it is in relation to those processes that I provided detailed accounts of my position regarding the allegations made against me.

That being said I note your concerns and I would like to assist you in addressing your concerns and also to provide any further clarification you require.

⁴⁸ [708]

⁴⁹ [726]

- 75 The Claimant's union representative, Corrado Valle, wrote to Dr Findlay's PA on 25 April 2017 asking for a copy of the fit and proper persons policy to which a reply was provided on 28 April 2017 saying that there was no specific policy and the Trust relied on the Employment Checks Policy and that it had responsibilities under the Regulations.⁵⁰
- 76 The Claimant also wrote to Mrs Griffiths on 15 May 2017 following that correspondence.⁵¹ The letter stated that the Claimant was putting BSUH on notice that she was alleging that she was being victimised. The Claimant also told Mrs Griffiths that Mr Valle had contacted Professor Richards and Mr Thorne of the CQC who had confirmed that no concerns had been raised about the Claimant's leadership role regarding the delivery of race equality. The Claimant also stated that the matters referred to by Dr Findlay were then the subject of Employment Tribunal proceedings due to commence on 22 May 2017, and she asked that a copy of her witness statement in those proceedings be provided to Dr Findlay.
- 77 We have traced what appears to be the letter from Mr Valle dated 28 April 2017.⁵² In that letter Mr Valle referred to the letter to the Claimant of 25 April 2017 from Dr Findlay saying as follows:
- From the letter it would appear CQC has raised concern about [the Claimant's] leadership within the organisation and we would like to understand whether CQC has specifically raised a concern and/or received a complaint about her.
- 78 We have to say that we cannot interpret the letter of 25 April as having the meaning apparently read into it by Mr Valle. The letter refers to guidance issued by the CQC but does not say that the CQC had raised any concerns specifically about the Claimant.
- 79 The Claimant referred to an email of 25 April 2017 as being a protected act.⁵³ There is also a further allegation relating to 24 April 2017.⁵⁴ Again we cannot trace any evidence on the matter.⁵⁵
- 80 The Claimant wrote to Mrs Griffiths on 15 May 2017.⁵⁶ The letter commences as follows:
- I am writing to you as the accountable officer for BHUS NHS Trust to place you on notice concerning the victimisation that I am being subjected to having done protected acts.
- 81 The Claimant continued by setting out her perspective of the then current position. She also alleged that Dr Findlay has said that there was an intention to clamp down on the lodging of grievances and Employment Tribunal proceedings.

⁵⁰ [735]

⁵¹ [896]

⁵² [797]

⁵³ Issue 12(ii)

⁵⁴ Issue 14(ix)

⁵⁵ We think we have traced the email as being at [710] but we were not referred to it.

⁵⁶ [896]

82 The Claimant met Dr Findlay on 16 May 2017. The Claimant was accompanied by Mr Valle. We have detailed notes of the meeting and also Dr Findlay's report dated 24 May 2017.⁵⁷ The notes commence with Dr Findlay saying as follows:

I have set the issues out in my letter 25 April. The Trust has a new leadership team and under my stewardship responsibility there are two issues that I need to address with you;

- 1 Why the Trust should not take steps to remove you as Associate Director where on the face of it you fall foul of Section 5 of the Regulations; the fit and proper person requirements for directors.

We can go into details of that.

- 2 As an associate director, where you have been found to act in certain ways, to explore if it is appropriate you to continue to lead on race issues for the Trust.

What I want to make clear is that this is not a disciplinary meeting; it is a meeting between a new Trust management executive and a director colleague to have a discussion and I want to enter into it with that spirit. This is your opportunity to tell me whether the issues are valid or not and for me to consider that and take things forward as appropriate. It is set out clearly in my letter. What I do not have is any investment in past history.

Before we start I have a more specific question; as a fellow director of the organisation, do you agree that the existence of the adverse findings create an issue the Trust has to address by virtue of the Regulations and, separately, also because of your specific responsibilities for leading on race equality for the organisation?

83 Dr Findlay produced a report dated 24 May 2017.⁵⁸ We summarise the report. Having set out the background Dr Findlay addressed the 2014 Regulations. The report noted that the Claimant asserted that the Regulations only applied to members of the Board and did not apply to her. Dr Findlay concluded that the Regulations did apply to her as she was an Associate Director providing services directly to the Board.

84 The next section was headed 'Leadership on race'. He concluded that the findings against her of bullying, victimisation, racial discrimination and harassment and of a failure to comply with management instructions were realistically in fundamental conflict with the position the Claimant held. At the end of that section, Dr Findlay said that there 'was no meaningful scope for a discussion or reflection on this as [the Claimant] denies the conduct.'

85 Dr Findlay noted other matters raised by the Claimant. The first was that she said the process was victimisation. Secondly, she had said that the findings against her had been wrong. Thirdly, the Claimant maintained that the process ought to have been paused pending the conclusion of the existing Tribunal proceedings. Finally, the Claimant had said that the dispute between her and Ms B was not of concern to BSUH as it

⁵⁷ [898] & [912] The Claimant stated that she did not accept the accuracy of the notes but did not provide full details.

⁵⁸ [912]

concerned the activities of the BME Network, and Dr Findlay concluded that that was not correct.

86 Following the meeting the Claimant wrote to Mrs Griffiths again on 17 May 2017 saying that she was being victimised for bringing proceedings against BSUH.⁵⁹

87 As a result of the report of Dr Findlay Mrs Griffiths wrote to the Claimant on 26 May 2017.⁶⁰ Mrs Griffiths invited the Claimant to attend a meeting on 8 June 2017. Mrs Griffiths said as follows:

I am not reassured further to your meeting with Dr Findlay that there is no requirement to consider matters further. In my judgement, there is a requirement to formally consider if your employment as Associate Director of Transformation should be terminated because:

1 I believe that the quality of leadership is crucial and I need to have trust and confidence in senior people in the trust as we tackle the significant challenges outlined by the CQC. I have concerns that it may not be tenable for you to have been found to have committed acts of victimisation, discrimination and harassment and still be responsible for leading BSUH in relation to race equality as your conduct is fundamentally incompatible with that; and/or

2 You are no longer a fit and proper person within the meaning of Regulation 5 by reason of your serious misconduct such that BSUH must not continue to have you in place as an Associate Director.

88 The Claimant was notified that one possible outcome was a termination of her employment as Associate Director of Transformation on the basis that it was some other substantial reason and not misconduct. The Claimant was told that as the issue related to her role as Associate Director of Transformation then redeployment would be considered.

89 One of the alleged protected acts was a letter from the Claimant to Mrs Griffiths of 7 June 2017.⁶¹ In that letter she alleged that there had been further discrimination, harassment and victimisation.

90 We go back in time slightly. On 17 May 2017 the Claimant wrote to the Chairman, Mr Viggers.⁶² She asserted that the 2014 Regulations did not apply to her, and she asked to meet with him. In her letter of 26 May 2017 Mrs Griffiths said that the enforcement of the Regulations was a matter for the board and that Mr Viggers was not involved at the time.

91 The proposed meeting with Mrs Griffiths took place on 14 June 2017. The Claimant was again represented by Mr Valle. The Claimant had prepared a substantial pack of documents which she presented to the meeting.⁶³ That pack consisted of what she described as a 'report' together with appendices. The Claimant stated her conclusion to be as follows:

The evidence presented in this report, clearly demonstrates that Ms Griffiths with the assistance of Dr Findlay and with the 'blessing' of Mr Viggers (and no doubt the Trust Board) is determined

⁵⁹ [906]

⁶⁰ [919]

⁶¹ [925]

⁶² [909]

⁶³ [933]

to find a way to unjustly 'remove' [the Claimant] as Associate Director of Transformation from her role and/or from BSUH.

The evidence also presented in this report shows that not only is the conduct of the named individuals and the Trust Board, unjustly, unfair and unlawful, but under the circumstances also amount to bullying, discrimination on the grounds of race; harassment on the grounds of race and victimisation of [the Claimant] for having done protected acts.

- 92 A transcript was made of that meeting.⁶⁴ Mr Kibling drew our attention to the following statement by the Claimant:⁶⁵

It's important for me to actually say what my role is, because everybody else is telling me what – Dr Findlay is telling me what I did, and what I didn't do in my role, and that, you know, reporting to the Board, I actually decide the race equality programme for BSUH.⁶⁶

- 93 Mrs Griffiths took time to consider what was clearly a difficult situation for some time. Mrs Griffiths had perceived the Claimant to be defiant and combative at the meeting, and had sought to criticise everybody else and not take responsibility for her position.

- 94 The outcome of the meeting was notified to the Claimant in a letter of 28 June 2017.⁶⁷ The letter of 28 June 2017 was detailed, being of nearly five pages. Mrs Griffiths dealt first with regulation 5 of the 2014 Regulations. She concluded that the Claimant's role fell within the compass of the regulation. Mrs Griffiths then turned to the Claimant's position relating to the previous disciplinary findings. Mrs Griffiths stated that she was not revisiting that process but was 'looking at the separate issues of whether you are a Fit and Proper Person to be an Associate Director and your ability to credibly lead on race equality.' Mrs Griffiths added that she was 'approaching this matter with fresh eyes in the context of a pressing need to establish credible leadership at the Trust.' Mrs Griffiths also said that the point that the Claimant had made about the dispute with Ms B as relating to the BME Network and not BSUH was weak as it was a Trust staff group.

- 95 Mrs Griffiths then set out her conclusions. She noted that the Claimant had been found to have acted in a discriminatory way, and that that constituted serious misconduct. There was no reason to disregard those findings. Mrs Griffiths said that regulation 5 did apply to the Claimant. Mrs Griffiths then said:

More importantly for me, I have considered if your conduct is fundamentally incompatible with your role. I accept you are the choice of the BME Network to lead it and that BME staff are, in your words, the beneficiaries of a successful approach to race equality. They are of course not the only beneficiaries. But moreover, that fails to distinguish between your role in the BME Network and your employment as Associate Director of Transformation or address the issue I have raised. Your role, for which you are employed and enjoy the status of Associate Director and all that goes with that, is not to lead the BME Network but to lead the Trust. Your role requires you to achieve change which can only happen with credible leadership for the Trust as a whole not just a staff group. I believe utterly that the Trust needs a senior leadership team that displays

⁶⁴ [968]

⁶⁵ At [981]

⁶⁶ Emphasis added

⁶⁷ [1014]

the highest standards of conduct at all stages this is the key to addressing the issues that the Trust faces. I was surprised that your lack of willingness to accept that they should even be a basis to me to enquire into this matter. Although in what you said to me you did not appear to see yourself as part of a leadership team or as having that responsibility, I am satisfied that that is your role and so I have thought about if you can discharge that function.

I have concluded that your ability to perform the specific role for which are employed is fatally undermined by having been found to have acted in the way you have. Overall it is not objectively credible or acceptable for you to lead on the important issue of race equality when you yourself have been found to have acted in a way that is discriminatory and lacking respect for colleagues on more than one occasion.

- 96 The decision was to terminate the Claimant's employment as Associate Director of Transformation on three months' notice. Mrs Griffiths asked the Claimant to meet Denise Farmer to discuss redeployment. The Claimant was also told she could appeal although there was no specifically applicable Trust policy.
- 97 In answer to a question from a lay member Mrs Griffiths specifically stated that the principal reason for the dismissal of the Claimant was that her conduct was incompatible with her role as Associate Director of Transformation. That echoed the text of the letter of dismissal.
- 98 The Claimant then contacted Professor Richards of the CQC again. There appears to have been some correspondence with the CQC concerning a Mr Akinwumni which we did not see. The Claimant wrote to Professor Richards on 8 July 2017 asking if she was covered by regulation 5.⁶⁸ There is then an email of 28 July 2017, the first paragraph of which is as follows:
- I thought that I had set out the position very clearly in my previous response. As you make it clear that you are not a director or board member at the trust, my understanding is that regulation 5 would not apply to you. However, as a member of the trust's staff regulation 19 would apply.
- 99 The Claimant appealed against the decision of Mrs Griffiths. The grounds of appeal dated 17 July 2017 were, in summary, as follows:⁶⁹
- The disciplinary matter had been concluded in 2016.
The current decision was not under any recognised procedure.
Any policy used came from WSH and not BSUH.
The process was a sham, and the outcome was prejudged.
The 2018 Regulations did not apply to her.
The dismissal was victimisation and also on the ground of the Claimant having made one or more protected disclosures.
The Claimant's grievance had not been properly addressed.
- 100 On 20 July 2017 the Claimant presented her claim to the Employment Tribunal. The papers were served on the Respondents under cover of letters dated 31 July 2017.

⁶⁸ [1040]

⁶⁹ [1079]

- 101 On 28 July 2017 Mr Viggers notified the Claimant that the appeal hearing would take place on 3 August 2017 and that he would chair the hearing.⁷⁰ Mrs Griffiths prepared a Management Case.⁷¹ The appeal hearing took place on 3 August 2017.⁷² The Claimant was represented at this hearing by Gary Palmer, a GMB representative. The Claimant insisted on presenting her appeal by reading out to the panel the Particulars of Claim which had been attached to the ET1 claim form rather than addressing her grounds of appeal. The panel decided to reconvene on the following day to consider the outcome from what had been a lengthy hearing.
- 102 The panel decided to dismiss the appeal, and the Claimant was informed of the decision by a long letter dated 11 August 2017.⁷³ Reference must of course be made to that letter for the full details of the reasons. We extract the following points:
- 102.1 Mr Viggers did not accept the objection by the Claimant to him chairing the hearing.
 - 102.2 The fact that there was no specific written policy to cover these particular circumstances was not relevant as the Trust had used a fair process analogous to others relating to employment relations.
 - 102.3 The argument that the Claimant was being subjected to double jeopardy was not upheld. The panel had accepted the point made by Mrs Griffiths that she was not revisiting the outcome of the Claimant's disciplinary hearing, but considering the issues flowing from it.
 - 102.4 Such delay as there had been in the process had not had any impact.
 - 102.5 The panel accepted the view of Mrs Griffiths that the 2014 Regulations applied to the Claimant in her role as Associate Director.
 - 102.6 A point was made about a grievance but this matter was not explored before us and we make no further comment.
 - 102.7 The final point linked the allegations that the process was a sham, victimisation, and as a consequence of having made protected disclosures. The conclusion was that the process had not been a sham and that the decision of Mrs Griffiths was not victimisation, nor as a result of whistleblowing. Ten reasons for those conclusions were then set out.
- 103 Before stating that the outcome of the appeal was to uphold the decision of Mrs Griffiths, Mr Viggers stated that the panel had considered whether there was any alternative to dismissal. He said:

⁷⁰ [1093]

⁷¹ [1095]

⁷² [1124] & [1147]

⁷³ [1205]

There was nothing that we took from the appeal that led us to think that, although you deny acting in the way that has been found, you even fully acknowledge the expectations of your role. This was of particular concern to the panel given the need to re-establish effective leadership at BSUH, where leaders lead by example and model the behaviours and values of the organisation. On the contrary, you specifically informed us that your attendance at the appeal was to demonstrate to the employment tribunal that you had done so. We considered this to be perfunctory – which we think means without genuine interest, feeling, or effort – and you are only attending to show that you have given BSUH an opportunity to overturn the decision. In other words, this of itself was not what we would expect from an Associate Director and there was no sense that you wanted to engage with us and reassure us and instead your approach was overall hostile to the Trust.

104 The Claimant then wrote to Mr Viggers on 14 August 2017 as follows:⁷⁴

I am in receipt of your letter dated 11 August 2007 concerning the outcome”.

You are aware of my position from my presentation at the meeting on 3 August 2017 at having been unfairly dismissed and victimised I am seeking an order as part of my employment tribunal claim for reinstatement to my role. Given the unlawful action taken against me redeployment under the circumstances would be most inappropriate.

105 One of the areas raised in this hearing related to the consequences of a claim in the Employment Tribunal against BSUH by Mr Akinwumni. Criticisms were made by the Tribunal of three senior employees of BSUH. In July 2017 Mr Findlay considered whether further action ought to be taken against any of them under the 2014 Regulations. He concluded that it was not appropriate. One individual had ceased to be a board director and another had resigned. Mr Findlay concluded that the role of the third, Mr H, was not sufficiently senior in the management hierarchy, although that individual was a senior clinician.

Submissions

106 Each of Miss Brown and Mr Kibling provided us with substantial written submissions, for which we are grateful. They also made additional oral submissions. The written submissions totalled 75 pages in all and it is not appropriate to seek to summarise them in this section of the document. Further, reference was made to a large number of authorities. We have no intention of reciting each of those authorities.

The law, discussion and conclusions

107 As both parties are professionally represented, we do not propose to set out each of the various statutory provisions, which would only serve to extend this lengthy document even further. Instead we summarise the law as we understand it to be.

108 There is a claim of unfair dismissal under Part X of the Employment Rights Act 1996 which consists of two elements. The first claim in the list of issues is that of ‘ordinary’ unfair dismissal. In such circumstances the respondent must prove the actual reason (or principal reason) for the dismissal, and also that it falls within one of the potentially fair reasons within section 98 of the Act. In this case reliance is placed upon the residual category of

⁷⁴ [1209]

some other substantial reason within section 98(1)(b) of the Employment Rights Act 1996. The precise wording is important:

. . . some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

- 109 If the respondent establishes the reason for the dismissal, and that it was a potentially fair one then the Tribunal must consider whether in all the circumstances the dismissal was actually fair in accordance with section 98(4) of the 1996 Act. There is no burden of proof on either party in that respect.
- 110 The second element to the unfair dismissal claim is that the dismissal was automatically unfair in accordance with section 103A of the 1996 Act on the basis that the reason (or principal reason) was that the Claimant had made one or more protected disclosures. We deal with the question of protected disclosures below. The difficulties as to the burden of proof were explored by Mummery LJ in the Court of Appeal in *Kuzel v. Roche Products Ltd* [2008] IRLR 530.

56 I turn from those general comments to the special provisions in Part X of the 1996 Act about who has to show the reason or principal reason for the dismissal. There is specific provision requiring the employer to show the reason or principal reason for dismissal. The employer knows better than anyone else in the world why he dismissed the complainant. Thus it was clearly for Roche to show that it had a reason for the dismissal of Dr Kuzel; that the reason was, as it asserted, a potentially fair one, in this case either misconduct or some other substantial reason; and to show that it was not some other reason. When Dr Kuzel contested the reasons put forward by Roche, there was no burden on her to disprove them, let alone positively prove a different reason.

57 I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.

58 Having heard the evidence of both sides relating to the reason for dismissal it will then be for the tribunal to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.

59 The tribunal must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the tribunal that the reason was what he asserted it was, it is open to the tribunal to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the tribunal must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.

60 As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced

by the employee on the basis of an automatically unfair dismissal on the basis of a different reason.

111 There are also claims of the Claimant having suffered detriments because of having made protected disclosures. In such circumstances the position is different. Once the fact of there having been a detriment has been established by the Claimant the onus is on the employer to show that the disclosure did not materially influence the treatment of the employee. We cite the first part paragraph 31 from the judgment of HHJ Eady in *Mid-Essex Hospital Services NHS Trust v. Smith* (UKEAT/0239/17):⁷⁵

31. The language used when determining causation in an unlawful detriment claim is different to that applicable in a dismissal claim (whether brought under section 103A or section 98 ERA): for the purposes of a claim of unfair dismissal, the ET will need to ask, what was the reason or principal reason for the dismissal? *That said, whether dealing with a claim of detriment or of unfair dismissal, it will be the mental processes of the relevant decision taker that will be key:* the ET will need to determine what materially influenced the decision taker (in the detriment case) or what facts or beliefs caused her to decide to dismiss (in the complaint of unfair dismissal - see per Cairns LJ in *Abernethy v Mott, Hay and Anderson* [1974] ICR 323 CA).

112 We add that the mental processes of the decision taker cannot by definition be influenced by matters of which that person was not aware. There was little effort made to provide evidence as to who was aware of which alleged protected disclosures or protected acts.

113 For there to be a protected disclosure there must first of all be a qualifying disclosure within section 43B of the Employment Rights Act 1996. That provision is as follows insofar as is material:

43B Disclosures qualifying for protection

(1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

- (a) that a criminal offence has been committed, is being committed or is likely to be committed,
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
- (d) that the health or safety of any individual has been, is being or is likely to be endangered,
- (e) that the environment has been, is being or is likely to be damaged, or
- (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

114 The qualifying disclosure must then have been made in accordance with one of sections 43C to 43H.

115 We note at this stage that the issue as to whether any one or more of the alleged protected disclosures was in fact a protected disclosure was not the subject of cross-examination of the Claimant, nor of submissions. We are taking it that the Respondents accept that there was one or more such disclosures.

⁷⁵ Our emphasis

116 Claims of victimisation are based upon there having been a protected act as defined in section 27 of the Equality Act 2010, and then the employee having been treated badly (to use a general word) because of having done that act, or the employer believing that there has been a protected act. It is apparent of course that previous claims made by the Claimant to the Tribunal in which she alleged unlawful discrimination were protected acts. The provisions as to the burden of proof in respect of this head of claim are set out in section 136 of the Equality Act 2010. Again ultimately of fact it is a question as to why the Claimant was dismissed.

Discussion and conclusion

117 At this stage the Tribunal would normally have to come to a conclusion on each of the matters set out in the list of issues. For the reasons just mentioned we will not analyse each of the alleged protected disclosures or protected acts and decide whether each one falls within the relevant statutory definition. For reasons mentioned below we will also not seek to ascertain who in WSH or BSUH was aware of each of any protected disclosures or protected acts.

118 We must first of all decide upon the reason, or principal reason, for the dismissal of the Claimant, taking into account the authoritative guidance set out above. That is the critical question. As HHJ Eady said in *Mis-Essex Hospital Services NHS Trust*, it is the mental processes of the decision makers which are key.

119 The list of issues records the alleged reasons for there dismissal as being (i) the requirements of regulation 5, and (ii) because the Claimant's conduct meant it was not credible for her to continue in her role. In his oral submissions Mr Kibling submitted that of those two reasons, the principal reason for the dismissal was the second one. That followed the unchallenged evidence of Mrs Griffiths on the point.

120 Both Miss Brown and Mr Kibling addressed the applicability of regulation 5 point at some length in their written submissions. As we understand it the position of the Claimant, through Miss Brown, is that regulation 5 did not in fact apply to her and could not therefore have been a valid reason for the dismissal. The Claimant devoted some 35 paragraphs of her witness statement to the point. Miss Brown summarised the Claimant's position in a more modest twelve sub-paragraphs to her paragraph 15.

121 Mr Kibling's submission was that all of Mrs Griffiths, Mrs Barker, Dr Findlay and Mr Viggers believed (and still believe) that the regulation applied to the Claimant's 'role as Associate Director of Transformation because of the leadership responsibilities of her role, its status, title and its connection to [the BSUH] board in delivering on its statutory public-sector equality duty enshrined in the EQA 2010 and addressing issues of race equality generally at' BSUH.

122 We have set out above in some detail the history of matters giving rise to these proceedings, and we will not of course recite all that history over again. We do note what we consider to be the particularly relevant points. The first point is that the Claimant had been the Associate Director of

Transformation since October 2014, and had been active in BME Networks from before that time. The second point is that the CQC put BSUH into special measures and made the adverse comments which we have recorded above. As a result of the CQC report WSH officers formally took over the management of BSUH also from 1 April 2017, having had some earlier involvement.

- 123 The Respondents' narrative in summary is as follows. Ms B sent her email to Ms Weatherill on 23 February 2017, and a further email on 2 March 2017. That email was copied to Mrs Barker. Mrs Barker was made aware of the disciplinary findings against the Claimant following the complaints which had been made by Ms B and Mr W. The matter was referred to Mrs Griffiths, who asked Dr Findlay to investigate. He did investigate, and the Claimant was required to attend a meeting on 14 June 2017 with Mrs Griffiths, following which she was dismissed for the reasons set out above. The Claimant then appealed and the appeal failed.
- 124 The Claimant's view of events as summarised by Miss Brown is somewhat different. Miss Brown referred to the correspondence of early April 2017 concerning the date and the fact of the meeting of the BME Network with the CQC. That 'highlights the tension between the Claimant's role subordinate role to Mrs Barker as Associate Director of Transformation and her role as Chair of the BME Network with direct access to members of the CQC.'⁷⁶ That, said Miss Brown, caused Mrs Barker to consider the Claimant's summary of her employment and the Tribunal claims, and also the concerns of Ms B. Consequently, Mrs Barker escalated the matter to Mrs Griffiths. Thereafter the events as described by each of Miss Brown and Mr Kibling are effectively the same.
- 125 We have heard a very considerable volume of evidence concerning the Claimant's activities on behalf of the BME Network and what she says were protected disclosures or protected acts. In the end, the issue before us at this stage boils down to one simple question. That question is whether we accept that the principal reason in the mind of Mrs Griffiths for the dismissal of the Claimant was her view that it was simply not appropriate for someone who had been found responsible for acts of victimisation, harassment, and discrimination to be the lead person in BSUH responsible for race equality, and that any of the alleged protected disclosures or protected acts did not form a material part of the decision.
- 126 We find without any doubt that that question is answered in the Respondent's favour. The history of events is entirely straightforward. What is particularly important in our view is that after the conclusion of the Claimant's disciplinary proceedings in November 2016 (and the letter providing details of the outcome of her appeal) the CQC was very critical of the culture in BSUH, and said that the issues 'had been long-standing . . . without effective board action' resulting in BSUH being put into special measures. It is obvious that remedial steps were necessary to address the findings made by the CQC.

⁷⁶ Paragraph 15

- 127 Having made that finding of the principal reason for the dismissal as a matter of fact it is not strictly necessary for us to consider at all the question as to whether the Claimant was covered by regulation 5 of the 2014 Regulations. Further this is not a case where reliance is being placed on section 98(2)(d) covering cases of statutory prohibitions. In any event we do not consider that it would have been our function to decide whether or not the Claimant was in fact covered by the regulation. In our judgement the issue before us would have been whether Mrs Barker, Dr Findlay, Mrs Griffiths and Mr Viggers genuinely believed that the regulation did apply to the Claimant, and would also have applied to anyone else in her position. We find that they did genuinely believe that that was the case. There may well have been a difference of view between the management of WSH and the earlier management of BSUH as to the extent of the applicability of the Regulations, but that in our judgement is not relevant.
- 128 We have made a factual finding as to the reasons for the dismissal. The corollary is that the claim of automatic unfair dismissal within section 103A fails. Having decided the actual reason for the dismissal, we must next decide whether that was a potentially fair reason for the dismissal within sections 98(1) or 98(2) of the 1996 Act. The category of reason put forward by the Respondent is section 98(1)(b) of the 1996 Act. The relevant text is:
- some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held
- 129 We will refer to that as 'SOSR' for convenience. There are some difficulties concerning the categorisation of the reason for the dismissal. In the amended Grounds of Resistance the reason was categorised as SOSR but based on the 2014 Regulations or 'because [the Claimant's] conduct meant it was not credible or appropriate for the Claimant to continue in her role.'⁷⁷
- 130 Miss Brown submitted that therefore the dismissal could not be categorised as some other substantial reason within section 98(1)(b) of the 1996 Act, but had to be related to conduct and therefore within section 98(2)(b). However, said Miss Brown, the Respondent was not entitled to advance such a proposition. The point as we understand it is that dismissal for SOSR on the one hand and for a reason relating to conduct on the other hand are said to be mutually exclusive, and reliance had been placed on SOSR. Miss Brown said that a fresh reason for the dismissal could not now be advanced. Mr Kibling was quite clear in his opening note that it had been the case for BSUH throughout that the dismissal was SOSR in respect of the 2014 Regulations or because of the adverse disciplinary findings for conduct. That is not, however, as the case was pleaded in the amended Grounds of Resistance where in paragraphs 31 and 32 it is apparent that the only potentially fair statutory ground relied upon was SOSR. The agreed list of issues reproduced above does not

⁷⁷ [142] at paragraph 31

assist in resolution of this point because of the text in paragraph 2 where reference is made to 's. 98(2) i.e. SOSR'.

131 In our view this matter can easily be argued either way, but the outcome is of no particular relevance. One way of looking at it is that in the widest sense the dismissal was related to the conduct of the Claimant (and therefore a reason within section 92(1)(b)) because of the findings made by Ms Cashman of unlawful conduct under the Equality Act 2010. Another more subtle concept is that the reason was the incompatibility of the Claimant's role with the findings which had been made in the earlier disciplinary proceeding, that being SOSR. It was the latter which was urged on us by Mr Kibling.

132 We conclude that the dismissal can fall within either category. Thus the dismissal was potentially fair. What is then important is to apply the provisions of section 98(4) of the 1996 Act. The wording is important:

Section 98(4) Employment Rights Act 1996

Where the employer has fulfilled the requirements of subsection (1), [i.e. shown the reason for the dismissal and that it was a potentially fair reason] the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)–

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and
- (b) shall be determined in accordance with equity and the substantial merits of the case.

133 We must take into account the specific circumstances and whether those circumstances constituted a sufficient reason for the dismissal of the Claimant in accordance with equity and the general merits. In paragraphs 4 to 8 the list of issues the Claimant set out matters relevant to fairness. Some similar matters were also raised in the lists of detriments. In her written submissions Miss Brown did not address any of those matters save for the one mentioned below. Mr Kibling did address them, and we have noted his submissions.

134 We have reminded ourselves that there is no burden of proof under section 98(4) and the Tribunal must simply come to a conclusion on the evidence. Issues numbered 4 and 5 in the list of issues are whether the Respondent carried out a reasonable investigation, and also a reasonable decision-making process. Although not referred to by Miss Brown in submissions, the Claimant made the points that either this matter should have been dealt with through the disciplinary procedure of BSUH, or that there should not have been any process undertaken at all because BSUH did not have a policy to cover the circumstances.

135 As Mr Kibling pointed out, this was a unique set of circumstances and obviously BSUH would not have had a policy to cover them. Mrs Griffiths adopted a procedure akin to what would be considered a 'normal' disciplinary procedure. She learned of an issue through Mrs Barker and

asked Dr Findlay to investigate the matter. He gave proper notice to the Claimant of his desire to discuss the specific matters with her, and they met on 16 May 2017. Thereafter the Claimant was required to attend a meeting on 14 June 2017 with Mrs Griffiths, following which she was dismissed. The Claimant was then given a right of appeal which she exercised. In our judgement that was all perfectly fair and reasonable. Any criticism of these matters made by the Claimant was one of form and not of substance.

- 136 Issue number 6 is whether the dismissal decision was predetermined. The point was not addressed by Miss Brown. The dismissal decision was taken by Mrs Griffiths who was cross-examined concerning her attitude to the Claimant during the hearing on 14 June 2017. There was no evidence to support the allegation that the matter had been predetermined, and we could not draw any inference from other evidence that that was the case. Mrs Griffiths pondered on the decision to be made before writing to the Claimant on 28 June 2017 and we are satisfied that if the Claimant had acted differently at the meeting then the outcome may have been different.
- 137 We do not fully understand issue 7 and it appears to us that it can conveniently be dealt with along with issue 8, or indeed it could be seen as having been covered by issue 6. Issue 8 is whether there was a sufficient reason for dismissal in all the circumstances. The test usually applicable to conduct cases is whether dismissal was within the band of reasonable responses. The same concept must apply in cases of SOSR. We have of course reminded ourselves that we must not substitute our own view of the matter and decide what we would in fact have done. Further, in the case of SOSR section 98(1)(b) provides that the reason must be such as to justify the dismissal of a person holding the position which the Claimant held.
- 138 The particular and unusual circumstances have been set out above. What Mrs Griffiths was faced with was a NHS Trust in special measures in respect of which the CQC had made an adverse finding that harassment and discrimination was rife. One of the individuals who had been found responsible of unlawful discrimination was the Claimant. It was she who held the very senior position of Associate Director of Transformation. As Mrs Griffiths put it in her witness statement, 'hers was a leadership role related to race equality and it was not objectively credible or acceptable for her to lead on the important issue of race equality, which . . . has respect at its heart, having been found to have acted in a way that was discriminatory and lacking respect for colleagues on more than one occasion.' That comment was made by Mrs Griffiths after she had said that the Claimant was not prepared to engage with her.
- 139 Both Miss Brown and Mr Kibling addressed the point about the previous decision of Ms Cashman, which is of course one of the circumstances of this case. We were referred to *Christou & anor v. London Borough of Haringey* [2013] EWCA Civ 178 – the 'Baby P' case. What there occurred was that two social workers were initially disciplined under a simplified procedure and given a written warning. Later further disciplinary

proceedings were instituted and they were dismissed. The principal issue before the Court of Appeal was that it was unfair to reopen a matter which had already been concluded. Arguments were presented about *res judicata* and abuse of process under the *Henderson v. Henderson* principle. Elias LJ giving the judgment of the court decided that neither principle applied, as it was 'wrong to describe the exercise of disciplinary power by the employer as a form of adjudication.'⁷⁸ Elias LJ then commented in paragraph 56 that one element of an Employment Tribunal's considerations under section 98(4) will be whether it was fair to institute the second procedure at all.

- 140 Miss Brown sought to distinguish *Christou* on the basis that in that case there were fresh allegations of misconduct being considered in the second procedure. We agree that that is correct in that in the second procedure new heads or categories of alleged misconduct were introduced, although based on the same factual background. We accept that the factual backgrounds are not identical. In our judgement it is the comment by Elias LJ which we consider to be important. It takes us back to the pure text of section 98(4) unsullied by glosses on it.
- 141 Miss Brown referred us to *Sarkar v. West London Mental Health NHS Trust* [2010] EWCA Civ 289 to support her contention that the dismissal was unfair. We do not find that authority to be of any particular assistance in this matter. It turns on its own facts and the view that the Employment Tribunal took of what occurred. It is, however, an example where the adoption of different procedures caused unfairness.
- 142 In our judgment it was within the range of reasonable responses for BSUH, through Mrs Griffiths, to decide to dismiss the Claimant in the particular unusual circumstances of this case. Our conclusion is based upon the combination of the factual findings which were made by Ms Cashman, the particular role held by the Claimant, the criticisms in the CQC report and the Claimant's unwillingness to accept any responsibility at the meeting with Mrs Griffiths.
- 143 The claim of unfair dismissal is therefore dismissed.
- 144 The Claimant is also alleging that she suffered certain detriments as acts of victimisation or because of having made protected disclosures. As we have already stated the fact of having committed protected acts and of having made protected disclosures was not in issue before us. This was in reality a claim of unfair dismissal, rather than one relating to detriments short of dismissal. There was a notable lack of concentration on these matters in evidence. The witnesses for the Respondents were not cross-examined as to knowledge of protected acts or protected disclosures, nor as to causation.
- 145 We will deal with each of the points in turn as best we can for the sake of completeness. The first alleged detriment is that there was a misinterpretation of regulation 5 in the 2014 Regulations. We have

⁷⁸ Paragraph 47

referred to this matter above in connection with the unfair dismissal claim. There is an obvious difference between the attitude taken by the previous management of BSUH as to the application of the regulation to that taken by the WSH management. We heard a considerable amount of evidence as to whether the Claimant's status was sufficiently senior for her to be potentially covered by the Regulations by reason of regulation 5(2), and also whether the Claimant was involved in a prescribed or regulated activity within regulation 3 and Schedule 1 to the Regulations.

- 146 We repeat the point made above. We are not prepared to come to any final conclusion as to whether or not the Regulations applied to the Claimant. The issue before us is whether the management of BSUH treated regulation 5 as applying to the Claimant, knowing that it did not apply, and that was because either or both of the Claimant having committed a protected act or having made a protected disclosure.
- 147 We have found that Mrs Griffiths and the other members of management involved did genuinely believe that the Claimant was covered by regulation 5, whether or not that interpretation is in fact correct. The practice at WSH had been that all those with 'Director' in their title were treated as being covered by the regulation.
- 148 Miss Brown submitted that it was not open to the WSH management to treat the BSUH staff otherwise than in accordance with the BSUH policies, and that the BSUH Employment Checks Policy did not include the Claimant as being covered by the 2014 Regulations. The point about the Regulations was first raised by Dr Findlay. Miss Brown cross-examined him and his position was that it was up to each health service provider to decide to whom the Regulations applied. It was not put to him that his reference to the Regulations in his report was made because of any protected act or protected disclosure.
- 149 Miss Brown also cross-examined Mrs Griffiths extensively on the matter. It was the firm position of Mrs Griffiths that the Regulations as interpreted by the CQC Guidance took precedence over any internal policy of BSUH, and that they covered the Claimant. What was not put to Mrs Griffiths was that the reason that she considered that regulation 5 applied was because of either or both of the carrying out of the protected acts, or the making of a protected disclosure.
- 150 There is no evidence from which we could conclude that the interpretation placed on the 2014 Regulations (be it right or wrong) was to any extent caused by the protected acts. Further for the purposes of the claim relating to the protected disclosures we are satisfied with the reasoning by each of Dr Findlay and Mrs Griffiths.
- 151 The second and fourth to sixth alleged detriments have really been dealt with above in connection with the unfair dismissal claim. There is nothing from which we could conclude that any of those matters had anything to do with the Claimant's protected acts. There was no evidence of any link to any protected disclosure. As is apparent we are satisfied with the explanations of the Respondents for the actions taken.

- 152 The third alleged detriment is that there was a predetermined decision to dismiss the Claimant. We have rejected that on the facts.
- 153 The seventh alleged detriment relates to the ACAS Code. In her oral submissions Miss Brown referred to paragraphs 23, 24, 30 and 31 of the Code. As we understand the submission, what Miss Brown was contending was that as reliance had been placed on regulation 5 of the 2014 Regulations then BSUH should have included reference to that matter in its disciplinary policy, so that a breach of the Regulations was stated to be an act of misconduct. We do not understand reference to paragraphs 30 and 31.
- 154 We consider that submission to be misconceived. Paragraphs 23 and 24 relate to gross misconduct justifying summary dismissal and state that disciplinary rules should give examples of such misconduct. Regulation 5 of the 2014 Regulations places duties on service providers (i.e. the employer) and is wholly different from the examples of misconduct by an employee recommended to be included in a disciplinary policy.
- 155 Mr Kibling submitted that the Code did not apply to these particular circumstances, but in any event a proper procedure was followed. Further, he said, there was no evidence of any breach caused by any protected disclosures. He might just as well have made reference also to protected acts. It is that point which is the critical one. As already made clear we have accepted the Respondents' narrative of events and the reasons as to why the various steps and decisions were taken. What occurred had nothing to do with any protected disclosures or acts.
- 156 For the various reasons set out above we find that each of the various claims made by the Claimant fails and they are dismissed.

**Employment Judge Baron
Dated 12 March 2019**