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EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Ms S Noronha	**AND**	Care Quality Commission

Heard at: London Central **On**: 27,28 June and 2,3,4,6 July 2018. In chambers 5 July 2018

Before: Employment Judge Goodman
Mr R. Mead
Dr. V. Weerasinghe

For the Claimant: Mr. C. Kennedy, counsel
For the Respondent: Mr. J. Chegwidden, counsel

REASONS

1. The Claimant was employed by the Respondent as an Assistant Inspector from 12 December 2016 until 10 April 2017, when her probation was terminated early. The claims she brings are of direct race discrimination, race harassment, harassment related to disability, direct disability discrimination and disability related discrimination, failure to make reasonable adjustments for disability and of victimisation. The claims initially made were narrowed down, and we have for this purpose an agreed updated list of claims before us.

Evidence

2. In order to decide the claims, we heard evidence from

Shamin Noronha, claimant

Darren Smith, Analyst Team Leader and trade union steward, who represented her at hearings

Elizabeth Kershaw, Inspection Manger in the South-East Team, who was the Claimant's initial line manager

Theresa Salt, also an Inspection Manager in South East Team, who substituted as her Line Manger after the Claimant lodged a grievance about Miss Kershaw.

Alan Thorne, Head of Hospital Inspection for the South East, who made the decision to terminate her probation early

Michelle Golden, Head of GP Inspection, who decided the Claimant's appeal. We also read written statements from **Polly Rasmussen** and **Ruth Jacob-Brown**, who interviewed the Claimant on 7 October 2016 in relation to whether the Claimant had explained an entry as to qualifications on her application form and another written statement from **Matthew Preston**, who witnessed an episode of which race discrimination is alleged. It was said that Mr Preston was not here because he has had to go to Australia at short notice where a relative is ill. It was proposed that he could give evidence by Skype during the week, 1pm on Tuesday, but we were told this was not possible because of his father's illness. Having read those statements, we have given them some credence, but take in to account that neither side has had an opportunity to ask questions.

3. There was a substantial bundle of documents, and at the conclusion of the Hearing, more documents were added at the request of the Tribunal, namely, a batch of emails from Terri Salt during the period that she was the line manager, and the error reports on two of the hospital inspection reports that the Claimant had proof read.

Findings of Fact

4. The Respondent is a statutory body appointed as to regulate hospitals and adult social care. Its job is to impose standards, to see that they are being carried out, and on occasions to make recommendations for improvement, sometimes even closure. It does so by sending a team of inspectors to review an institution's operations. It sets four core values to be followed in its work: excellence, caring, team work and integrity. These are impressed on new recruits at induction, and they are used to review conduct and capability at probation reviews. The core values are regarded as important in maintaining public confidence in the independence of the regulator and the quality of its reports. In the private sector of healthcare health, the respondent's approval is vital for business success.

5. The Claimant identified herself as of mixed race, and black. She is also a person under a disability. At the time of joining the Respondent her work experience comprised a period working for the London Borough of Enfield recruiting carers, then as a care manager from July 2015 to November 2016, and a period of twelve months as a mental health recovery worker from July 2012. She had pursued one year of a master's degree at Birkbeck, but stopped at the end of 2013 in order to start employment. On her application for employment with the respondent she added that she had considerable experience of mental health in that both her mother and her brother had so suffered, and she had acted as their carer from time to time. Of her formal qualifications, she had, as noted, undertaken twelve months of a part-time (16 hours per week) MA at Birkbeck, and achieved twenty credits by the end of 2013, and also had a certificate in counselling and counselling skills. She intended to take course at London Metropolitan University - an MSc in Social Care, Health Management and Policy. She had been to the University to discuss the course, and told that she should submit an application form o

follow it. She began filling in the form on 3 July 2016. It had to be completed within six weeks or it would be discarded. She did not complete it. Enrolment for this course, we are told, takes place in October and January each year. The Claimant did not enrol in October 2016. She told the Tribunal she was going to apply and start in February 2017, but put it off because of her work at the Care Quality Commission (CQC), and in particular because the region to which she was allocated added travel to her working day.

6. The role she applied for was advertised as assistant inspector, on a twelve month fixed-term contract, with a number of vacancies across England. The CQC is divided in to four regions; candidates were invited to express a preference for a region. Usually assistant inspectors are on two-year fixed term contracts, and since this recruitment round, recruits have been appointed for two-year contracts. It was envisaged that using the experience gained as an assistant inspector they would be able to apply, in a competition, or the role of inspector.

7. The advertised qualification for assistant inspectors stated was: “degree or equivalent.” It was disputed whether that meant a 2:2 degree, as Miss Salt maintained. We do not have the full job advertisement to which the Claimant responded, but the job advertisement in the spring of 2017 for a further round of recruitment did state a 2:2 degree.

8. When the Claimant completed her application form she entered that she had done twelve months of a MA in social studies at Birkbeck, and the taken a break. She entered her certificate in counselling skills at Birkbeck from 2012. There was then a heading “training courses attended”. She entered: trusted assessor level 2 CPD certified, and then “MSc Health and Social Care Management and Policy”. This is the course she was considering applying for, but had not applied for. The name of the institution is not given. The Claimant said that she explained this when completing the online application form, but that her explanation had been cut off in the printed version in the bundle. The respondent says it was not on any form they saw. Following the entry on training courses attended, there is a space giving an opportunity to enter membership of professional bodies, which the Claimant did not complete, and then there was an opportunity to enter a supporting statement, which the Claimant has done at length. Finally she named referees.

9. She was interviewed on 7 October 2016. The Claimant’s evidence is that she told the interviewers on 7 October 2016 that the MSc qualification was an aspiration, not a course she had completed. The Respondent denies that. We read the witness statements of the two interviewers, their contemporary hand-written notes, and the typed-up version, and considered the evidence of the claimant. The factual dispute relates to the question of the Claimant’s integrity that led to termination of her employment. The interviewers have no recollection of such a discussion, but in any case, were asking questions to assess competency, and did not ask about qualifications. The notes show a template of set questions to be asked, and instructions on what was to be said to each candidate. They were detailed, and say nothing about qualifications. There is no note of the claimant mentioning it. We were invited to find her answer to one question shows that she did explain; we do not

accept this. She was asked to describe her experience in her current post, and the notes of her answers cover her work recruiting carers, and within a list of tasks undertaken says check suitability and qualifications. It is clear to us that this is the Claimant checking the carers' qualifications as part of her current role, not her explaining her own qualifications to the interviewers. There is a sweep up section at the end of the template, where the candidate is asked if she has any questions or wants to say something. The Claimant's observations at this stage are recorded; there is nothing about her MSc at London Met. The Tribunal majority, the Employment Judge and Mr Mead, concluded that the Claimant did not mention her MSc at the interview, because if she had the interviewers would have noted it in the final miscellaneous section. Everything else is recorded, so it is most unlikely this answer would not have been noted, particularly as it was stating material changes to the application form. In the minority, Dr Weerasinghe holds that the Claimant did state this, but it was not recorded because checking qualifications was outside the scope of the interview, so the interviewers would not necessarily have recorded it had the discussion taken place. Furthermore, the email of 24 January at 08:53 (which occurs later in the narrative) from Mark Tarrant does not mention the MSc as one of the issues Miss Salt had raised with HR, and in Dr Weerasinghe's view this indicates that on or before 24 January Miss Salt would have known that the MSc was no longer an issue, as the Claimant would have explained to her that she had not started it; the majority holds that this conclusion cannot be drawn from that email. There is no evidence that Miss Salt considered the MSc at all at that stage, let alone that the Claimant or HR had discussed it. Finally, we need to record that there was a suggestion from the Claimant - though not put to any witness - that the notes have been doctored, because they were not handed to her when requested by her representative Mr Smith in the meetings leading to termination of employment, and only disclosed in the Tribunal disclosure process. The Tribunal does not accept that this implies that they were doctored. The notes appear accurate and genuine, there is indication that they have been altered, and there are many reasons why they might not have been disclosed immediately on request.

10. We comment on the Claimant entering her aspiration to do an MSc course under "courses attended". No member of the Tribunal would have done this; all of us would have put that material into the supporting statement. Mr Smith also said he would not have done that. We record this as a measure of the views taken by the Respondent's staff from time to time that the Claimant had been deceitful when she made this entry.

11. At the interview on 7 October the Claimant was asked a number of competence-based questions. She failed one, getting a 2 for decision making when 3 was a pass. Nevertheless it was decided that she should be offered the job, subject to references, and she was told that on 4 November. The reference checking involved contact with Birkbeck to establish that she had done twelve months of the MA course. It does not appear there was contact was made with London Metropolitan, no doubt because their name does not appear on the application form.

12. On 23 November 2016 the Claimant was sent a welcome email from Elizabeth Kershaw, welcoming her to the South-East Hospital team and saying that she would be based at the CQC office in Buckingham Palace Road.

13. The Claimant was then sent a contract of employment. This said her employment was to start 12 October 2016 , she was to be paid a salary of just under £30,000, and her employment was subject to a probation period of six months. In respect of place of work, it stated London, but in addition there is a section saying she could be required to work elsewhere: "CQC may require you with reasonable prior notice and consultation to work at other locations whether temporarily or permanently as CQC may require, you will not be required to work outside the UK for a period in excess of one month without written agreement".

14. The South-East team had an office in Buckingham Palace Road, but in fact most of the South-East team lived outside London, most in the region, and so worked from home when not inspecting a site. Communication was via a skype link or by email. The Claimant was placed in Buckingham Palace Road, where she worked with a number of other assistant inspectors located in London.

15. She was told in her welcome email from Miss Kershaw that she was to make a start by shadowing an inspection carried out by Elaine Biddle from 19-22 December. Before that was a period of induction. She was sent a check list of induction materials, which include a list of the skills to acquire and courses that she was to undergo. A training plan sent to her on 9 December 2016, just before she started. We understand that this training plan is a corporate document, not specifically tailored to the Claimant.

16. While the Claimant was on the inspection in the South-East from 19-22 December, she worked with a special advisor, that is, someone with particular clinical knowledge, called FC. The documents show that FC became highly emotional when having to check clinic records of termination of pregnancy. On 23 December 2016, just the inspection concluded, FC asked the Claimant to complete a feedback form. The Claimant said that she would do that next week, and referred to the difficulties she had had, that she had great respect for her dedication, and looked forward to working with her again. Then on 3 January the Claimant responded to FC saying that she (now) declined to give her feedback. At the same time she sent a long (two-page) email to Miss Biddle, copied to Elizabeth Kershaw, saying that FC had been highly emotional, that the Claimant had to do an interview, that she had been instructed -and objected to - carry water, and to watch her bag and files, which the Claimant had "politely declined", she had also been asked to make a cup of tea. She referred to another member of staff (Emma) advising her to complain about it. She said that FC's fitness, or lack of it, was a serious situation requiring immediate management intervention. She felt she could not work alongside FC.

17. The disparity of opinion apparent in these emails (23 December and 3 January) in the same chain prompted Miss Kershaw to telephone the claimant

to discuss it. Miss Kershaw was concerned about a number of matters, but particularly that the email showed an about turn; that two weeks after the event she was making a written complaint; the proper course of action, if she thought FC was unfit for inspection work, would have been to have spoken to inspection manager Miss Biddle at the time. She also took a dim view of the Claimant refusing to mind files, carry water or make a cup of tea; to her mind it indicated a misunderstanding of her role and lack of team work. Other Respondent's witnesses say these are tasks all members of the inspection team do for each other.

18. A day or so later, on 6 January, the Claimant asked if she could move to the London-North team. She said she had been networking at Buckingham Palace Road with the staff in North London, that she herself lived in North London, and she understood that they would be recruiting more assistant inspectors in 2017. Miss Kershaw objected to the Claimant undertaking inspections for the London team: she was allocated to work for the South-East team, she had accepted a post there and that is what she should do.

19. On 9 January the two met face to face (for the first time) at an inspection at a Holiday Inn in Kent. In a group session Miss Kershaw criticised the Claimant for talking about "we". The explanation given, which is now accepted by the Claimant, was that she did not think she should talk of "we" meaning London Borough of Enfield having particular practices, as she should now be saying "we" meaning the CQC. (Initially this claim to the Tribunal was pursued as less favourable treatment related to race, but the allegation has been abandoned).

20. On 10 January occurred what we will call the "fridges incident". This is the first treatment alleged as race discrimination. It occurred during lunchtime feedback at Leatherhead. The claimant was working with an inspector called Matt Preston. They went to check the fridges in which medicine was stored. When Elizabeth Kershaw learned the Claimant had been checking the records, she questioned her about it and became concerned that the Claimant was maintaining that all records were fine, but did not respond when asked whether she had checked the recordings had been made daily. Miss Kershaw says that she was frustrated that she could not get a straight answer to her questions. Mr Preston intervened to say that in fact that the temperature readings were automatic, so it was not necessary to check whether individuals had checked them. We simply record that, as later agreed by the grievance investigator, Miss Kershaw had not done this with "the support and learning manner to be expected with the CQC value of caring and integrity", and this had caused the Claimant distress.

21. The Claimant decided to lodge a grievance about Miss Kershaw, she asked a colleague, and was told to discuss it with Alan Thorne. On 13 January she drafted a lengthy grievance whist working from home, and on 16 January she emailed it to Mr Thorne. It begins: "I hereby lodge a formal complaint against my line manager Elizabeth Kershaw on grounds of discrimination, victimisation and harassment". She then recited that she had received callous, offensive and humiliating treatment, starting 3 January 2017 with her email about FC. The action she wanted to resolve her grievance was

to remove Miss Kershaw as her line manager, to cancel the one to one supervision meeting fixed for 19 January, to replace Miss Kershaw with Sean Martin, and to place her on a waiting list to transfer to London-North team. Specifically, she complained that on 3 January she was accused of undermining Elaine Biddell and of not taking instruction, and that Miss Kershaw had been abrasive. Her request to transfer to London was an innocent question,and had been misunderstood and slapped down. She complained of Miss Kershaw "correcting my English" in respect of the use of "we" on 9 January, and on 10 January 2017 that Miss Kershaw was visibly upset about the conversation. There was poor feedback given on 12 January, which she found humiliating, and that Mr Preston had to intervene and had subsequently apologised to her for Miss Kershaw's behaviour.

22. In this six-page grievance there is no mention at all of race or disability. Two members of the panel (we will analyse this subsequently) do not believe that a reasonable person could or should have appreciated that this was a complaint about race or disability, the other member (Dr Weerasinghe) disagrees.

23. On 16 January Alan Thorne allocated the Claimant to Terri Salt for supervision. He intended this as a temporary measure. He also discussed with the Claimant whether she would opt for mediation as an alternative form of resolution; the Claimant declined. She was told that a transfer would be considered, but separately, not as part of the grievance procedure.

24. On taking over, Terri Salt promptly arranged for the Claimant to have IT support from a named individual, she prepared a detailed work plan which included that the Claimant would be trained in a number of relevant software packages for the production of reports, duty CRM and digital publisher. She had a skype call with the Claimant to discuss her experience and background (hse was otherwise unknown to Miss Salt), on 18 January she told the Claimant to meet Beth the planner, who was leaving soon, to introduce her before tasks landed on her desk. On work load, she wished the Claimant to filter the tasks she was given to do through her, so that she could see she was not overworked.

25. On 23 January the Claimant complained to HR about being in the South-East team, and she requested a transfer, as she was unaware that she was to be allocated to London. She was having difficulty with the long hours of travel. Her postgraduate course had been put on temporary hold because of the travel.

26. We know from late disclosures that on 24 January HR were asked by Terri Salt to check whether the Claimant was actually qualified for the role, given that she had dropped out of her Birkbeck course after one year. Miss Salt also queried with HR whether an assistant inspector would automatically progress to an inspector's role, as the Claimant seemed to think, rather than applying in competition for the inspector role. On the preferred outcome for this grievance being a transfer to North East London, she said she had already "requested/demanded" a move to North-East London team as a preferred outcome for a grievance about a previous line manager, citing

discrimination, harassment and bullying, within less than a month of joining, and that she had refused mediation. Terri Salt said there was a need to manage her expectations. If she has been appointed but is unqualified, she had concerns, and not just about her qualifications and experience, but also about her behaviour and work delivery.

27. The majority of the tribunal believes this does not tell us whether Miss Salt had discussed the MSc at the London Metropolitan with the Claimant: if she had, Miss Salt did not pick it up with HR. Miss Salt says that she knew about the grievance because Alan Thorne had told the team in a joint team managers' call that the Claimant had lodged a grievance against Miss Kershaw, when explaining why she was being transferred to Theresa Salt.

28. Margaret McGlynn was appointed to investigate the grievance. On 31 January 2017, the day before the claimant was due to meet Miss McGlynn to discuss the grievance, she emailed to say that she had a disability, namely: "I am disabled" with epilepsy, which, she said, was medicated. She added that CQC had a duty to protect her from unfair acts, as they could lead to a serious seizure.

29. It seemed to us that this was prompted by a recent intervention with Miss Salt by Elizabeth Kershaw, querying whether the Claimant, when typing up notes of the December inspection interviews, had been accurate when she said that Mr Preston was present at a particular interview, or whether the Claimant was in fact alone. (The Claimant's explanation is that Mr Preston was present at the beginning but then left).

30. As noted, on 1 February the Claimant had a grievance investigation meeting with Miss McGlynn. She asked her if she could transfer to London. She explained that she was now planning to start the MSc at London Metropolitan in September 2017. Next day Miss McGlynn interviewed Elizabeth Kershaw, and then a number of others.

31. On 1 February 2017 Terri Salt asked another manager, of whom she had heard at a management training course off-site that "you have managed a couple of people out during a probationary period - I could really do with some insight on how you managed to do this". This suggests to us that as early as 1 February Miss Salt was considering whether the Claimant should be leaving the Respondent.

32. A quarter of an hour later the Claimant told Miss Salt that she could not take on the duties of Beth the planner. She had seen the volume of tasks that Beth had to do, and she was busy learning inspections, had to take some time off in lieu, and she then had three days of CRM training to reschedule. Miss Salt replied asking for a picture of her inbox and her calendar, so she could assess her workload. She was asking her to do Beth's work short term. In an aside, she said: "you might want to reread and consider the tone of your email which came across as rather demanding", pointing out it was a reasonable request to assume Beth's role, and they should discuss it. Half an hour later the Claimant replied at great length, including: "I need to inform you that I am someone with a disability". She had told HR she had epilepsy,

usually controlled by medication, but triggered by serious adverse conditions. If she had been offensive in her email she was sorry, but she was overwhelmed with work. Miss Salt replied briefly that she did not want to overload her.

33. That evening the Claimant emailed Miss McGlynn (whom she had seen that day for discussion of the grievance) to say that she had just discussed it with her counsellor; she had advised that race discrimination can take many forms; and "the fact that I am the only black member of the team and Elizabeth Kershaw treated me unfavourably compared to other inspectors, all white, meant that race discrimination cannot be removed from the equation". The Claimant had been advised that she should not be in denial about it and she now agreed it was race discrimination, and as evidence of that said that Elizabeth Kershaw corrected her English in an offensive manner, (her use of "we"), and she wanted to know how to delete Matt Preston's name from the interview notes of the inspection, which was a serious misrepresentation of the case.

34. Terri Salt's response (2 February), to being told that the Claimant was under a disability, was to propose an occupational health review.

35. It is not disputed that some years earlier the claimant had been diagnosed with Idiopathic Generalised Epilepsy including Myoclonic and Tonic Clonic Seizures together with Absence Seizures. There had been a number of difficulties in the past, but since 2010 symptoms had been well controlled by medication. There was no restriction on her ability to drive a car. The Claimant says this is why she did not declare the disability, because of the well-known stigma of Epilepsy. The Claimant states that as from 1 February they were aware of this disability. The panel accepts that Epilepsy can be a stigma, and if the Claimant did not think any reasonable adjustments needed to be made, it was in order to say on her application form that she was not a person subject for disability.

Fridges Incident - Race Discrimination?

36. At this stage we pause the narrative in order to consider the first matter alleged on the list of issues, which is that Elizabeth Kershaw's treatment of the Claimant during the 10 January fridges incident was race discrimination. Section 13 of the Equality Act provides that a person discriminates against another if he treats that person less favourably than another on grounds of the protective characteristic (here, race). Section 23 provides that comparators must be material - that the circumstances are not materially different. We heed **Shamoon v The Chief Constable of the RUC 2003 IRLR 285,** that often it will require a hypothetical comparative to establish the reason for a Respondent's action. A reason is a set of facts or beliefs known to the Respondent – **Aberbethy v Mott, Hay and Anderson.** We are invited to consider **Nagarajan v London Regional Transport 2000 1AC501** to the effect that if there is more than one reason for a Respondent's action, if racial grounds or protected acts had a significant influence on the outcome, discrimination is made out. **Aylott v Stockton on Tees Brough Council** holds that the main question is why the Claimant was subjected to less

favourable treatment than others; it is good practice to check this by using a hypothetical comparator. Section 136, on the shifting burden of proof, is important, because discrimination may not be admitted by the Respondent, indeed the Respondent may not even recognise that is what he is doing. The section requires if there are facts from which the court could decide in the absence of any other explanation that a person A contravened the provision concerned the Court must hold that the contravention occurred, but that does not apply if A shows that A did not contravene the provision. That sums up the earlier case law in **Igen v Wong** and **Barton v Investec** to the effect that the Claimant must first establish facts from which we could conclude by the facts themselves or by inference from those facts that discrimination occurred and then look to the Respondent to explain why discrimination was not the reason for its actions. That test is relevant here in relation to both race and disability, but for now we proceed to discuss the fridges incident in relation to the claim of race discrimination. The Claimant submits that she has shown the following facts from which the Tribunal should conclude that Elizabeth Kershaw's behaviour and general feedback session was an act of race discrimination: she was hostile to the Claimant on this occasion, and this was unusual behaviour and she was normally kind to staff, though she agreed that she was viewed as more than direct and that she did not "fluff around the edges" in the view of her staff. We also note that the Claimant is black, and all the other team members are white, including Elizabeth Kershaw. It is also the case that Elizabeth Kershaw disliked the Claimant, as shown by other events. The Respondent submits that this is not sufficient to shift the burden of proof, but even if it does, the explanation is that Miss Kershaw was frustrated because she could not get a straight answer to a straight question. In the Tribunal's view, Miss Kershaw was hostile to the Claimant on this occasion, as found in the grievance investigation. She was visibly frustrated and short with the Claimant in front of other team members, and team members thought that this was unusual. It was also the case that the Claimant was the only black person in the team. The Employment Judge and Mr Mead also agreed that the exchanges on 6 January show that she disliked her. Dr Weerasinghe has reservations as to whether this inference can be drawn from that evidence. The Employment Judge and Mr Mead are not clear that this is enough to shift the burden to the Respondent for explanation, as there is merely unfavourable behaviour and the fact of difference, and nothing more except that the behaviour was unusual. Dr Weerasinghe was clear that it is enough because the behaviour was unusual. However, all panel members concluded that if the burden *does* shift the Respondent's explanations suffice to explain why she behaved in that way, and that it was not the difference in race. Miss Kershaw was clear that the Claimant was asked what the records for January showed, that she replied the records for July to December were correct, when the question was repeated she got the same answer. It was important that the Claimant understood that CQC inspectors were looking to see that not just that the temperatures were correct but that they were looking to see if they had been *checked* each day and the Claimant had not appeared to have grasped this - in this way it was right that Miss Kershaw could not get a straight answer to a straight question. We can see from the notes of the Claimant's initial interview on the question she failed, a comment that her answer was tangential to the question (she did not

answer it), so it was possible the Claimant had been obtuse. It is also the case that Miss Kershaw clearly took a poor view of the Claimant's conduct with regard to email about FC (saying one thing to FC and another to Miss Biddle and Miss Kershaw, then she was complaining late and in writing, when if the concern was genuine she should have spoken to the inspection manager), and by appearing to be disdainful of tasks she deemed menial. We note too that Miss Kershaw's emails of 23 November and 9 December addressed to the Claimant were friendly and general, and displayed no dislike. This goes to explain why she was more hostile to the Claimant than to another member of staff - she took a poor view of Claimant's behaviour over FC. We conclude that had a white assistant inspector behaved as she did on these occasions she would have taken a similarly poor view of her. She had also taken a poor view of the Claimant using "we" to mean Enfield Borough Council, rather than CQC, another reason for her poor view of the Claimant, and if that was hostile it arose from the FC episode. The Claimant has now accepted that this was an explanation for picking her up on the use of "we", and that it was not a correction to her use of English, with the implication that not being white was the reason for that. We conclude that the Respondent has adequately explained Miss Kershaw's behaviour in such a way as to exclude race discrimination.

37. This episode was also included as race harassment, as defined in Section 26. We concluded that if Miss Kershaw's actions on that occasion were, in the alternative harassment, that might well be for the same reasons. We do not accept that any harassment to which the Claimant was subjected was related to race, bearing in mind that we must take account of the Claimant's perception, the other circumstances of the case and whether the reason for the conduct should be taken to have that effect.

38. Returning to the factual narrative, on 6 and 7 February the Claimant was engaged in an inspection in Tunbridge Wells. She experienced extensive travel delay because of industrial action on Southern Region. She got home late and next day reported that she had suffered a seizure triggered by this long day. On the morning of 8 February she had a telephone consultation with her GP, who increased her medication for a thirty day trial. The Claimant emailed Miss Salt to report this and say that the GP would send a letter in fourteen days in support of her request for transfer. The Claimant said she would work from home the following day, 9 February. Miss Salt then referred the Claimant to occupational health. This report is in the bundle, dated 1 March. In the meantime, Ms Salt told the Claimant to work at the office, not at home, as if she was not fit to travel to the office she was probably not fit to work at all, and Buckingham Palace Road was her normal place of work. But she was to be restricted to the office, so that she did not have to travel across the South-Eastern region, so as to reduce the stress, as requested. She added it was easier to reduce her stress fatigue by reducing non-essential tasks, and she needed to withdraw from some training courses she had booked (dementia awareness, SOFI and safeguarding). She had not discussed with her line manager whether she should go on these courses. She was to do the administration tasks first, as it was necessary for her to get to grips with the administration programmes before further training on

inspections. Other assistant inspectors had not done this training, and it was not required - it was better for her to focus on the core job. The Claimant responded on 9 February that she was confused why she could not work from home, as other assistant inspectors did. The response was extreme. She was being punished for taking out a grievance and requesting a transfer. She should be consulted if she was going to be given a solely administrative job. There would be a GP report, and she consented to a reasonable adjustment. On the requirement to do courses, in the induction check list of 9 December 2016 there were mandatory courses for induction, and some additional learning courses, including the three Ms Salt wanted postponed. Miss Salt explained that as more meetings were set up for her more course would be booked. The syllabus she had been sent was the whole of an assistant inspector's training. The Claimant replied that she had been told by Miss Kershaw to book these courses; there was some misunderstanding. The Claimant thought that she was to go ahead and book the courses in her own time, while her managers thought they should manage which courses she did and in what order. On 9 February the Claimant said that training had been allocated to her by others, she did not request it, and she was forced to work as the planner and on administration just because the disability prevented travel. She would request an urgent transfer to London so she could continue inspections.

39. The Claimant then emailed Miss McGlynn, who was investigating the grievance, and HR, to say transferring her to London was an appropriate adjustment for disability, pointing out that last week the CQC had advertised for additional assistant inspectors nationally. Miss Salt then cancelled the courses that the Claimant had booked and said that it was more important for her to get to grips with the administration, these courses were for inspectors, SOFI was not appropriate to her grade, she had no further safeguarding duties, she had done the basic safeguarding on the induction. As for other assistant inspectors doing the courses, Miss Salt made some enquiries, as we can see from emails that she consulted with the training group who had confirmed that safeguarding and dementia sessions were run throughout the year but that invitations went out to all new starters. The Claimant's objection to being removed from the courses is that this would put her at a disadvantage when she made an application for an inspector's post.

40. On 10 February the Claimant emailed HR to say that her relationship with the South-East team was "deteriorating". She was now ready to "take matters external", and get legal advice if she was not transferred.

41. On 13 February 2017 she was told "we can accommodate a move to London" and was invited to discuss which team she would go to.

42. The occupational health report was received on 1 March. Her condition was noted to be controlled by medication, as was the fact that the Claimant had reported that she had never met difficulties before when travelling within London. It reported that the information on the report was based on what came from the Claimant, it was suggested that she was transferred to London North Region, that her workload be monitored to avoid uneven or unexpected demands, and that there should be a stress risk assessment. It did not say,

as the Claimant subsequently represented, to Miss Salt's annoyance, there should be an immediate transfer.

43. In March 2017 there was an interim review of the Claimant's probation involving the Claimant and Miss Salt. The notes of the meetings show that the Claimant first discussed transfer, then proof reading work and planning, then her grievance. Miss Salt objected to the Claimant's approach to team work, saying that the tone of her emails to her manager was unacceptable , not in line with the cultural norms; she referred particularly to the email on FC of 3 January. She mentioned her lack of cooperation in assuming some of the planners duties when Beth left. She then said, in relation to the core value of integrity, that she had said that there was only staff member living in London on the South-East team, when in fact some members of the South-East team were resident outside the region, and then that in the email of 23 January 2017 the Claimant had represented that she was a postgraduate student and had put her course on hold because of being allocated to the South East, but she had not started the course. They discussed the Claimant's MSc. This is when Miss Salt learned that the course had not even been started. As she had said it was "on hold", Miss Salt concluded that the assertion that she was such a student was untrue, and this displayed lack of integrity. Next Miss Salt objected to the Claimant having rebooked the three training courses from which Miss Salt had removed her. This too displayed a lack of integrity. The Claimant justified rebooking the courses because after she transferred to London North region she would need them. She said that she was duly being punished for taking out a grievance. There was then mention of an episode involving a fellow employee called Darcy Dickson, whom the Claimant was alleged to have aggressively questioned about the fact that she had been able to work in London on a transfer from North West, the complaint had reached Miss Salt from Miss Dickson's mother, whom Miss Salt had met on a training course. Next, they discussed whether the claimant was actually doing any work over and above training - Miss Salt suspected she was not, as there had been extensive delays in proof reading two reports allocated to her some time before. Miss Salt had handed the Claimant a file of emails for discussion in relation to the integrity point: the claimant handed them back, but asked and got them again on 3 April, so by the time of the final probation review meeting the Claimant did have the file of emails.

44. The move to transfer to London continued. Later that day Miss Salt contacted HR - she understood that they were to look for vacancies in London, there were no current vacancies in Acute, but she was not certain if there were any spaces elsewhere. On 8 March Miss Salt told the Claimant she had heard there was a vacancy in London Mental Health and invited her to set up a meeting with Jane Ray, the team leader, if she was interested. The Claimant said that she would discuss it with her representative, andd asked Miss Salt to stay out of it, saying that there was a conflict of interest. We do not understand this to mean that Miss Salt was involved in the grievance, because she was not, we understand that this was in relation to the Claimant's understanding that Miss Salt was considering terminating her probation, which had been flagged up at the March review. The typed record of the meeting says there was a potential transfer date of 20 March 2017, but

the claimant had been "made aware that her current work practice behaviours and communications style may impact on the success of completion of her probationary period." This was sent to the Claimant within days of 6 March meeting.

45. On 10 March 2017 HR told the Claimant that a vacancy in Mental Health team for an assistant inspector was immediately available. On 17 March the Claimant told her union representative, at some length, why she considered this was unsuitable, and HR, briefly, that it was not accepted as it was unsuitable. On 21 March the Claimant was told that there would be a vacancy in London Acute team (which was the one she wanted) but they would not know which team had a vacancy until the end of April 2017, in the meantime she was to continue being managed by Terri Salt within Alan Thorne's South-East team.

Reasonable Adjustment for Disability?

46. We pause the factual narrative again to consider the claim under Section 20 of the Equality Act that the Respondent did not make reasonable adjustments for the Claimant's disability. Section 20 requires that where there is a provision, criterion or practice which puts people with whom the Claimant shares a protected characteristic at a substantial disadvantage, and where the Clamant does suffer disadvantage as a result, then there is a duty to make reasonable adjustments. The provision is agreed to be the requirement to undertake inspection work within the South-East region. The substantial disadvantage alleged is that travel, prolonged by travel delays, in the South-East region caused her to have fits, or made her more vulnerable to such episodes. The proposed adjustment was to allow the Claimant to work in London only, to reduce travel time and disruption. The alleged breach of duty was that the Respondent did not transfer her from South East to London North. The Claimant alleges that this breach occurred on 8 February, while the Respondent says that they made her a reasonable offer on 8 March, and then a further offer on 31 March which was in fact accepted.

47. The Tribunal holds that this duty arose from 1 February, when the Claimant said that she had a disability, albeit no details were provided, and in any event from 8 February when she reported that excessive travel had given rise to her first seizure for several years. The action the Respondent took then was to remove her from inspection duties, so that she did not have to travel, to arrange an occupational health assessment, which took place on 1 March, and then from 6 March, following the probationary review meeting, to follow up a transfer request, resulting in an offer on 8 March on Mental Health, and an offer on 21 March of a likely vacancy from the end of April, and in the meantime to keep working in Buckingham Palace Road, in London. Taking the substantial disadvantage to the Claimant as travel delays in South East, we ask whether the Respondent acted reasonably in making the adjustments that they did, namely taking her off travel immediately, getting an occupational health report and then finding an inspection role. The dispute is about how promptly they did that.

48. In the view of the majority (the Employment Judge and Mr Mead) is that this was a reasonable adjustment, and that the Respondent acted reasonably in doing what they did. They noted the Claimant's reported concern immediately and without waiting for an occupational health report removed her from duties requiring travel. They established that there was a vacancy by 8 March, which is only 7 days after the date of the occupational health report. It was reasonable for an employer to wait for a report before making this adjustment. In our view Mental Health was suitable work, having regard to the reported disability, namely inability to travel, because it would involve travelling only within the London region, which according to the occupational health adviser was something that the Claimant could manage. In any case, the Claimant was told on 21 March that she could have the vacancy she wanted in the Acute team, available at the end of April. In the view of the majority it is hard to see how the Respondent could have done more. Dr Weerasinghe however concludes that the adjustment that they made was not reasonable for the following reasons: he accepts that the adjustment that was made did eliminate the major disadvantage that impacted the Claimant's health, that is, travelling in the South East, however, in doing so the Respondent introduced further disadvantage which was the exclusion of inspection duties until a transfer took effect. Inspection is an important aspect of the Claimant's training towards becoming an inspector. In an email to Miss Salt on 9 February the Claimant had written: the area I work and train in is not causing me any stress and has not caused me to have the seizures, it's the travel difficulties in the South East that has caused the health difficulties". Moreover, on 8 February 2017 which is after the disclosure of the disability Miss Salt unilaterally withdrew the Claimant from three courses she booked herself on to stating was much better to do the core job well at the moment and reduce the stress and fatigue by reducing the non-essential commitments.

49. Dr Weerasinghe, the minority, concludes that the adjustment was not reasonable. He reasons as follows: it is accepted that the adjustment was made did eliminate the major advantage that impacted the claimant's health which was travelling in the south East. However, in doing so the respondent introduced a further disadvantage which was the exclusion of inspection duties. It is to be noted that inspection is an important aspect of the claimant's training towards becoming an inspector. In an email to Ms Salt on 9 February, the claimant writes: "the AI work and training is not causing me any stress and has not caused me to have the seizures, it is the travel difficulties to the south-east that has caused me health difficulties…" Moreover, on 8 February 2017, which was after disclosure of the disability, Ms Salt unilaterally withdrew the claimant from 3 courses she had booked herself into stating: "much better to do the core job well at the moment and reduce the stress and fatigue by reducing the non-essential commitments". What we receive concludes that this action too was a further element of the adjustment because of the reference to reduction of stress and fatigue. It is also to be noted the wording Miss Salt used "stress and fatigue" is identical to the wording in the occupational health report. On 10th of February, the claimant emailed Miss Salt stating: "by removing me from all of these academy training courses which are part of the AI task log requirements you are placing me at

a great disadvantage in being able to be successful in the future in becoming an inspector as all the other AI's would be completing higher inspection training than me and I would be the only AI who has not met the AI task log requirements". Furthermore, the claimant said in oral evidence that the courses that were removed were not stressful to do. This was not contested by the responden . (The majority comment on this view is that inspection work was carried out by teams in one week in four, and that the brief delay in allocating her a place in Mental Health, and slightly longer delay in allocating work in London Acute, she would be losing relatively little inspection experience, not enough to constitute a disadvantage or make the way the adjustment was carried out unreasonable. Further, removing her from training courses was not related to her need to restrict travel, but because Miss Salt wished the Claimant to focus on her administration tasks, as she was concerned that she was not doing enough of an assistant inspector's normal duties).

Events Leading to Termination of Employment

50. Returning to the factual narrative, on 13 March 2017 Miss McGlynn completed her report on the outcome to the Claimant's grievance. She was critical of Miss Kershaw's behaviour as not always in line with CQC standards at the January inspection as noted. But did not think it was to do with race. She recommended the Claimant's transfer to London, but in the meantime, she would be managed by Miss Salt. She did not uphold that there had been discrimination or bullying or harassment, but she thought that all concerned should reflect on their behaviour. The Claimant was offered an appeal against this decision, but she did not exercise.it.

51. Following the 6 March interim review, the Claimant continued with administrative tasks, proof reading and uploading draft reports prepared by inspectors. She did not in fact undertake Beth's planning duties. The reports she checked included one for Sussex Spire and one for another Hospital. The error reports that came back on her checked work included twenty pages listing typos and spelling mistakes for one, and sixty-six pages for the other. Miss Salt considers that these are unusually extensive, given that these were relatively short reports on small private health care providers - a CQC report on an NHS Trust would be far more substantial. The Tribunal reviewed the error reports, and the Sussex Spire report in detail. Of the listed typos, spelling mistakes and grammatical mistakes, there are several instances of the Claimant using a singular instead of a plural, and vice versa, errors in placing possessive apostrophes, errors of punctuation, inconsistent typing of figures in numbers or letters, inconsistent use of capital letters in titles and uncorrected doubling errors. Generally, the standard is clearly unacceptable for a regulator's report. Some of this might indicate a poor command of English, or just simple carelessness in proof reading. The Claimant's own emails, by contrast, are generally highly fluent and grammatical in the use of English, although sometimes with uncertain use of the past tense, and do not demonstrate poor education, so more likely failure to proof read adequately is the cause. We have discounted some errors such as corrections of the substance of what it said, even doing so, there are so many mistakes that it is

clear that it had not been corrected carefully. The Claimant has defended this report at the final meeting by saying that she does not know how these occurred - she attributed some errors to the report writer, or to the unit known as SQAG, or says the text must have been altered since uploading. We can see that the Respondent found these excuses unattractive. The Claimant did not engage in a detailed defence or her errors, simply saying she did not know how they arose; we also note that at the final review meeting on 10 April the Claimant herself acknowledged that she was "gutted" about the number of errors, and her representative did not attempt to defend them, just saying there were grounds for improvement and further effort.

52. The Respondent's probation policy provides for reviews after the first month, third month and sixth month. The Claimant's reviews were on 25 January, 6 March and 10 April. The 10 April review was brought forward two months because the policy provides for early termination if it becomes clear that the probationer is "unlikely" to be acceptable, and it was the view of Miss Salt and Mr Thorne that the final review meeting should be brought forward having regard to the continued concern about the Claimant meeting the values of excellence.

53. The Claimant was told on 31 March that there would be a final review meeting on 10 April, although she seems to be aware before that date that it was coming because she had seen it in Miss Salts calendar. At the meeting on 10 April Alan Thorne brought a person from HR, and the Claimant came with a trade union representative. She was told that they wanted to cover three key areas where it was thought that she fell down, namely integrity, excellence and team working, including the quality of her work, and noting that the first review had been delayed by the fact of the grievance and her transfer to Miss Salt's supervision. Concern was expressed that she did not have a 2:2 degree or its equivalent, and that the quality of her proof reading (having regard to the error report) was poor, especially when she had complained that she did not have enough work to do. The respondent said they had adjusted her working in the interim by not requiring her to carry out inspections, and that this had made no difference whether she had or had not been transferred to Mental Health. It was said by Miss Salt that the Claimant did not understand the need for trust, or the context in which she worked, and had limited awareness of her own shortcomings. She had done all the mandatory on-line training by 6 January 2017. As for the interim review, the Claimant had not subsequently engaged sufficiently with the need to improve. She had viewed it as a disciplinary investigation. Miss Salt's appendix, attached to the invitation to the meeting, showed that the particular concerns were integrity in relation to the application form. This was discussed in the meeting: the Claimant said that she had done one year of the Birkbeck MA and she aspired to do the other course. She had told the interview panel and they knew that the MSc was an intention only. She had now decided to pursue another course, not the MSc. She was gutted about the number of errors. On starting she had always assumed she would be allocated to London, and had been surprised to be allocated in the South-East. That should have been done with her consultation.

54. Alan Thorne concluded that she had not met probationary objectives, and adopted Miss Salt's analysis: in respect of integrity, the application form contained a falsehood; she had not been offered London, and had not objected to South-East when it was offered, and had accepted it. As of 26 January, she had asserted that all staff lived in South-East which was untrue - she had not checked the facts; she had reapplied for three courses despite Miss Salt having just un-booked them As for excellence, she had not met deadlines to produce and upload the reports she was required to proof read, and they had contained numerous errors.

55. On 18 April 2017 Mr Thorne drafted a letter summarising the arguments presented by the management and the Claimant, and concluded that she had not met probationary objectives. This letter does not contain the reasons for concluding that the management case was to be preferred. She was given one week's notice and told that she would be entitled to any unpaid holiday; she was not to undertake further work.

56. On 2 May the Claimant appealed, on the basis she had been dismissed because she lodged a grievance against Elizabeth Kershaw. It was unfair to dismiss her because they did not follow procedure. The dismissal was discrimination as "I was the only black member of staff", and she had Epilepsy. She had not had proper supervision, she had not been treated impartially, Miss Salt had accused her of fraud, and she had not been consulted about being placed in the South-East team, when she had wanted to work in London.

57. The appeal was conducted by Marion Golden. There was a meeting to discuss it on 25 May 2017, and although the appeal was to be limited to a review of the evidence, there was a more extensive discussion of the Claimant's concerns, in particular the race issue. It was noted there were three BME staff in the South-East team including the Claimant. Some of he team lived outside the Sout-East, namely Bristol. The notes of the grievance meeting summarise the history and each side's case.

58. On 1 June the Claimant was told that the appeal was unsuccessful: she had had adequate supervision and training; expressing an interest in being placed in London was not the same as having a right to work in London; she had been offered a transfer when she raised the issue. There was concern about her integrity, in particular her assertion about qualifications, and that she had said she placed her course on hold when she had not in fact applied for it. Her performance was lacking. She had not displayed CQC core values. The adjustment made for her disability was reasonable and timely, as she was no longer required to work within the South East, she had declined the reasonable offer of transfer to mental health, but in any case had then been offered a vacancy in London Acute.

59. Of the remaining items on the list of issues, it is alleged as disability harassment and disability discrimination under sections 13 and 15 (although it was not clarified to us in what respect something arising was different from discrimination because of disability), that Theresa Salt had, on 6 March and 10 April, accused the Claimant of lying about her disability in order to secure

a transfer to London. We first examined whether such an accusation was made in either meeting. We have a full set of the respondent's 6 March notes, and a set as corrected by the Claimant, and we have also reviewed the notes Miss Salt made for this meeting. As far as we can see on 6 March there was a discussion of integrity, but even in the Claimant's corrections there is no mention of an accusation of lying about disability, and no context from which we could draw such an inference. The Claimant says in her witness statement that she was accused of having "lied". We are not sure of the purpose of the quotation marks - whether the Claimant is saying that the words had not been used but accusations made to that effect. We have no information on which we could find that such an accusation had been made: at best it was being said that she had used inaccurate information to get a transfer. Miss Salt did feel strongly about the Claimant's integrity on a number of grounds, and did hold the view that the Claimant had from time to time mis-represented facts in order to get the result she wanted. It is possible Miss Salt used the word lying, but this not in the record; it is not even clear from the Claimant's witness statement it was used. Miss Salt's own evidence to the Tribunal was that she felt the Claimant was being less than frank, which might amount to an accusation of lying even if the word was not used. But "less than frank" would be justified by her concerns about her representation that she had attended an MSc course when she had not. We concluded it was not proved that Miss Salt accused the Claimant of lying on 6 March. Even if she did we concluded that the discussion of the Claimant's integrity was a proper subject of discussion. The Claimant may have said that there was an innocent mistake in what she said about the course, or that she had made a mistake saying that everyone but her lived in the South-East, but we could not see how any of the discussion of her integrity could be related in any way either to her race or the fact of disability. If she had been white or not disabled, we concluded that the Respondent would still have been entitled to discuss what she had said in these emails or in the application form.

60. In relation to the meeting on 10 April, the Claimant's evidence was that Miss Salt said that she was lying about her seizures to get a transfer to London Regional Acute, thoug this is not apparent from the notes. Miss Salt's preparation notes show that she was concerned that the Claimant was lying about her qualifications on her application form, and that "Shamin (the Claimant) appeared to believe that it was her right to transfer to North East London not Mental Health, her activity before and subsequently to sharing the effect of her disability have been geared towards achieving this". We think that may be what the Claimant is referring to, but it does not add up to an accusation of lying to get a transfer. We do not uphold the allegation.

61. Another allegation of disability discrimination is that Theresa Salt instructed the Claimant on 10 Febraruy and 6 March to disenroll from three training courses (safeguarding, dementia awareness, and SOFI). It is also alleged as race discrimination and race harassment. The panel was unanimous in concluding that the instructions Miss Salt gave in respect of the training courses were not discriminatory related to race, or harassment, or related to disability. The stated reason for dis-enrolling her was that they were not necessary, as it was important that she focussed on administrative

work. In the background, Miss Salt was annoyed that as line manager she had not been consulted before the booking was made. There may have been a misunderstanding as to whether the Claimant should book herself, it was a genuine problem for any manager that the Claimant had defied her by rebooking herself on the courses without consulting. The Claimant's explanation that this was because she was about to transfer to London Acute, does not hold water, because by now the Claimant ought to have considered it something she should discuss with her new line manager in London Acute first. We can understand why Miss Salt gave the first instruction, and why she annoyed that she had rebooked. She wanted her to focus on the core element of the job, and had said she was too busy to take on any of Beth's tasks, and on checking her workload was entitled to consider that the management training courses were taking up her time; this is also relevant in the context of the Claimant delaying proof reading reports. It was done simply as a way of managing her workload. The claimant has not shown, even having regard to the reverse burden of proof, that Miss Salt gave these instructions because the Claimant was black or because she had a disability, or anything arising from disability, nor do we hold that this was humiliating (in sense of harassment): it was a reasonable management instruction, even if Miss Salt's approach was firm. Nor is it shown that this related either to race or to disability. At the best it could be related to disability in Miss Salt's initial comment that they wanted to ease the stress of her work load to avoid recurrence, but this was before the occupational health report was received, but there were clear reasons otherwise why she should be asked not to do the training. The Claimant disobeying by rebooking herself on the courses is sufficient to account for the respondent's action. The allegation is not made out.

Victimisation – was there a protected act?

62. We now address the victimisation claim. Were the acts alleged protected? Section 27(2) of the Equality Act lists protected acts, (d) is "making an allegation (whether or not express) that A or another person had contravened the Act".

63. The first protected act alleged is the formal grievance raised on or about 16 January 2017. Is race discrimination implied in the 16 January 2017 email, given that it is not explicit, and there is no reference within the text of the email to the Claimant being black. The only reference that might be allude to her race is the correction of her English ("we"), but this would not, in our view, be apparent to a reasonable person, given that white English speakers maybe picked up on their correct use of English as much as people from other backgrounds. The Employment Judge and Mr Mead concluded that discrimination and victimisation are terms frequently used by employees without reference to protected characteristics, meaning simply unfair treatment. There must be something more that would lead someone reading the grievance to conclude this was about race. The later email (1 February 2017) said that the Claimant had *now* concluded following discussion with a counsellor that race was the reason, tells us that the Claimant herself did not think race was the reason when she wrote that grievance, and if the Claimant herself did not mean it, it is hard to see how the Respondent could reasonably be expected to detect that that was what it was

about. Further, she states that she does not know the reason for Miss Kershaw's hostility. All the same, an experienced manager or HR professional reading that grievance and seeing the words discrimination and victimisation would want to explore with the writer whether in fact they did mean something to do with the protected characteristic. That was done by Miss McGlynn, and at the meeting face to face on 1 February Miss Glynn noted that the Claimant said that it was *not* racial. It was only following the meeting that the Claimant sent her email saying that following discussion with the counsellor "it could not be removed from the equation".

64. In view of the majority, the Claimant was not saying on 16 January expressly or by implication that the Respondent had contravened the Equality Act 2010 which is what is required to protect the grievance. Dr Weerasinghe concludes however, that it is a protected act, on these grounds: it is accepted that the grievance does not explicitly say that the discrimination complained of was race discrimination; Dr Weerasinghe was advised by the Judge that the legal test in this regard is whether a reasonable person reading the email could understand that the discrimination complained of is race discrimination. Given that both the first and last name of the author of the email is clearly of an BME origin and the first and last name of the alleged discriminator is indicative of a Caucasian origin, a reasonable reader on the balance of probability would understand that it was race discrimination that was complained of. Moreover, both Miss Kershaw and Miss Salt would understand that it was race discrimination because the Claimant's protected characteristic was visible to them, and all the other staff present were Caucasian.

65. We then proceeded to consider the grievance as clarified on 1 February. By now it would have been apparent to the Respondent that this was a grievance about race; it was treated as such in the response on 16 March which concluded there was no discrimination related to race or anything else.

66. In relation to whether there was victimisation – the early termination of her probation by bringing forward the review and then ending her employment - "because of" of the protected act, we had to consider whether either Terri Salt or Alan Thorne knew about the Claimant's clarification on 1 February. In this respect, we note that as of the 24 January Miss Salt was looking at managing out the Claimant, as seen from her email. She was concerned that she was not fit for work as an assistant inspector as early as 24 January, both in relation to qualifications and integrity. Miss Salt could not then have known there was an allegation of any breach of the Equality Act. As to whether Alan Thorne knew about it, we have no evidence. Obviously he knew that there was a grievance, because it was addressed to him on 16 January, but we do not know if he knew of Miss McGlynn's 1 February clarification. We say only it is possible that he knew that the grievance as amended was about race.

Reasons for Dismissal – the Discrimination Claims

67. Having regard to our findings about whether this was a protected act, and at what stage, we then turn to consider the act of dismissal by early termination of probation, which is alleged variously as an act of race discrimination, as disability discrimination either under section 13 or 15, and as victimisation. It is the

unanimous view of the panel that the dismissal was neither race nor disability discrimination, and for these reasons. The reasons given for the decisions made are coherent and supported by the facts and are reasonable concerns for managers. A white or non-disabled person who misrepresented her MSc course as the claimant did would have caused similar concern about integrity, and the defiance in rebooking the cancelled courses, or resisting management instruction on what work to do, or the same laxity in proof reading inspection reports, would also have been cause for grave concern about her suitability. Race has not been shown to have been as relevant to any of the decisions made, there was nothing that could be referred to any difference in race, or to anything from which we might conclude that the reasons given were not the real reasons. Similarly, with regard to disability, we know that the Respondent was prepared to make adjustments. There is no sign that the fact of disability, or consequent restriction of her duties until a transfer was arranged, was the reason for her dismissal. The stated reasons for dismissal do not refer to in any way to her inspection duties, or to her training or lack of it.

Was the Dismissal Victimisation?

68. We turn then to whether the dismissal was an act of victimisation. We remined ourselves first that if the Claimant had had two years qualifying service we might have been concerned about the way the matters alleged against her were investigated, for example, in relation to qualifications we might have expected someone dismissing in the context of unfair dismissal to check with recruitment whether her qualifications had been checked, whether her one year on a BA course was equivalent to a 2:1 first degree, and so on. But we have to consider any lack of thoroughgoing investigation in the context of whether the reason for dismissal was the fact that she lodged a grievance. In this respect once again the panel divides. Alan Thorne's evidence, when asked whether he considered an option short of dismissal, was to the effect that he said that he would have extended her probation if it was just a matter of the proof reading. In response to another Tribunal question, he said the inaccurate application form would not lead to dismissal by itself, but it was the fact that there were numerous matters alleged against her which had to be explained that led him to conclude that this was a probation which should be terminated. If this was an unfair dismissal claim we would have expected him to check her qualifications and what view HR had taken of them when she was offered the job. We took into account the fact that she was of black or minority ethnic origin, that there was only one such person in the senior management team, and none in the middle management team in the South-East. Alan Thorne was aware of the Claimant's grievance on 16 January, although it was not clear he knew that she had added an allegation of race discrimination to that. His own belief was that having only worked with Elizabeth Kershaw for a very limited period it would have been reasonable for the Claimant to engage in mediation, so he did have a view about her grievance. Of the allegations of deceit, in our view there was enough there to show that she had on several occasions misstated facts when seeking to obtain a transfer, and that this is a matter which the CQC was entitled to take seriously given the importance of accurate reporting of concerns when preparing reports which might have effect on public confidence in public institutions, and effect on the business of private institutions. We note too that proof reading was an

important part of an assistant inspector's task and was completely inadequate, and that her representative did not try to excuse it. She does not seem to have taken the task very seriously. Unlike an unfair dismissal claimant, she was on probation: the Respondent carried out reviews in accordance with their own policy, and Miss Salt appeared to have considered the question of equivalence by checking a qualifications website, and as Mr Thorne said, it was not a reason to terminate her on its own. The Claimant had the required reviews, she had an opportunity to respond to all the allegations, including having the material and a detailed account of what the Respondent was concerned about. There was some evasion in her answers on to the level of excellence the Respondent was entitled to, and on occasions she had embellished facts to get what she wanted. There were grounds on which Alan Throne could accept the management case that she was unsuitable for continued employment as assistant inspector, and that the extension of probation was insufficient to cure all these points. Integrity concerns are not usually allayed by further training. If Miss Salt was resentful of the Claimant of bringing a grievance, she was also resentful of the Claimant wanting a transfer to North London even before the disability issue was raised. This was an adequate reason why Miss Salt may have resented her, not just that she had brought a grievance so promptly, and even at 24 January was looking at getting her out, before it would have been clear to anyone that the grievance was about race. Miss Salt's own view, as adopted by Mr Thorne, was formed before race became an issue. As of 6 March Miss Salt was concerned about whether probation should be continued, but still wanted to give the Claimant an opportunity to improve, it was not clear that even then Miss Salt knew that race had been raised an issue in the grievance. The majority concluded that the Claimant, having bought a grievance about race, if that is what it was from 1 February, that was not the reason for the early termination of her probation.

69. By contrast Dr Weerasinghe takes the view that the dismissal was an act of victimisation for the following reasons: due to unfairness there was no contemporaneous evidence that Mr Thorne applied his mind to anything short of dismissal, he said that he had three options - to do nothing, to extend the probation or to dismiss her. In his statement Mr Thorne says "perhaps most importantly there was a clear issue with her integrity" and continues to refer to the educational issue. As part of the management case at the final probationary review Miss Salt says the major concern remains a serious lack of integrity and refers to the educational qualifications issues saying lying on the application form is a potential breach of the Fraud Act. Notwithstanding the importance that was attached to the educational qualifications issue there was no investigation done which might have led to a lesser sanction consistent with what was imposed on Mr Preston, Matt Preston having been given final writing warning for plagiarising a report, we learned in the course of the Tribunal questions. Mr Thorne's decision is entirely based on the management case put forward by Miss Salt. There is no evidence that any of the matters put forward by the Claimant were investigated, the issue about the MSc there is no evidence that it was investigated to ascertain the veracity of the Claimant's explanation of a serious allegation being made by Miss Salt of a potential criminal offence, that is fraud. On the matter of the degree equivalence, no consideration has been given to the Claimant's explanation that it was the Respondent's HR department who ascertained the equivalence. It was said that even the in-house HR personnel

did not have the expertise to evaluate the equivalence and it had to be outsourced. Dr Weerasinghe asked Mr Thorne hypothetically, if he were an applicant what he would put in the educational qualification box, Mr Thorne responded by saying that he would have put his educational qualification which was an HND; clearly a diploma cannot be equivalent to a degree unless combined with other qualifications. All that would have happened is that the application would have got rejected on verification of the equivalence. No one would have accused the applicant of deceit.

70. We could not find any reference to this in the notes of 6 March even as amended by the Claimant, nor could we find it in the notes of 10 April. The Respondent submits that it is simply not there, the Claimant concedes that it is not there but says it is asserted that she did make it because it is obvious because of what she says on 16 January 2017. In our view, there is insufficient evidence for us to hold that the Claimant did refer in either meeting to race and disability discrimination.

Conclusion

71. That concludes the Reasons of the Tribunal: to summarise our Judgement, the race discrimination claim fails, and that is a unanimous decision. The race harassment claim fails and that is a unanimous decision. The disability harassment claim fails, s unanimous decision, as does the disability discrimination claim. On reasonable adjustments, it is held by majority, Dr Weerasinghe dissenting that the Respondent did discharge the duties to make reasonable adjustments. On the victimisation claim, by a majority, Dr Weerasinghe dissenting, that claim also fails.

Correction made in Tribunal after Delivery of Reasons

72. Dr Weerasinghe (after the decisions were delivered in tribunal) has drawn to my attention an error in reading out the statement of his reasons as to whether the grievance on 16 January is a protected act. This should read “given that both the first and last name of the author of the emails clearing of a BME origin and the first and last name of alleged discriminator is indicactive of Caucasian origin a reasonable reader on the balance of probability would understand that it was race discrimination that was complained of”. Dr Weerasinghe also wishes to add to the decision on the factual dispute as to what the Claimant told the interviewers, that there should be a final sentence appended to his dissenting view which is “if Miss Salt had interpreted the Claimant’s application form otherwise she would have not raised any concerns about the Claimant’s qualifications”.

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Employment Judge Goodman
Dated: 2 November 2018

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Judgment and Reasons sent to the parties on:
5 November 2018
For the Tribunal Office