# EMPLOYMENT TRIBUNALS

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| **Claimant:** | Mr Andrew Rumin |
| **Respondent:** | University Hospitals of Derby and Burton NHS Foundation Trust |
| **Heard at:** | Nottingham Employment Tribunal |
| **On:** | 19 (reading day), 20, 21, 22, 23, 26, 27, 28, 29, 30 July 2021, 31 December 2021 (reading day) 4 January 2022 (evidence), 5 January 2022 (submissions), 6, 7 and 10 January and 4 February and 9 May 2022 (deliberations) |
| **Before:** | Employment Judge Jeram, Ms F French and Mr C Tansley |
| **Representatives:** | |
| **Claimant** | Mrs S Rumin (mother) |
| **Respondent** | Mr Keith of Counsel |

# RESERVED JUDGMENT

The Judgment of the Employment Tribunal is as follows:

1. The respondent's application to strike out the claimant's claim pursuant to rule 37(1)(e) is dismissed;
2. The claimant's allegation of direct race discrimination pursuant to s.13 Equality Act 2010 in relation to the allegation that RE instigated an investigation into the claimant's conduct is well founded and succeeds;
3. All other claims of direct race discrimination and race related harassment pursuant to s.26 Equality Act 2010 are not well founded and are dismissed.
4. The claimant's claim of detriment on the ground of having made a protected disclosure pursuant to s.48 ERA 1996 is not well founded and is dismissed.
5. The parties will receive separately a notice of a telephone case management hearing at which directions for remedies will be discussed.

# RESERVED JUDGMENT REASONS

1. By a claim presented on 17 April 2019, the claimant complains of direct race discrimination and race related harassment. At a preliminary hearing before EJ Broughton on 28 November 2019, the claimant was permitted to amend his claim to include a claim of 'whistleblowing detriment'.

**Issues and Law**

2. The first day of the hearing was a reading day. The whole of the second day was used to discuss and refine the list of issues to be determined. The final, agreed, list of issues to determined are set out in the Annex A attached hereto. By consent, the claimant was given permission to amend his claim to include allegation 2b. He was given permission to amend his claim to include allegation 2q for the reasons given orally at the hearing.

3. The relevant law is set out at Annex B.

**Application strike out**

4. At page 7 of his closing submissions, Mr Keith on behalf of the respondent made an application to strike out the claim pursuant to rule 37(1)(e) of the 2013 Employment Tribunal Rules, on the basis that a fair trial was no longer possible. The bases for the application are in summary:
    a. The claimant's claim has been '*created'* on his behalf by his mother, Mrs Rumin both in particular after the receipt of documents provided in response to a Subject Access Request made by the claimant;
    b. The claimant was a poor witness who *'provided barely any evidence at all';*
    c. There is a '*serious danger'* that any inconsistency in the respondent's evidence will be taken as evidence of discriminatory behaviour *'in the absence of any other explanation';*

d. And in oral submissions, Mr Keith added that there was a gap in the claimant's employment so that those allegations that predate his dismissal as a bank porter in April 2016 were old.

5. We dismiss the application for the following reasons. The application, unusually and unexpectedly, was made at the close of the case after all the evidence was heard. Mr Keith invited to us, as we understand him to say, considered the points above in our deliberations more generally. Nevertheless, the application was made and we dispose it as follows. Mr Keith accepted that the respondent knew nothing on the date of the application was advanced (5 January 2022), that the respondent did not know when the agreed list of issues was finalised on the second day of the hearing i.e. 20 July 2022 and yet the respondent did not suggest then that it was unable to have a fair hearing. The fact that Mrs Rumin had drafted the allegations on behalf of her son was no secret. It was a regular feature in the cross-examination of the claimant, but at all stages, including in the advancing of the application, the respondent withheld from suggesting that the claimant was fabricating his evidence. We cannot see how Mrs Rumin's assistance prevents or hinders the respondent's ability to have (had) a fair hearing. Likewise, the reliance on documents received in response to a Subject Access Request is a routine occurrence in the Tribunal; that they had been referred to in the grounds of complaint was self-evident and it is a matter for the Tribunal to determine the relevance of, and weight to be attached to, them. The quality of the claimant's evidence is a matter for the Tribunal to determine after the hearing of the evidence and we have set out our observations below. Paragraph (c) is an observation. In any event, those adverse inferences we have drawn in our conclusions were drawn in the absence of any explanation from witnesses that the respondent knew were obvious and chose not to call i.e. Richard Edwards and James Chadwick. The age of the allegations is a matter to bear in mind when considering the cogency and quality of the evidence before it and when considering time limits. We agree, to a limited extent, that the allegations were disjointed, but that, too, is hardly unusual when drafted by a lay representative. It was open to the respondent at any stage of the litigation and before the final hearing to seek clarity of the issues, but it did not. We identified from various iterations of the pleadings and finalised to the satisfaction of both parties before any evidence was

heard. There is no basis for taking the draconian step of striking out the claim, much less so at the conclusion of the evidence. The application is dismissed.

**Evidence**

6. We had regard to a bundle consisting of 605 pages.

7. For the claimant's case:
    a. We heard from the claimant and Helen Elson (Unison representative);
    b. We read the statement of Ashley Reid Mitchell (Porter).

8. As regards the respondent's case:
    a. We heard from Sue Buglione (Ward Manager), Ian Holden (Porter Supervisor), Melissa Howe (General Manager, Burton on Trent site), Claire Rowe (HR BP), Robert Ridge (General Manager, Facilities Management);
    b. We read the statements of Richard Edwards (Facilities Manager – Logistics) and of James Chadwick (Head of Estates).

**Witness credibility**

<u>The claimant</u>

9. In summary, we found the claimant to have poor verbal skills, but to be a genuine witness of fact. He was open about his lack of literacy skills. He suffers from mental health difficulties and presented as tired and sometimes distracted when he gave evidence; his evidence was not always easy to understand. Nevertheless, we found him to be fundamentally truthful about the events he recounted; it was clear from the manner in which he delivered his evidence, those matters he immediately recalled from memory and those matters which he more difficulty comprehending or recalling. He was measured in his criticism of the respondent's actions; he was not prone to exaggeration or suggestion. The claimant had received a significant amount of assistance from his mother, Ms Rumin in the formulation of his claim. Ms Rumin is a branch officer for a trade union but she was acting in her personal capacity as his representative at all times. The claimant readily resiled from, or qualified, allegations or assertions that she had drafted on his behalf. Contrary to

the respondent's submission, that added to his credibility rather than, as the respondent seeks to suggest, detracted from it. In the face of lengthy and testing cross-examination, the claimant gave his evidence in a polite, respectful manner and he was gently spoken. Without hesitation, we find that the claimant was a truthful witness of fact although on several occasions he was plainly mistaken.

Helen Elson

10. We found Ms Elson to be direct, reliable and compelling as a witness; she gave her evidence in a measured way, freely and without any obvious bias. We were impressed with her as a witness. Where their accounts diverged, we preferred the evidence of HE to that of the respondent's witnesses.

The respondent's evidence generally

11. We consider it necessary to state at the outset of this judgment that for much of the hearing we found it difficult to piece together the respondent's written and oral evidence with the documentation, or lack thereof, in the hearing bundle. Significant evidence that was in the direct knowledge of the respondent's witnesses that were called, and which were plainly relevant to a claim of race discrimination, was either omitted or glossed over in their witness statements, particularly in the case of CR, RE and JC. We are not satisfied that what evidence we did receive from the respondent's witnesses was the whole of the story.

Sue Buglione

12. We did not find SB to be a compelling witness. We bore in mind the fact that the incident in which she was involved took place a long time ago but we noted that, contrary to her claim in her witness statement she was, in fact able to recall further aspects of the incident, where they were prejudicial to the claimant, or exculpatory of her.

Richard Edwards

13. RE provided a witness statement but not attend Tribunal to give evidence for reasons which the respondent refused to share. He was an obvious witness; the level of detail in his statement were therefore important. Many paragraphs of his statement did little more than recount what RE

*'could see'* in the hearing bundle, despite his personal involvement in those events. Some aspects of his evidence were both recent and highly relevant to allegations of race discrimination and in respect of which RE had failed to address adequately or at all in his witness statement. We are not satisfied that we have been provided the whole story in his witness statement. His statement is unsigned. We attach very little weight to his written evidence.

James Chadwick

14. As with RE, JC was an important witness, whose reason for non-attendance at the hearing was also withheld from the Tribunal. JC's interactions with the claimant were lightly documented; but, as with RE, his statement was lacking in areas that were in his direct knowledge and highly relevant to a case of race discrimination. We attach very little weight to his written evidence.

Claire Rowe

15. Ms Rowe is a Senior HR BP with 19 years' experience. Her written evidence was selective and lacking in important details that we consider were well within her experience to know were relevant to the case, although to her credit when she did give evidence, and to the extent that she added to her written evidence, she was truthful. We are compelled to state, however, that we were troubled by the extent to which she was complicit in management's treatment of the claimant and particularly so for a person in her role, operating at her level of seniority.

Melissa Howe

16. Ms Howe was a confident witness whose oral evidence was elaborate and often at odds with her written evidence. MH was an unreliable witness of fact.

Ian Holden

17. We found elements of his evidence to be improbable and observing his interaction with the claimant and his mother, much like that of MH and SB, was at times uncomfortable to observe. We found that conduct to be indicative of and consistent with the disregard that all three witnesses had for the claimant.

Robert Ridge

18. We were not impressed by RR who we found to be a vague and reluctant witness in circumstances where, if taken at face value, his evidence should be simple, uncontroversial and ultimately to the claimant's advantage. Our concerns about his credibility served only to compound the Tribunal's concerns that we had not heard the full story from the respondent.

**Preliminary Matters**

19. The facts below contain allegations of misconduct by persons who are not parties to this case, nor otherwise participating. For that reason, we have anonymised the names of certain individuals below. Where we have used initials that are not preceded by that person's full name, those initials are not those of the person referred to.

**FINDINGS OF FACT**

20. The claimant is mixed race; his mother is black and of Afro-Caribbean origin and his father, white.

21. The claimant was employed from 10 August 2015 as a Bank Porter on a zero hours contract. The claimant's mother was thrilled that the claimant had secured stable employment and made her views known to management.

22. The respondent employs three categories of porter: porters, relief porters who cover absences in the porters team and finally bank porters, who are engaged to work shifts that remain vacant after allocation to porters and relief porters. It was not until he was cross examined that the claimant learned, for the first time that he was not a relief porter, but in a third category altogether. His ignorance in that regard is consistent with the lack of clear communication and meaningful dialogue with the claimant during his employment.

23. There were approximately 50 porters, who were all were white, apart from the claimant and one other, Ashley, both of whom were black / mixed race.

24. We received some generalised evidence from the respondent about proportion of population in Burton on Trent, from which we conclude that there were significantly fewer non-white porters than there were in the population of Burton.

25. There were three Band 3 Porter Supervisors, Dave Gallagher ('DG'), CD and Ian Holden ('IH'). The Porter Supervisors reported to the Porter Manager, Melissa Howe ('MH').

**Comments Made to the Claimant**

26. The porters had established friendship groups; many were significantly older than the claimant. There was a distinct culture of banter and loose language amongst the porters. The culture was known of, and tolerated, by MH and the other supervisors.

27. CD informed porters that he had seen the claimant's personnel file, and that the claimant had criminal convictions. We accept the claimant's evidence that, as a direct consequence of GM's behaviour, the claimant was subjected to numerous and repeated comments about his history from his colleagues, such as being a *'drug dealer'*, being *'straight outta Compton'*. We received no evidence as to the number of, or nature of, the claimant's convictions.

28. The claimant's lunch consisted of chicken, rice and peas. The claimant's colleagues regularly passed comment about the claimant and his lunch. We have no difficulty accepting the claimant evidence that comments were made about the claimant, and his food such as addressing him as *'your lot', 'what's that smell', 'only you could eat that'*, that he *'must only eat chicken, rice and peas'* and '*you wouldn't see me eating that stuff'.* MH knew about these comments and that they upset the claimant, because he brought them, and their effect on him, to her attention on numerous occasions.

29. Aromatic food stuffs brought in by other porters, such as mixed veg and fish and chips attracted comments such as *'we know what you had for lunch'*. IH and MH accepted in evidence that the claimant was in fact told by another porter to call him *'Sir'* but, like the comments about his food,

they told the Tribunal *'it was nothing malicious'.* We were not told of occasions when the porter was addressed as *'your lot'*.

30. On 10 November 2015, three members of staff in the X-ray department reported an issue with the behaviour of the claimant and Ashley. The following day, MH made a file note, kept on the claimant's file, stating that they had both been advised to keep the voices and noise levels down *"as they are both naturally loud people who can be prone to bouts of silliness when they are together".* (emphasis applied) The claimant does not suggest that the complaint about his behaviour is racially motivated; we heard insufficient evidence about this incident and decline to infer from the file note that this is evidence of racial or cultural stereotyping by MH.

**Shift and Job Allocation**

31. We accept that the claimant perceived he was unfairly allocated shifts which were less attractive in that they did not attract pay enhancements e.g. 11am to 7pm. Furthermore, that shift was particularly laborious, requiring porters to walk long distances. The Tribunal received no evidence of what proportion of shifts he was allocated and that did not attract pay enhancements, or how many shifts required him to work 11am to 7pm.

32. When working on a shift, the tasks would be received by either an allocations officer IH or any supervisor - before being distributed amongst the porters. The allocation of jobs is logistically complicated, and dependent on a number of factors including how many tasks a porter has already carried out, where porters were located when tasks were received etc.

33. The claimant was regarded as an enthusiastic worker. We accept the claimant's evidence that he felt he was called upon to carry out the less attractive, labour intensive tasks more frequently.

**Verbal complaints**

34. The claimant raised with MH on a number of occasions his concern about the way he was being treated by CD and the other porters. Those

complaints consisted of poor treatment by CD as well as casual comments as set out above, made by CD and other porters.

35. MH told the claimant that she would deal with the claimant's concerns and the claimant believed her. She took no steps at all to address the claimant's concerns, despite being aware that the claimant's concerns about CD were shared with other porters.

36. Having read the minutes of interviews with other porters during a later investigation conducted by Jessica Harris, we find that the claimant was far from alone in his attempts to register his concern about CD with MH. Indeed, the evidence before us, it was known amongst the supervisors that CD's conduct was unacceptable (page 373) and porters had sought to bring their concerns about him at various times to the attention of MH, DG, IH as well as GN (page 376, 379).

37. On 12 November 2015, OH and his partner met with MH. They reported bullying by CD of OH. The alleged acts were unpleasant; the reported effect on OH significant. MH took details of the complaints, and she gave OH three options including the option to make a formal complaint against OH. OH that he would take time to reflect. We find this occasion to be an exceptional occasion; this was the only file note that we were taken to. In light of the contents of the interviews of porters given for a subsequent investigation by Jessica Harris in the subsequent investigation, we do not accept that MH was methodically creating notes of concerns as she claimed in her evidence; she was not managing the complaints made by the claimant, or any other porter.

**28 January 2016**

38. On 28 January 2016, the claimant was on duty when he was asked to take a patient to the CT department. The patient was receiving supplementary oxygen. The respondent has a policy, the Acute Adult Oxygen Therapy Policy, for the administration and monitoring of patients requiring supplementary oxygen therapy, so as to, it states *'avoid serious harm to the patient'*. It is a mandatory requirement of that policy to ensure that, when a patient receiving oxygen is transported from one clinical area to another, they must be accompanied by either a registered nurse or, in

appropriate circumstances, and unregistered member of staff where the HCP takes responsibility for ensuring oxygen is continued appropriately. In summary, according to the respondent's own policy, there are no circumstances in which a patient receiving oxygen should be transported by a porter unaccompanied.

39. On the day in question, the claimant knew that he was not permitted to transport a patient receiving oxygen to another department without an escort. He sought an escort; both MH, who is a member of the training panel, as well as IH confirmed that was the correct course to take. The claimant was refused an escort. Sue Buglione ('SB') was a Band 7 Ward Manager and a Registered Nurse. She was unfamiliar with the claimant and asked him how long he was likely to require an escort for; he replied that he was unsure, but that it may be up to an hour.

40. SB qualified as a nurse in the mid-1990s. She has, since then, used her experience to decide and dictate what was, and was not, safe practice. She told the claimant that he was to transport the patient unaccompanied for his CT scan. SB considered taking the patient off oxygen; she gave no clear explanation why she would consider doing that.

41. An argument ensued between SB and the claimant about the propriety of transporting the patient; they both raised their voices. It took place over the patient who was lying in his bed, and whilst the bed was in the corridor of the hospital.

42. In evidence before the Tribunal, SB repeatedly described the claimant as nasty, aggressive and arrogant. The respondent accepts that being aggressive is a racial stereotype of black men.

43. SB told the Tribunal that she had *"never in all [her] 25 years been confronted by a gentleman like [the claimant] who was nasty from the onset*". SB described herself as having a loud voice, but that when she is '*loud'* that does not equate to '*aggressive'*.

44. As SB reminded the Tribunal, the claimant is significantly taller than SB. Nevertheless, she leant forward and pointed her finger up into the

claimant's face making a comment about *"people like you".* That was the only aggressive gesture displayed by either party during this interaction; SB does not seek to suggest otherwise.

45. SB's explanation for using the phrase *'people like you'*, was that she was referring to *'porters like you'*. This explanation was offered for the first time in her oral evidence, despite, on her own account, first realising that the comment could be construed as racial harassment upon being informed of the claim; the claim was presented 2 years before she submitted her witness statement. Nor could she explain why she did not say '*porters like you'*; on her own evidence, this was the only occasion that SB had had an altercation with a porter.

46. The claimant became very upset. SB immediately went to the Porter's Lodge to complain about the claimant; she believed he was being rude and arrogant and wished to make the claimant's supervisors aware that his behaviour was unacceptable. In doing so, left the claimant with the patient on a bed in the corridor. The claimant returned the patient to the ward, thereby causing delay to the patient. We reject SB's evidence that she did not realise her comments could be construed as racial harassment until she was informed of the claimant's claim in part because of her haste to complain about the claimant and in part because, according to MH, and indeed consistent with MH's note of that day, she and SB discussed the potential for the comment to be construed as a racial slur.

47. Unsurprisingly and consistent with SB's expressed intention, by the time the claimant returned to the Porters Lodge, SB had complained to MH about his behaviour. MH spoke to SB. SB accepted that she told the claimant to transport the patient unaccompanied because she could not afford to lose an escort for an hour; that the claimant had refused to do so; that a verbal argument ensued; that she leant forward and pointed in the claimant's face saying *"people like you"*.

48. MH spoke to the claimant, who was so upset by the events that he was about to walk out of his employment. MH made a note that the claimant took the comment *"very disrespectfully and thought she was referring to his race*" and that the claimant *"admits he retaliated".*

49. MH knew the comment could be construed as racial harassment but she decided that it did not amount to racial harassment because SB denied that the comment was racially motivated. MH knew that a band 7 member of staff leaning forward and pointing into the face of a band 2 member of staff could be construed as bullying and harassment which, according to the respondent's own policy *"may be considered gross misconduct"* (page 214), but she did not take up SB's behaviour with anyone because she noted that SB recognised her conduct was unprofessional and unacceptable.

50. MH used identical words to describe the claimant's contrition i.e. that he too accepted his conduct was unprofessional and unacceptable. MH decided to make a file note on the claimant's personnel file in which are recorded the he had been spoken to in the presence of DG, porter supervisor and that he had been informed this that his behaviour would not be tolerated and that any more incidences would result in the termination of his contract of employment. After the events of 10 November 2015, this was the claimant's *'second chance'*.

51. Notwithstanding the fact that MH had spoken to the claimant, CD also spoke to the claimant about his conduct. At the shift hand over, he spoke to the claimant in the presence of IH. IH was unable to explain why the claimant was being spoken to at all by CD, in the presence of IH given that the matter had already been addressed by MH. We find that this is an example of heavy-handed behaviour towards the claimant.

**26 April 2016 – Ward 20 incident and Dismissal**

52. On 26 April 2016, the claimant was involved in an exchange with a member of staff on Ward 20. That member of staff was not SB. The exchange resulted in that staff member reporting the claimant to CD and IH. As a result, both CD and IH spoke to the claimant repeatedly questioning him about the event. This is the second occasion that the Tribunal heard about where CD and IH addressed the claimant in their joint presence. We are satisfied that this was another instance of CD behaving in a heavy-handed manner.

53. Consistent with her warning to the claimant, MH regarded this event as the claimant's *'third chance'* and she terminated his contract.

54. At the end of April 2016, MH went on maternity leave.

**May 2016 - Written Grievance**

55. In or around May 2016, the claimant sent a grievance letter to the respondent. It was written by his mother because the claimant has problems with literacy. In the letter, the claimant complained that he had been *"emotionally bullied"* by a number of members of his team which made it unbearable to stay in this position. He said that he suffered *"racist remarks"* and information in his CRB checks had been disclosed, that he had been unfairly treated in respect of rotas and shift enhancements, and that he had been segregated within the team. The reference to '*segregation'* was a reference to the fact that the claimant had been told that he would not work the same shift as Ashley, the only other non-white porter. The claimant said these matters amounted to "*direct discrimination".*

56. The claimant continued that CD gave him difficult tasks and shift patterns, so as to favour other friends/colleagues. He said he felt belittled and that he had been subject to sarcastic comments that he found both racist and degrading, giving examples such as being question whether he had drugs in his car, whether he was on day release, and being directed by one porter to call him *'Sir'.* IH and MH accepted in evidence that the claimant was in fact told by another porter to call him *'Sir'* but, rather like the comments about his food, they told the Tribunal *'it was nothing malicious'*. He added that CD was not following hospital policies and procedures. He mentioned that there had been bullying by other colleagues also. He stated that he had a partner and a baby support and had made the decision to leave his role because the unacceptable behaviour and bullying were impacting on his mental health.

57. On 27 May 2016, Claire Rowe, Senior HR Manager, wrote to the claimant acknowledging receipt of his grievance *"regarding behaviour of members of the Portering team"* (emphasis applied). She invited him to a 'grievance meeting' on 7 June 2016. The claimant was told that his mother was able

to be present, but reminded him that she could not act as his representative. CR said that she would be there in an '*advisory capacity'.*

**'Grievance Meeting' on 7 June 2016**

58. A meeting took place on 7 June 2016. It was not, as the claimant was told, a meeting to discuss the grievance he had submitted.

59. Chairing the meeting was Geoff Neild ('GN') who was Head of Facilities but had also held the role of Deputy Director of HR. He was accompanied by Mark Abella (Facilities Manager) and CR.

60. The claimant was accompanied by his mother who was present in her personal capacity.

61. No formal minutes of the meeting were taken. The only documentary evidence of what was discussed in the meeting are therefore the handwritten notes in the personal notebook of CR. Those handwritten notes appeared in the bundle; they had not been transcribed, for the purposes of the hearing. When asked in cross-examination about the lack of any formal documentation in relation to the grievance, CR replied: *"I would have expected a copy of the grievance and outcome letter would be on the personnel file – if it is not on the file, I cannot comment as to why that would be".*

62. It was not until CR was asked by the Tribunal to decipher her handwritten for their benefit on the 9th day of the hearing i.e. on 29 July 2021 that it learned of its contents.

63. We are far from confident that CR's notes are a comprehensive account of what was discussed at the meeting, since she was not acting as note taker and because we are not confident she understood the significance of the complaints e.g. why a white colleague demanding the claimant to address him as *'Sir'*, might be construed as an insult.

64. In fact, GN and/or MA were already aware of the complaints that the claimant was making about CD beforehand; GN opened the meeting stating as much. GA told the claimant, however, that they had been '*unable'* to do anything about CD's behaviour until somebody had put it in

writing. The respondent's policy that does not require complaints of bullying and harassment to be set down in writing, and we find it troubling that GN, who we are told had occupied the role of Deputy Director of HR, would suggest that to the claimant.

65. The claimant said that he had been picked on to carry out job after job as a porter whilst others sat back, resting. He complained about his shift allocation, in that he was routinely given those which did not attract pay enhancements. He said he just wanted the shifts and/or jobs to be allocated fairly.

66. CR's note contains references to unfair shift or job allocation, but no reference to IH. We are not satisfied, on what evidence we have before us, that he did not mention IH in this meeting; had he done so, we would have expected a repeat of that complaint about IH in his later grievance interview in July 2016.

67. The claimant complained about CD's disclosure to the staff that the claimant had been to prison. He described the past of CD's behaviour, saying that sometimes there were *"lots of little things or one big event"* and that sometimes it was *"very direct".* He described his responses as being construed as violent when in fact he had just been frustrated.

68. The claimant was asked whether he thought the comments or behaviour was racial. The claimant initially answered, *"not as deep as racial"* before proceeding to give examples of comments such as *"did they find any weed"*, *"a push bike dealer"*, *"looks like you got parole".* The claimant stated in terms of these comments were made to him and Ashley, who according to CR's notes, he pointed out were *"both black".* The respondent accepts that a racial stereotype of black men is an involvement in drugs.

69. The claimant said he felt belittled and subject to emotional bullying. The claimant's mother added that the claimant had turned his life around. GN told the claimant that he '*regretted'* the claimant not complaining to him earlier. The claimant when asked, named CD as well as two other porters as perpetrators, stating that one had instructed him to call him *'Sir*

*[surname]'*. The claimant complained that days after the claimant had been involved in a car accident and the day before his uncle's funeral, CD asked the claimant *'whether he was in the right job'.*

70. GN told the claimant that his complaints would be *'investigated properly'* and invited the claimant returned to work. He told the claimant that he and MA would support his return to work. GN told the claimant that an independent investigating officer would be appointed to investigate the claimant's grievance and the claimant was given GN's '*assurance that things would change'.*

71. GN said he hoped the claimant would return to the Trust but asked the claimant to '*contribute to the process'.*

72. The claimant was told that the investigation report would be directed to GN and that the claimant would not have sight of it or know its contents.

73. CR knew that what GN told the claimant and his mother about not being entitled to the investigation report at this meeting was contrary to the Trust's grievance policy which states that a complainant is to be updated with the progress of the complaint and informed at a meeting of the outcome of the investigation and proposed action.

74. We find it inconceivable that GN, as a senior manager who once occupied the role of Deputy Director of HR with the Trust, genuinely believed that the claimant was not entitled to know or have sight of the investigation into his grievance.

75. The reason why the claimant was being told he would not be informed of the outcome of his grievance is because what was to be investigated was not the claimant's grievance but CD's conduct. Put more bluntly, the claimant was used as a cover to commence what was a long overdue disciplinary investigation into CD.

76. CR was complicit with GN in deceiving the claimant and his mother into believing that the whole of his grievance was to be investigated fairly and impartially.

77. No other aspect of the claimant's grievance was ever looked at by the Trust.

78. On 13 June 2016, GN wrote the claimant, thanking him for attending the *'grievance meeting'* on 7 June 2016. He continued to assure the claimant that an *'independent investigation'* had commenced to *'fully investigate the issues you raised in your letter*". The claimant was asked to confirm his decision whether he would wish to be '*reinstated'* either to his old job at Band 2 or another job at Band 1.

**Jessica Harris Investigation**

79. Jessica Harris ('JH') (Head of Occupational Therapy) was appointed as Investigating Officer.

80. JH's report investigation was commission by MA. The respondent was unable to produce any terms of reference in which her remit was identified or explain their absence.

81. JH wrote to CD to inform him that the claimant had made a complaint against him and that he would the subject of her investigation. CD was redeployed to a hospital in Tamworth.

82. The claimant, all three Porter supervisors (CD, IH, DG), three porters and one relief porter were interviewed. Since the grievance included allegations of racial harassment directed to himself and Ashley, it might have been sensible to interview Ashley, as the victim and the only other non-white porter, but he was not.

83. On 12 July 2016, the claimant was invited by JH to an investigation meeting to discuss *"allegations concerning the inappropriate behaviour of a former colleague"* (emphasis applied).

84. The claimant discussed his belief that he was unfairly allocated shifts and given a disproportionate number of jobs when working his shift. He did not mention IH in this or any other context.

85. He stated that he had repeatedly told MH about his problems. He named two staff who he said had made the remarks to him about drugs and being on day release. No investigation was undertaken in respect of those two porters and the report of JH does not explain why.

86. The claimant said CD had not made any racially motivated remarks to him adding that his treatment by CD was about work and being controlled by him as well as disclosure of his criminal record.

87. The porter supervisors maintained that they were unaware of any difficulties involving CD. IH said that the claimant had made SB *"very upset"* by his *"attitude"* and that he and CD spoke to the claimant about this incident, he mediated it and "*helped him to keep his job again".* He told JH that there were many file reports on the claimant. He told JH that the daily duties which it out evenly; he did not mention an allocations manager. IH denied knowing anything about racial remarks.

88. All three porters, together with the claimant, stated that they knew that MH and the porter supervisors were aware of the difficulties involving CD. One porter stated MH had known for months, another stated that he had informed GN personally about CD.

89. One porter volunteered in the context of his own complaint about CD the crass joke he directed at Ashley about *'chocolate fingers'* adding that *"everyone laughed and thought nothing of it"*.

90. Two porters described either being or knowing of other porters who are fearful of CD, including descriptions that porters were fearful of expressing their concerns or opinions as well as the existence of *"friendship groups"* or *"favourites"*.

91. CD accepted there was a factual basis for suggesting that he and the claimant had discussed the claimant's background/CRB check; he accepted that there was *"lads banter"* after the claimant had been in an accident. He explained that he spoke to the claimant after the SB incident, and that the claimant was thankful for his input. CD said the claimant's complaints about him were a *"pack of lies"*.

**Investigation report**

92. On 18 August 2016, JH completed her investigation report into CD. In her report. Her summary of the evidence, which we consider to be a fair and accurate summary of the interviews that she conducted, included as follows:
    a. Staff who felt that CD was responsible for the manipulation of rotas and shift enhancements, providing certain team members with preferential treatment.
    b. The claimant, when asked, denied that CD had made any racially motivated remarks to him, but rather that other members of the portering team had;
    c. A number of the team felt CD was intimidating and created an element of fear within the department;
    d. There was evidence that CD had bullied other members of the team, as a result of which the scope of the allegation had widened;
    e. A number of members the team had previously raised their concerns with managers (including MH, DG, IH and GN) indicating that not only was this an isolated incident,
    f. Not all invitees responded - JH had been informed that certain members were too frightened to speak out.

93. In her report, JH asked whether the situation should have managed been managed at an earlier stage; she recommended a review of culture when the department. The recommendation as not actioned. We find that lack of action is consistent with our finding that the sole aim of the investigation was to invoke disciplinary proceedings against CD.

94. On 24 August 2016, MA wrote to CD to inform him that he was invited to a disciplinary hearing on 8 September 2016 which meeting was to be chaired by GN.

95. On 31 August 2016, GN wrote to the claimant. He told the claimant that he was writing to him personally to *'show a final bit of courage'* and attend the disciplinary hearing of CD to give evidence and *'in order that the issues raised were properly addressed'.* No other witness in the investigation was asked to give evidence at CD's disciplinary hearing. CR was unable

to identify how a request for a complainant give evidence was consistent was the respondent's bullying and harassment policy.

96. On 2 September 2016, CD wrote to MA resigning with immediate effect.

97. The claimant discovered that CD had resigned via gossip in the Porters Lodge.

**Generic Worker / Security Guard contract**

98. On 10 August 2016 the claimant returned to work at the Trust as a Band 2 Generic Worker. This Job Description required the claimant to carry out a wide variety of tasks including security and portering. He was engaged on a full-time basis, reporting to MA.

99. We find that there was likely to have been a discussion between the claimant and MA about his location of work and that an agreement was reached that he would work in the Parcel Hub for a short period. The location was unfortunate because it had the effect of requiring the claimant to work in very close proximity to the porters who he had complained about in his grievance and whose conduct had remained uninvestigated. We accept the claimant's evidence he continued to suffer from similar comments as he had when he was a porter.

**Accident reporting**

100. On 26 November 2016, the claimant sustained injury whilst working in the Parcel Hub. Natalie Roddis completed an accident report form in the claimant's presence.

**CD Grievance**

101. On or about 14 December 2016 CD wrote to the respondent complaining about how *"badly I was treated by HR and my manager"*. It is clear from the reading of the letter, that CD believed that his treatment had been as a direct result of a complaint made by the claimant.

102. CR replied to CD's letter on behalf of the Chief Executive. She identified each complaint contained in CD's letter, spoke to colleagues,

reviewed the relevant documents and policies and set out the respondent's response to each complaint within the timescales set out in the policy. The letter, signed by the Chief Executive was returned to CD on 21 December 2016.

103. Despite also having been in attendance in an advisory capacity at the 'grievance meeting' held in June with the claimant as well as being involved in reply to the grievance submitted by CD, CR was unable to explain why the claimant's grievance was not treated with the same degree of thoroughness.

104. In January 2017, MH returned to work after a period of maternity leave. On her return, she no longer managed the porters, but instead managed other areas, including transport. She reported to RE.

**2017 – Ward 4 Incident**

105. During 2017, the claimant was asked by a ward sister to take a patient to the x-ray department. The patient was on oxygen. The claimant refused to do so, unescorted, as contrary to Trust policy; he believed the patient was struggling for breath. The sister raised her voice at the claimant. A junior doctor was eventually sent to escort the claimant and the patient to the x-ray department. The claimant was right to be concerned for the patient; on the way, the patient went into cardiac arrest and the claimant understands the passed away.

106. The claimant spoke to MA about the patient needs be ignored and the way he had been spoken to, but nothing was done. In evidence, the claimant accepted that it would be reasonable for MA to believe the matter was a clinical issue, rather than an event where a porter should have been listened to. He said he did not know whether MA would have acted differently in identical circumstances involving a non-black porter.

**February 2017**

107. On 2 February 2017, CR received a telephone call from Mrs Rumin about her son. In that call, Mrs Rumin stated that the claimant was in a worse position since returning to work. She added that he had returned to undertake a security role, but had been placed in the Parcel Hub, which

was intended only to be for a limited period. CR told Mrs Rumin that the clamant could contact her himself. She made a handwritten note of the discussion.

108. On 18 February 2017, CR met with the claimant about his concerns and his security guard role. The claimant raised matters about his role that he was unclear about, he asked why he was on a generic worker contract when he thought he had been engaged as a security guard, he asked why he had no job description. He raised his placement in the Parcel Hub notwithstanding his engagement as a security guard. He said he had been placed back in the same place with the porters about who he had complained and that this caused friction. He said other security guards working fixed areas but he had been asked float. He said he had been led to believe by MA that he would be doing a security role. He said he was again covering for others and that he did not want to end up covering for everyone else.

109. In summary he was complaining that he lacked clarity and that he was essentially working the so contract as before, notwithstanding that he had been promised a security guard role; he raised yet again, the problems with his colleagues in the Parcel Hub.

**CD and EF**

110. In November or December 2017 both CD, now no longer an employee of the respondent and on the premises as a patient and his partner, EF, who was employed as a nurse by the respondent, were at the Burton hospital when the claimant was on duty as a security guard. CD said to the claimant *'I didn't know they employ drug users'* and EF said to him *'what are you looking at'*.

111. The claimant, stressed by that the interaction, raised the matter with MA. He did so, not because he believed he had done nothing wrong, but because he was accustomed to being accused or criticised for matters irrespective of his blameworthiness. He was correct to be concerned; both CD and EF simultaneously complained about the claimant, but she did so anonymously. The complaints were couched in identical terms, i.e. that the

claimant was smirking; they both questioned how the respondent can employ *'a known drug user'*.

112. We are satisfied that both the comments made by CD and EF and their complaints about him were made about the claimant as a direct result of the respondent leading CD to believe that the claimant was responsible for his disciplinary investigation.

113. The claimant, when pressed in cross examination, was unsure whether EF's complaint was related to race.

114. On 8 January 2018, MA met with the claimant. He told the claimant that he had sought advice from HR. He explained that the complaint was submitted anonymously. He was satisfied that the handwriting matched that belonging to EF but stated that the respondent would be unable to prove as much. No further action would be taken in relation to the complaint made by EF. The claimant that he was happy with that outcome. The advising HR representative was not CR.

115. On 24 May 2018 the claimant was informed by MA that Security Services would be removed from the Generic Workers role and would form a department of its own. He confirmed that there were no changes to the claimant's terms and conditions. The claimant remained on a generic worker contract.

116. In June 2018, MA left the respondent's employment, to be employed by an NHS trust in the West Midlands. Richard Edwards (RE) took over the role of Facilities Manager on MA's departure.

**August 2018 – Incident in A&E**

117. In August 2018, the claimant was instructed to attend the Accident & Emergency department to stay with the patient who had been brought in by armed police. When he arrived, he saw that the patient was in distress and trying to mobilise. The patient was bloodied, unable to open his eye and smelt of urine. He had lash marks across his back. The claimant was understandably distressed by the patient's condition.

118. The cubicle was directly opposite the nurse's station. The claimant sought help from clinical staff in the area; they were busy and the claimant felt that his pleas for assistance were unsuccessful. Furthermore, he had no colleague to assist him, he was unsure of his role, in particular whether he was to restrain the patient moving and he had received no training for his role. The claimant had already been told by his colleagues to be careful about which jobs he was given since the view taken amongst the security guards was that their jobs should consist of patrolling the premises rather than looking after patients.

119. The claimant panicked; he contacted RE to help. He did so because he believed that, since RE was more senior to him, RE might be more successful in securing medical attention for the patient and provide him with guidance.

120. As to the words used when calling RE, we cannot be satisfied. We have no doubt that he relayed to RE that he was concerned for the welfare of the patient, that he felt that his pleas for assistance were going unheeded for some unidentifiable period of time, and he wished to be accompanied by his colleague, Jonny. Beyond that, the inconsistencies in his pleaded and oral account as well as our general observations about the lack of specificity in his oral account are such that we are unable to identify with an adequate degree of accuracy what was said during his call to RE. For the avoidance of doubt, we found the claimant to be genuine in his attempts to provide an accurate account as possible.

121. RE attended to the claimant. He decided the situation was a clinical matter. The claimant told the Tribunal that *'race was in there'* in RE's failure to secure medical attention for the patient.

**September 2018 - Joint Grievance**

122. On 3 September 2018, Richard Hilton, Jonathan Broadhurst and the claimant submitted a joint grievance. We consider there to be much force in the claimant's evidence that he was concerned that if he were to submit a grievance by himself, he would not be taken seriously. In the grievance, they stated that they had raised previous concerns about their roles, the lack of job description training policies and guidance on and had

not been listened to. They highlighted a 'recent' incident' as being of concern; it was the claimant's incident in Accident & Emergency.

123. The raised a lack of job description, the contracts lack of clear expectations, and queried the use of restraints and the lack of training. They sought clarity on whether they were to be used merely as physical presence, whether they have a more active role to play and whether they should be assisting with aggressive situations in departments and wards.

124. On 4 September 2018, James Chadwick (Head of Facilities) ('JC') and RE met with the three men. They were reassured in writing that the respondent was '*committed to providing a new current meaningful security JD'* together with a set of policies and procedures concerning their roles and relevant training to fulfil the job requirements. They were reassured that the respondent was serious about making the service safe, thanking them for their great work and reminding them that they were a credit to the Department.

125. In fact, their training was not arranged until December and then subsequently rearranged into the following year and no finalised contract had been provided by the end of the year. We remain unclear when, if ever, the claimant and his colleague were provided with a finalised contract of employment as security guards.

126. The claimant was absent on sick leave with work-related stress from 27 September 2018.

**September / October 2018 - Covert Car Park Investigation**

127. The Burton hospital site is equipped with a car parking enforcement system operated by a third party company named 'Parking Eye' and which uses Automatic Number Plate Recognition so that vehicle registration plates are detected and recorded as vehicles enter and leave the site. Users accessing the visitors' car park are expected to use car parking machines to pay for use of the car park. The parking system allows exemptions to be made. One such exemption is obtained by entering a pin code at a terminal located at the hospital helpdesk; doing so extinguishes the need for payment and avoids a fine being generated. The pin code

had not been changed for the few years since the parking enforcement system had been installed. The claimant had been using the visitors' car park, and entering the pin code, thereby avoiding the need to pay a parking charge or being subject to a fine.

128. In late September/early October 2018, RE, JC and MH decided to investigate the claimant's use of the visitor's car park.

129. We are wholly unsatisfied with the respondent's evidence that the information about the claimant is said to have come to the attention of all three of those individuals: via an unspecified *'rumour'* / '*someone passed comment'* / *'evidence that had come forward'*. MH, according to her witness statement could not recall *'specifically who I heard the rumour from (although I do note it was not Richard Edwards, James Chadwick or another member of management)*' as well as attributing it to a unnamed member of the portering team (paras 27 and 33); in any event, we considered her to be an unreliable witness of truth.

130. MH was unable to explain to the Tribunal why, if the information had come to their attention via rumours, the claimant was not simply asked whether they were true. The information that she subsequently obtained from Parking Eye could be obtained in the event that they remained unsatisfied by the claimant's explanation.

131. They agreed that MH would undertake the investigation into the claimant. As the only relevant witness before us, MH told the Tribunal that she was unable to recall the circumstances in which she was personally was asked to or agreed to investigate the claimant about this matter. We are not satisfied that she cannot recall why she went to the lengths she subsequently did to investigate the claimant in light of the steps she subsequently took.

132. We are satisfied, given the covert nature of, and lengths to which she went to obtain evidence about the claimant's parking habits, that JC, RE and MH jointly agreed to seek information about the claimant in the knowledge or expectation that they would secure evidence blameworthy conduct on the part of the claimant.

133. MH had the claimant's registration number; she had sought from Parking Eye the ANPR data for the vehicle accessing and leaving the Trust sites but we were not taken to any documentary evidence of the request she made, or the response from Parking Eye.

134. By 3 October 2018 at 13.06, MH had received Parking Eye data which had captured the claimant's vehicle registration entering the patient and visitor car parks at two hospital sites. The data consisted of a list of dates, and we understand times also, consisting of 85 occasions on which the claimant's vehicle registration had been captured by the software between November 2017 and September 2018.

135. Later that afternoon, MH emailed with the list of data to JC to tell him that she had noted that the Parking Eye data logged times, as well as dates. She provided a him with information about her investigation with staff as to how the claimant may have been using a code to enter and park in the patient and visitors' car park. She had identified that the claimant did not have a staff parking permit; that having spoken to staff and she had identified that the likelihood was that the claimant was entering a code rather than using an on-site login code. She had spoken to the staff of the coffee shop and she knew that they provided the code to enter the car park to visitors such as suppliers. She spoke to staff at the helpdesk who confirmed that the they gave the claimant the code to help a patient. She knew that the pin code was circulated to individuals as required. At 15.46, MH emailed JC, stating that she recalled "*at the back of my mind*" the claimant had a relative who worked in the coffee shop thereby implying that the claimant may have obtained the code in that way.

136. On 4 October 2018 at 10.03am i.e. half a working day after obtaining the Parking Eye data, MH emailed JC again notifying him that she had been through all of the claimant shifts and to confirm that he was working on each of the 85 occasions identified by the Parking Eye data, save for one occasion, in respect of which she said, she had checked that the claimant was not only on paternity leave but, she said, according to JC's diary the claimant and RE had had a meeting with the claimant. MH's efforts were thorough and speedy.

**Sickness Review Meeting**

137. Two days earlier, on 2 October 2018, RE had invited the claimant to a sickness review meeting in accordance with the respondent's Health and Attendance Policy. RE stated that the purpose of the meeting was to ensure the respondent provided the appropriate duty of care to the claimant and to enable him to access any support that can help situation. The letter stated that RE would be accompanied by Sophie Ford (HR Representative) ('SF').

138. On 16 October 2018, the claimant attended a sickness review meeting with RE and SF.

139. The claimant was told that the purpose of the meeting was to understand the source of the stress which preventing him from attending work. The claimant said that there was still a lack of clarity over his job role; he was told that the job descriptions were still under review and training sessions were being put in place. SF explained the purpose of the meeting was to discuss the reasons why the claimant was experiencing stress. The claimant said that he continued to experience the same or similar behaviour as he had encountered in 2016. He said the simply wanted to attend work without people making comments the comments made him feel angry and that it was increasingly difficult to contain his anger. The claimant said he would look to other jobs if things did not change. He informed, by both RE and SF, to put his concerns in writing.

140. We find that it would have been plain to a manager assisted by an HR officer that the instruction to put his concerns in writing was not only contrary to the stated purpose of the hearing, but also contrary to the respondent's grievance and bullying policy. Furthermore, we find that it would have been plain to both RE and SF that an instruction to put his concerns in writing, given the state of his mental health as well as his verbal and likely written skills, would amount to a wholly inappropriate and unnecessary obstacle. It appeared to the Tribunal that neither RE nor SF had any genuine interest in the cause of the claimant's absence.

141. RE told the claimant that he felt a phased return to work would benefit the claimant. The official minutes of the meeting were circulated the claimant on 18 October 2018.

**Claimant's Parking Permit Application**

142. In October 2018, MH changed the pin code to the parking system for the first time since its installation a few years previously. The claimant submitted an application for a parking permit; in it, he inserted his vehicle registration number. The claimant's vehicle was now definitively linked to the Parking Eye data. On 31 October 2018, MH forwarded the claimant's parking permit application to JC and RE. She wrote:

*"Hi both, We **now** have the **evidence** we **need** on Andy as he has submitted a parking application where he has signed **to say what his registration is!*** (emphasis applied)

143. JC, RE and MH, were already in possession of the claimant's vehicle registration of course; the records from Parking Eye relate to only one vehicle. The completion of the parking permit application was never put to the claimant at any subsequent stage. We find that the pin was changed, at least in part to compel the claimant to declare his vehicle registration number.

144. On 24 October 2018, the claimant returned to work after his absence on sick leave for work related stress.

**8 November 2018 - 'Return to Work' Meeting**

145. On 8 November 2018, the claimant attended what he had been told was a return to work interview. When he arrived, he was met by RE, SF and a notetaker, Julia Kenton ('JK'). The claimant was handed a sheet of paper with a car registration number on it and asked whether it was his. RE said that information had been *"brought to '[his] attention"* that the claimant had been using the respondent's car park.

146. The claimant immediately accepted he had been doing just that and explain that his previous manager, MA, did the same thing and also allowed his team members to do so.

147. He said that he had spoken to Seb, Beth and Natalya to ask if he could get a parking space but that they had told him that he could not go on the waiting list because they were not taking any more applications. This assertion was never investigated by MH, RE or, subsequently, the investigating officer Mark Riley. We find that they were either uninterested in any mitigation the claimant might have, or that they already knew that his assertion was correct.

148. The claimant said he could provide five names and registration numbers of people who did the same. He was not asked to provide them.

149. The claimant repeatedly queried why only he was being asked about this; he said that he felt the people were setting him up. RE replied:

*"it is nothing from me to him that I had been given the information following a regular report check".*

150. That was plainly untrue.

151. SF told the claimant that the parking *"system is monitored and audited regularly".* As the respondent accepts, that statement was incorrect.

152. RE told the claimant that an independent investigation would take place, to look at whether MA had agreed to the use of the parking facilities; the claimant asked who that would be and he was told it would be somebody completely impartial. The claimant repeated that there were more people in the team doing as he did, asking why he was the only person being investigated. RE told the claimant that it was for him provide any information he felt would be helpful.

153. A file note was produced of this meeting; RE signed to confirm the truth of its contents.

154. The claimant later complained about this meeting, describing himself as having felt ambushed and intimidated. We have received no

evidence at all why RE prioritised what the respondent subsequently described as a 'fact find' meeting over a return to work meeting, or indeed, why it was necessary for a member of HR and a notetaker to be present.

155. On 8 November 2018, the claimant was again absent on sick leave; the reason was work related stress.

156. The claimant obtained trade union representation; Helen Elson ('HE') was his representative.

**27 November 2018 – Sickness Review Meeting and Commencement of Formal Investigation**

157. On 27 November 2018 a further sickness review meeting took place. In attendance was RE, SF and JK (as notetaker) as well as the claimant, who on this occasion was accompanied by HE.

158. HE stated that the respondent should have by now, in accordance with its policies, completed a stress risk assessment and an occupational health referral. She said she had started to complete a stress risk assessment form already and would send it over when it was complete. According to the minutes of the meeting, RE told HE that an occupational health referral had been declined by the claimant, although we have been taken to no such evidence to support that comment.

159. HE again told the respondent the claimant was being subject to the same behaviours as previously and that these issues need to be dealt with in accordance with the respondent's bullying and harassment policy. RE reminded the claimant that he had failed to put his concerns in writing; SF told the claimant that these matters would be addressed separately through the respondent's bullying and harassment procedure. They never were.

160. The claimant stated that he was still concerned about his role. No contract, job description or training had been provided in relation to the security guard roles still. RE told the claimant that the matter had been addressed via the grievance procedure and steps were being taken to address the matters raised; both RE and SF reminded the claimant that he

had not raised any further concerns, thereby ignoring the fact that this was the second occasion, in a minuted meeting, that he was doing just that.

161. The claimant complained about the meeting on 8 November, stating that he believed it had been a return to work interview but turned out not to be. He said that he found the presence of three people at that meeting intimidating. SF told the claimant that RE was still conducting a fact find and was due report back to the claimant.

162. RE told the claimant that he had 'now' completed his initial fact find. We have been taken to no evidence to suggest that any other steps were undertaken by RE, or for that matter anyone else, between 8 November 2018 and 27 November 2018.

163. RE told the claimant that he had identified that *"there was enough information to be taken forward through a formal investigation process in accordance with the Trusts Disciplinary policy".*

164. HE asked how the information about the claimant's parking been brought to RE's attention. The minutes of the meeting record as follows:

*"RE explained that the car parking reports had shown that an unregistered vehicle was parking on site, but* ***it was not until [the claimant] recently*** *filed a car parking application* ***that it was noted that the vehicle belonged to [the claimant]".*** (emphasis applied).

165. The claimant's vehicle registration number was already known to RE, CJ and MH before the application form was submitted. That was how the Parking Eye Data was collected. RE knew that his explanation to HE was untrue.

166. We have no hesitation in accepting the evidence of HE that she and the claimant were told that the respondent received monthly reports from Parking Eye. She requested them. They were not provided.

167. RE agreed that the stress risk assessment and an occupational health referral would now be completed. In fact, he did not do so; he completed, incorrectly, a 'stress audit tool'.

168. On 28 November 2018, the minutes of the meeting of 27 November 2018 were sent to the claimant for agreement.

169. On 28 November 2018, RE also sent to the claimant confirmation that a formal disciplinary investigation would be conducted into the allegation *"the [the claimant] has inappropriately used Trust systems",* that he had determined that the investigation would be conducted by Mark Riley, Emergency Preparedness Manager, ('MR') and that the allegation potentially amounted to gross misconduct which if proven could lead to dismissal.

**Occupational Health / C's Stress Risk Assessment**

170. RE made a referral to Occupational Health on 29 November 2018. It made no mention of an earlier offer to the claimant to refer him to Occupational Health, or that he had declined the offer.

171. In reply, Occupational Health wrote as follows *"I have read [the claimant's] referral seems clear that the issues are inappropriate behaviour from colleagues and lack of clarity around his work. We could see him but the advice is that if he is to make a successful return to work and remain at work these issues must be addressed urgently. If the root cause of the problem is not resolved nothing will change. I have attached the correct work place risk assessment which* ***you*** *should complete with him and there is an action plan at the end which should be used to address all the issues"* (emphasis as original).

172. The enclosed workplace risk assessment was never completed by RE or anybody else on behalf of the respondent. He was not re-referred to Occupational Health.

173. On 10 December 2018, the claimant's mother wrote an email on the claimant's behalf. In it she made plain that the email had been sent on her son's behalf; the body of the email was addressed to RE and bore the

claimant's name. The email itself was sent to RE and the claimant and was copied to HE. In the email, the claimant complained about the circumstances in which he had been invited to what he thought was a sickness review meeting on 8 November 2018 having only just returned to work with work related stress for bullying harassment which he had had to cope with since 2016. He said that he felt he had been ambushed in the meeting. The respondent refused to accept the email because it had been sent by the claimant's mother, rather than the claimant.

174. On 12 December 2018, HE therefore emailed RE attaching two documents. The first document was a letter again written by the claimant's mother on his behalf, but this time containing the claimant's signature. The letter stated that if the meeting on 8 November 2018 was an initial fact find meeting it should have taken place with the manager only the first instance and not in the presence of HR or a minute taker. That comment mirrors paragraph 7.1 of the respondent's disciplinary policy. He described the meeting as another example of bullying.

175. The second document attached to HE's email was a stress risk assessment that HE had completed with the claimant. In the risk assessment, the claimant stated the still had no job description or training in respect of his security role. He stated there was a lack of management support when reporting issues and *'when I raise concerns they are not fully addressed which leaves me in a vulnerable position'.* He stated he was still being subject to racially motivated comments linking him to prison and drugs, being isolated because he *'looks like a Muslim and they are terrorists'.* He stated he believed he was entitled to protection under the Equality Act and that he was constantly being bullied and harassed. He said there was *"unclear leadership in the managerial team".*

176. In light of the 'implication' that RE had contributed to the stress suffered by the claimant, RE wrote to HE on 13 December 2018 to state that it was no longer appropriate to deal with the claimant's sickness absence, and that those matters would be dealt with JC. RE nevertheless considered it appropriate to remain case manager responsible for the investigation into the claimant of what came to be described as alleged fraud.

177. On 14 December 2018, JC responded to the email sent by HE on 12 December 2018. He noted in the letter the claimant was complaining *'regarding a file note meeting on 8 November 2018'* as well as the individual stress risk assessment form. He stated he was concerned about the points raised and would like to discuss them in more detail with the claimant in order to agree a way forward. The meeting was arranged on 21 December 2018.

178. On 18 December 2018, MA wrote to MR in response to a telephone conversation. He stated that he had never given the claimant permission to have free parking on site, or any other member of staff.

179. On 21 December 2018, a meeting took place between JC, the claimant and HE. No notes of the meeting were made.

180. The claimant had been told by a member of staff that he was facing an allegation of fraud, which was a criminal offence and which was a police matter. JC stated that he wished to address the contents of the stress risk assessment that HE had completed on behalf of the claimant; HE told JC that the allegation of fraud needed to be prioritised as this was the most immediate stressor before addressing the contents of the stress risk assessment. JC sent HE the draft job description for roles; he told her that Trust policies were still being worked on, and that some training dates had been provided, but further dates would be made available to 'the team' next year.

181. No plans were put in place for the stress risk assessment, or their contents, to be revisited.

182. JC did not deal at all with the claimant's complaint that he had been ambushed at the meeting of 8 November 2018: he did not deal with the claimant's complaint that he had been ambushed or bullied by being required to attend the meeting of 8 November 2018; he did not deal with circumstances of the 8 November meeting at all.

183. On 3 January 2019, RE was instructed by MR to notify the Trusts Counter Fraud Specialist or Director of Finance of the allegation of fraud; RE did not explain in his witness statement why he declined or refused to do so.

**9 January 2019 – Investigation Meeting**

184. On 9 January 2019, MR held an investigation meeting with the claimant. He was supported by Shelley Boyle ('SB'), HR manager and the claimant supported by HE.

185. The claimant repeated that he had been given the pin code enabling him to park without incurring a charge by MA. He said MA used the code himself, and that he gave the code to the claimant, telling him he was not to share the code with anybody, but also that he knew MA had given the code to AB. HE stated that if MA knew that he himself should not have been using the pin code, he would be likely to deny what the claimant was saying.

186. The claimant wanted reassurance that MA would be asked to confirm this to be the case and that AB's records were checked; he added that he understood AB was trading in vehicles and therefore had used several vehicles during his employment.

187. MR described the pin code as 'secret'. HE therefore asked MR how it was that the claimant obtained the pin code, if not from MA. HE asked MR to consider and provide evidence of how it was that the claimant had obtained the pin code, if it was being suggested that MA did not provide it to him.

188. MR agreed that MA and AB would be questioned further in relation to the allegations.

189. On 9 January 2019, MA confirmed to MR and SB confirming that he did know the pin code and that he did not give it to anyone *"let alone Andrew Rumin".*

190. MH emailed MR, and at MRs request (which request we were not taken to) provided him with brief information about AB's parking habits. She stated that AB did not have a parking permit; she stated where she believed he parked his vehicle and that, to her knowledge, AB had not parked on the Trust site. She did not state the source of her information.

**29 January 2019 – AB investigation meeting**

191. On 29 January 2019, MR interviewed AB. AB, who had like the claimant, been managed by MA, said that he did know the pin code of the car park but said that he could not recall who gave it to him. He accepted that he did use the car park two years ago when the site was not fully operational, but he had never used the pin code. He said he knew the claimant was parking on site and that he was using the pin code but MA did *'not his knowledge'* give the claimant the pin code. AB was not asked for the registration numbers of any vehicles are used on site.

**Investigation report**

192. On 7 February 2019 MR produced his investigation report. In his report, MR identified RE as the Case Manager for the matter. MR noted that the pin code had not been changed several years, there was no way of knowing how many people knew this code; it was far from '*secret'*.

193. Nevertheless, MR concluded that *'it would stretch credibility'* to accept that the claimant did not know he was expected to pay for his parking – something that was never suggested to, nor for that matter denied by, the claimant. On that basis, MR concluded that there was a case to answer that the claimant had breach the Trusts car parking policy and that in doing so he defrauded the Trust of parking revenue in the sum of approximately £500.

194. On a date that has not been disclosed to us, RE and JC discussed the investigation report and they jointly decided that there were sufficient grounds for the matter to proceed to a disciplinary hearing. Neither witness addressed in their statement when that decision was made.

195. On 22 February 2019, Corall Jenkins ('CJ'), Regional Organiser of Unison, telephoned RE to inform him that the union were advising the

claimant to enter into ACAS Early Conciliation. We were not taken to any notes of that discussion. CJ followed the telephone call with a letter, in which she raised a number of questions on the claimant's behalf. On 8 March 2019, RE replied to CJ's letter.

196. One question posed by CJ was *"can you confirm the reasons for raising the car parking issues in the sickness review meeting?".* RE responded *"the car parking issues were raised after the sickness meeting concluded. It was made clear that the sickness meeting had ended and Andrew and his representative were happy to proceed with that discussion"*.

197. RE was aware that the claimant was complaining about the way he had been '*ambushed'* when on he believed he was attending a return to work meeting on 8 November 2018, not the sickness review meeting at which he was accompanied and which took place on 27 November 2018. He knew of the distinction because he had received that complaint in the email from the claimant's mother on 10 December 2018 as well as the letter from the claimant on 12 December 2018. His answer to CJ was dissembling.

198. Since HE had been told that car parking reports were produced on a regular basis, CJ asked the question *"Can you confirm how often the party reports provided?".* RE responded as follows:

*"Car parking reports are not provided on a regular basis. Concern had been raised by the Car Parking Team as a particular registration was being entered into the car parking system on a regular basis and this vehicle was confirmed as Andrew's when he submitted the car parking application".*

199. RE's reply to CJ was wholly untrue and RE knew that.

200. The claimant entered ACAS early conciliation on 22 February 2019 and a certificate sent to him on 20 March 2019.

201. On 15 March 2019, RE wrote to the claimant letter to invite him to a disciplinary hearing on 29 March 2019 to answer the allegations that he

had breached the Trusts car parking policies and in doing so defrauded the Trust of parking revenue in the sum of approximately £500. He was reminded that the allegation, if proven, could be potentially treated as gross misconduct and the possible outcome was dismissal.

202. Notwithstanding his involvement in the covert investigation commencing in October the previous year, JC was to be the chair of the hearing, to be supported by CR; the presenting managers were to be RE and MR.

203. The claimant was told that the Trust would be calling MA to give evidence. This hearing, scheduled to take place on 29 March 2019, was postponed until 10 April 2019.

**Alleged threats of violence**

204. The events of 7 April 2019 are recounted in the statement of RE, JC and CR.

205. On Sunday 7 April 2019 at 12:06, RE emailed JC and CR stating:

*"Hi both, [AB] has contacted me today very concerned as people had gone to his daughter's address and ex-wife in the early hours looking for [AB]. When asked what they wanted they replied because of the statement made against [the claimant]. I'm not in until Tuesday but could someone please contact [AB] on Monday"*

206. The Tribunal were taken to no notes of that discussion but, according to the statement of RE, CR and JC, AB also told him that he wished to withdraw his 'statement' to MR.

207. At 12:11 the same day, CR replied: *"Do you know if the police have been involved?*

208. Twenty minutes later, at 12.29, JC replied to CR stating:

*"In light of this,* ***should we be concerned around our safety*** *and the safety of our families if this is how Andrew is going to operate,* ***outcome***

***depending****? Real concerns as* ***an innocent person does not "send the boys" round****" (emphasis applied)*

209. CR in her statement stated: *". . . on 7 April 2019, I received an email from RE confirming that AB wished to withdraw his statement given to MR. . .On 16 April 2019, AB confirmed [that he wished to withdraw his statement] via email to me".*

210. That was a wholly inadequate description of the events that occurred on and the day or days thereafter.

211. We were told that CR and her Director of HR met with AB as she was too scared to see him on her own. AB stated that his ex-partner and daughter had had a visit from two individuals. She understood that AB said he knew who the people were, although he himself was not present during this alleged visit. They had said words to the effect that AB '*had done the dirty on his brothers'*. CR asked AB whether, if he perceived the event as a threat, why he did not go to the police and AB replied that if he did report the matter to the police that he '*would have to leave Burton'*. In evidence, CR stated *'we were all a bit scared'*.

212. We were taken to no note of this interview; we do not understand one was made.

213. Seemingly, no thought had been given to the coincidence that threats were made at the wrong address, or that AB's ex-partner and daughter were not employees of the Trust and so the claim could not be verified by the respondent, or for that matter, by the police. If AB was correct, then the claimant was guilty of serous criminal conduct and therefore a most serious act of gross misconduct; conversely if what AB had told RE, CR and her Director was untrue, then he himself was guilty of a very serious act of gross misconduct.

214. AB's word was taken at face value. The claimant was never asked by the Trust about this matter during his employment. The first the claimant had any clue about this matter was when he received the emails of 7 April in response to his Subject Access Request.

215. In addition, the respondent adduced no evidence whatsoever to suggest that what AB had said was true, nor to suggest that their belief in AB's account was reasonable. It adduced no evidence at all of any propensity to aggression or violence on the part of the claimant. The respondent did not address in their statement what, if anything, the witnesses said or did next; plainly there were discussions because CR confirmed that, as a direct result of the account given by AB, MA declined to attend the disciplinary hearing as a witness; MA was not an employee of the Trust.

216. For the avoidance of doubt, we believe the claimant when he says he did not '*send the boys round'* to threaten AB's family and that he and AB had were sufficiently close that one was the best man at the other's wedding.

217. Having received a response to his Subject Access Request, the claimant presented his claim on 17 April 2019. In his grounds of complaint, the claimant reproduced the email of 30 October 2018, stating : *"this looks like [JC] and [RE] have been searching for information on me and I'm not sure how long that had been going on for. . . I believe I am being set up to fail because of my race"* The claimant set out his concerns about JC and CR sitting on the disciplinary panel at the hearing due to take place on 29 April 2019.

218. The claimant did not submit a claim form any sooner than he did because he felt overwhelmed by a lack of support, he felt hampered by his literacy skills and he had a child and a mortgage that he was responsible for. He was losing faith in the system.

219. On 26 April 2019, CR emailed HE. In that email, CR informed HE that *"since the management case was sent to Andrew on 15 March 2019 AB has withdrawn his statement so this will not be taken into account by the panel".*

220. HE replied to CR. She pointed out that the respondent had been told that AB had several vehicles and wanted all those vehicles to be checked. She pointed out that not once had AB been asked for his vehicle registration details. She pointed out that AB was white, and Andrew was

black, and wished to know why AB was not being subject to the same investigation procedure as the claimant. She asked why AB had withdrawn his statement.

221. HE furthermore raised her concern, with no clue of the events that occurred on 7 and 8 April 2019, that both CR and RE remained involved at the disciplinary hearing stage, given their earlier involvement; she stated she had concerns that they could not be regarded as impartial.

222. In her reply dated 7 May 2019 CR made no mention of her exchange with RE that led to the making of the 'file note of 20 March 2019' (see below). She said she noted HE's concerns about impartiality and therefore advised that she and JC would be replaced by a new disciplinary panel. She added *"AB has chosen to withdraw his statement and he has not **formally** advised of his reasons."* (emphasis applied). That answer was misleading and dissembling.

223. At some point, AB telephoned the claimant and told him that the reason he didn't tell the truth in his interview, was because he felt his job might be *'on the line'*. RE also contacted AB, knowing that AB had contacted the claimant, to ask him to attend the disciplinary hearing on the claimant's behalf, she having been notified that the Trust were not relying on him as a witness. He told her he was fearful of being dismissed; he made no mention of threats of violence, and she had no clue about the call on 7 April until sometime later, when she saw the emails of that date.

**'File note 20 March 2019'**

224. We have been taken to a document in the bundle purporting to be a file note, entitled '20 March 2019'. It contains a record of an exchange between RE and AB about where AB parked his vehicle and it is signed, but not dated, by both.

225. On the respondent's own evidence, is unrelated to the disciplinary investigation into the claimant, which is in itself curious, given that RE was the case manager for the investigation into the allegation about the claimant's parking.

226. The note records that AB admitted to using the car park before the ANPR system was operational, but not since. The note states that AB's vehicle registration number was checked against Parking Eye data since it was operational and there had been no occasion when it had been parked in the Trust car park.

227. We are not satisfied of the accuracy of the date, or its contents; the note does not record the vehicle registration number checked; there is no supporting documentation to indicate that task was in fact undertaken e.g. a request to, and a negative response from, Parking Eye; we would have expected CR to correct HE's contention, contained in her letter of 29 April 2019, that AB had not been asked for a single registration number for any of his vehicles if this had in fact been undertaken after discussion with CR; CR states that she cannot recall when she spoke to RE about making a file note and the statement from RE does not confirm when he met with AB.

228. We are not satisfied that the 'file note 20 March 2019' is genuine or contemporaneous.

229. We conclude that, as the claimant stated in evidence, AB had several vehicles which he used to travel to work; he was not asked to provide the registration number of any of his vehicles; no checks of his vehicles were made with Parking Eye so as to identify whether AB was using the car park as the claimant contended.

230. On 14 May 2019, the claimant was sent a third letter inviting to a disciplinary hearing, this time on 29 May 2019. Now, the panel chair was identified as Rob Ridge ('RR'), General Manager of Facilities Management; the HR BP was Jodie Steemson. The respondent stated that MA would be called as a witness.

231. RR was experienced in chairing disciplinary hearings.

232. Around May 2019, the claimant was arrested and remanded in custody. The claimant volunteered for the disciplinary hearing to proceed in his personal absence, with HE in attendance. The Trust refused. The claimant was released from custody, having been acquitted of all charges.

233. On 29 November 2019, a fourth letter was sent to the claimant, inviting him to a disciplinary hearing, to take place on 20 December 2019. No mention was made of the attendance of MA as a witness. This was intentional because MA had withdrawn his agreement to attend as a witness, because he had become aware of the alleged threats to AB made on behalf of the claimant. MA had left his employment with the respondent in June 2018 the alleged threats of violence were therefore known outside the respondent organisation.

**Disciplinary Hearing – 20 December 2019**

234. In advance of the disciplinary hearing, RR and Claire Sanders (Senior HR Advisor) held a case conference to discuss the forthcoming disciplinary hearing, although no mention of this was made in the statement of RR and we have seen no notes of this meeting.

235. In advance of the disciplinary hearing, RR knew the following matters: that the claimant had accepted that he had used the car park as alleged but claimed that MA had given him the pin code with which to do so; that both the claimant and AB had been managed by MA; that MA had denied giving anyone the pin code; that when RR was due to chair the disciplinary hearing in May 2019, when MA was due to attend as a witness, but when at the disciplinary hearing in December 2019, MA was no longer attending as a witness; that the claimant was insisting that AB's use of the car park should be thoroughly investigated; that when AB was interviewed on 29 January, he denied using the car park at any time after the car park system was installed, but was never asked for his registration number/s by MR to check that claim; that the claimant was black and that AB was white; that claimant had alleged that the investigation and disciplinary proceedings against him was an act of race discrimination.

236. The disciplinary hearing on 20 December 2019 was effective. In attendance was RR, accompanied by not only CS but also Darren Gillot (Senior HR Advisor), MR and a notetaker. MA was not in attendance. The claimant was accompanied by HE.

237. The claimant accepted that he had used the car park as alleged i.e. that he had used the car park on 85 occasions without paying, but remained adamant that MA had provided him with the code to do so. He repeated that MA and AB's car registration numbers could be checked against the Parking Eye data. He repeated that his belief that his car had been targeted and searched for. HE said she wanted it recording that the allegation was racially motivated. In her closing submissions, HE stated that the claimant had been subject to a history of racial abuse and discrimination.

238. Just before the end of the hearing, which lasted 1.5 hours, CS asked the claimant about his thoughts about returning to work. If RR's evidence is to be believed, this was a spontaneous enquiry, in an effort to be *'supportive'.* We considered this to be a most unusual enquiry on the part of CS, given that the RR was the decision maker alone, the claimant had admitted to an allegation that the respondent had itself characterised as fraud and gross and that, on the evidence before him, MA had denied giving the claimant the pin code to enable him to use the car park without paying.

239. By the end of the hearing, RR had asked no questions about why the claimant was alleging that he had been targeted or that the matter was racially motivated. He knew that MA was no longer a witness and did not ask management or, according to his evidence to the Tribunal CS, why. He knew that AB had withdrawn his statement and did not ask management or, according to his evidence CS, why. When asked by the Tribunal whether he had any recollection at all of discussions or conversations about the claimant being violent or making threats of violence, RR replied that he *'didn't recall'* any.

240. Taking his evidence on its face, we found RR to be oddly incurious about the task before him.

241. RR deliberated for a total of 17 minutes. He delivered a conclusion of '*no case to answer'.* He gave no explanation at all for his finding in fact he passed no comment at all about the case he had just heard. Nothing was said about the contention that the claimant had been *'targeted'* or that

the allegation was racially motivated or why the lack of investigation into AB was acceptable. Arrangements for the claimant's return to work were discussed.

242. On 20 January 2019, a letter confirming the outcome of the disciplinary hearing was sent to the claimant. No rationale at all for the decision of *'no case to answer'* was provided in the letter. RR was unable to explain why.

243. We find the lack of any rationale for the outcome troubling; the claimant had alleged that he had been targeted and that the process was an act of discrimination. RR was not only, by his own description, an experienced chair of disciplinary hearings, but because on this occasion, he was assisted by two Senior HR Advisors.

244. We were not satisfied with RR's explanation to the Tribunal as to why he had decided that there was no case to answer; the claimant had, after all, and from the outset, admitted to the act alleged. RR's explanation to the Tribunal was that he had identified procedural defects. The two procedural 'defects' identified by RR in his witness statement – the lack of a formal statement from MA and the fact that the claimant had not been formally notified of the Trust's parking policies, were both known to both RR and CS before the hearing; the first was self-evident and the second explicitly referred to by MR in his report. Nor was either defect raised by RR during the hearing. In his oral evidence, RR added a third defect, namely that he became aware of an undocumented meeting between MR and MA on 3 December 2018. That meeting was not new; it was referred to in the investigation report. That exchange was the subject matter of a short discussion during the disciplinary hearing, but not expanded upon by MR. We consider reliance on this 'third defect' be nothing more than a makeweight to what was already an inadequate explanation.

245. We are not satisfied of the explanation given by RR as to why he determined that there was '*no case to answer'.*

246. The claimant resigned from his employment on 11 March 2021.

## DISCUSSION AND CONCLUSIONS

**(a) Between August 2015 to approximately September 2016 Gavin Murray said spoke to the claimant saying such things as *'your lot'*, *'oh what's that smell', 'only you could eat that'* and *'you wouldn't see me eating that stuff'***

247. When asked by JH whether CD had made any comment related to his race, the claimant denied the same, adding that his complaints were about work and control and disclosure of his criminal record. We have no doubt at all that the comments were made, regularly, by other colleagues, but we are not satisfied that they were made by CD.

248. The allegation is not well founded.

**(b) On 28 January 2016 Susan Buglione pointed her finger to the claimant's face and addressed him as *'people like you'***

249. SB accepts that she did behave in the way alleged. We have little doubt that, in the context of her role, an autocratic style may be the most expedient way to ensure tasks are completed. But the claimant was 5 bands junior to SB and he was unfamiliar to her. Her physical gesture was overbearing and patronising, her raised voice and her words were unwanted; the claimant became upset by her conduct.

250. We are satisfied that SB's comment was related to the claimant's race. It is not necessary for SB's conduct to have been because of the claimant's race; the test is broader than that. We have, in any event rejected SB's explanation that she had in mind 'porters' when she directed her comment to the claimant. The claimant was one of only two porters in a team of 50 who were not white. We bear in mind SB's insistence, albeit unparticularised, that the claimant was aggressive, and we are mindful that this is one of the racial stereotypes of black men that the respondent accepts exists. We are satisfied that SB's conduct related to the claimant's race.

251. We are satisfied that SB's purpose was to violate the claimant's dignity, or create an intimidating, hostile, degrading, humiliating or

offensive environment. We accept that in a pressured environment in which SB no doubt works, a disagreement, even a heated disagreement may not be unusual. But, considering the significant disparity in seniority, together with the aggressive physical gestures made by SB, we are satisfied that it was her purpose to intimidate or humiliate the claimant.

252. Further and in any event, we are satisfied that her conduct had the prohibited effect. The claimant was so upset by SB's conduct that, even on SB's own account he was considering leaving his employment. The claimant was acting in accordance with his training by refusing to move the patient without an escort; SB was not only wrong in her instruction to the claimant to move the patient without an escort, she did not seek to engage with the claimant about his refusal. The event took place over the bed of the patient, in a corridor. SB was significantly senior to the claimant and, in her position, it was open to her, her responsibility, even, to deescalate the situation but instead she aggravated it by using a physically aggressive gesture towards the claimant.

253. This allegation of harassment is well founded.

**(c) On 26 April 2016 Susan Buglione in an argument with the claimant said to him that she was 'tired of your kind'**

254. The ward sister was not SB. The allegation is not well founded.

**(d) On both 28 January 2016 and 26 April 2016, CD spoke to the claimant in a disparaging way**

255. Although we are satisfied that CD's conduct towards the claimant on both occasions was likely to be overbearing and appropriate, we are not satisfied that the manner in which CD addressed the claimant on either date was related to, or because of, the claimant's race. There is a significant volume of evidence before us, e.g. the meeting between MH and OH, and all the interviews conducted by JH with the other porters that CD was widely regarded as conducting himself in a hostile and bullying behaviour manner.

256. The allegation is not well founded.

**(e) Between 2015 and May 2016 Melissa Howe failed to document the complaints the claimant made to her about his treatment by other porters**

257. The claimant spoke with MH to relay his concerns about the way he has been treated by not only CD but also other porters. The complaints were, on the face of it, serious in nature consisting of allegations racial harassment and bullying. However, from the ample evidence before us, and in particular the evidence of the porters who were interviewed by JH, it is apparent that MH failed to document not just the claimant's concerns, but those brought to her attention by other porters.

258. We are not satisfied that her failure was related to the claimant's race, or because of it. When asking ourselves the reason why she failed to do so, we are satisfied that the reason was her wholesale failure to manage almost all concerns about CD that were brought to her attention.

259. The allegation is not well founded.

**(f) During 2016 Ian Holden gave the claimant job after job whilst other colleagues were sitting around without jobs**

260. Although we accept that the claimant's perception was that he was required to carry out more than his fair share of tasks, on shifts that did not attract pay enhancements and that were more physically demanding, there was a lack of objective evidence before the Tribunal to support his contention. In fact, there are a number of factors that are likely to have

affected the claimant's perception of fairness: the claimant had not appreciated that he was bank staff; there were friendship groups amongst the porters that led to manipulated shift allocations meaning that he may well have been working more physically demanding shifts; allocation of tasks was undertaken by an Allocations Officer as well as the porter supervisors. We take the view that the very fact that the claimant was regarded as an enthusiastic worker is likely to have been a factor in the allocation of tasks to him.

261. Although the claimant complained about unfair task allocation in his written grievance in May 2016, he did not make any complaint about IH in his interview with GN in June 2016 and he did not name IH as responsible in his interview with JH in July 2016.

262. Although the Tribunal consider that there is some merit in the claimant's perception that he was unfairly treated generally, we are not satisfied that that treatment was attributable to IH or related to or because of his race.

263. The allegation is not well founded.

**(g) The claimant reported Ian's Holden's treatment of him i.e. routinely giving him jobs, and not his colleagues. Claire Rowe / Mark Abella / Geoff Nealds – they failed to document his grievance at a hearing / meeting on 7 June 2016**

**(h) Claire Rowe / Mark Abella / Geoff Nealds failed to investigate the claimant's grievance about Ian Holden giving him job after job when other team members were available and sitting around, that he raised at the meeting on 7 June 2016**

264. Although we have found that CR's handwritten notes of the meeting on 7 June 2016 is far from comprehensive, we are not satisfied that the claimant did in fact complain about IH at this meeting; had he done so, we would have expected to see a reference to that complaint when he was interviewed by JH in July 2016. It follows that they did not fail to investigate the allegation.

265. The allegations are not well founded.

**(i) Around August or September 2016 Claire Rowe failed to note a conversation between Mrs Sharon Rumin and herself in which Mrs Rumin raised the failure to deal with the claimant's concerns**

266. We have found that this allegation is likely to refer to the call made by Mrs Rumin to CR on 2 February 2017. The exchange in February 2017 was in fact noted by CR in a short, handwritten note. We are unaware of any obligation on the part of CR to have made a note of the exchange at all, whether it took place in August or September 2016 or in February 2017. We are not satisfied that any failure to make a note at all, or make a formal note, of the discussion with the claimant's mother could be said to be related to race, or because of the claimant's race.

267. The allegation is not well founded.

**(j) Mark Abella told the claimant to work in the Parcel Hub in January 2017 to March 2017 without being asked for his preference**

268. We have found, consistent with the note of the discussion had between CR and Mrs Rumin in February 2017, that MA had discussed with the claimant where he was to be located when he returned to work as a Generic Worker / Security Guard in which the claimant had been asked to, and agreed to, work in the Parcel Hub *'for a limited period'.*

269. The allegation is not well founded.

**(k) From January 2017 to March 2017 every member of staff in the claimant's team joked on a daily basis about the Afro-Caribbean food that the claimant ate, making comments such as the claimant *'must only eat chicken, rice and peas'* and that his food *'smelt'***

270. We found that the claimant was regularly subject comments such as those above by his colleagues. Mr Keith the respondent contends the claim must fail in the absence of a finding by the Tribunal that "*every*" member of staff passed comment on a "*daily*" basis. We disagree; the substance of the claim was made out and it would be wholly inappropriate to require an unrepresented party to draft an allegation with the precision of legal draughtsman.

271. The conduct was unwanted; the claimant was sufficiently upset by these comments to make numerous verbal complaints to MH. The comments were related to race; the claimant's heritage is part Afro-

Caribbean and the comments relate to Afro-Caribbean food. When discussing his food, the claimant was addressed as '*your lot'*. The comments had the proscribed effect. We consider it particularly significant that the claimant was one of only 2 out of 50 porters who are not white; he was in a significant minority. When discussing his food, the claimant was addressed as '*your lot'*. The comments were personal in nature, since they were being passed not only about the food he ate, but food that is typical of his cultural heritage. The comments were being passed in an environment where such conduct was tolerated and condoned by the claimant's supervisors and manager.

272. The allegation of harassment is well founded.

**(l) Natalie Roddis failed to complete an accident form when the claimant suffered an accident at work.**

273. We have found that NR did complete accident report form.

274. This allegation is not well founded.

**(m) On 16 November 2017, EF said to the claimant *'what are you looking at?'.***

275. There is no evidence before us to suggest that the comment was related to race or because of the claimant's race rather than, as we consider to be significantly more likely, out of anger because of her erroneous belief that the claimant was responsible for her partner's resignation.

276. The allegation is not well founded.

**(n) Also on 16 November 2017, CD stated 'I didn't know they employed drug users'**

277. The comment was made and reflects a racial stereotype of black men being involved with drugs; it is related to race, again a stereotype that the respondent accepts exists. The conduct was unwanted and both the purpose and reasonable effect of that wholly gratuitous comment was to insult and humiliate the claimant.

278. The allegation of harassment is well founded, but CD was not employed by the respondent when the comment was made; it is not liable for his conduct.

**(o) Claire Rowe advised that because a complaint about him had come from a patient, the respondent could not investigate; how the complaint been about hypothetical white comparator they would have investigated**

279. The person who advised MA about the anonymous complaint was not CR.

280. The allegation is not well founded.

**(p) Mark Abella failed to log and investigate an incident that occurred in 2017; the claimant had told him of his concerns about the way the ward sister at ward 4 had spoken to him and his concerns about a patient he had been instructed to take to the x-ray department without a medical escort**

281. The Tribunal identify this as with incident below, is an instance in which the claimant was genuinely concerned for the welfare and best interests of the patient. He was correct to refuse to transport the patient unescorted, as a matter Trust policy. He was also correct to be concerned about the fact that the patient was presenting as particularly unwell proved to be correct.

282. We are not satisfied however, and the claimant's own evidence, that the matter was to be properly categorised anything other than a clinical incident or that MA would have behaved differently in similar circumstances had the reporting porter not been black.

283. The allegation is not well founded.

**(q) In August 2018, RE failed to seek medical attention for a patient with a head trauma when the claimant informed him of his concerns about the patient**

284. We have great sympathy for the claimant in relation to this incident. Through no fault as though he was required to undertake a task for which

he was untrained and unguided. The circumstances were plainly greatly distressing for the claimant. However, the incident took place in the Accident & Emergency department, and the patient was in the cubicle directly opposite the nurses station; and the claimant's own evidence there were clinical staff in the vicinity. We recognise the claimant felt helpless and genuinely believed that RE could achieve more for the patient the himself, but the need for medical attention with clearly a matter of clinical assessment.

285. On the facts as we have found them to be we are not satisfied that there was an obligation on the part of RE to seek further medical attention than that which the patient was already receiving, however inadequate the claimant believed it was, and therefore no failure to do so. We are not satisfied that any omission on the part of RE was in any way motivated by race rather than his assessment that the amount and quality of medical attention that the patient required was a clinical concern.

286. The allegation is not well founded.

**(r) RE instigated an investigation into alleged car park fraud by the claimant**

287. We are acutely aware that in making the findings of fact that we have about events involving RE and JC, and drawing the inferences we do below, we have done so in the absence of either witness. But, they were both obvious witnesses to call; RE was an alleged perpetrator. The grounds of complaint implicate both witnesses. The findings, and the inference that follow are entirely warranted given that both witnesses have chosen not to be present, for reasons they chose not to share.

288. RE, together with JC and MH, was complicit in instigating a covert investigation into the claimant's use of the car park. He and JC subsequently decided to instigate a formal investigation.

289. We summarise the facts relevant at the first stage.

290. RE's – unsigned - statement lacks detail. Not only have we been compelled to make findings of fact without the benefit of his input, we also

draw an adverse inference from his non-attendance at the final hearing. Had he attended, the claimant as well as the Tribunal would have heard his account of the sources of the 'rumours' that led to the covert investigation, why he did not simply ask the claimant whether the 'rumours' were true, the circumstances in which he and JC and MH came to embark on a covert investigation, why that investigation was not ever revealed to the claimant, and why he misled the clamant, HE and CJ about how the investigation commenced. We infer that he did not attend Tribunal to give evidence in order to avoid scrutiny of his actions.

291. It was open to RE, had he wished to conduct a fact find, to simply ask the claimant if the rumours were true that he was using the car park illegitimately. The Parking Eye data was retrievable in the event that the claimant's reply was unsatisfactory. He did not do so. Instead he was complicit in a covert and detailed investigation by gathering data from Parking Eye and cross referring it to 85 shifts over a period of 10 months. We have found that RE, JC and MH embarked on the search in the expectation that they would find prejudicial information. We infer that the covert investigation as an information gathering exercise which was to serve as a precursor to a formal investigation.

292. RE suppressed the existence of the investigation at all times from the claimant and from his trade union representative. We can see no reason to have done so, if the covert investigation had been carried out in good faith.

293. Furthermore, RE lied:

a. To the claimant on 8 November 2018;
b. To HE at the meeting on 27 November 2018;
c. To CJ in his letter of 8 March 2019. He wrote that letter to the Regional Organiser of Unison only one week before he told the claimant, on 15 March 2019, that a formal investigation was to commenced.

294. The claimant was told he was attending a return to work meeting on 8 November 2018. Instead he was met by RE, SF and JK as a notetaker in what was described as a 'fact find' meeting. The presence of Human Resources and a notetaker was far in excess of what the respondent's

disciplinary policy envisages, which provides for fact find meetings to be conducted by the manager (alone). We infer that that approach was adopted, not only as the claimant says, to ambush him, but ensure that an accurate record was made of his response.

295. We read the email of 30 October 2018 at face value: *"Hi both, we now have the evidence we need on Andy as he has submitted a parking application where he has signed to say what his registration is!'.*

296. We infer the facts above that RE, in concert with JC and MH, acted as he did to entrap the claimant; a denial from the claimant when RE held all the information would serve only to aggravate matters for the claimant.

297. We consider the characteristics of a hypothetical comparator in materially the same circumstances as the claimant. The comparator would not be black, or be white, and in respect of whom information would come to RE's attention that the comparator was entering the car park by entering a pin that s/he was not entitled to have, so as to obtain free parking.

298. When considering how that comparator would have been treated, we take into account RE's lack of interest in exploring the claimant's claim that others were doing as he was at the meeting on 8 November 2018. At that meeting the claimant said he could name '5 others' who were doing as he was, yet RE failed to take any details from him, despite the alleged status of the meeting as a 'fact find' meeting.

299. By 9 January 2019, the clamant had told MR that AB was using the car park as the claimant was. AB is white. RE was case manager. That amounted to 'information' that came to RE's attention; he was case manager for the claimant's investigation. There are two significant differences, however. The information was given by the claimant during a formal investigation; it was more likely to be reliable than a 'rumour'. Second, the name was significant because AB and the claimant were both line managed by MA until MA left his employment with the respondent. There was therefore a real possibility that the claimant's claim that others were doing the same as him, had merit. Furthermore, in his investigation meeting on 29 January 2019, AB agreed that he knew the pin code; still, RE made no attempts to carry out his own check to test AB's credibility.

300. Returning then to how a hypothetical comparator in materially the same circumstances would be treated, we are satisfied that on the balance of probabilities, no enquiries, covert or otherwise, would have been made of them, and therefore no investigation instigated. The comparator would have been treated more favourably than the claimant.

301. That, however, is insufficient in itself to shift the burden of proof;: there must be an additional factor – Madarassay. We found that throughout the claimant's employment, he has sought to have his race related complaints heard. Whether by reporting it verbally or in writing in a grievance or, in a stress risk assessment, whether directed to his immediate manager or to senior managers, whether accompanied by his mother, or his trade union representative It made no difference whether the claimant was attending of his own 'grievance' hearing, was at a sickness review meeting in which he specifically said his mental health was deteriorating as a result of unaddressed conduct, or at a disciplinary hearing facing an allegation of gross misconduct, his pleas have consistently landed on deaf ears. His complaints were simple to comprehend. They were plainly about racially motivated language. He was not only consistently ignored, he was duped and he was lied to. It is difficult to comprehend what more could reasonably be expected of him, in order to be seen and to be heard by the respondent. There was an incomprehensible and deeply ingrained culture of ignorance, arrogance and high-handed attitude towards the claimant and his complaints of racial harassment. This is the additional factor required to shift the burden of proof.

302. We find that the claimant as discharged the burden of proving facts from which we could conclude, in the absence of any other explanation that an unlawful act of discrimination had occurred.

303. The burden of proof is therefore shifted to the respondent to provide an explanation for instigating the investigation into the claimant's actions. The facts as we have found them to be are extremely serious and require cogent explanation. We have not heard from RE, or for that matter JC, who joined with RE in deciding to convert the covert investigation into a

formal investigation. We have received no explanation from either RE, JC or MH as to why they decided to embark on a covert investigation and the statements of RE and JC do little more than recount the documents in the bundle about the conversion to a formal investigation. We have attached very little weight to their statements. In the circumstances we are not satisfied that either investigation was completely untainted by race. It follows that the claim of direct discrimination is made out.

**Whistleblowing Detriment**

304. The Tribunal were not satisfied of the words used by the claimant when he called RE, panicked and seeking assistance and we are not therefore satisfied whether he disclosed information which, in the reasonable belief of the claimant the health or safety of the patient had been, was being or was likely to be endangered (or, for that matter, the alternative ground advanced). In any event, that belief was not objectively reasonable; the patient was in the Accident & Emergency Department, the nurses' station was located directly opposite the bed and there were staff in the vicinity.

305. The allegation is not well founded.

**Time Limits**

306. There is no issue that the complaint about RE's instigation of the investigation into the claimant has been presented within the applicable time limits.

307. We have considered whether the comment made by SB in January 2016 and / or the comments about the claimant's food in January to March 2017 could, together with the investigation into car park fraud, amount to 'conduct extending over a period'. We find they are not. If anything, the conduct extending over a period was the respondent's failure to address the claimant's concerns, rather the individual acts, which were perpetrated by unconnected persons, carried out in different contexts.

308. We have considered whether it would be just and equitable to extend time in respect of the earlier acts. We have considerable sympathy for the challenges in his personal life, but the acts are very significantly out of time, the first by 3 years, they were overt acts of

discrimination that he was aware of at the time they were made, and in light of the fact that he had at his disposal a valuable source of support in his mother, we are not able to identify a compelling reason to find that it would be just and equitable to extend time.

Employment Judge Jeram

Date: 13 May 2022

Annex A

Agreed List of Issues

**Direct race discrimination (Equality Act 2010 section 13)**

1. The claimant is black.

2. Did the Respondent do the following things:

   a. Between August 2015 to approximately September 2016 Gavin Murray said spoke to the claimant saying such things as *'your lot'*, *'oh what's that smell', 'only you could eat that'* and *'you wouldn't see me eating that stuff'*

   b. On 28 January 2016 Susan Buglione pointed her finger to the claimant's face and addressed him as *'people like you'*

   c. On 26 April 2016 Susan Buglione in an argument with the claimant said to him that she was *'tired of your kind'*

   d. On both 28 January 2016 and 26 April 2016 of those occasions, Gavin Murray spoke to the claimant in a disparaging way

   e. Between 2015 and May 2016 Melissa Howe failed to document the complaints the claimant made to her about his treatment by other porters

   f. During 2016 Ian Holden gave the claimant job after job whilst other colleagues were sitting around without jobs

   g. The claimant reported Ian Holden's treatment of him i.e. routinely giving him jobs and not his colleagues. Claire Rowe / Mark Abella / Geoff Nealds failed to document his grievance a hearing / meeting on 7 June 2016

   h. Claire Rowe / Mark Abella / Geoff Nealds failed to investigate the claimant's grievance about Ian Holden giving him job after job when other team members were available and sitting around, that he raised at the meeting on 7 June 2016

   i. Around August or September 2016 Claire Rowe failed to note a conversation between Mrs Sharon Rumin and herself in which Mrs Rumin raised the failure to deal with the claimant's concerns

   j. Mark Abella told the claimant to work in the Parcel Hub in January 2017 to March 2017 without being asked for his preference

   k. From January 2017 to March 2017 every member of staff in the claimant's team joked on a daily basis about the Afro-Caribbean food that the claimant ate, making comments such as the claimant *'must only eat chicken, rice and peas'* and that his food *'smelt'*

   l. Natalie Roddis failed to complete an accident report form on the occasion when, on a date between January 2017 and March 2017, the claimant suffered an accident at work

   m. On 16 November 2017, EF said to the claimant *'what are you looking at?'*

   n. Also on 16 November 2017, CD stated *'I didn't know they employed drug users'*

o. Claire Rowe advised that because a complaint about the claiamtn had come from a patient they could not investigate; had the complaint been about a hypothetical white comparator, they would have investigated

p. Mark Abella failed to log and investigate an incident that occurred in 2017; the claimant had told him of his concerns about the way the ward sister at ward 4 had spoken to him and his concerns about a patient he had been instructed to take to the x-ray department without a medical escort

q. In August 2018, Richard Edwards failed to seek medical attention for a patient with a head trauma when the claimant informed him of his concerns about the patient

r. Richard Edwards instigated an investigation into alleged car parking fraud by the claimant

3. Was that less favourable treatment?

    a. The Tribunal will decide whether the Claimant was treated worse than someone else – a "comparator" – was treated. There must be no material difference between their circumstances and the Claimant's.

    b. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

    c. The Claimant relies on the following real comparators in respect of allegation p above: Richard Hylton and Mark Abella

4. If so, was it because of race?

5. Did the respondent's treatment amount to a detriment?

**Harassment related to race (Equality Act 2010 section 26)**

1. Did the Respondent do the following things:
    a. Allegations a, b, c, d, k, m, n above
2. If so, was that unwanted conduct?
3. Did it relate to race?
4. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
5. If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

**Protected disclosure**

1. Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

    a. What did the Claimant say or write? When? To whom? The claimant says he made disclosures on this occasion:

    August 2018, verbally in a telephone call to Richard Edwards, *"the patient in A & E is in a bad way, there is blood everywhere coming from his ears and head and bad marks on his back. He has been left unattended for hours and no one is coming to see him. Please come to A & E and see for yourself. He needs some help".*

2. Did he disclose information?

3. Did he believe the disclosure of information was made in the public interest?

4. Was that belief reasonable?

5. Did he believe it tended to show that:

    a. the health or safety of any individual had been, was being or was likely to be endangered;
    b. information tending to show any of these things had been, was being or was likely to be deliberately concealed

6. Was that belief reasonable?

7. If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

8. If so, it was a protected disclosure.

**Detriment (Employment Rights Act 1996 section 48)**

1. Did the Respondent do the following things:

    a. Richard Edwards instigated an investigation / subject to disciplinary action about alleged car parking fraud by the claimant

2. By doing so, did it subject the Claimant to detriment?

3. If so, was it done on the ground that he made a protected disclosure?

**Time limits**

1. Were the **discrimination** complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

    a. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

        i. If not, was there conduct extending over a period?

ii. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

2. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

    a. Why were the complaints not made to the Tribunal in time?
    b. In any event, is it just and equitable in all the circumstances to extend time?

3. Was the **detriment** complaint made within the time limit in section 48 of the Employment Rights Act 1996? The Tribunal will decide:

    a. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of?

    b. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

    c. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

Annex B

The law

1. Section 4 of the Equality Act provides that race is one of the protected characteristics. Further, section 9 provides that "race" includes "colour": see subsection (1)(a).

2. Section 13 of the Equality Act 2010 ('EqA') provides that:

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

3. Section 23 of the Equality Act 2010 states that in a claim of direct discrimination 'there must be no material difference between the circumstances relating to each case'.

4. Section 136(2) of the Equality Act 2010 provides that 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. However, section 136(3) provides that subsection (2) does not apply if A shows that A did not contravene the provision.

5. The guidance set out in Igen v Wong [2005] ICR 9311 (approved by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054) still sets out the correct approach to interpreting the burden of proof provisions.

    a. it is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude that the employer has committed an act of discrimination, in the absence of an adequate explanation (para 79(1),
    b. in deciding whether the claimant has proved such facts it is unusual to find direct evidence of discrimination and '[i]n some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in"' (para 79(3));
    c. therefore the outcome of stage 1 of the burden of proof exercise will usually depend on 'what inferences it is proper to draw from the primary facts found by the tribunal' (para 79(4));

d. At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

e. 'in considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts' (para 79(6));

f. where the claimant has satisfied stage 1 it is for the employer to then prove that the treatment was in no sense whatsoever on the grounds of the protected characteristic and for the tribunal to 'assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that [the protected characteristic] was not a ground for the treatment in question' (para 79(11)-(12));

g. '[s]ince the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof' (para 79(13)).

6. In Madarassy v Nomura International PLC [2007] ICR 867 Mummery LJ stated that: 'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination'

7. Sometimes the question of whether there has been less favourable treatment cannot be resolved without, at the same time, deciding the reason why the claimant received that treatment: Shamoon v Chief Constable of the RUC [2003] UKHL 11, [2003] IRLR 285, [2003] ICR 337 at [7]–[12].

<u>Harassment</u>

8. Section 26 Equality Act 2010 provides as follows:

*(1) A person (A) harasses another (B) if—*

*(a) A engages in unwanted conduct related to a relevant protected characteristic, and*

*(b) the conduct has the purpose or effect of—*

*i. violating B's dignity, or*
*ii. creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

*. . .*

*(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*

*(a) the perception of B;*
*(b) the other circumstances of the case;*
(c) whether it is reasonable for the conduct to have that effect.

9. We had regard to the guidance given by the EAT in Richmond Pharmacology v Dhaliwal [2009] IRLR 336 as reviewed by the CA in Pemberton v Inwood [2018 EWCA Civ 564 per Underhill LJ at [85-88].

Protected Disclosure

10. A worker has the right not to be subject to any detriment, done by his employer on the ground that he or she has made a protected disclosure: s.47B ERA 1996.

11. A disclosure to an employer is a qualifying disclosure where it is, in accordance with s.44B ERA 1996:

*"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, is being or is likely to be deliberately concealed."*

Time Limits

12. Section 123 materially provides as follows:

*123 Time limits*

*(1) [Subject to [[section] 140B],] proceedings on a complaint within section 120 may not be brought after the end of—*

*(a) the period of 3 months starting with the date of the act to which the complaint relates, or*

*(b) such other period as the employment tribunal thinks just and equitable.*

*(3) For the purposes of this section—*

*(a) conduct extending over a period is to be treated as done at the end of the period;*

*(b) failure to do something is to be treated as occurring when the person in question decided on it.*

13. As to a possible just and equitable extension, per Auld LJ in Robertson v Bexley Community Centre [2003] IRLR 434, *'the exercise of the discretion is the exception rather than the rule'.*

14. As to an act extending over a period, per Mummery LJ in Hendricks v Metropolitan Police Comr [2003] IRLR 96 at [52]:

*...[T]he focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed.*