



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Franklin

**Respondents:** (1) NHS England  
(2) Ms P Issar

**Heard at:** London South Employment Tribunal

**On:** 6-8 February 2023 & 21 March 2023 (in chambers)

**Before:** Employment Judge Ferguson

**Members:** Ms N O'Hare  
Ms J Forecast

## Representation

**Claimant:** Mr C Hay (lay representative)

**Respondent:** Mr P Halliday (counsel)

# RESERVED JUDGMENT

**It is the unanimous judgment of the Tribunal that:**

The complaints of harassment related to race and/or sex, direct race discrimination, direct sex discrimination and victimisation are dismissed.

# REASONS

## INTRODUCTION

1. As at the date of the hearing the Claimant remained employed by the First Respondent as Joint Director of Equality and Inclusion. The Second Respondent was the Chief People Officer for the First Respondent and the Claimant's line manager at the relevant time but has since left the First Respondent's employment.

2. By a claim form presented on 19 November 2021 (following early conciliation in respect of both Respondents between 17 September 2021 and 29 October 2021) the Claimant brought complaints of direct sex and/or race discrimination, harassment related to sex and/or race and victimisation.
3. The issues to be determined were agreed and are annexed to this judgment. It was also agreed at the start of the hearing that the Tribunal would need to consider the question of jurisdiction/ time limits in respect of Acts 1 and 2. In respect of both acts the Claimant contends that they formed part of a continuing act that ended after 18 June 2021, and the claim was therefore brought in time, or alternatively that it would be just and equitable to extend the time limit in respect of those complaints.
4. We heard evidence from the Claimant and, on his behalf, from Jennifer Douglas-Todd. On behalf of the Respondents we heard evidence from Prerana Issar, Anton Emmanuel, Helen Bullers, Matthew Baker and Susan Newton. We had an agreed bundle of 467 pages and an agreed supplementary bundle of 80 pages. The hearing took place in person but by agreement Ms Issar attended remotely by CVP, for health reasons.

## **FACTS**

5. The Claimant has worked in the public sector for more than forty years. He has had a distinguished career, including an appointment as HM Assistant Inspector of Constabulary (Race and Diversity), two terms as IPCC Commissioner and several terms as a Non-Executive Director of NHS Trusts in London. The Claimant describes himself as a Black man of African Caribbean origin.
6. The Second Respondent, Ms Issar, held a number of prestigious HR roles, both in the private and public sector, prior to her appointment as Chief People Officer for NHS England and Improvement (now NHS England, "NHSE") in April 2019. She explained in her evidence that the role of Chief People Officer was new for the NHS, and that she was responsible for delivering the workforce vision set out in the NHS Long Term Plan. She and other leaders in the NHS created a workforce plan which included the strengthening of equality, diversity and inclusion. The "People Plan", which she describes as the NHS's first ever workforce strategy, was published in July 2020. As part of the structure for the team that was to deliver the People Plan, Ms Issar created the role of Head of Equality, Diversity and Inclusion. A number of candidates were interviewed and ultimately the Claimant and Jennifer Douglas-Todd, who is a black woman, were appointed to the role jointly. Ms Issar was on the interview panel for the interviews. Ms Issar describes herself as an Asian woman.
7. The Claimant's appointment took effect from 29 July 2020 and Ms Douglas-Todd commenced her role in September 2020. They were each contracted to work 60% of full time. The appointments were at "ESM2" (Executive Senior Manager 2) level and reported directly to Ms Issar.
8. Within the Equality, Diversity and Inclusion ("EDI") team there were six functions for which the Claimant and Ms Douglas-Todd had overall responsibility. The Tribunal bundle did not include a job description for the Claimant's role. Ms Douglas-Todd said that Ms Issar emailed both her and the

Claimant setting out the areas for which each of them was responsible. The Claimant oversaw the Workforce Disability Equality Standard (“WDES”), led by Dr Christine Rivers, and the Advocacy and Activism function, led by Ms Leslie Cove. Initially the Claimant was also assigned responsibility for the Workforce Race Equality Standard (“WRES”), but this function was taken over by Ms Douglas-Todd in late 2020. Around the same time, Anton Emmanuel, a practising clinical and academic consultant, was appointed as Head of WRES.

9. Ms Issar’s evidence was that ESMs were aware of their objectives from the “implementation plan” from the People Plan. Ms Issar would hold “clinics” or “surgeries” in which the ESMs would provide an update on their team and she would keep track of their goals and outcomes.
10. The Claimant says that soon after his appointment he became aware of some dissatisfaction in the WDES team, who felt there was a disparity in terms of their status and banding within the EDI structure as compared to the WRES team. It is not in dispute that Christine Rivers had raised this issue with Professor Wilkinson-Brice, the Deputy Chief People Officer, earlier in 2020 before the Claimant’s appointment.
11. The Claimant alleges he conveyed the views of the WDES team to Ms Issar on a number of occasions from August 2020 onwards “but her response was dismissive and hostile”. He says that on one occasion she described Dr Rivers as “useless” and said that the WDES team had a “bad attitude”. The Claimant says he became increasingly concerned about the situation and on 24 or 25 September 2020 he shared his concerns with the HR Director, Helen Bullers, saying that the situation gave the appearance that NHSE was “not taking disability seriously”.
12. The Claimant emailed Ms Bullers on 28 September 2020 as follows:

“Hi, Helen,

Further to our discussion on 25th September, regarding the anomalies in the bandings of Christine Rivers and Stuart Moore, can we look to make some adjustments as an interim measure?

I am aware that Christine has queried the bandings of other members of her team also, as well as suggesting to me that all the team should be reviewed, but Jenni and I are of the view that in the case of Christine and Stuart, this is urgent and requires immediate remedy.

It would be helpful if you could let us know how to get the ball rolling in the first instance so that we can demonstrate that these problems are being address with a degree of urgency.

Grateful for your guidance.

Best wishes,

Mike”

13. Ms Bullers responded the same day suggesting that the solution may be to look at “rebanding / reviewing the JDs for Christine and Stuart based on the WRES JDs”. She said, “I think it feels anomalous for there to be such a difference”.
14. The Claimant’s evidence was that he continued to raise this issue with Ms Issar up to January 2021 but she kept insisting that the WDES team would simply have to “accept the structure”. The Claimant says that at no point did Ms Issar accept the need for change and “it became clear that she did not like the fact that I continued to raise the issue of the clear disparity”.
15. Ms Issar accepts that the Claimant raised the banding and pay issues with her but denies she was “dismissive and hostile”. She denies saying that Dr Rivers was useless or that the WDES team had a bad attitude. She says she was aware that the Claimant had had several conversations with Ms Bullers about the banding issue. The Claimant accepts that Ms Issar referred him to Ms Bullers to deal with the banding issue. Ms Issar must therefore have been open to the idea of the job evaluation and there is no suggestion that she blocked or otherwise interfered with the job evaluation process.
16. As for the conversation with Ms Bullers on 24 or 25 September 2021, Ms Bullers accepts the Claimant raised concerns about the apparent disparity between the two teams but says she does not recall him using the particular phrase “not taking disability seriously”. We find on the balance of probabilities that he did use that phrase. It is clear from the correspondence between the Claimant and WDES around this time that that was the way they felt. The Claimant took up the cause with some passion and we consider it likely he would have said something along those lines.
17. The Claimant accepted in cross-examination that he did not use the language of, or expressly refer to, the Equality Act when he raised the issue with Ms Bullers. He said he was not speaking in those terms. He said he was trying to understand why the anomaly existed because this was the first issue that had been raised with him when he met the WDES team.
18. In November 2020 a vacancy arose in the EDI team for a Band 9 role. One of Ms Issar’s direct reports, KM, a black woman, who was at Band 8d (one band below Band 9), applied for the post via the internal “IMAS” directorate. It is not in dispute that KM worked with Ms Issar on time-sensitive projects. Ms Issar explained in her evidence, which was not challenged on this issue, that KM “supported the Chief of Staff, and led the overall business areas including supporting the senior management meetings, preparing for ministerial briefings, supporting the team delivering the Covid emergency meetings (which, at the time, took place every day)...” KM did not tell Ms Issar that she was applying for the role and asked Ms Douglas-Todd not to tell her either. It is not disputed that there was no formal obligation on KM under the internal recruitment system to inform Ms Issar or seek her permission.
19. The Claimant and Ms Douglas-Todd decided that they wished to appoint KM. They accepted that she would need some training in order to move up to the Band 9 role. Ms Issar became aware that the role had been offered KM and was very unhappy about it. Ms Issar had a conversation with KM, the result of which was that KM stayed in her existing role. Ms Issar says that this was by agreement, after discussing what would be best for KM’s career progression. It

is not in dispute that Ms Issar also discussed the issue with Ms Douglas-Todd and said that she felt betrayed. Ms Douglas-Todd says that Ms Issar was angry and used the phrase “stabbed in the back”. We do not consider it necessary to make a finding about the language. The important facts are not disputed.

20. The Claimant relies on this incident as evidence that Ms Issar “had issues with Black people” and that she was “doing everything in her power to prevent a black woman progressing” (in the words of Ms Douglas-Todd). Ms Issar strongly denies this characterisation of the incident. She says she was not angry, but was disappointed and a bit hurt that neither Ms Douglas-Todd or the Claimant discussed it with her. She accepted that there was no requirement in the IMAS system for the line manager to be notified, but she felt that line managers should at least have some say on the timing. If KM had taken up the role it would have compromised delivery because there would have been a learning curve for any new person in the role.
21. There is no dispute that sometime in March 2021 Ms Issar and Ms Douglas-Todd had a conversation that included discussion of the Claimant. There is also no dispute that Ms Douglas-Todd reported the conversation to the Claimant and the Claimant was angry with Ms Issar as a result. The Claimant says Ms Douglas-Todd told him that Ms Issar had been “slagging him off”. The Respondents have no direct knowledge of that conversation and did not challenge the Claimant’s evidence about it. We accept that that is what Ms Douglas-Todd said to the Claimant, or words to that effect. There is no other explanation for his subsequent anger towards Ms Issar.
22. The contents of the conversation between Ms Issar and Ms Douglas-Todd is disputed.
23. Ms Douglas-Todd’s account is that Ms Issar said that people had been telling her that Ms Douglas-Todd was carrying an unfair burden and that the Claimant was not pulling his weight. She asked Ms Douglas-Todd what work the Claimant had been doing. Ms Douglas-Todd says that she stopped Ms Issar at this point, saying she thought the conversation was inappropriate and that Ms Issar should be discussing the issue with the Claimant.
24. Ms Issar says it was Ms Douglas-Todd who raised the issue of workload, saying that people were coming to her about parts of the role that the Claimant was responsible for because the Claimant had not responded. Ms Issar says she advised Ms Douglas-Todd to discuss this with the Claimant but she said she did not want to as it made her feel uncomfortable. She denies making any derogatory or disparaging remarks about the Claimant.
25. On the balance of probabilities we prefer Ms Douglas-Todd’s account. Ms Issar must have said something derogatory about the Claimant for Ms Douglas-Todd to have reported it to him. There was no reason for Ms Douglas-Todd to cause trouble by inventing criticism that had not happened. Further, we consider Ms Douglas-Todd’s oral evidence about this conversation was credible. She readily accepted that she could not remember every detail, but clearly recalled how the conversation started, the gist of what Ms Issar said, and the reasons why she thought the questions were inappropriate. It is also consistent with Ms Issar’s email of 26 March (see below) in which she referred to the Claimant’s reaction to her “raising her concerns”.

26. We note that the allegation in the list of issues (para 2.1.2) includes an allegation that Ms Issar said the Claimant was “‘not co-operating’ in the management of the WDES team and the Head of the Advocacy Team”. Ms Douglas-Todd has not given evidence that that is what Ms Issar said, and that specific allegation was not put to Ms Issar. There is no basis for us to find that anything along those lines was said.

27. On 24 March 2021 Ms Issar and the Claimant had a scheduled catch-up meeting on Teams. It is not in dispute that the Claimant immediately challenged Ms Issar about what he had heard from Ms Douglas-Todd. Nor is it in dispute that he was angry and upset. The Claimant’s account in his witness statement, which was not challenged, is as follows:

“I told Prerana that I was pretty angry about what she had said to Jenni and that it was “out of order” and completely unacceptable. I said to her how dare she, and that if she had criticisms about me then she should put them to me honestly, rather than doing it in a way that sought to undermine my working relationship with a close and trusted colleague. I said that her behaviour contradicts what she says to the wider NHS and that she should treat people better than that.

I told her that if she didn’t want me in this role and wanted my resignation, she should be clear and say so and I can then decide what to do.

I also told her that I had known Jenni for over 35 years and that if she can speak of me in that way to Jenni, I shudder to think what she is saying to others colleagues about me.

Prerana didn’t deny making the remarks. She said that I was obviously angry and that we should speak again when I was “less angry”. She asked when I thought that would be and I replied “who knows”.

28. Ms Issar’s account is that the Claimant lost his temper in this meeting and closed off to hearing anything from her, hence her suggesting a break and talking when he was calmer. She told him she would wait for him to reach out.

29. On Friday 26 March 2021 Ms Issar emailed the Claimant as follows:

“Dear Mike

Further to our catch up earlier on this week I am conscious that I haven’t heard anything from you since. I want to check in with you given how you reacted to me raising my concerns and your comments on considering your position. I would ideally like to speak you this week but if you don’t feel ready to discuss with me yet that’s fine – we can either speak early next week or if you would prefer you could talk to Helen Bullers in her capacity at Director of HR & OD for NHSEI.

Assuming you would like more time to reflect on the issues further before you speak to me or Helen, I do not think you should attend the face to face meeting we have planned for Monday. Given our current

disagreement on your delivery and different views on my support to you, I think it would be difficult and counterproductive for us to meet with the rest of my direct reports on Monday to collectively discuss our future priorities and how we plan to work together in 2021 before you and I have agreed a way forward between us.

Please let me know in light of this whether you are ready to have a discussion or if you need more time to consider everything.”

30. The Claimant replied on 28 March (a Sunday), agreeing that it would be counterproductive for him to attend the meeting on Monday, so he would not do so. He also informed Ms Issar that a family member was receiving end of life care and it was an incredibly difficult time for him and his family. He said “discussions I am to have with Helen will have to wait until I am sure my daughter and grandson are coping with this imminent bereavement”. He said he intended to attend the office for existing commitments on Tuesday, but “Following that, I will need to be at my daughter's side and work matters will not be my priority.” He said he would keep Ms Issar updated.
31. The Claimant said he went along with Ms Issar’s instruction not to attend the direct reports meeting, partly because of his difficult personal circumstances at the time.
32. Ms Issar’s oral evidence about this email exchange was that she “left the ball in his court”. She said he is a professional, and he had shouted at her. She said she was being compassionate by not forcing him to come back to her until he was ready.
33. The Claimant and Ms Issar did not speak directly again after this, except possibly on one occasion in April when they bumped into each other and Ms Issar says she offered her condolences about the family member who had died. They communicated by email occasionally over the following three months about work matters, but did not continue the discussion about the Claimant’s position or their working relationship. Ms Issar’s evidence was that she felt the relationship had broken down. There is no dispute that the relationship was very strained after the meeting on 24 March.
34. Ms Bullers gave evidence that after the meeting on 24 March the Claimant contacted her and said he needed to take bereavement leave and then annual leave. This was agreed, but the dates of the Claimant’s leave were not clear from the evidence before us.
35. Ms Issar and the Claimant were in email communication in early April about a board paper that the Claimant was preparing. Ms Issar had given feedback on a draft, asking for various changes and improvements.
36. A further direct reports meeting was scheduled for 15 April. Ms Issar says she was expecting the Claimant to attend but he did not. 20 minutes into the meeting she emailed him as follows:

“Hi Mike,

We have started the direct reports meeting on priorities.

Shall we wait for you? I haven't had any communication from you about today.

Helen has just informed me about the death of your [family member], please accept my heartfelt condolences.

If you could let me know about your working days that would be very helpful."

37. The Claimant did not respond and the meeting went ahead in his absence.
38. Later on 15 April Ms Issar emailed the Claimant saying that she had just read the third revision of the board paper. She said she was disappointed and had had to pull the paper from the board due to its quality. She said she looked forward to receiving a revised paper and asked when that would be.
39. Further direct reports meetings were scheduled at the end of May and in early June. It is not in dispute that the Claimant and Ms Bullers discussed these meetings and agreed that he would not attend given the unresolved issues between the Claimant and Ms Issar. The Claimant claims that he was "excluded" from these meetings, but he accepted in cross-examination that he agreed with the suggestion that he would not attend, and said that because of the bereavement he would not have attended the meetings anyway. We accept Ms Buller's account that it was mutually agreed that the Claimant would not attend.
40. Ms Issar says that on 9 June 2021 she received a text message from an EDI team member, stating that the team cannot work with Mr Franklin, who is holding up work and dragging the team down. A screen shot of the message was included in the bundle but the identity of the person sending the message has never been disclosed to the Claimant or the Tribunal.
41. Mr Emmanuel attended the direct reports meeting on 11 June, which took place by Teams. It is not in dispute that he did so at Ms Issar's request and that Ms Douglas-Todd, his line manager, was not informed. Ms Douglas-Todd noticed Mr Emmanuel had joined the meeting and immediately texted both him and Ms Issar to query his attendance. Mr Emmanuel said he had been asked by Ms Issar last month but "I declined the last two as I asked her to liaise with you first. At our last meeting this week she said it was not an optional ask and that she wanted me to join". Ms Douglas-Todd expressed surprise that he had not mentioned it the previous day and Mr Emmanuel replied saying "No conspiracy. It was for the boss to speak to you in my view." Ms Issar apologised to Ms Douglas-Todd and said she should have mentioned it, "too many things going on". She said "This and a couple of other issues to discuss with you on Monday".
42. By this time Ms Issar had been having conversations with Ms Bullers about the breakdown in her relationship with the Claimant. Ms Bullers advised that they would need to initiate an investigation into Ms Issar's concerns and allow the Claimant to respond. An external investigator, Susan Newton, was contacted and it was agreed she would conduct the investigation. It was decided jointly by Ms Bullers and Ms Issar that the investigation would be into the question of



whether there had been a breakdown in trust and confidence. Ms Issar's evidence was that they considered using the performance management process but given that the Claimant was not engaging with her she did not think it would be successful. Ms Bullers said that she had experience of one previous such "trust and confidence" investigation, several years previously. It is not in dispute that there was no formal or written procedure for such an investigation.

43. On 21 June 2021 Ms Issar wrote to the Claimant as follows:

"Dear Mike

**Investigation**

Further to our various discussions and e-mail correspondence since November 2020 I am writing to inform you that the organisation has decided it is necessary to conduct, in accordance with a fair process, an investigation into a breakdown in trust and confidence between you and the organisation. This includes the following allegations which have ultimately led to this position:

- failure to deliver on key business projects including an advocacy strategy, network building, WRES communications and engagement plan, BAME Covid Programme, influencing key stakeholders including NHS Employers, SPF and DHSC, and Future of HR and OD strategy;
- lack of awareness/understanding of the gap between your delivery and the organisation's expectation;
- failure to communicate effectively with me as your line manager;
- me as your line manager having no confidence in your ability to deliver the role you are employed to do;
- failure to provide effective line management support to your direct reports; and
- complaints about you by colleagues about your non-delivery, including concerns raised by fellow Director colleagues and members of the EDI team. We have deliberately not named them at this stage and you should not approach colleagues whilst the investigation is underway.

Should any further allegations come to light during the course of the investigation, you will be informed of this in writing.

If proven, the above actions and behaviours could be deemed to amount to a breakdown in the relationship of Trust and Confidence between you and your employer. If it is found to be the case and that relationship cannot be repaired then it is likely your employment will be terminated and you will be dismissed.

Susan Newton (external HR Consultant) has been asked to undertake the investigation. Please provide your preferred contact details for this purpose to me and these will be passed to Susan Newton for her to contact you to arrange to meet with you.

The aim of the investigation is to establish the facts of the issues by gathering as much information as possible. It is currently expected that the investigation will be completed by 2 July 2021. However, depending on availability of witnesses and relevant information, especially in these times when people are not in the office, it may take longer. We will keep you up to date on the progress of the investigation.

The investigator may invite you to attend an investigation meeting where you can explain your version of events. If this is required, you will be informed of the time and date of the meeting in advance.

Once the investigation has been completed, you will be informed in writing, provided with a copy of the report and other evidence and invited to attend a formal hearing.

You are required to co-operate in our investigation and may be required to attend investigative interviews or hearings, albeit given the current national situation and movement restrictions it is most likely that such meetings would be virtual.

Lael Hird (Senior HR and OD Advisory Manager) will also be available to provide you with support and assistance from a welfare perspective and to keep in touch with you during the period of investigation. Lael's contact details are [...]

To ensure that the investigation can be conducted as fairly as possible we request that you keep the matter confidential. Any breach of confidentiality or attempt to contact anyone involved with the investigation, with the exception of Susan Newton or Lael Hird without my prior consent may be considered to be a disciplinary matter.

I appreciate this may be a difficult time for you, so I would also like to take the opportunity to remind you that the Employee Assistance Programme continues to be available to you during your period of suspension. This is a free, 24-hour telephone counselling and information service that can be contacted on [...]

Yours sincerely”

44. Ms Issar's evidence was that she drafted the letter, with the assistance of one or more templates provided by HR, possibly including a template letter from the disciplinary procedure.

45. The Claimant emailed Ms Issar in the evening on 21 June asking for clarification of the last paragraph and the reference to a “period of suspension”. He also asked her to “set out the basis for any ongoing exclusion and clarify if there are any other meetings to which my exclusion applies”.

46. Ms Issar replied the same evening, saying:

“I want to be very clear that you have not been suspended. The reference to suspension in the final paragraph is an error I'm afraid. It is part of an EAP support paragraph that HR provided which is also used

in suspension situations. It should not have been amended in your letter and to be clear I set out below the paragraph as applicable to you, without any reference to suspension.”

47. She also said that she would not be communicating details of the process to colleagues and that the Claimant should continue to work as normal.

48. The Claimant emailed Ms Issar the following day:

“Thank you for the clarification. I assume you mean it “should have been amended.”

I am sure you will understand the impact of this "error" and how such an important aspect of your letter will have been received. It is regrettable that this didn't warrant any form of apology, further compounding an already traumatic situation.

Would you please also confirm that I am still excluded from the Direct Reports meetings but am expected to attend everything else?”

49. Ms Issar replied:

“Dear Mike

Of course I am sorry for the error made in the letter and I do understand that this is a difficult situation for you.

I suggested you didn't attend my direct reports meeting on 29th March given our clear disagreement on delivery of your work projects. After that date I understand you were on leave for a period which is why you continued not to attend. Unfortunately, since then you have still not resolved the work issues (to my satisfaction) and there remains a clear gap between my expectations and your delivery (linked to the situation we are now in).

You are not excluded from my direct report meetings but I have not required you to attend because I believe they would put you in an awkward position as I would be challenging you in a more public forum on your delivery. I would be surprised if you would like to attend the direct reports meeting because as you know it is a small group and collaboration is a core part of these meetings. Given you have not provided me with the reassurance I need on delivery of your own work plans I struggle to see how you would add value to the other parts of the Directorate deliverables.

You are expected to continue to work as normal which includes attending all relevant meetings (save for the direct reports meeting given my above comments).”

50. We did not hear any evidence directly on the point, but it appears Ms Newton and Ms Issar spoke on or shortly before 23 June 2021. Ms Newton then emailed Ms Issar on 23 June to introduce herself formally. She asked to arrange a time

to interview Ms Issar and said “I look forward to speaking to you and to receiving the emails and additional information I requested”. We assume the information was requested during the earlier conversation.

51. On 24 June 2021 Ms Issar forwarded to Ms Newton a large number of emails between her and the Claimant. She included comments when forwarding, such as “I never received any response or work done”, “Mike does not take things into any action or delivery” and “There has been no line management which is a key responsibility for his role”.
52. It is not in dispute that the Claimant did not know what information Ms Issar had sent to Ms Newton until receiving disclosure for these proceedings in October 2022.
53. On 24 June 2021 Ms Newton emailed the Claimant to introduce herself and set up a meeting. A meeting was then arranged for Friday 2 July.
54. On 28 June Ms Newton interviewed Ms Issar. Draft notes of the meeting, which were never approved by Ms Issar because the process stalled shortly afterwards, were in the bundle and neither Ms Newton or Ms Issar suggested they were not accurate. According to the notes Ms Issar told Ms Newton that all started positively with the Claimant but from October she started seeing a fall in output and lack of proactive work from him. Ms Issar said the Claimant had not shown any understanding of what a senior executive needs to deliver. She said his management style was laissez-faire and his team were almost unmanaged. She also said that she had a lot of respect for the Claimant because of his CV but he does not treat her like a line manager. He did not respond to feedback she gave him. She explained about the meeting on 24 March and said that since then he had not contacted Ms Issar other than responding to her contacting him. She also referred to some specific concerns about projects and reports for which the Claimant was responsible.
55. Later on 28 June 2021 Ms Newton emailed the Claimant as follows:

“Dear Mike

In preparation for our conversation on Friday and for inclusion in the investigation file could you please send me the following:

1. Your responses to the following emails from Prerana
  - Dated 16/10/20 subject Making History Now – SLT version
  - Dated 9/11/20 subject Fortnightly progress update
  - Dated 17/11/20 subject Covid Vaccine and BAME staff
  - Dated 4/12/20 subject Themes from yesterday’s session chat box
  - Dated 6/12/20 subject Lilley – good news
  - Dated 26/3/21 subject Following up
2. Your objectives agreed with Prerana
3. The Advocacy strategy
4. Dates of your meetings with Prerana since January

I look forward to meeting you on Friday.”

56. On 29 June 2021 the Claimant commenced a period of sick leave due to work-related stress. He remained off sick until after the commencement of these proceedings in November 2021.

57. Ms Issar appointed Mr Emmanuel to act up in the Claimant's role during the Claimant's absence. Mr Emmanuel describes himself as an African Asian man. He said his mother was black African and his father Asian. Mr Emmanuel gave evidence in his witness statement of his impression of Ms Issar and the Claimant's allegations in these proceedings as follows:

"I am aware of the claims that Mr Franklin has made, where he alleges that he was treated differently as a black African Caribbean male. I am a reflective person and I have thought about this a lot – whether I recall any treatment from Mrs Issar that would have led me to believe there were discriminatory overtones or undertones. I have faced racism personally many times before. It is certainly not something I am blind to – on the contrary I believe I am sensitive to it. My honest reflected answer is that I cannot recall an incident where I felt I witnessed Mrs Issar discriminating against any individual because of their race or sex, including Mr Franklin."

58. Also on 29 June 2021 the Claimant emailed Ms Newton asking for a copy of the "specific policy and procedures that your investigation is being conducted under". Ms Newton forwarded this enquiry to Lael Hird in HR, who asked her colleague Matthew Baker to respond.

59. Mr Baker responded on 1 July, saying that the investigation was "not governed by a specific organisational policy" but that ordinary principles of fairness would be followed, including ensuring the Claimant had a chance to answer the concerns.

60. The Claimant responded, objecting to Mr Baker's explanation, and saying that he was not well enough to attend the meeting with Ms Newton the following day.

61. On 7 July the Claimant wrote a further letter asking, in relation to each allegation in the letter of 21 June, for precise details and examples. Mr Baker responded on 9 July, saying he was unable to provide the detail the Claimant was seeking "but I would expect this to feature in your discussions with the Investigation Officer". He said "Typically there is scope to either provide details in advance of an investigation meeting or during said meeting(s), but with a further opportunity to respond once you have had an opportunity to consider the information presented". Mr Baker also made an Occupational Health referral.

62. On 14 July the Claimant directed the same request for further details of the allegations to Ms Newton. She responded saying that she was waiting for further instructions regarding the investigation pending the OH referral, but if the Claimant felt able, for further clarity about the allegations he should refer to the list of emails and information requested in her email of 28 June.

63. An OH report was produced on 26 July 2021, saying that the Claimant was not currently fit to return to work. The report was sent to another member of the HR

team and the evidence before us was that none of the Respondent's witnesses saw the report at the time.

64. On 11 August 2021 the Claimant sent Ms Issar an "Equality Act Questionnaire". This set out the Claimant's allegations of race and sex discrimination, as well as victimisation, along the same lines as the complaints in these proceedings. The document questions about all of the allegations of discrimination and asked for precise details of Ms Issar's allegations in the letter of 21 June.
65. Ms Issar forwarded the questionnaire to Ms Bullers. She also wrote to the Claimant the following day as follows:

"Dear Mike

I write to acknowledge receipt of your letter dated 6 August 2021, enclosing an Equality Act Questionnaire, which I received yesterday. I am really saddened to read the letter.

I will respond in detail to that in due course because as I'm sure you would expect I want to give some dedicated time to that given the important and serious issues you raise. However, in the meantime I am keen to meet up to discuss your concerns at a high level and see if you and I can resolve this conflict together. Although I have a different recollection to a number of the points set out in that document, I recognise the strength of your feeling that has prompted this step.

I am conscious we haven't had a face to face - even virtual - conversation in a while to exchange views and perhaps that has led to some misunderstandings on both our parts. I do want to understand your perspective better and reflect on that properly and feel that this would be best done through you and I meeting to discuss, rather than written correspondence which can't convey the important and nuanced perspective in the same way.

If you are open to meet then I would suggest we ask someone independent to facilitate the meeting. If you prefer, I am happy for you to suggest the independent facilitator. I would also like you to feel fully supported in such a meeting and therefore want to offer that you bring an accompanying colleague/union rep as well if that would make you feel more comfortable.

I have a few days leave coming up in the next two weeks but apart from that will completely flex my diary to ensure we can meet. Despite our different viewpoints I do recognise that our working relationship is damaged, as evidenced by the need for you to put in such a questionnaire, but I hope not irreparably so I am keen to see what I can do on my part to repair our relationship and move forwards."

66. The Claimant responded on 17 August, saying that he would be willing to meet but would require the "rescinding/ withdrawal" of the letter of 21 June and the meeting would need to be "without prejudice". He also said the person he

wished to accompany him would not be available between 23 August and 29 September.

67. Ms Bullers then responded to the Claimant on 18 August, referring to his letter of 17 August to Ms Issar, and saying that having discussed with Ms Issar they suggested it may be helpful for the Claimant to meet her (Ms Bullers) as a “neutral point of contact” on a without prejudice basis first. The Claimant responded saying he was not currently well enough to meet either of them, but hoped to be better by the end of September when his companion/representative returned.
68. On 20 August 2021 Ms Bullers wrote to the Claimant saying that they proposed to ask Ms Newton to investigate, and report on, many of the questions in the questionnaire, including those requesting details of the allegations against him, and that they would respond after receipt of the investigation report. The other questions would be answered “within a couple of weeks”.
69. The Claimant objected to this approach, but Ms Bullers maintained that it was appropriate for Ms Newton to include the questions in her investigation. This effectively resulted in an impasse in the investigation and the Claimant commenced these proceedings on 19 November 2021.
70. In her oral evidence, when asked about providing further details of the allegations to the Claimant, Ms Bullers said she believed Ms Newton had done so.
71. The Respondents eventually provided a response to the questionnaire on 30 December 2022, which included details of the allegations against the Claimant in the letter of 21 June 2021, along the lines of the information Ms Issar provided to Ms Newton.
72. Ms Issar set out in her witness statement in these proceedings various performance-related problems she had with the Claimant between October 2020 and March 2021 with references to correspondence in the bundle. These included:
  - 72.1. An email from Ms Issar to the Claimant on 15 October 2020 highlighting an issue that she thought was an good opportunity for him to take forward from an advocacy perspective. She did not receive any response and no work was completed on the issue.
  - 72.2. An email from Ms Issar on 16 October 2020 asking for more due diligence on a proposal before it could be signed off. She did not hear anything further from the Claimant.
  - 72.3. An email from Ms Issar on 21 October 2020 asking the Claimant to work on some advice for GPs about dealing with racist abuse. She said as far as she is aware this was not implemented by the Claimant.
  - 72.4. In October 2020 Ms Issar asked the Claimant to put together a WRES communication plan but she had to follow up on this about 5 times and later found out the Claimant had given the task to a more junior member of the

team and the quality of the work was not what was required. Mr Emmanuel then took the communication plan forward.

- 72.5. On 9 November 2020 Ms Issar asked the Claimant and Ms Douglas-Todd for fortnightly progress updates on the work of the EDI team. She received these from Ms Douglas-Todd but none from the Claimant.
- 72.6. On 4 December 2020 Ms Issar received an EDI work plan that she had chased for several times. This was completed by junior members of the Claimant's team with Ms Douglas-Todd's guidance, but it should have been led by the Claimant.
- 72.7. On 6 December 2020 Ms Issar asked the Claimant to contact a Trust which had implemented a very successful inclusion programme, to help understand what they had done to achieve this. She did not hear anything back from him.
- 72.8. On 12 January 2021 Ms Issar chased the Claimant for his team's outputs for each quarter and plan for the following quarter. The Claimant sent this on 26 January 2021 but it was incomplete.
- 72.9. On 3 February 2021 Ms Issar met with the Claimant and, having had repeatedly to chase for his advocacy work, they discussed this and agreed two outcomes for him to achieve in the next 12 weeks. Ms Issar says "for some reason he would not follow this up in writing and so I emailed him to make it clear what had been agreed". By an email of the same day entitled "outcomes for next 12 weeks" Ms Issar asked the Claimant to provide a "plan of activity" for each of the two outcomes. The Claimant responded asking for a template used by other ESMs for this. Ms Issar said she was surprised by the request, but she did provide a template another staff member had used.
73. None of that evidence was challenged in cross-examination of Ms Issar. The Claimant did not comment on any of the emails, many of which were also included in the information sent to Ms Newton with Ms Issar's comments, in his witness statement, except for the email of 3 February 2021 in which Ms Issar asked for the "plan of activity". The Claimant referred to this as Ms Issar requesting his "personal objectives" and said he was concerned because, as far as he was aware, no other ESM2 had been required to do this.
74. The Claimant was asked about some of the issues in cross-examination, but his responses were limited because he said he had not been able to access his work computer in order to respond. He accepted that he had had disclosure of the documents relating to these issues since 31 October 2022, but said he could not access his work computer due to a security issue. He said he had not asked anyone at the Respondent to help with getting access.
75. On the issue of providing regular progress updates to Ms Issar, the Claimant said he did not know whether he did this. When it was put to him that it was not a functional relationship, he accepted that it "doesn't look very good". As for forwarding on junior staff members' work without review, he said "on occasion I may well have done". When asked about his lack of response to emails from Ms Issar he said in relation to some issues that he had already taken the action



she was requesting, but he did not dispute his lack of response to her. On other issues he could not remember what action he had taken.

76. The Claimant accepted in cross-examination that he was not accusing either Ms Newton or Mr Baker of discrimination or victimisation.

77. Ms Douglas-Todd gave evidence in her witness statement about another issue that caused her “to believe that [Ms Issar] had issues with Black people”. She said that in November and December 2020 became “fixated” with the performance of two black women in Ms Douglas-Todd’s team. She said that although the performance of other members of the team were at similar levels, Ms Issar focused her criticisms on these two members of staff, such that Ms Douglas-Todd had to shield them. Ms Issar insisted Ms Douglas-Todd start performance management with them, which Ms Douglas-Todd declined to do. She says “It was difficult holding that line, but she did eventually move on”. We were not taken to any documents about this issue. Ms Douglas-Todd accepted in cross-examination that she and Ms Issar had agreed that one of the employees was struggling. There was clearly a difference in style as regards their approach to managing performance. When asked whether Ms Issar was someone who held others to high standards, Ms Douglas-Todd said “I think that’s what she believes”. Ms Douglas-Todd described Ms Issar’s “surgeries” as “very bruising” and she queried the point of them. She said this was the first place she had worked where it was “all challenge and no support”.

## THE LAW

78. The Equality Act 2020 (“EQA”) provides, so far as relevant:

### 13 Direct discrimination

- (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
- (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

...

### 26 Harassment

- (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.

### 27 Victimisation

- (1) A person (A) victimises another person (B) if A subjects B to a detriment because--
- (a) B does a protected act, or
  - (b) A believes that B has done, or may do, a protected act.
- (2) Each of the following is a protected act--
- (a) bringing proceedings under this Act;
  - (b) giving evidence or information in connection with proceedings under this Act;
  - (c) doing any other thing for the purposes of or in connection with this Act;
  - (d) making an allegation (whether or not express) that A or another person has contravened this Act.

### **39 Employees and applicants**

- ...
- (2) An employer (A) must not discriminate against an employee of A's (B)—
- (a) as to B's terms of employment;
  - (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
  - (c) by dismissing B;
  - (d) by subjecting B to any other detriment.

...

### **40 Employees and applicants: harassment**

- (1) An employer (A) must not, in relation to employment by A, harass a person (B)—
- (a) who is an employee of A's;
  - (b) who has applied to A for employment.

### **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.

...

**136 Burden of proof**

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

79. Race and sex are both protected characteristics.

80. Pursuant to section 212 EQA conduct which constitutes harassment cannot also be a detriment.

81. The Supreme Court in Royal Mail Group Ltd v Efobi 2021 ICR 1263, confirmed that the claimant in a discrimination case bears the initial burden of proving, on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an unlawful act of discrimination.

82. It is well established that a difference in status and a difference in treatment are not, without more, a sufficient basis on which a tribunal “could conclude” that the respondent has committed an act of unlawful discrimination (Madarassy v Nomura International plc 2007 ICR 867).

83. In deciding whether or not a prima facie case has been made out, the tribunal should ignore the substance of any explanation proffered by the employer for the treatment, turning to it only once the burden has shifted. This does not mean that at the first stage the tribunal should consider only evidence adduced by the claimant and ignore the respondent's evidence. The tribunal should have regard to all the facts at the first stage to determine what inferences can properly be drawn (Laing v Manchester City Council [2006] ICR 1519, approved by the Court of Appeal in Madarassy).

84. Unreasonable behaviour alone cannot found an inference of discrimination (Bahl v Law Society [2004] IRLR 799). If, however, there is no explanation for the unreasonable treatment the absence of an explanation (as opposed to the unreasonableness of the treatment) might found an inference. But a tribunal should not be “too ready” to infer unlawful discrimination from unreasonable conduct in the absence of evidence of other discriminatory behaviour (Wong v Igen Ltd [2005] ICR 9311).

85. Once the burden of proof has shifted, the employer must show that the protected characteristic did not have a significant, or more than trivial, influence on the unfavourable treatment so as to amount to an effective reason or cause of it (Pnaiser v NHS England and Coventry City Council [2016] IRLR 170).

86. As for the meaning of a “protected act” in s.27 EQA, there is no appellate guidance on s.27(2)(c), but there are two authorities on the predecessor provisions which referred to acts done “under or by reference to” the relevant

equality enactments. In Kirby v Manpower Services Commission [1980] ICR 420 making a report to a Community Relations Council was an act done “by reference to” the Race Relations Act 1976 because the purpose of the report was to inform the Council that facts were available which ought to be investigated and which indicated “a possible breach of the provisions of the Race Relations Act 1976” (at 426). In Aziz v Trinity Street Taxis Ltd [1988] ICR 534 the Court of Appeal upheld a decision that making secret recordings with a view to assisting a possible complaint of race discrimination was something that could properly be said to be done “by reference to” the 1976 Act. It was sufficient that this was done by reference to the legislation “in the broad sense, even though the doer does not focus his mind specifically on any provision of the Act” (at 542).

## **CONCLUSIONS**

87. The Claimant relies on the same six acts as harassment or direct discrimination and/or victimisation. We address first the question of whether those allegations are made out on the facts.

### Act 1

88. We have accepted Ms Douglas-Todd’s account of the conversation, i.e. that Ms Issar said she had heard Ms Douglas-Todd was taking more of the burden in the job share and the Claimant was not pulling his weight. She also asked what the Claimant was doing. The factual allegation is therefore made out to that extent.

### Act 2

89. We accept that the Claimant was excluded from the first direct reports meeting on 29 March, following the meeting on 24 March at which he challenged Ms Issar about her comments to Ms Douglas-Todd. That was Ms Issar’s decision, communicated in her email of 26 March. A line manager saying “I do not think you should attend” can only reasonably be interpreted as an instruction not to attend or an exclusion from the meeting, notwithstanding the Claimant’s agreement that it would be “counterproductive”.

90. We do not accept, however, that the Claimant was excluded from any further meetings. It is evident from the email Ms Issar sent on 15 April 2021 that she was expecting the Claimant to attend. This is very strong evidence that there was no ongoing exclusion, and the Claimant would not have had any reasonable basis to believe he had been excluded on an ongoing basis.

91. By the end of May, however, things had deteriorated to the extent that the Claimant was dealing primarily with Ms Bullers, rather than Ms Issar. We have accepted Ms Bullers’s evidence that it was agreed between her and the Claimant that he would not attend the direct reports meetings at the end of May and in early June. This did not constitute an “exclusion”, and the Claimant said he would not have attended the meetings in any event because of the bereavement.

92. This allegation is therefore made out only to the extent that the Claimant was excluded from the direct reports meeting on 29 March 2021.

Act 3

93. There is no dispute that the letter of 21 June was sent. We do not consider it necessary or appropriate for us to determine whether the allegations were “unfounded” on an objective basis; we are only concerned with whether sending the letter constituted harassment, direct discrimination or victimisation by Ms Issar, i.e. what her thought processes were in sending the letter. We address this below.

Act 4

94. The implication in this allegation is that the inclusion of the reference to suspension in the letter was not in fact an error. We find that it was an inadvertent error. If Ms Issar had intended to suspend the Claimant she would have made that clear, rather than referring to the “period of suspension” in the context of a paragraph about the employee assistance programme. It is also unlikely that she would have so quickly retracted the suspension.

95. The crux of this complaint seems to be the failure to provide a “genuine apology”. There is no dispute that Ms Issar did not apologise at first. When pressed she said, “Of course I am sorry”. We accept that that is a somewhat dismissive way of apologising, but again, whether that apology was “genuine” gives rise to the question why Ms Issar acted as she did. We address this below.

Act 5

96. It is not in dispute that the Claimant was subjected to a formal investigation that could lead to the termination of his employment. Nor is it disputed that the investigation was not governed by a specific organisational policy. As to who was responsible for this conduct, the allegation in the list of issues says “2<sup>nd</sup> Respondent (aided by Mathew Baker, Helen Bullers and Susan Newton) and 1<sup>st</sup> Respondent.” We have found that it was a joint decision by Ms Bullers and Ms Issar to initiate this type of investigation. As noted above, the Claimant accepted in cross-examination he was not alleging any discrimination against Mr Baker or Ms Newton.

Act 6

97. Although the list of issues names Ms Issar as being involved in this decision, there was no suggestion in the evidence before us that she had any involvement in deciding whether the information she had provided to Ms Newton could be sent to the Claimant. Her oral evidence, which we accept, was that after she sent the letter on 21 June she did not have anything to do with any of the decisions made during the investigation process. “I was out of the loop”.

98. On the evidence before us we find it was the decision of Ms Newton and/or Mr Baker not to provide the information to the Claimant in advance of Ms Newton’s meeting with him. We do question the fairness of that approach, but the Claimant does not allege discrimination (or victimisation) against either Ms

Newton or Mr Baker so it is unnecessary and inappropriate for us to comment further.

99. As for Ms Bullers, she accepted that she did not respond to the Equality Act Questionnaire, but she considered the issue about providing details of the allegations was a matter for Ms Newton and Mr Baker. She said she would have discussed this with Ms Baker at some point but she could not remember whether he sought her advice on the issue. Her evidence was that she believed Ms Newton had provided further details of the allegations. We do not consider there is any basis for us to find that she “refused to provide the Claimant with specific details of the broad allegations”. She simply did not consider it her responsibility and believed that Ms Newton was dealing with the issue.

100. This allegation is not, therefore, made out because the Claimant has effectively withdrawn the complaint against the only two individuals who were involved in the decision.

#### Protected Act

101. We have accepted the Claimant’s account that he said to Ms Bullers in the meeting on 24 or 25 September 2020 that the situation with the disparity between the WDES and WRES teams gave the impression that NHSE were not taking disability seriously. The Claimant contends that was a protected act because it was done “for the purposes of and in connection with the Equality Act 2010” within the meaning of s.27(2)(c) EQA.

102. As noted above, there is limited authority on the meaning of this particular provision, but we consider the words “for the purposes of and in connection with” are no wider than “under or by reference to”, which was the language in the Race Relations Act 1976 considered in the cases of Kirby and Aziz. In both of those cases the acts were done in contemplation of complaints of unlawful discrimination under the 1976 Act.

103. The Claimant’s comment to Ms Bullers is somewhat further removed from the EQA. The Claimant does not contend that he was making an allegation that someone had contravened the EQA and clearly the comment would not fall within s.27(2)(d). Limb (c) cannot have been intended to cover a wider category of similar acts to those covered by subsection (d) otherwise there would have been no need for subsection (d). Limb (c) refers to different types of conduct that is connected to the EQA. The cases of Kirby and Aziz are good examples: requiring an investigation into a possible breach of the 1976 Act and gathering evidence for a possible complaint of unlawful discrimination.

104. The Claimant relies on the fact that he later forwarded to Ms Bullers an email from Stuart Moore, on 29 October 2020, in which he mentioned having grounds to bring a claim for discrimination, but we must assess the Claimant’s comment in the context of the circumstances at the time he made it. At the time no-one had suggested the possibility of a claim under the EQA and the Claimant accepts he was “not talking in those terms”. The fact that he did not refer expressly to the EQA is not necessarily fatal, but we consider there would need to be some connection between his comment and the legal obligations under the Act. The mere reference to a protected characteristic is not sufficient. The Claimant did not refer to or even hint at any *legal* failure or *legal* risk. His

concern was about staff morale and credibility of the EDI function if there is perceived to be an unjustified disparity between WDES and WRES. Being new to his role, he said he wanted to understand why the apparent anomaly existed. It must follow that at the time he raised the issue he considered it possible that there would be a good explanation. We therefore do not accept that the Claimant's comments constituted an act done "for the purposes of or in connection with" the EQA.

105. The victimisation complaint therefore fails.

The reason(s) for the conduct

106. For both the harassment and direct discrimination complaints we must consider the reasons for the conduct we have found to have occurred under Acts 1 – 5. The Claimant does not allege there was anything particular about any of the allegations, such as the language used, that meant they were "related to" either sex or race. The only basis on which he claims the conduct constituted harassment is that he says Ms Issar (and possibly Ms Bullers) acted as they did *because of* the Claimant's race and/or sex. The issue of whether the conduct was "related to" race or sex for the harassment complaints is therefore the same as the causation issue for direct discrimination, i.e. it is a necessary element of both types of complaint that we find Ms Issar/ Ms Bullers acted because of race or sex.

107. We consider first the reasons for Ms Issar's conduct. The Claimant attributes Acts 1 – 5 either wholly or partly to her. As regards Acts 2 – 5 Ms Issar has put forward a positive case as to her reasons for acting as she did, so if we accept that case we can determine the "reason why" question without having to apply the shifting burden of proof.

108. In broad terms, Ms Issar says that she had genuine concerns about the Claimant's performance and that the relationship broke down after 24 March 2021 such that she believed the "trust and confidence investigation" was the only viable solution.

109. Whether or not Ms Issar's concerns about the Claimant's performance were justified, we are satisfied that they were genuine. There is ample evidence that she was chasing him for work and was raising issues about the quality of work from October 2020 onwards. The Claimant accepted that, at least as regards his apparent failure to provide fortnightly updates to her, it did not "look good". The Claimant was unable to provide explanations for the apparent lack of response to other emails and said in cross-examination that he had not had an opportunity to respond to these concerns because he was never provided with the details despite his repeated requests. While we accept that that was the case for a long period of time, the Claimant was given disclosure of all the documents now relied upon by Ms Issar, including the information she provided to Ms Newton, on 31 October 2022. He is still employed by the First Respondent and could have sought access to his work emails and other documents in order to respond to the allegations before exchanging witness statements, or at least before the hearing on 6 February 2023. He did not do so, and has chosen not to provide any evidence in response to Ms Issar's evidence of her concerns. In those circumstances, and given there is ample

documentary evidence to support her case, we accept that her concerns were genuinely held.

110. As for the relationship between the Claimant and Ms Issar from 24 March 2021 onwards, there is no dispute that it was strained. We accept that the Claimant effectively stopped treating Ms Issar as his line manager from that point onwards. He engaged only with Ms Bullers about his bereavement leave, and only contacted Ms Issar by responding to emails she sent him about particular projects or work to be produced. We note that it was during this period, on 15 April 2021, that Ms Issar felt she had to withdraw a paper presented by the Claimant for a board meeting because of its poor quality.
111. It seems to us that Ms Issar, as the Claimant's line manager, could have adopted a more proactive approach to repairing the relationship. We understand why she was reluctant to hold another meeting with the Claimant after 24 March 2021, and instead "put the ball in his court" by her email of 26 March. It was also difficult timing because of the bereavement the Claimant suffered in mid-April. Despite all of that, however, we consider it somewhat surprising that she did not ask the Claimant to attend a one-to-one meeting with her at any stage before deciding to commence the "trust and confidence" investigation. She did send a more conciliatory email on 12 August 2021, after receipt of the Equality Act questionnaire, but this was rather too late to retrieve the situation. We accept that line management of very senior staff can be a difficult task, but it is sometimes necessary to grasp the nettle and have difficult conversations in order to maintain functional relationships between senior staff. It is of course possible that a further meeting would have made no difference, but equally it could have allowed for other options to be discussed, such as a performance improvement plan and/or mediation.
112. While there may have been deficiencies in Ms Issar's management of the Claimant, the difficulties in the relationship were evident and we accept that by May or June 2021 she felt that trust and confidence had broken down. We accept that that was the reason she consulted Ms Bullers and the reason why they decided that it was necessary to commence an investigation. It is an unusual step to commence an investigation into trust and confidence, not least because there is no established policy or procedure that governs such an investigation, but the decision to go down that route is consistent with Ms Issar feeling that the situation was not capable of resolution through the performance management process or ordinary day to day management of the Claimant.
113. All of those concerns are sufficient to explain the inclusion of bullet points 1-5 in the letter of 21 June, i.e. those allegations were not knowingly "unfounded" and nor were they malicious. We have more difficulty with the final bullet point, which alleged there had been complaints about the Claimant by fellow Directors and members of the EDI team. There is no evidence of Ms Issar having received complaints from fellow Directors. If this was intended to refer to her conversation with Ms Douglas-Todd, we have rejected Ms Issar's account that the conversation was initiated by Ms Douglas-Todd complaining about an unfair burden of work because of the Claimant not responding to queries from his team. As for any complaints from members of the EDI team, the only evidence of this is the anonymous text message. The Claimant did not seek to exclude this evidence from the bundle, but we consider it would be wholly unfair for the Respondents to be allowed to rely on it without disclosing



the identity of the sender. It is impossible for the Claimant or the Tribunal to assess its genuineness or reliability.

114. We consider it entirely understandable that the Claimant has been particularly upset and concerned about this allegation. On the evidence before us we are not satisfied that Ms Issar's inclusion of the allegation was based on such complaints having been made to her, as opposed to her own feelings about the Claimant and conversations similar to that she had with Ms Douglas-Todd in March 2021. Even if the inclusion of the allegation was "unfounded" in that sense, however, we must consider whether it was because of the Claimant's race or sex to any extent.
115. There is no evidence before us to suggest that the Claimant's race or sex played any part in Ms Issar's approach or decision-making. The Claimant relies heavily on the incident involving KM, but we consider this is misconceived in two respects. First, Ms Issar has given an entirely plausible non-discriminatory reason for her conduct. Whatever the strict rules of the internal recruitment process, she felt betrayed and disappointed that she was not consulted or warned about the possibility of KM leaving her team to work for the Claimant and Ms Douglas-Todd. There may have been an element of self-interest in her reaction because KM was an integral part of the day to day functioning of her team, but that is a non-discriminatory reason for seeking to keep KM in her team. Secondly, taken at its highest this was, on the Claimant's case, an example of Ms Issar failing to recognise a development opportunity for a black woman in her team. It is not, even on that case, evidence of a negative attitude towards black staff generally.
116. As for the assertion that Ms Issar was "fixated" by the performance of two black members of Ms Douglas-Todd's team, we heard very little evidence about this, but the oral evidence on both sides suggests this came down to a difference in managerial style in dealing with performance issues generally. It was a consistent theme of the evidence on both sides that Ms Issar had exacting standards and her management style could be "bruising". There is no basis on which we could find that Ms Issar's approach to these two members of staff had anything to do with race.
117. Neither of those two matters, either alone or cumulatively, amount to grounds on which we could conclude that Ms Issar's conduct towards the Claimant had anything to do with his race.
118. Apart from those two matters, the only other evidence of Ms Issar's attitude towards race was evidence from Ms Douglas-Todd that she had formed the impression Ms Issar "had issues with Black people". We accept that that was her genuine belief, and we do not wish to discredit or dismiss her experience, but it is subjective and does not provide a sufficient basis for us to make a finding that Ms Issar's conduct was influenced to any extent by race. Further and in any event, we heard evidence from Mr Emmanuel which was directly to the contrary; that he, as an African Asian man who has experienced racism and is sensitive to it, had worked closely with Ms Issar for some time and could not recall any incident where he felt she had discriminated against anyone because of their race (or sex).

119. The Respondents also relied on Ms Issar's undisputed track record in working in the field of EDI and positive changes she had introduced or overseen. We place very little weight on this because we note that discrimination, especially if it is not overt or conscious, can take place anywhere and from anyone. We do, however, place some weight on the fact that Ms Issar was involved in the decision to recruit both the Claimant and Ms Douglas-Todd and she promoted Mr Emmanuel to act up into the Claimant's role during his sickness absence. Overall we consider there is no objective basis for finding that Ms Issar "had issues with" black people.
120. We therefore accept Ms Issar's evidence as to the reasons for Acts 2 – 5 and we find that her conduct was in no sense whatsoever to do with the Claimant's race. We find that she excluded the Claimant from the direct reports meeting on 29 March 2021 (Act 2) for the reasons given in her email of 26 March, i.e. given the difficult meeting on 24 March it would have been counterproductive for him to attend before matters had been resolved. We find that she decided to commence the "trust and confidence" investigation and sent the letter of 21 June 2021 (Acts 3 and 5) because of her concerns about the Claimant's performance and belief that the relationship of trust and confidence had broken down. To the extent that her apology for the mistaken inclusion of a reference to suspension was dismissive or not "genuine" (Act 4), that is consistent with the general breakdown in the relationship and had nothing to do with the Claimant's race or sex.
121. As for sex discrimination, there is even less evidence that the Claimant's sex had any bearing on Ms Issar's actions. The only basis for this complaint is that Ms Douglas-Todd was not subjected to the same treatment, but (a) that is further support for the Respondents' defence to the race discrimination complaints, and (b) Ms Douglas-Todd was not in materially identical circumstances. There were no equivalent concerns about her performance, and notwithstanding the difficult conversation in March when Ms Issar criticised the Claimant, the managerial relationship remained functional.
122. We have accepted Ms Issar's reasons for acting as she did, and there is no evidence on which we could find that her conduct was influenced by the Claimant's sex.
123. As for Act 1, the comments to Ms Douglas-Todd about the Claimant in March 2021, Ms Issar denied making the comments but we find on the basis of all the evidence before us that her criticism of the Claimant was consistent with her having had genuine concerns about his performance at the time. On Ms Douglas-Todd's own evidence Ms Issar said she was concerned about Ms Douglas-Todd shouldering an unfair burden in the job share, which, given that Ms Douglas-Todd is also black, suggests that Ms Issar's conduct had nothing to do with race. It may not have been exemplary management to make such comments to the Claimant's job share partner, indeed we consider it surprising that a senior manager with an HR background would do this, but there is no basis on which we could find it had anything to do with the Claimant's race or sex.
124. Finally, we consider Ms Bullers's reasons for commencing the investigation (Act 5). For the reasons we have given above we query the lack of proactive management of the Claimant prior to commencing the "trust and

confidence” investigation, and perhaps Ms Bullers as Head of HR could have done more to encourage that, but we accept her evidence as to the reasons for recommending such an investigation. She was presented with the problem by Ms Issar and genuinely believed that the relationship had broken down. There is no evidence whatsoever to suggest that the Claimant’s race or sex had anything to do with her decision-making.

125. For completeness, having accepted Ms Issar’s reasons for acting as she did, even if we had accepted the Claimant did a protected act, we would not have found that Ms Issar subjected the Claimant to the alleged detriments because he did the protected act.

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Employment Judge Ferguson

Date: 5 April 2023