EMPLOYMENT TRIBUNALS

Claimant:	**Mr N Chowdhury**
Respondent:	**Barts Health NHS Trust**
Heard at:	**East London Hearing Centre (by Cloud Video Platform)**
On:	**14 – 17 March 2023**
Before:	**Tribunal Judge D Brannan, acting as an Employment Judge**
Members:	**Mr J Webb** **Mr P Adkins**

Representation

Claimant:	Representing Himself
Respondent:	Miss Ibbotson instructed by Bevan Brittan LLP

RESERVED JUDGMENT

1. **The claimant's claim of direct race discrimination is dismissed.**

2. **The claimant's claim of victimisation is upheld.**

3. **The claimant's claim of harassment related to race is dismissed.**

REASONS

1. The claimant is a Senior Critical Care Technologist at the respondent. He began working for the respondent on 2 April 2001. On 16 July 2021 he brought a claim against the respondent. Following a hearing before Employment Judge Russell on 17 January 2022 the claimant and respondent agreed a list of issues that included claims of:

   (a) direct discrimination because of race;

   (b) victimisation; and

   (c) harassment related to race.

2. In relation to each of these headings were specific allegations on which the claimant relied. We note that claims of discrimination because of religion were not included in the list of issues or pursued at the hearing.

3. At the hearing before us we discussed the list of issues and Miss Ibbotson accepted on behalf of the respondent elements of some of the factual allegations in the list of issues. She also abandoned any argument that the claims were brought out of time, and in closing submission did not seek to argue that any protected acts were done in bad faith. The claimant also asked that his allegation numbered 4 under the heading direct discrimination because of race include his complaint on 5 February 2021 as well as the complaint already included dated 28 March 2021. The respondent did not object to this. We were consequently provided with an updated list of issues.

4. This course of events has meant that the list of issues is also the list of allegations by the claimant. There is no other document before us in which his claim is summarised. In order to make this decision as straightforward and accessible as possible, it is therefore structured as follows:

   (a) Evidence – List of the evidence before us

   (b) Law – The relevant law to the claim

   (c) Fact Finding – The findings we make on what happened and mental processes involved with reference to the list of issues

   (d) Conclusions – Our decision on the overall claim

5. In structuring our decision in this way, we are conscious that it may be more conventional to set out what happened (often referred to as primary facts) first, and then put these through the legal framework to consider what inferences can be drawn about the thought processes involved (often referred to as secondary facts). However due to the way the claims have been explained, with relatively little dispute about what happened and most emphasis on the legal categorisation of these events and why they happened, we consider the structure we have adopted to be the most appropriate.

Evidence

6. The parties provided a bundle of 573 pages in advance of the hearing. During the hearing we were also provided with:

   (a) A reference for Mr Patel

   (b) The staff roster for April 2020

   (c) Two emails from the claimant dated 19 February 2023

   (d) An email from Mr Aldridge dated 22 February 2023

7. We also had witness statements from:

(a) The claimant

(b) Atit Patel

(c) Lukey Begum (the claimant's wife)

(d) Ananya Chowdhury (the claimant's daughter)

(e) Richard Aldridge

(f) Vladimir Petelca

(g) Craig Finch

8. Ms Begum and Ms Chowdhury were not called to give evidence because their statements were undisputed. In the interests of saving time without sacrificing fairness or justice, it was agreed that their statements be taken as read.

9. The other witnesses all adopted their statements under their chosen oath or affirmation, and were subject to oral examination. Their evidence is recorded in my written notes of the hearing.

Law

Direct discrimination

10. Section 13 of the Equality Act 2010 (the "EA 2010") provides that:

> *(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.*

11. On a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case: section 23(1).

12. "Because of" means that the protected characteristic has to be "the reason" for the less favourable treatment: *Essop v Home Office (UK Border Agency)* [2017] UKSC 27, paragraph 17. It is not sufficient for the protected characteristic to simply be part of the background context or circumstances in which the treatment occurred.

13. The protected characteristic does not need to be the only or main reason for the less favourable treatment, it need only contribute to the reason: *London Borough of Islington v Ladele* [2009] I.C.R. 387, paragraph 39.

Victimisation

14. Section 27 of the EA 2010 provides that:

> *(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.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

15. A worker will have suffered a "detriment" only if the treatment is of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment, an unjustified sense of grievance cannot amount to detriment: *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, paragraph 35.

Harassment related to race

16. Section 26 of the EA 2010 provides that:

(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.

17. The words "related to" mean that the conduct must have had "some connection" with the protected characteristic: *Unite the Union v Nailard* [2019] I.C.R. 28.

18. While it is very important that employers and Employment Tribunals are sensitive to the hurt that can be caused by offensive comments or conduct, it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase: *Richmond Pharmacology Ltd v Dhaliwal* [2009] I.R.L.R. 336, paragraph 15, 22.

Burden of Proof

19. Section 136 of the EA 2010 potentially applies to all the claims. This says, as relevant:

> ***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.*
>
> *(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.*
>
> *(5) This section does not apply to proceedings for an offence under this Act.*
>
> *(6) A reference to the court includes a reference to –*
>
> *(a) an employment tribunal;*

20. In relation to subsection (2), it is not sufficient for the employee merely to prove a difference in protected characteristic and a difference in treatment. Something more is required: *Madarassy v Nomura International Plc* [2007] EWCA Civ 33 .

21. If the burden does shift, *Igen Ltd v Wong* [2005] EWCA Civ 142 makes two points about the burden on the respondent to show that it did not contravene any provision. First, *Igen v Wong* says that the employer must prove the less favourably treatment was in no sense whatsoever because of the protected characteristic. The second point is that because the evidence and support of the employer's explanation will usually be in the possession of the employer, the Tribunal should expect cogent evidence for the employer's burden to be discharged.

22. Given a global pandemic was interfering with the respondent's normal operations throughout the period that we are looking at, we also particularly have in mind *Komeng v Sandwell and Metropolitan Borough Council* UK/EAT/592/10. This said that it can be an easy defence for the employer to hold its hands up and say was just disorganised, inefficient or unfair but a Tribunal must carefully test such an explanation.

23. Finally, in relation to the burden of proof, we are conscious that the bulk of the claimant's complaints relate to victimisation. Victimisation claims do not require a comparator and therefore the focus of the respondent has been either on there having been no detriment or on the positive reason why the detriment was inflicted. We are conscious that in *Hewage v Grampian Health Board* [2012] UKSC 37 the Supreme Court said:

> *it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.*

24. Where positive findings are possible, we have taken this approach but when doing so we have been wary of the danger of subconscious discrimination or victimisation by the alleged perpetrator.

Fact Finding

25. The claimant is from Bangladesh and is a Bangladeshi national. His line manager is Mr Aldridge. Mr Aldridge is white and British. Also reporting into Mr Aldridge are two other Senior Care Critical Technologists. They are Mr Patelca and Mohammed Ali. Mr Patelca is white and from Romania or Moldova. Mr Ali is British but his parents are from Bangladesh or Bengal (their precise origin was not in evidence). It should be noted that Messrs Ali and Aldridge were both born in the UK but have clearly different ethnic origins. Mr Patelca and the claimant were both born outside the UK and have different ethnic origins. The claimant and Mr Ali have similar (but not identical) ethnic origins, but their race, for the purposes of the EA 2010 is clearly different because of nationality.

26. These people are the leadership of the "tech team" of the Royal London Hospital's Adult Critical Care Unit ("ACCU"). With them work a number of more junior technologists who are introduced as they become relevant in this decision. Their responsibilities involve supplying and maintaining medical devices used on the unit.

27. In early 2020 a wave of coronavirus infection spread across the world. It greatly affected the workplace of the claimant. All the relevant incidents about which the claimant complains took place during that pandemic. However, he sets the scene with two allegations of discrimination by Mr Aldridge predating the incidents about which he complains to the Tribunal. Other than the claimant's allegations in his witness statement we heard no evidence about these, nor were they foreshadowed in the list of issues or in the claimant's ET1. It would be unfair for us to make any findings on these allegations and we do not do so.

28. We therefore turn our attention to the issues before us. We look chronologically at the claimed incidents of discrimination, harassment and victimisation, along with the protected acts required for the victimisation claim. Interspersed with these are incidental facts which are required to understand the claim.

29. The individual allegations are numbered as they were in the list of issues. In relation to the protected acts, six of the seven protected acts are listed under subparagraph 1 of paragraph 2.1 in the list of issues and the seventh protected act is in subparagraph 2. To ease identification, we have numbered these 1(a) to 1(f) and then 2.

Direct Discrimination 1: In March 2020, the Respondent denied the Claimant training on iPoint. The comparator is Mr Patelca.

30. iPoint is the system that the respondent uses for booking and approving bank shifts. By way of context, the tech team work on a rota basis for their core hours but can also book bank shifts to provide additional cover for the team.

31. It was made clear at the hearing that this complaint in fact relates to iPoint training that took place on 13 May 2020 and both sides accept that this is in fact the issue we need to look at.

32. The respondent accepts that both Mr Aldridge and Mr Patelca received training for iPoint on 13 May 2020 and that the claimant did not receive such training. Mr Ali also did not receive such training. The simple explanation provided by the respondent is that the reason they received training was that they had accounts to access the system whereas the claimant and Mr Ali did not have accounts.

33. The claimant challenges whether it was necessary to have an account in order to receive the training. He notes that often within the respondent people would be given training on something before they were given access to use it. We do not accept this argument because in the context of the pandemic iPoint access suddenly became urgent because of the increased need for bank shifts within the team due to a huge increase in workload and staff sickness absence. The training was by no means routine and was clearly set up ad hoc based on the availability of the necessary participants.

34. However we also must look at why the claimant did not have access to iPoint. Why had accounts been requested only for Messrs Aldridge and Patelca? We find the burden of proof shifts on this allegation because Mr Ali was also not set up. The white people were given accounts and the non-white people were not. However, we also accept the explanation for why they were not set up. The critical period was between 15 April when the forms for iPoint access were provided to Mr Aldridge and 20 April when Ms Poole sent the forms to request access for Mr Aldridge and Mr Patelca on iPoint. During that period the claimant and Mr Ali were off work. The claimant was off sick. According to the rota while Mr Ali was not at work between Monday 13 April and Friday 17 April. He did attend work on 18 and 19 April but as these were the weekend he did not see Mr Aldridge (who only works Monday to Friday). Mr Patelca, on the other hand, worked Monday, Wednesday and Friday during that week, and Mr Aldridge worked Tuesday to Friday (Monday having been a bank holiday). We therefore accept that the reason why it was Mr Aldridge and Mr Patelca who were set up on iPoint was that they were together at work during the key period. The fact that the claimant and Mr Ali were not set up had nothing whatsoever to do with their race.

35. We note that when the claimant and Mr Ali did seek to be set up on the system, they obtained access (though clearly the administrative systems for arranging this are not smooth, and were problematic for Mr Aldridge and Mr Patelca as well).

Direct Discrimination 2: Between March and December 2020, restricted and/or prevented the Claimant from booking bank shifts. The comparators are Mr Petelca and Mr Aunzo

36. It is not in dispute that during March to December 2020, bank shifts were offered by Mr Patelca and Mr Aldridge on a team WhatsApp group (to which we will return) on a first come first served basis, or in person to whoever happened to be at work.

37. The claimant's complaint in truth is that this system disadvantaged him because he checked the WhatsApp group less often than some colleagues and was at work less than full-time colleagues because he worked 30 hours a week, not because of his race. It is a potentially unfair system. But it has the advantage of speed which was needed by his managers at the time. The claimant happened to be disadvantaged but there are no facts on which we can conclude that it was organised in this way because of race.

Protected Act 1(a): The Claimant raised concerns of discrimination, victimisation and harassment at work on 04 April 2020 to Jacqueline Tumelty, Deputy Head of People

38. There is documentary evidence that the claimant had a meeting with Ms Tumulty, Deputy Head of People, on 4 April 2020. There is no documentary evidence that shows the claimant raised discrimination with Ms Tumulty at this meeting. In oral evidence the claimant said:

> *We didn't discuss whole complaint situation, it was a meeting to discuss what I was expecting from HR. She did recognise that I had raised a complaint. I believed RA was negotiating with another department to move me. He was calling it redeployment. I felt there was an attempt to remove me. I was upset that rather than focus on my complaint, there was discussion between departments about exchanging me for another person.*

39. There is no protected act within this description. We find that this was not a protected act.

Direct Discrimination 3: In April 2020, Mr Aldridge nominated his team for the 'Team of the Month' award but the name of the Claimant was deliberately excluded. The comparators are Mr Aunzo, Mr Hart and Mr Petelca.

40. In April 2020, Mr Aldridge nominated his team to be Team of the Month. When doing so he named Mr Patelca, Mr Ali and more junior colleagues, Ayodele Ross, Michael Aunzo and Michael Hart for their particularly hard work during the month. The claimant was off work sick from 8 April until early May.

41. The team won this accolade and it was announced on 4 July 2020. The claimant was upset when he saw that his name was not included. He claims it was because of race.

42. Naming individuals within the team seems to us to have been an unwise management decision. However the fact that Mr Ali was included means that unless Mr Aldridge specifically discriminates against Bangladeshis we can see no way in which this is connected with race. To be more specific,

Mr Hart is the only white British person who was named, and Mr Aunzo, Ms Ross and Mr Ali are all not white. Mr Patelca is white but is not from the UK. It is not about what the recipient feels, it is about what the discriminator thinks. We can find no facts on which to conclude Mr Aldridge was motivated by race.

Protected Act 1(b): The Claimant raised concerns of discrimination, victimisation and harassment at work on 19 November 2020 to Ruksana Khatun, Inclusion Executive

43. We do not have notes of the meeting with Ms Khatun but we do have an email arranging the meeting. The respondent admitted that the meeting was likely to be a protected act given the content of that email in which the claimant requests a meeting to have a conversation "regarding inclusion and the challenges that we are facing at work in regards to inclusion, equality and diversity". We find it was.

44. However, there is insufficient evidence for us to find that Mr Patelca or Mr Aldridge knew about this protected act. Mr Patelca denied it in his witness statement and was not asked about it in cross examination. Mr Aldridge had no recollection of any discussion with Ms Khatun.

Protected Act 1(c): The Claimant raised concerns of discrimination, victimisation and harassment at work on 23 Dec 2020, to Anuska Casas Pinto, Freedom to Speak Up Guardian

45. This raising of concerns was in an email to Ms Pinto from the claimant. The respondent accepts that the email contains a protected act as it is alleged that there have been contraventions of the Equality Act. We find it was a protected act.

46. There is insufficient evidence for us to find that Mr Patelca or Mr Aldridge knew about this protected act. Mr Patelca denied it in his witness statement and was not asked about it in cross examination. Mr Aldridge had no recollection of any information from Ms Pinto.

Protected Act 1(d): The Claimant raised concerns of discrimination, victimisation and harassment at work on 16 January 2021 to Mr. Aldridge, Line Manager

47. The claimant made this complaint in writing. Within it the claimant refers to "harassment". His case is that he meant harassment within the meaning of the EA 2010. The respondent's case is that the reference to harassment was in the colloquial sense meaning that there was no allegation of a breach of the EA 2010 and therefore no protected act.

48. The respondent's own Dignity at Work policy, which the claimant was well-versed in, defines harassment with reference to the EA 2010 in Appendix 6. We do not accept the respondent's submission. We find it was a protected act.

49. The complaint was made to Mr Aldridge so he clearly knew about it.

50. There is insufficient evidence for us to find that Mr Patelca knew about this protected act. He denied it in his witness statement and was not asked about it in cross examination.

Protected Act 1(e): The Claimant raised concerns of discrimination, victimisation and harassment at work on 5 February 2021 to Nicola Rudkin, Deputy Associate Director

51. The respondent accepts this was a protected act. It was in the form of a letter from the claimant to Ms Rudkin. Mr Aldridge accepted during cross-examination that he was told about it at the time.

Content of Protected Acts

52. In order to consider the motivations of Mr Aldridge in relation to the claimed act of victimisation that follow, it is necessary first for us to look at what the claimant said in his Protected Acts. On 16 January 2021 the claimant said:

> *Dear Richard,*
>
> *I have recently reported to my GP that my emotional and psychological wellbeing has been further deteriorated due to adverse events at work, especially frequent incidents of bullying and harassment.*
>
> *Over the recent months, I repeatedly made you aware that I have been having subjected to unwanted conducts such as constant criticism, nit-picking and unsubstantiated allegations perpetrated by a senior member of our team. I also found it particularly hurtful that at work on a number of occasions, I have been deliberately treated differently than other colleagues in similar circumstances.*
>
> *After the incident at work on Wednesday, 16/12/2020 (witnessed by you), I felt deeply upset and had another episode of anxiety leading to difficulty sleeping at night. Unfortunately, there had been further incidents of similar nature resulted in detrimental impact on my mental health. Despite being in the aforesaid climate of negativity, I am trying my best to remain assertive, resilient and seeking support to enable me to carry out working for the department without compromising my personal health and well-being.*
>
> *In these circumstances, having consulted with my GP, I had been advised to make a self-referral to occupational health. However, it appears that occupational health currently only accepting referrals from line managers.*
>
> *For this reason, I request that you kindly make a referral to occupational health so I could be assessed and supported.*
>
> *Kind regards,*
>
> *Nurur Chowdhury*

53. We note that the claimant referred to nitpicking by "a senior member of our team", which means that it was not a complaint specifically about Mr Aldridge's own conduct. Mr Aldridge was a witness to the incident on 16 December 2020 rather than the perpetrator.

54. Turning to the letter of 5 February 2021, it was a complaint about events perpetrated by Mr Patelca. In it five specific incidents were described:

    (a) Mr Patelca saying at a senior staff meeting on 18 November 2020 that every member of the technologist team had approached him complaining about his character, performance at work and relationships with other colleagues

    (b) On 16 December 2020, Mr Patelca becoming furious, abusive and aggressive in response to the claimant taking time off in lieu of extra hours worked

    (c) Mr Patelca rearranging shifts to his own benefit and specifically on 17 December 2020 leaving the claimant with an inadequate team

    (d) On 11 January 2021, Mr Patelca refusing to remove one of the claimant's shifts

    (e) Mr Patelca being the only member of the team who could create, and authorise bank shifts from the beginning of 2020 until January 2021 and specifically denying the claimant a bank shift on 17 January 2021 in favour of giving himself the shift.

55. We note that all of these complaints were about the conduct of Mr Patelca and not of Mr Aldridge.

<u>Victimisation 1: On 8 February 2021, Mr Aldridge failed to act on occupational health advice to address the Claimant's workplace concerns, take immediate steps to protect the Claimant from further harassment, and carry out a Stress Risk Assessment.</u>

56. The Respondent accepts this failure happened. It is clear to us that this was a detriment. We therefore turn to why it happened.

57. The occupational health report dated 8 February 2021 recommended "a resolution to outstanding grievances… as soon as possible" and "a management workplace stress risk assessment is undertaken as soon as possible".

58. Mr Aldridge did not investigate the claimant's grievance so was not responsible for the time it took to resolve it. Mr Aldridge said in cross-examination that the reason he did not give the claimant a stress risk assessment was:

> *It was an incredibly busy time in the hospital. I was trying to deal with Mr Chowdhury's issues and Mr Patelca's issues, with the pair of them, and I was trying to manage the service with a reduced workforce, which was very difficult. It was incredibly stressful. I didn't necessarily do the right things at the right times. I didn't have time to do it. I was working very long hours. It was a detriment to my health. It was a very difficult time for me, it was very difficult for me to address the issues, but I tried my best.*

59. In his witness statement he said:

> *My focus at that time was almost entirely on ensuring I had enough staff to support the wards housing Covid-19 patients in the middle of a pandemic, which was almost impossible given the severe staff shortage. It was an incredibly stressful period and other issues took a backseat, which I am aware is far from ideal.*

60. In a telling email at page 185 of the bundle, Mr Aldridge summarised the dire situation in the Tech Team in February 2021. During his oral evidence he was in tears when he recalled that period.

61. We accept Mr Aldridge's evidence. We note that the complaint was not even about him so we cannot see why he would decide to do nothing regarding occupational health as a result. There are no facts to show, in the absence of his explanation, that this was due to a protected act. We also accept the respondent's explanation.

Victimisation 2: On 24 February 2021, the Claimant was subjected to intimidation for attending an OH appointment.

62. The alleged intimidation was in an email. It said:-

> *Hi Nurur*
>
> *Ayodele tells me that you are attending an OH appointment later this morning.*
>
> *Were you going to tell me that you were going to this appointment, or did it slip your mind when you saw me this morning?*
>
> *Thanks*
>
> *Richard*

63. The respondent argues that this was not a detriment. Mr Aldridge said in cross-examination that he needs to know if a staff member leaves the building and that the email was just routine management. Miss Ibbotson also noted that the claimant replied saying that he would notify Mr Aldridge in future if he was leaving the site.

64. On the other hand, the claimant described this as nitpicking and an unusual approach. He questioned why Ms Ross (Ayodele) would bother to tell Mr Aldridge about the claimant leaving.

65. The email strikes us as sarcastic. But we are conscious that an unfortunate turn of phrase is not necessarily harassment. Neither is it necessarily detriment. In this situation we find that it was not. The claimant did not reasonably understand he had been disadvantaged.

Victimisation 3: On 25 February 2021, Mr Aldridge and Mr Petelca influenced some members of the team to write to the Claimant suggesting that he should deny redeployed staff equal treatment in regards to shift allocation.

66. It is helpful to explain a little bit more about what this allegation involves. During the pandemic the claimant's tech team was supplemented with staff redeployed from other teams. We describe them respectively as "permanent" and "redeployed" staff.

67. The respondent accepted that there was a preference for more experienced permanent team members rather than less experienced redeployed staff to work at the weekend. It says this was to ensure there were adequate levels of experience at the weekend.

68. The respondent submits that even taking the claimant's case at its highest and accepting that Mr Aldridge and Mr Patelca influenced others to write to the claimant suggesting that he should deny redeployed staff equal treatment in regard to shift allegation, it is an unworkable victimisation complaint: it is non-sensical to suggest that the reason that Mr Aldridge and Mr Patelca did this was because the claimant complained about discrimination and there is no detriment suffered by the claimant as he was permanent.

69. The claimant said he had principled disagreement with Mr Aldridge and Mr Patelca because he believed all should be treated equally, and that the redeployed staff came from a BAME background. He also suggested that it made drawing up the rota more difficult and by discriminating against redeployed staff, by not giving them weekends, it made him unpopular with them.

70. The job of creating the rota was shared between the claimant, Mr Ali and Mr Patelca. It is clear to us that the claimant was asked to arrange the rota in the same way as Mr Ali and Mr Petelca. The claimant describes himself as an advocate for the redeployed staff. That was a decision for him, but it is clearly the cause of the dispute. We therefore find that there was no detriment and even if there were, it was caused by the claimant's position rather than any protected act. Similarly there is no evidence or facts from which we can conclude that Mr Aldridge decided to take a position adverse to the claimant on this issue because of a protected act.

71. For the reasons discussed above, we find that Mr Patelca did not know about any protected act at this time as well. It is therefore impossible for an act by Mr Patelca at this time to be an act of victimisation.

<u>Victimisation 4: On 24 March 2021, Mr Aldridge cancelled a number of the Claimant's shifts without proper consideration or communication, on the sole recommendation of Mr Petelca, and then ignored a request for reconsideration.</u>

72. In relation to this allegation it is helpful to give some context. On 22 March 2021 Mr Patelca wrote to Mr Aldridge suggesting that changing numbers of Covid-19 cases warranted a reduction in the number of technologists at the weekend and an increase in technologists for weekday shifts. He said he had shared his suggestions with Mr Ali and the claimant. He cc'ed Mr Ali and the claimant.

73. It was not clear from the email that the claimant had disagreed with the suggestion when Mr Patelca had discussed it with him.

74. Within half an hour Mr Aldridge replied saying it sounded sensible and suggesting some discussion with the team.

75. On 24 March 2021 Mr Aldridge sent a WhatsApp to the team saying:

Hi folks

I've cancelled a few bank shifts booked at weekends as we no longer need for people.

Please check, and don't just turn up anyway

Regards

Richard

(This email also triggered a further victimisation claim which is dealt with below.)

76. On 25 March 2021 the claimant replied to Mr Aldridge's email of 22 March adding the rest of the team in cc. He opened his email by saying:

> *It appears that you have been unduly influenced and subsequently misled by Vlad's [Mr Patelca's] email.*

77. He went on to explain why he thought the shifts should not be changed and asked Mr Aldridge to reconsider his decision.

78. Mr Patelca then replied on 26 March 2021 keeping everybody in cc complaining about the attack on him, providing further reasons for the change and noting the impact on the claimant's shifts while suggesting that it impacted his ability to make the right decisions in regards of service needs.

79. It is not disputed that the decision to change the staffing levels caused the cancellation of the claimant's bank shifts and also bank shifts of Mr Aunzo. It was a detriment.

80. The consistent evidence from Mr Aldridge is that he made the decision to change the shifts because it was a sensible suggestion in light of the needs of the hospital and would save money.

81. The claimant's complaint is fundamentally that the decision was made to target him and despite his objection. However we accept the explanation that it was because it was a good idea. It would be inherently wrong to delay the decision so that the claimant could do his shifts. The claimant accepted my words that he thought Mr Aunzo was "collateral damage" in the decision, as Mr Aunzo lost more shifts due to the decision. We do not accept this. It is clear it was a sensible decision not designed to target the claimant and it would overall affect all people the same.

82. The claimant also suggested that the manner of the communication by WhatsApp targeted him. He thought that the words "don't just turn up anyway" were designed to get at him. The claimant's criticism of the method of proper communication is misconceived. The email discussion began between Messrs Ali, Patelca and the claimant. The claimant then copied in the whole team to an email beginning "It appears that you have been unduly influenced and subsequently misled by Vlad's email." If anybody was making a public personal attack, it was the claimant.

Victimisation 5: On 24 March 2021, Mr Aldridge responded with anger to the Claimant's request to be excused from active participation in a work social media platform while not on duty.

And

Harassment: In March 2021, compelled the Claimant to participate in a work WhatsApp group outside working hours that adversely affected his work-life balance and psychological well-being.

83. To give context, following Mr Aldridge's WhatsApp regarding the cancellation of bank shifts, the claimant said in WhatsApp that he had decided to remove himself from the team's WhatsApp group as it was important for him to switch off from work completely. He said people were welcome to message directly if they wished.

84. Mr Aldridge sent a private message to the claimant. It is at page 200 of the bundle. It is about this message that the claimant complains. We have carefully considered the content of this message, in which Mr Aldridge states "I've not asked you to read [the group's WhatsApp group] on your days off". We find that Mr Aldridge did not respond 'in anger' to the claimant saying he was removing himself from the Team WhatsApp group. Mr Aldridge's message is polite and professional.

85. It is clear that the cause of this all happening is the claimant's notice that he would leave the group. WhatsApp had clearly been a vital tool for communication and management throughout the pandemic. All members of the team had been asked to use it so the claimant was obviously not singled out nor was the expectation to use WhatsApp connected with the claimant's or anyone's race. Equally, it is obvious that Mr Aldridge responded because of this, rather than any protected act.

86. The claimant says nobody else was asked to explain in writing their leaving the WhatsApp group. However the claimant was the only person to make an announcement in this way and, at that point in the pandemic, we find WhatsApp remained important. Although we do not know the exact times when others left the group, we accept the general submission that the importance of the group had diminished by the time others left.

Victimisation 6: On 27 March 2021, Mr Petelca violated Claimant's dignity at work by degrading and intimidating the Claimant in the presence of other colleagues.

87. For the reasons discussed above, we find that Mr Patelca did not know about any protected act. It is therefore impossible for an alleged violation by Mr Patelca of the claimant's dignity at work to be an act of victimisation.

88. It is nevertheless helpful to set out what happened on 27 March 2021 as this is relevant to the subsequent events.

89. Mr Patelca and the claimant were both working on 27 March 2021. Both brought complaints the following day about what happened. From these complaints it is clear that the claimant did checks on equipment in the morning and Mr Patelca did checks on the same equipment in the evening. When Mr Patelca did the evening checks he found that a membrane should

have been changed in a medical device and that a message saying so would have been visible when the claimant did his morning checks. He took a photo of the equipment in question. He asked the claimant about it in front of two other team members. The result was an argument. Both perceived the other as confrontational.

Protected Act 1(f): The Claimant raised concerns of discrimination, victimisation and harassment at work on 28 March 2021 to Mr. Aldridge, Line Manager & Helen Hewitt, Matron/Head of the department

90. This protected act is the claimant's complaint about Mr Patelca's conduct on 27 March 2021. In relation to this the respondent argues that the term harassment was used in the colloquial sense. For the same reasons as we give in relation to the protected act on 16 January 2021, we find this was a protected act.

Victimisation 7: On 30 March 2021, a note was recorded on the shared staffing record (MAP), that Mr Petelca 'had a confrontation with Nurur'.

91. The Respondent accepts this happened. To explain the context, following the argument on 27 March 2021 Mr Patelca went off sick. On the respondent's electronic rota system, which is accessible to staff of the claimant's grade and above, Mr Aldridge recorded the reason for the absence as:

> *Vlad reported that he had a confrontation with Nurur over the weekend and was feeling stressed as a result*

92. We have no doubt that this was a detriment as it was pinning blame for the absence of Mr Patelca on the claimant. We particularly note that Mr Aldridge had received complaints from both the claimant and Mr Patelca at this point. It seems entirely wrong for him to publicly name and shame the claimant in relation to this incident when there had been no investigation.

93. Mr Aldridge said that the reason he did it was to record the reason for the absence. However he accepted that he had never named another person in such a note before or since. He did however explain that this was because he had never had a situation where one person sickness absence was caused by another. He described under cross examination it was: "a reminder for me further down the line as to why the Mr Patelca was off sick".

94. This was done after the claimant had also complained about the incident on 27 March 2020. We do not accept the explanation of Mr Aldridge as being innocent. Rather, we find he was venting his feelings because the claimant had made himself out to be the victim when it was the claimant's alleged perpetrator who had ended up off sick. We find this to have been an act of victimisation.

Victimisation 8: On 5 April 2021, Mr. Aldridge violently (non-physical) abused the Claimant in his office when he inquired about a meeting that Mr. Aldridge arranged to discuss Claimant's conduct.

95. To provide context in relation to this allegation, Mr Aldridge decided in light of the ongoing dispute between the claimant and Mr Patelca to arrange a

meeting between them to try to mediate the issues. This was scheduled for 14 April 2021. On 5 April 2021 the claimant spoke to Mr Aldridge and questioned the need for a meeting. Mr Aldridge accepted at the time and accepted before us that he raised his voice during that discussion.

96. The claimant says that Mr Aldridge told the claimant to leave the room or he would start swearing. We accept the claimant's account in this regard. We also note that in his ET1 the claimant said that the reason he approached Mr Aldridge on 5 April 2021 was that he was concerned that the meeting was a "disciplinary meeting in a modified form". While that may have been the claimant's perception, we do not accept that this was the respondent's intention. We accept Mr Aldridge's evidence that the reason for the meeting was to try to mediate the issues between Mr Patelca and the claimant.

97. This leads to the reason why Mr Aldridge became angry. It is clear to us that he was exasperated by the ongoing conflict between the claimant and Mr Patelca. He made a mistake by failing to explain to the claimant in advance the purpose of the meeting he had scheduled. But in his mind the purpose was clear. The reason why Mr Aldridge became angry was because the claimant was questioning the very need for a meeting which in Mr Aldridge's view was vital to resolve the issues in the workplace that was still having a serious effect on both morale and attendance. We find the cause was not any protected act.

<u>Victimisation 9: On 24 April 2021, Mr Petelca withdrew himself from the staff rota on Wednesdays to avoid working with the Claimant, without any discussion with other team members or seeking formal approval.</u>

98. According to Mr Aldridge and Mr Patelca, at the meeting on 14 April 2021 it was agreed that Mr Patelca would stop working on Wednesdays so that he would have less interaction with the claimant. The claimant says there was no such agreement.

99. There is documentary evidence to support either account. First, we note that in his email of 28 March 2021 Mr Patelca requested not to be assigned to work the same shifts as the claimant. Second, we note that the email Ms Tumulty sent after the meeting did not mention any agreement for Mr Patelca not to work on Wednesdays.

100. Overall we prefer the evidence of Mr Patelca and Mr Aldridge that the change, so that Mr Patelca would not work Wednesdays, was agreed with the claimant. It therefore did not come as a surprise to the claimant. The claimant repeatedly complained at the hearing about a lack of formal communication of the decision. We accept that there was no such formal communication but that was no detriment to the claimant because he knew about the decision already following a discussion involving him. We also note that this change was only relevant to the claimant, Mr Patelca and Mr Ali because they would be drawing up the monthly rotas, so there was no reason for it to be communicated to the whole team.

Victimisation 10: On 1 May 2021, Mr Petelca and Mr Aldridge deliberately stopped supporting the Claimant in the process of rota planning, leaving the Claimant to produce the staff rota.

101. The claimant's complaint in relation to this was unclear before the hearing. During the hearing he explained that Mr Aldridge was delaying approvals for annual leave. In his closing submissions he also said that it was linked to Victimisation 9 in that there was a lack of formal communication about when Mr Patelca would be working. For the reasons we have already given, we do not accept that this caused any problem for the claimant. If the complaint is really about Mr Aldridge not approving annual leave in a timely way it is really just a complaint about Mr Aldridge not doing his job properly. There is no allegation that related to the annual leave of the claimant, rather it related to annual leave of team members so that it was unclear who was and was not available to be rostered. In this respect Mr Aldridge was not subjecting the claimant to anything and it is therefore not a detriment. Furthermore, even if it were a detriment, there is no evidence or facts from which we can conclude that any such failure by Mr Aldridge specifically targeted the claimant because of race or for any other reason.

Victimisation 11: On 27 May 2021, Mr Aldridge agreed to flexible working requests for other team members knowing the changes would remove experienced staff from the rota on days when the Claimant worked.

102. On 24 May 2021 Mr Aldridge circulated a table showing the days which members of the tech team has requested that they do not work. It is common ground that at the time the claimant was the only member of the team who had a formal flexible working agreement. His agreement was reflected in the table along with the requests of the other team members.

103. The result of these requests was that the claimant would be the only senior technologist who would work on Wednesdays.

104. In his email Mr Aldridge specifically identified that it would be awkward if the claimant wanted annual leave on a Wednesday because it would leave no senior members of the team apart from himself. He therefore said:

> *I would therefore please ask those of you who have asked for flexible working, whether you could move the days that you work so that we have more scope for cover on Wednesdays. I don't want to have to refuse anyone their request, but we have to work out something better than this.*

105. Mr Patelca replied recognising the issue and suggested that he, Mr Ali and Mr Aunzo take turns working Wednesdays if the claimant needed to take annual leave and that the claimant avoid taking annual leave unless really necessary. Mr Aunzo replied agreeing with this.

106. The claimant argues that this is a detriment because he would have to ask other members of staff if he wished to take annual leave. The respondent contends that the claimant was not being targeted or treated unusually and it was not unusual to have a single senior technologist working on any shift.

107. It strikes us that the claimant was pursuing preferential treatment in seeking to maintain his flexible working arrangement at the expense of his team

members being able to have any flexible working arrangements for their shifts. We are not satisfied that the claimant was in any way singled out. Although he sees detriment in working with more junior people, there are no facts from which we could conclude that this arrangement was due to any protected act. Rather it is clear that it was an entirely legitimate effort to help keep everyone informed about the preferred shifts of all team members to assist with rostering.

Victimisation 12: On 9 June 2021, Mr Aldridge refused the Claimant's request to change a shift to 17 June 2021, which was so he could attend an investigation meeting relating to his complaint on 5 February 2021.

108. This allegation relates to the investigation meeting with the claimant as a result of his complaints of 5 February and 28 March 2021. He had a meeting with the investigating officer, Tomi Shitta, that began on 9 June 2021 and was going to resume on 17 June 2021. On 9 June 2021 the claimant consequently requested a change to the shifts so that he would be rostered on 17 June 2021 and could attend the investigation meeting during working time. Mr Aldridge refused that request.

109. Mr Aldridge had no recollection of refusing the request and gave a speculative account of why he might do so.

110. However there are no facts from which we can conclude that the reason for the refusal was any protected act. The Dignity at Work policy under which the investigation was being conducted provides no right to have meetings during working time. It seems unreasonable for the claimant to expect to be able to move his shift to coincide with a meeting which will result in being unable to work part of that shift. If any action were appropriate it would be for the claimant to have requested to move the meeting to coincide with a shift that was rostered, and then for the claimant to ensure he was allowed time away from his duties in order to attend that meeting.

Victimisation 13: The deliberate disinclination to grant reasonable time off from work on 18 June 2021, the respondent failed to support the Claimant carry out his public duties as a school governor.

111. The claimant has a long-standing role as a school governor. The respondent's policy allows employees to take special leave for this purpose. The manager should not unreasonably refuse special leave but can refuse taking into consideration various factors including the effect of the absence of the employee on running the service.

112. On 27 May 2021 the claimant wrote to Mr Aldridge requesting special leave to carry out school governor duties on 24 June 2021. The claimant says that Mr Aldridge verbally approved this around the same time. However, on 18 June 2021, Mr Aldridge replied to the claimant requesting that he cancel his attendance. The reason given was that Mr Ali was not going to be back at work by 24 June following an operation.

113. The claimant suggests that he was treated differently from Mr Patelca who was allowed to take annual leave on 2 July 2021. We do not accept this because on 24 June the absence of the claimant would have left only two

team members working whereas the absence of Mr Patelca on 2 July left three members of the team. It is true that on both occasions there would be no senior cover, but the overall number of staff on 24 June was different. That was because of Mr Ali being unable to do his rostered shift due to illness.

114. There are therefore no facts from which we could conclude that the reason for the decision was the claimant's protected act.

Direct Discrimination 5: On 19 June 2021, required the Claimant to ensure that his annual leaves were recorded electronically as well as on paper. The comparator is Mr Hart.

And

Victimisation 14: On 19 June 2021, the Claimant was accused of not following the rules for requesting annual leave.

115. The respondent accepts that it required both paper and electronic records of annual leave.

116. On 19 June 2021 Mr Patelca wrote to the claimant cc'ing Mr Aldridge saying there seemed to be a discrepancy in regards to the claimant's 20 July annual leave request. He could see the request on the diary calendar and on the health roster, but no request authorisation from Mr Aldridge in the paper annual leave card.

117. We do not accept this was a detriment because the claimant had emailed the whole team on 16 August 2020 to explain the requirement for annual leave to be recorded on personal cards and signed off by Mr Aldridge. The claimant reiterated this to two team members on 15 July 2021 when he discovered they did not have personal cards. One of them was Mr Hart.

118. He suggested at the hearing that the fact they did not have such cards meant that he was being singled out by the required to have one. The explanation from Mr Aldridge was that probably the reason the two technologists did not have cards was because they were new to the team and had not yet taken any annual leave. Whatever the reason they did not have cards, the team process was known to the claimant, Mr Aldridge and Mr Patelca. Mr Patelca did not subject the claimant to any detriment when he reiterated this. Equally, all of the team were subject to the same process so there was no less favourable treatment of the claimant.

Victimisation 15: On 21 June 2021, Mr Aldridge raised a bullying allegation against Mr Atit Patel and the Claimant, on behalf of a junior technologist, Ms Ayodele Ross.

119. The Respondent accepts this happened. The sequence of events is that on 20 June 2021, Ms Ross wrote an email to Mr Aldridge with the subject "Bullied". It described an incident where the claimant and Mr Patel (a redeployed team member) challenged Ms Ross about a bronchoscope, or "scope". These devices need to be sterile and effectively have a "use by date" after which their sterility cannot be guaranteed. The argument involved a scope who's use by date had passed. Ms Ross finished her email by saying:

I had enough I cannot work in this environment. I really felt like I was bullied by my colleagues today.

120. The next day Mr Aldridge sent an email to Mr Patel and claimant. He said:

Dear Nurur / Atit

I have had an email from Ayodele where she has expressed her upset at what she describes as being bullied at work over the weekend.

I don't know the full details of what happened, but it concerns the use of scopes coming out of the drying cabinet that may or may not have expired.

Irrespective of what the issue under discussion was, all members of the team are required to treat each other with respect and dignity, and nobody should feel bullied by others.

I would therefore please ask that you reflect on the way that the message you were trying to deliver to Ayodele may have been interpreted by her, and the effect it may have had on her for the rest of her shift.

If you wish to discuss this further with me, then please do. But I really hope that this is just a one off event, and that we can all work together in some sort of mutual harmony.

Regards

Richard

121. Miss Ibbotson submits that this was a reasonable and innocuous response for a line manager to take in response to Ms Ross's complaint. We do not accept this. What we observe is no critical thinking at all by Mr Aldridge. He simply accepted the word of Ms Ross against the claimant and Mr Patel. It is a notable change of approach from what was typical. A typical approach by Mr Aldridge was to send a message to everybody about what he had been told was poor behaviour without identifying the alleged perpetrator or directing it specifically to the alleged perpetrator. The use of the words "Lets hope this is a one off" implies that Mr Aldridge thought Mr Patel and the claimant were the problem. We note the similarity with the note on the HR system on 30 March 2021 (Victimisation 7). In both cases Mr Aldridge was blaming the claimant for the impact he has on other staff. We ask ourselves why Mr Aldridge took forward Ms Ross's complaint without investigating it first. We consider the facts sufficient to shift the burden of proof. As explained above, we do not accept the explanation for the reason, such as it is, because inherent within it is prejudgment of the claimant which is itself unexplained. We consequently find this was an act of victimisation.

122. In saying this, we note that on 26 June 2021 the claimant wrote to Ms Shitta suggesting the complaint by Ms Ayodele was a conspiracy. Now he does not claim this and there is no evidence before us that it was a conspiracy.

Protected Act 2: 24 June 2021, the Claimant disclosed that he helped Mr. Atit Patel in making complaints of unlawful discrimination and harassment at work. Mr Patel confirmed this in writing to Mr. Aldridge on 24 June 2021

123. The respondent accepts this was a protected act. It was written in the claimant's email in response to Mr Aldridge's email of 21 June 2021. In this the claimant said, as relevant:

> *7. Furthermore, you will be aware that I have recently made a formal complaint about bullying, harassment and discrimination at work, and AP is a named witness in this complaint that is undergoing investigation. Additionally, I have supported AP in regard to circumstances where he was subjected to perceived bullying, verbal abuse and discrimination at work. Regrettably, there were incidents where your own conduct had been perceived by AP as bullying and had caused him feeling deeply upset. As you stated in your email that all members of the team are required to treat each other with respect and dignity, and nobody should feel bullied by others, so, this principle must be applied to 'all members' equally.*
>
> *8. Making a complaint of harassment and discrimination or supporting another person who has made such complaint are 'protected acts' under the trust policies and afforded by The Equality Act 20210. I am concerned that some of my colleagues are being unduly influenced and encouraged (also being motivated by offering direct and indirect promises, privileges and special treatments) to commit acts of victimisation. I am also concerned as it appears that AP and I both are being targeted and this particular incident might have been constructed for that reason.*
>
> *9. I appreciate that as a manager, you are obliged to seek to prevent bullying and harassment in the workplace and to take all reasonable steps to seek to prevent any forms of unlawful discrimination, however the trust policy also state that you should lead by example and role model.*
>
> *10. AP and I both genuinely believe that this is a grossly unsubstantiated 'complaint' and made in bad faith. I, therefore request that you fully investigate this alleged incident within an acceptable time limit in accordance with Trust's Dignity at Work policy.*

Victimisation 16: On 7 July 2021, Mr Aldridge considered that the Claimant's action when responding to a fire alarm to be a failure to meet 'expectation' and criticised the Claimant by email and on social media.

124. On 7 July 2021 there was a continuous fire alarm at the hospital. The claimant was in a tea room attached to the ACCU. A person who he did not know told him to evacuate the hospital and he did so.

125. Mr Aldridge did not think the claimant's approach was appropriate. In his view the "unit fire policy", which we do not have in evidence, says that all nursing staff should return to their patients. He thought the claimant should have stayed on the unit until he was given other instructions. Mr Aldridge raised this with the claimant on the same day both orally and in a subsequent email. The claimant responded promptly complaining that he was being subjected to rigid management. He explained why he thought it was the right decision. He did not name any of the people who either evacuated with him or told him to evacuate.

126. On the same day Mr Aldridge also wrote to his whole team on WhatsApp stating his expectation that in the ACCU all available staff should stay on the unit to assist with the potential evacuation or movement of patients unless someone was in immediate danger or told to go elsewhere by someone in charge, such as the nurse in charge or consultant. He also said that this reflected the unit fire policy and Trust major incident policy. He did not mention that the claimant had evacuated in breach of his expectations.

127. Ultimately on 26 July 2021 Mr Aldridge sent a "letter of concern" to the claimant. In this he explained his view that the claimant had not done as he expected and there was potential impact on the ability to evacuate patients and issue of locating the claimant. He set expectations that in future the claimant would act in the way that would be expected of a senior member of the technologist team. The claimant says that it is this letter that precipitated his tribunal claim.

128. The claimant maintains before us that his action was correct. He provided a screenshot of his fire safety training which shows that it is correct to evacuate the building immediately if you were in a non-clinical area, but that it is also correct to check the area in accordance with your local fire plan and to evacuate critical areas only if necessary. He also provided a photograph of the notice from the tea room stating what action to take in the event of fire. It says to evacuate to the nearest safe compartment or lift lobby as directed by staff.

129. We consider relevant to note that there was in fact no fire at the hospital on 7 July 2021. The reason for the evacuation was a suspect package and there seems to have been particular concern about it because it was on the anniversary of the 7/7 bombings in London.

130. Having carefully considered the evidence relating to the incident we find that Mr Aldridge was completely entitled to reach the decision that he did. We find that anyone else in the team who had acted in the way that the claimant did would have been treated exactly the same way. We therefore find that it was not motivated by any protected act.

<u>Direct Discrimination 4: Failed properly to investigate his complaints made on 5 February 2021 and 28 March 2021.</u>

131. The claimant clarified at the hearing that his complaints relate to the investigation had three elements:

    (a) The investigator, Ms Shitta, did not consider the data that the claimant provided about bank shifts in March to December 2020 whereas she did consider the data that Mr Patelca provided for 2021.

    (b) The claimant had no right of appeal against the outcome of the investigation.

    (c) Ms Shitta did not consider the witness evidence of Mr Patelca's aggression to him on 27 March 2021.

132. We look at each element in turn.

133. The claimant showed us in the bundle the email onto which he attached the data for March to December 2020. That data shows the claimant doing only two bank shifts while Mr Petelca did many more. With regard to the 2021 shifts, Ms Shitta said in her report:

> *According to the information provided by Vladmir [Petelca] from a report generated on the Ipoint system, Nurur worked 155 hours bank shifts in comparison to 150 hours done by Vladmir in the second pandemic. The data for the first pandemic isn't available nonetheless This data demonstrates fairness in the allocation of bank shifts.*

134. She was clearly incorrect in saying that the data was not available. However, we are conscious that Ms Shitta did not in fact complete a report until 17 August 2021, after the claimant had made his claim. He has in no other part of this claim complained about the conduct of Ms Shitta. He has identified no reason why she might discriminate against him. We are faced with a situation of only less favourable treatment and difference in race without any other facts to suggest that Ms Shiita would have any animus towards the claimant, either consciously or unconsciously, due to race. In such circumstances we find the burden of proof not to shift.

135. Miss Ibbotson informed us that the reason Ms Shitta had not given evidence at the hearing was she is on maternity leave. She consequently was unable to provide any explanation for why she had ignored the claimant's evidence. However we note and find that even if the burden were to shift, there is no evidence that the claimant was in fact prevented from booking any bank shift between March and December 2020. The only example he has been able to identify where he attempted to book a bank shift and was unable to was on 17 January 2021, during the period for which Ms Shitta did have and consider evidence. We therefore find that consideration of the 2020 data would not have changed the outcome of the investigation report at all. As a result, the impact on the claimant would have been exactly the same had the data been included or not. Therefore even if this claim were to succeed, which it does not, there would be no additional injury to feelings as a result of Ms Shitta's omission.

136. Turning to the right of appeal, the Dignity at Work policy simply does not have a right of appeal against the outcome. The claimant referred to the ACAS code of practice as requiring a right of appeal. While the ACAS code of practice provides suggestions on procedures that should be followed, it is open to organisations to develop their own procedures. Failure to follow the ACAS code of practice is not itself a cause of action in the tribunal, it is merely a factor that may affect the level of compensation for certain successful claims. We have no doubt that no employee would have been given a right of appeal against the review of the claimant's complaints, based on Ms Shitta's investigation and therefore it is clear that there was no less favourable treatment of the claimant.

137. The complaint about the consideration of the witness evidence is slightly more complex. It relates to the first of the allegations that Ms Shitta considered. It is most helpful to look at this from the point of view of the claimant to understand where his complaint comes from before turning to the explanation of the respondent. Ms Shitta says:

> *3. Atit Patel and Deljo Cyriac observed the altercation between Nurur and Vladmir on the 27th of March 2021. The disagreement was as a result of a membrane replacement task prompted by the ABG machine see appendix 9.3. Vladmir confronting Nurur on this issue led to a disagreement. Atit said he observed Vladmir raising his voice and behaving in an aggressive manner towards Nurur. Atit described Vladmir as being angry at Nurur because he didn't undertake the task. Deljo Cyriac confirmed he observed Vladmir confront Nurur on the outstanding task which made him feel uncomfortable because he felt as a junior staff he shouldn't have observed the disagreement nor been dragged into it.*

138. The claimant particularly notes the comment that Mr Patel observed Mr Patelca raising his voice and behaving in an aggressive manner towards the claimant. However, Ms Shitta did not uphold the allegation to which this evidence was connected. Indeed she said there was "no evidence to substantiate this allegation". There appears at first sight to be a dissonance between the conclusion that there was "no evidence" and there being a witness to aggression.

139. Mr Finch explained the reason for this as follows. The allegation that Ms Shitta was considering was not that Mr Patelca was aggressive or raised his voice. The specific allegation in the investigation report is:

> *Vladimir had made slanderous and defamatory remarks towards Nurur.*

140. Mr Finch explained that there is no contradiction between her concluding that Mr Patelca did not make slanderous or defamatory remarks, and the evidence that he was aggressive and raised his voice. To put it simply he could aggressively and loudly state the truth.

141. We accept Mr Finch's explanation. It is not an explanation for the reason for less favourable treatment, but actually an explanation that there was no less favourable treatment in the first place.

Conclusion

142. We have carefully considered all the claimant's allegations.

143. For the reasons given above we find none of the claims of direct discrimination to succeed. To summarise:

(a) For issue 1 we find that the claimant not having access to iPoint or training on it had nothing whatsoever to do with his race.

(b) For issue 2 the claimant has failed to prove any facts from which we could conclude that he was restricted and/or prevented from booking bank shifts because of race.

(c) For issue 3 the claimant has failed to prove any facts from which we could conclude that he was excluded from the award of Team of the Month because of race.

(d) For issue 4 the claimant has failed to prove any facts from which we can conclude that the respondent failed to properly investigated

complaints made on 5 February 2021 or 28 March 2021 because of race.

(e) For issue 5 the claimant has not shown that he was subject to less favourable treatment by being required to record his annual leave electronically and on paper.

144. For the reasons given above we find two of the claims of victimisation to succeed. These are:

(a) 7. On 30 March 2021, a note was recorded on the shared staffing record (MAP), that Mr Petelca 'had a confrontation with Nurur'.

(b) 15. On 21 June 2021, Mr Aldridge raised a bullying allegation against Mr Atit Patel and the Claimant, on behalf of a junior technologist, Ms Ayodele Ross.

145. For the reasons given above we find the rest of the claimant's claims of victimisation to fail. To summarise:

(a) Issues 2, 3, 9, 10, 14 fail because we find there to have been no detriment.

(b) Issues 1, 11,12 fail because the claimant failed to identify facts from which we could conclude in the absence of any explanation that the detriment was because of the protected act.

(c) Issues 4, 5, 8,13, 16 fail because we find that the detriment had nothing whatsoever to do with the protected act.

(d) Issue 6 fails because Mr Patelca did not know about a protected act on 27 March 2021.

146. The harassment claim fails because the claimant was not compelled to use WhatsApp outside working hours but even to the extent he was encouraged to use WhatsApp, this had nothing whatsoever to do with race.

Tribunal Judge D Brannan, acting as an Employment Judge
Dated: 12 April 2023