Case Number: 3323919/2016

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Karim	v	The Hillingdon Hospitals NHS Foundation Trust

Heard at: Watford **On**: 3-6 July 2017

Before: Employment Judge Hyams **Members:** Mr D Bean
Mr A Kapur

Appearances:

For the Claimant: Mr T Welch, of Counsel

For the Respondent: Ms M Stanley, of Counsel

JUDGMENT

(1) The claimant was not discriminated against by the respondent indirectly, i.e. within the meaning of section 19 of the Equality Act 2010.

(2) The claimant was not harassed by the respondent or by any person for whose acts the respondent is vicariously liable, within the meaning of section 26 of that Act.

(3) The claimant was not victimised by the respondent or by any person for whose acts the respondent is vicariously liable, within the meaning of section 27 of that Act.

REASONS

Introduction; the claims

1 The claimant is employed by the respondent as a catering assistant. He claims in these proceedings that the respondent has indirectly discriminated against him contrary to sections 19 and 39 of the Equality Act 2010 ("EqA 2010"), having applied to him a provision, criterion or practice which was discriminatory in relation to religion or belief. The claimant also claims that the respondent, through its employees, harassed him contrary to sections 26 and 39 of the EqA 2010 and/or victimised him contrary to sections 27 and 39 of that Act.

2 The claimant's case was refined at a preliminary hearing held by Employment Judge Southam on 7 September 2016, with the issues stated over 3 pages, in the document at pages 34-36 of the bundle, and was further refined during the hearing before us, including by him acknowledging that he was wrong to claim that he had been "denied a day off to attend a funeral on 23 January 2016". In summary, the claimant's claims as refined by the end of the hearing before us were that the respondent had indirectly discriminated against by him requiring him to change his shift pattern from a 2-day roster, working on Saturdays and Sundays from 7.00am to 3.00pm on both days, to a roster under which he worked both during that period on some weeks and from 12.30pm to 8.30pm on other weeks. That was claimed by the claimant to constitute indirect discrimination because it prevented him from being able to spend time in religious contemplation of the sort to which we refer further below every evening for the periods to which we refer further below. The claimant in addition claimed that he had been harassed by (1) the changing of his shift pattern, (2) "[r]ude and abrupt behaviour" on the part of Mr Blackman, and (3) "Being forced to work under harsh conditions (in particular being made to mop the floor and lift heavy items on 23 January 2016)". Those things were also alleged by the claimant to have been done in part because he had made allegations of discrimination against him because of religion or belief in the course of his employment. Those allegations were made in the course of his stated opposition to the proposed new shift pattern to which we refer above.

3 At the start of the hearing, the claimant applied through Mr Welch for permission to amend his claim by claiming that the acts of Mr Blackman and Mr Shah to which we refer above were committed by them not only because he had asserted the right in 2015 not to be discriminated against because of religion or belief but also because he had complained about their conduct in 2012. The amendment was not the subject of any particularisation, but was made by reference to two paragraphs of the witness statement which the claimant put before us as his evidence in chief. That witness statement was served after a further preliminary hearing which occurred on 6 April 2017 when Employment Judge Lewis gave the claimant permission to serve a replacement witness statement, i.e. one which replaced a witness statement

which the claimant had previously served. We refer below to the replacement statement simply as the claimant's witness statement. Thus, the claimant's witness statement was written with the benefit of having had sight of the respondent's witness statements. There were in the claimant's witness statement these three paragraphs which we took as the additional allegation of the claimant of victimisation within the meaning of section 27 of the EqA 2010:

> "**B. The 2012 discrimination claim**
>
> 9. David Blackman ("DB") is and has for many years been my direct line manager. In 2012 DB was involved in a claim for discrimination I made against Sodexo.
>
> 10. In 2012 DB made derogatory and discriminatory comments aimed at my religion. This culminated in proceedings being bought [sic] against Sodexo. The proceedings, and pleadings, are set out in the supplementary bundle [SB pp 58-65]. The claim resulted in a settlement.
>
> 11. I find it odd that DB and SS have both claimed in their witness statements that they did not know of my faith and DB suggests he was unaware of the 2012 proceedings. Both DB and SS are named in the pleadings [SB pp 64- 65] and it is not credible they would not have known abut [sic] the claim."

4 Thus, the additional element of the claim was that Mr Blackman had been the subject of a claim in 2012 which alleged that he had "made derogatory and discriminatory comments aimed at [the claimant's] religion" and that he had dealt with the change to the claimant's shift pattern in the manner in which he had done (which was to the claimant's detriment) in part because the claimant had made that claim in 2012. It was also that Mr Shah had subjected the claimant to a detriment because the claimant had made that allegation.

5 One of the orders which resulted from the preliminary hearing before Employment Judge Southam was for the particularisation of the claimant's claims of rude behaviour by Mr Blackman and the occasions when he made allegations of "religion/belief discrimination (in that he was being denied the ability to observe Islamic prayers due to a change in his shift patterns)". The further particulars were at pages 39-50 of the main bundle. They included a number of further allegations, which were outside the scope of the claim as recorded by Employment Judge Southam.

The evidence

6 We heard oral evidence from the claimant on his own behalf and from the following witnesses on behalf of the respondent: (1) Mr David Blackman, Catering Operations Manager, (2) Mr Syed Shah, Supervisor – Patient Dining Services Team, (3) Mrs Anne Byrne, Business and Performance Manager – Facilities, (4) Mr Stephen Wedgwood, Assistant Director of Facilities, and (5) Mr David Searle, Director of Strategy and Business Development. We read the documents referred to by those witnesses in their witness statements and such other documents in the bundle put before us to which we were otherwise referred. Having done so, we made the following findings of fact. In doing so, we state how we resolved the conflicts of evidence which arose.

The facts

7 The respondent is responsible for the operation of two hospitals: Hillingdon Hospital and Mount Vernon Hospital ("Mount Vernon"). The claimant started working at Hillingdon Hospital in about August 2003, when he started working for a business called Medirest, which was a business operation of Compass Services UK Limited. In about November 2007 the business of Medirest was acquired by Sodexo Healthcare ("Sodexo"). That transaction was covered by the Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246 ("TUPE").

The claimant's 2012 grievance

8 In 2012 the claimant stated a grievance which was heard by Sodexo on 22 October 2012. In November 2012, the business of Sodexo in which the claimant was employed was integrated into the operations of the respondent, which took in-house the catering operation in which the claimant was employed. That transaction was also covered by TUPE.

9 The outcome of the claimant's 2012 grievance was the subject of an appeal. That appeal was heard by Mr Wedgwood and was determined by him in a letter dated 21 December 2012 of which there was a copy at pages 205A-205B of the main bundle. There was no mention in that letter of either Mr Shah or Mr Blackman, but Mr Wedgwood told us (and he was not challenged on this by Mr Welch) that in the 30 or 40 pages of documents which he saw at that time, there was a mention of the "washing comment" to which we refer below as having been made by Mr Blackman. The grievance was, said Mr Wedgwood, principally about the acts of Ms Lyndsay Jarra. Mr Wedgwood did not recall any complaint on the part of the claimant about any kind of discrimination because of religion or belief, and we accepted that he did not do so.

10 The claimant disclosed some documents (but clearly not all of the documents) which were created in connection with a claim which he subsequently made in the county court of (1) a breach of the Data Protection Act 1998, and (2)

harassment (presumably contrary to the Protection from Harassment Act 1997). They were in a supplemental bundle only parts of which were relied on by Mr Welch, and which we identify below by the use of the letters "SB" before referring to a page from that bundle. There was at SB64-SB67 a copy of a set of particulars of claim which was unsigned, but had the date "27/11/2013" written by hand at their top, i.e. on page SB64. There was a notice of issue at page SB60, which showed that the claim was received by the county court on 21 January 2014 and issued on 23 January 2014. The claim was made against (1) Sodexo and (2) the current respondent as the first defendant and the second defendant respectively. There were in the particulars of claim two references to the conduct of Mr Blackman and Mr Shah as elements of the "Particulars of Conduct" which were stated to constitute harassment. In paragraph (c) on page SB64, this was said about Mr Blackman:

> "On or about 7th November 2010, Mr David Blackman, an agent or employee of the First Defendant, blocked the Claimant's path at about 2pm, approached the Claimant and began making funny but very offending gestures, whilst stating "You need to, you need to, you need to umm ... wash!! You need to wash ...". The Claimant is a member of the Islamic faith and considered the actions and/or words used to be derogatory and/or prejudicial."

11 Mr Shah's conduct was the subject of sub-paragraphs (d), (e), (f) and (I) of the same paragraph, i.e. the things described in those paragraphs were also claimed "Particulars of [harassing] Conduct". Only Ms Jarra's conduct was otherwise described in those Particulars of Conduct, although at their end, in paragraph (m), this was said:

> "Concerns raised by the Claimant to Ms Kim Joyce and/or Mr Steve Wedgwood of the Second Defendant in or about November and December 2012 were not investigated adequately or at all."

12 The claimant said that the case was settled. There was no record of any settlement in the papers of which we were given copies, although there was a copy (at SB59) of an offer made by the claimant to settle that claim. In cross-examination, it was put to Mr Blackman that he was well aware that the claimant was a Muslim. Mr Blackman said that he was not at all so aware. He accepted, however, that he was asked by Ms Maureen Briggs about a conversation which he had with the claimant at some point before 2015 and that the gist of the allegation in paragraph (c) on page SB64 (set out in paragraph 10 above) was put to him. He said also that he was asked by Ms Briggs whether he knew that the claimant was a Mufti, and he said that he did not. His oral evidence about what had occurred when he had had that conversation with the claimant was that he had seen the claimant outside Hillingdon Hospital as he (Mr Blackman) was on his way to work, at 9.00am one day. The claimant was smoking. Mr Blackman later on that day came across the claimant in the hospital building and asked him why he had been

smoking, outside the building, at 9.00am. The claimant said that he was just having a smoke. Mr Blackman said that he should not have done that, as it was not a break-time of the claimant's. Mr Blackman also said to the claimant that he smelt disgusting, and that he needed to change his shirt. The claimant said that he had only one work-shirt (they were supplied by the respondent). Mr Blackman said that he would organise some shirts, but said also that the claimant should wash his arms on both sides.

13 Mr Blackman's oral evidence was that he had on only one other occasion spoken to an employee about his or her smell and the resultant need to wash. He justified speaking to the claimant about his smell on the basis that he was delivering food to patients on a trolley, and that it would be unpleasant for them to have the food accompanied by a strong body odour. We accepted that Mr Blackman's speaking to the claimant on that occasion was entirely justified for the reason given by Mr Blackman and that it was in no way connected with the claimant's religious beliefs or practices. We noted too that even in 2013, the claimant was not saying that Mr Blackman had overtly said anything which was critical of the claimant's religion. However, the first sentence in paragraph 10 the claimant's witness statement was (see paragraph 3 above) in rather different terms. We concluded that that sentence was not accurate, i.e. we concluded that it was not true.

The change in the claimant's shifts

14 The claimant referred in paragraph 12 of his witness statement as the next relevant event to him receiving "a letter (unsigned and untitled) from the respondent [SB 216-221] stating that my hours would be changed and that I might be rostered to work either 7.00-15.00, 08.00-16.00 and 11.30.2030" (sic). Mr Blackman's evidence (in paragraph 10 of his witness statement) was that he had a meeting with the claimant and the only other catering employee of the respondent who worked only at weekends, Ms Rukhsana Bibi, on 20 June 2015, to inform them that Mrs Byrne was preparing a consultation paper and that her review of the service had "highlighted the need for hours and rosters to be modified." Mr Blackman said also that he had on that occasion informed the claimant "that the consultation paper would be released on 23 June 2015 and that one-to-one consultations with staff would follow, in line with the Trust's Managing Organisational Change policy." It was put to the claimant in cross-examination that he had had a meeting with Mr Blackman and Ms Bibi on 20 June, but he refused to accept that he had done so. He said this: " No; it was 11 July when he told me with another member of staff." However, at no time before saying that in cross-examination did the claimant assert that the meeting which he had with Mr Blackman on 11 July 2015 (about which they both gave evidence; we refer further below to the meeting of 11 July 2015 and the evidence concerning it) was in the presence of anyone else. Given that factor, but also because we accepted Mr Blackman's evidence in preference to that of the claimant about the meeting of Mr Blackman with the claimant and Ms Bibi on 20 June 2015 (which, we noted,

was a Saturday), we concluded that the claimant was informed on 20 June 2015 of the forthcoming issue of the consultation paper written by Mrs Byrne and that Mr Blackman was intending to hold an individual consultation meeting with the claimant (and Ms Bibi) after that paper had been issued.

15 The documents which the claimant received on 23 June 2015 were those at pages 206-207 (the consultation paper written by Mrs Byrne), page 209, which stated the shifts which it was proposed the claimant would be required to work, and the job description for a catering assistant, of which there was a copy at pages 101-103. The document at page 209 wrongly said that the claimant might be rostered to work at Hillingdon Hospital at the following times: 7:00 to 15:00; 8:00 to 16:00, and 11:30 to 20:30; in fact 8:00 to 16:00 shifts were not going to be worked by catering staff at that hospital, and the final shift time was to be 12:30 to 20:30, and not 11:30 to 20:30.

16 The document at page 209 concluded with this paragraph:

> "Time has been allocated for one to one meetings with David Blackman on 1st - 2nd -7th -8th and 11th July 2015
> If you would like to arrange a meeting please contact your Supervisor."

17 The claimant did not contact his supervisor, who was Mr Shah (who himself reported to Mr Blackman) to arrange a meeting. Nevertheless, Mr Blackman, who did not usually work at weekends, went to Hillingdon Hospital and sought out Ms Bibi and the claimant and spoke to them about the proposal to change their shift patterns.

18 There was a major material conflict of evidence between the claimant and Mr Blackman about what happened at their meeting of 11 July 2015. Mr Blackman's evidence was that he informed the claimant of the two errors to which we refer in paragraph 15 above, at which point the claimant said that he wanted to work only 7am to 3pm shifts, i.e. continue to work only his current shifts. Mr Blackman's witness statement evidence about what happened then was this:

> "I explained to him that we had two people working weekends; he and Ms Bibi (who at this time had asked to reduce her hours and work only 7am to 3pm); and thus, in the interests of fairness, they should each be able to do the early shift on alternate weeks. At this point in the conversation, Mr Karim informed me that he attends the library in the evenings to study but that he could reschedule his studies to the mornings. We also discussed other shift patterns and vacancies in order to establish if there were any positions that more suited his preference to exclusively work an early shift pattern. I pulled up a list of all of the vacancies and corresponding shift patterns on my computer and we scrolled through to find potentially suitable options. I suggested

> a role at the Mount Vernon site which was exclusively weekend early shifts (Saturday and Sunday 8am to 4pm) and would fit in with his studies but he declined that option on the basis that the Mount Vernon was too far for him to commute to. I understand that Mr Karim now alleges that I 'threatened' him with moving to the Mount Vernon Hospital and I categorically deny this. We were collaboratively discussing possibilities. I also offered Mr Karim the option of working on early shifts on a 30-hour roster from Thursday to Sunday 7am to 3pm, as this was achievable within the parameters of the business requirements. Mr Karim declined this offer, explaining that he studied during the week so could not work. However, he seemed amenable to the suggestion of alternating weekends with Rukhsana Bibi on early and late shifts and he confirmed at the end of the conversation that he would let me know if he had any issues in this regard."

19 The claimant's evidence about and in relation to what happened at the meeting of 11 July 2015 was in paragraphs 16-27 of his witness statement. In no place there did he give any indication that Ms Bibi was present at the meeting. We noted that in paragraph 17 he said this:

> "I have always had a difficult relationship with [Mr Blackman] because of the previous discrimination I have set out above."

20 However, the claimant said in oral evidence that he hardly ever saw Mr Blackman because Mr Blackman was hardly ever at the hospital at weekends, and that in any event, he avoided seeing Mr Blackman. Mr Blackman said that he worked "predominantly" during the normal working week (i.e. Monday to Friday) and that he could recall seeing the claimant in addition to the time when he spoke to him about his shirt only on 20 June and 11 July 2015. Given those factors, we concluded that what the claimant said about having had "a difficult relationship" with Mr Blackman before 20 June 2015 was simply not true. The only thing that the claimant found difficult about Mr Blackman was the fact that he had tackled the claimant about (1) smoking when he should not have been and (2) his personal hygiene.

21 Paragraph 22 of the claimant's witness statement was in these terms:

> "I very clearly told DB that I wanted to be flexible and I agreed that I could change my hours to work 08.00-16.00 along with my normal working hours of 07.00-15.00. However, I was equally clear that I could not work the shift 11.30-20.30 because this interfered with my religious practice of prayer and other religious observance, as I have set out in this witness statement above. Additionally, I said I attend the library in the evenings which also prevents me from working a late evening shift."

22 The words "as I have set out in this witness statement above" were a reference to what the claimant had put in paragraph 7 of his witness statement, which was in these terms:

> "I am an observant Muslim. It is a personal manifestation of my religion [to] observe prayers and other Islamic practices. This includes FARZ which is commonly known as the 5 Islamic prayers which must be performed each day. FARZ means that I am under an obligation to pray 5 times each day between 5pm and 6pm I pray. This prayer is commonly known to Muslims as ASAR. Around 1 and a half hours after ASAR (but depending on the precise time of sunset), I observe a further prayer. This prayer is commonly known to Muslims as MAGHRIB. Then, during sunset (between ASAR and MAGHRIB) I observe what is termed NAWFIL. My own practice of NAWFIL requires me to be available and not working past about 5pm at the latest. NAWFAIL is not a prayer as such but an Islamic practice during which a Muslim can feel close to God. I refer to a statement made by Muhammed Ali, a qualified Mufti, setting out the Islamic practices [SB 208-209]."

23 We set out the statement of Mr Ali below, almost in its entirety, because it was highly material. We do so after we have finished describing the events in chronological order.

24 Mr Blackman was adamant that the claimant did not refer in the meeting of 11 July 2015 to anything other than going to the library. Except as stated in paragraph 29 below, he had no further personal interactions with the claimant, although he corresponded with the claimant in the following sequence of events.

25 The claimant sent Mr Blackman the letter dated 24 July 2014 at pages 215-221 (the date was corrected by hand in the copy at page 215 to 24 July 2015). Mr Blackman responded on the same day (it was a Friday) in the letter at page 222, in which he wrote this:

> "Further to our meeting on the 11th July 2015 regarding your shift patterns we discussed that
>
> - You will be place[d] on a rolling roster from 3rd August 2015 working late shift and early shift patterns as outlined within your consultation letter dated 23rd June 2015
> - You explained that in the afternoon after working an early you go to the library to study, I went on to explain the two shifts, one week of early and one week of late you stated that you could switch the time you went to the library if you worked a late, you also said you will check the paper sent to you and get back if to me if you had any issues.

> I've received a letter form [sic] you dated 24th July 2014 which I believe to be a mistake (24th July 2015) I would like you to contact me to arrange a meeting with you regarding the consultation and shift pattern, please note you are welcome to invite a union representatives to accompany you.
> My contact information
>
> david.blackman@thh.nhs.uk
>
> 01895 279407
> If you have any queries please do not hesitate to contact me."

26 In his letter of 24 July 2015, the claimant wrote this, and this only (on page 219), about what he did in the afternoons and evenings at weekends:

> "I asked you that I agree on the 7am to 3pm shift as well as 8am to 4pm, but cannot do the late shift. You told me that the allocated shift from 8am to 4pm was a mistake.
> I informed you that I have other engagements in the afternoon on weekends including library attendance. I asked you that so soon I cannot adjust my schedule out of the working hours and I need the same (early) shifts. ...
>
> However, I told you to give me some time and (if possible) I will try to adjust my time but it appears to be difficult for me to adjust my timings as to work on a late shift. ...
>
> I believe that the rolling roster should not be implemented as it impacts on my healthy work/life balance."

27 The claimant then wrote the letter dated 28 July 2015 at pages 224-226 and sent it to Mr Blackman. In that letter, he made no mention of anything to do with religious practice. He said that he did not agree to being placed on a rolling roster as from 3 August 2015 "before having a proper 'consultancy' in the presence of representation". In fact, the respondent then (in the letter from Mr Blackman dated 27 July 2015 at page 223) announced the postponement of the implementation of the new roster "while we are progressing queries raised". The "revised implementation date" was 14 September 2015.

28 On 6 August 2015, Mr Blackman wrote the letter at page 230 to the claimant. Given the way that the claimant's case was put (as we describe below), the whole of its terms were material. They were these:

> "Further to your letter which I received dated 24th July 2015. I would like you to attend a meeting to discuss. I would like to advise you I will be accompanied by Kim Joyce, HR Consultant.

> You have the right to be accompanied by your trade union representative or a friend or colleague not acting in a legal capacity.
>
> Date: 19th August 2015
> Time: 11.30Am
>
> Venue: Choice's Meeting Room Staff Restaurant Hillingdon Hospital
>
> If the proposed date or time is not convenient, please let me know as soon as possible so that alternative arrangements can be made.
>
> If you have any queries please do not hesitate to contact me on 01895-279407".

29 Mr Blackman and Ms Joyce went to that room and waited for the claimant on 19 August 2015. However, the claimant did not attend. Mr Blackman therefore telephoned the claimant to find out where he was. The claimant answered the call and when Mr Blackman said that he and Ms Joyce were expecting him to attend the meeting the claimant said that he was "not coming to any meeting" and that he had posted a letter under the door of the catering office and that the letter contained everything which Mr Blackman needed to know. The claimant then hung up on Mr Blackman.

30 Mr Blackman then went to the catering office and found the letter at pages 231-233. It was dated 17 August 2015. Its second paragraph was in these terms:

> "With regards to my letter of 24th July 2015, and in response to your letter dated 6th August 2015, I would like to mention that I will not attend any further meeting with you as I am fully intended to follow the grievance procedure against your behaviours."

31 On the second page of the letter, there was this passage:

> "You must remember that (while working for the previous employers at the same work place, and being one of the other managers) you are the same person who in 2012 was making very big fun out of my ***major-religious-rite*** called ***Fateha*** and discriminated me (at my work place) on my religious faith and believe." (Sic; all textual emphasis in the original.)

32 On the third page of the letter, there was this passage:

> "Your acts, for not considering any of my concerns including the religious issues and faith, exhibit that you may be guilty for (multiple victimisation) and forcefully trying to put an adverse impact on my

> healthy work and life balance. You cannot interfere with my rights of choosing my own life and its routines.
>
> Let me inform you that on 29th July 2015 at around 10:36 a.m., I met with Mr A Callender, who had decided to see you (the manager), in order to explain my situation and my obligatory commitments in the afternoon including my prayers and attending the library etc., and for that very reason I have been working on my early shifts continually for the last 12 years."

33 These were the first references made by the claimant in the correspondence with Mr Blackman to his (the claimant's) religion or beliefs. In oral evidence, the claimant said that it was because he wanted before then to be polite and not to "aggravate the situation". He said that he felt "suffocated" and "psychologically depressed".

34 Equally, it was in the letter dated 17 August 2015 that the claimant first said that he felt threatened in the meeting of 11 July 2015 for the following reason (stated at the top of page 232):

> "In the letter (by hand on 26th July 2015 through a staff) you did not mention about your ***threat*** (your proposed decision to make me go to Mount Vernon Hospital if I insist on an early shift). I consider it as a threat (***causing harassment***) that if I did not accept the changes by force then you would change my work place. You should know that nothing like that was notified in the proposed changes letter (written to me) or mentioned that you would change my work place."

35 Mr Blackman's evidence about what happened in that regard was in paragraph 13 of his witness statement, and was this:

> "I suggested a role at the Mount Vernon site which was exclusively weekend early shifts (Saturday and Sunday 8am to 4pm) and would fit in with his studies but he declined that option on the basis that the Mount Vernon was too far for him to commute to."

36 Mr Blackman strenuously denied threatening the claimant by saying that if he did not accept the rolling shift pattern then he would be transferred to work at Mount Vernon to work two 8am to 4pm shifts, and Mr Blackman (in paragraph 14 of his witness statement) categorically denied that the claimant had said to him that he (the claimant) "could not undertake late shifts for religious reasons, namely because he needed to pray" and said in that paragraph that the claimant "did not mention either religion or praying to me at any point during this meeting."

37 We accepted Mr Blackman's evidence on both of those matters. We did so not only because we found him to be a truthful witness, doing his best to tell

the truth to us, but also because the claimant's explanation for not raising the issue of his religion before doing so in his letter dated 17 August 2015 was implausible, given that the letters of 24 and 28 July 2015 were written in rather confrontational terms, so that the addition of a reference in them to the claimant's religion and religious practices would have made them in no way more confrontational than they already were. Furthermore, as far as the question of moving to work at Mount Vernon was concerned, at page 219, in the letter of 24 July 2015, the claimant wrote this:

> "You at that time offered me that you can give me an early shift in Mount Vernon Hospital, which I told you that it will be impossible for me to travel to Mount Vernon in order to be (in time) for an early shift starts at 7am (as I travel by buses and on weekends the buses are not regulated regularly, at the same time approximately 3 or more hours would be used to travel up and down journey."

38 In that passage, the claimant referred to an "offer", and did so in terms which were consistent only with Mr Blackman having truly made an offer and not a threat.

39 In a letter addressed to Mr Wedgwood and dated 26 August 2015 (pages 235-241), the claimant stated the grievance that he indicated in his letter of 17 August 2015 would be made by him. Mr Wedgwood heard that grievance on 3 September 2015, and sent the letter dated 4 September 2015 at pages 248-250 to the claimant, rejecting the grievance. On 18 September 2015, the claimant appealed against that outcome, in the letter addressed to Mr Searle at pages 257-261.

40 In the meantime, the respondent postponed the implementation of the new roster pattern (i.e. for the whole of the catering team). Mr Blackman notified the claimant and the other affected employees of that postponement in a letter dated 11 September 2015 of which there was a copy in the bundle at page 256. The date for the implementation was postponed to 2 November 2015. The postponement was for operational reasons unrelated to the claimant's complaint.

41 Mrs Byrne then sought to obtain the claimant's agreement to working the new shift pattern. After some correspondence, she had a meeting with him on 23 October 2015. She recorded the content and outcome of that meeting in the letter at pages 291-292 dated 27 October 2015. Mrs Byrne's notes for the meeting, and her additions to it as a result of the meeting, were at pages 287-289. We accepted that those documents were accurate records of what was said and done by Mrs Byrne and the claimant at that time. One of the things which Mrs Byrne did was suggest that the claimant completed a "flexible working request" in order to press his request to work only the early shifts at Hillingdon Hospital on Saturdays and Sundays.

42 The claimant responded in the letter dated 29 October 2015 at pages 293-296. Among other things he stated that he would work the new shifts under protest and that he would not complete a flexible working request. That has occurred. The claimant has since then worked those shifts, and he has not made a flexible working request.

43 On 4 November 2015, Mr Searle heard and dismissed the claimant's appeal against the dismissal by Mr Wedgwood of the claimant's grievance. Mr Searle's letter stating that outcome was dated 1 December 2015 and was at pages 344-346.

The claimant's interactions with Mr Shah

44 The claimant's evidence about what happened on 23 January 2016 was in paragraph 55 of his witness statement. So far as relevant, it was this:

> "SS [i.e. Mr Shah] told me to broom and mop the area of 'pick and pack' (rooms and a corridor). I told him the cleaning machine was out of service and without this I would have to do it by hand which would be heavy on my physical conditions, it will exaggerate my muscular activity and may be painful, as I was not allowed to lift a weigh[t] in excess of 5kg. It was clear from risk assessment as being unsuitable for me to undertake. Despite this SS told me to get on with it. A work colleague Mr Irshad wanted to help at that time but SS did not permit him."

45 Mr Shah's evidence was to a different effect. So far as relevant, he said this in paragraph 26 of his witness statement:

> "Mr Karim appeared happy to mop, and knew exactly what he was doing having carried out this task as part of his role for many years."

46 In fact, there was an exchange of correspondence about the event at the time: the claimant first complained about the situation in a letter of which there was a copy in the bundle at pages 356-360, which he addressed to Mr Shah. That letter was dated and apparently sent on 27 January 2016. The claimant's description of the events at page 359 was markedly inconsistent with that which was in paragraph 55 of his witness statement. It was different in that (1) the claimant wrote at page 359 that he was asked by Mr Shah to do the mopping up at about 12:25 on 23 January 2016, (2) the claimant made no mention at page 359 of saying to Mr Shah at that time that he (the claimant) was not happy about doing the mopping, and (3) the claimant wrote at page 359 that at about 13:00, Mr Shah came back into the area where the claimant was, and that at that time the claimant "wanted to speak that the task was very heavy and painful." The claimant continued (in the letter at page 359):

> "But without listening to me you told me to re-do the corridor because when the floors were wet some trolleys were taken into the room and that have left the marking on the floor. You also said that I should squeeze the mop tightly because the mop remains wet causing the floor remain wet for longer.
>
> By the time when you were speaking to me (about what I have mentioned in the above paragraph) you had another staff standing next to you but you did not instructed that staff to help me out or you did not listen to me."

47 Thus, the claimant did not say that he actually spoke to Mr Shah: he merely "wanted" to do so. If and to the extent that the claimant did start to vocalise any complaint, according to his own reasonably contemporaneous account, Mr Shah did not listen to him. That is a far cry from drawing to Mr Shah's attention a risk assessment and saying that what he (the claimant) was being asked to do was inconsistent with that risk assessment.

48 There had, indeed, been a risk assessment carried out in relation to the claimant's then-current physical state, and it was in the bundle at pages 374-377. The claimant's complaints in his letter of 27 January 2016 to Mr Shah were investigated by Ms Penny Lambert, the respondent's Patient Dining Manager. She wrote a detailed letter in response to the complaints. It was dated 8 February 2016 and there was a copy at pages 363-365. Her letter included this passage (on page 364):

> "I would like to take this opportunity to remind you of what we discussed and was covered in the risk assessment:
>
> - Being unable to raise your right arm above mid-chest height, whilst holding any item.
>
> - The non-lifting of items, above 5kg.
>
> ...
>
> - Should you feel that you were unable to complete a task you should ask for help.
>
> I recall asking you and Syed Shah if there were any further tasks that you completed that required me to assess, your response was that there was no other task that you had a problem with."

49 Given all of those factors, we did not accept the evidence of the claimant in paragraph 55 of his witness statement and we preferred the evidence of Mr Shah in paragraphs 24-30 of his witness statement. The latter evidence included that Mr Shah was not aware of the raising by the claimant of

concerns about his ability to practise Nawfil at his preferred time, in the evenings, on alternate weekends. While it was put to Mr Shah that he and Mr Blackman had a close relationship so that Mr Shah must have known about those concerns, we noted that the first letter in the sequence of letters in which those concerns were (eventually) raised, sent by the claimant on 24 July 2015, at pages 215-221, was in large part concerned with the Data Protection Act 1998 and confidentiality, so that Mr Blackman was thereby put on notice (if he was not already aware) that the claimant would complain about any discussion with for example Mr Shah about the claimant's personal concerns. In fact, it was not put to Mr Blackman that he had (or may have) told Mr Shah about the claimant's concerns. In any event, we accepted that Mr Shah did not know about the claimant's complaints concerning the impact of the proposed new shift pattern on his ability to practise Nawfil at his preferred time.

50 In addition, Mr Shah was cross-examined closely on the basis that he did not like the claimant. Mr Shah was adamant that he had nothing against the claimant and that his relationship with the claimant was a normal one of supervisor and supervised employee. We accepted Mr Shah's evidence in that regard.

51 As for Mr Shah being motivated by the complaint of discrimination made by the claimant against Mr Blackman before 2015, that complaint was at its highest as stated in paragraph (c) on page SB64 (which we have set out in paragraph 10 above). There was no reason for Mr Shah to have been told about that complaint. It was put to him in cross-examination that the claimant had made allegations of discrimination against him in 2012, but Mr Shah said that he was not aware in 2012 and had not been aware until "recently" that the claimant had made any allegations about his conduct in 2012. We accepted that Mr Shah was not told of any complaints of discrimination against him in 2012 (or even in 2014) not least because there was no record in any documents put before us of a complaint of discrimination on the part of Mr Shah at those times, and because Mr Wedgwood had no recollection of any complaint of discrimination of any sort having been made by the claimant in the 2012 grievance which he (Mr Wedgwood) considered in 2012.

The statement of a Mufti relied on by the claimant about Nawfil

52 The claimant put before us a statement written by a Mr M Ali, an "Islamic Mufti". It was at pages SB208-209. It was highly material and its relevant passage was in these terms:

> "I am asked to clarify the difference between the 5 Mandatory Prayers called Faraz and the Nafil applications as religious practice.
>
> (A) I can verify/ confirm (without any doubt) that in Islamic religion, there are 5 Mandatory Prayers namely (I) Fajar (ii) Zohar (iii)

Asar (iv) Mughrib (v) Isha. These mandatory prayers have their own (different timings) to offer. Their timings are observed by the movement of the Sun and its shadow. These Mandatory Prayers can be offered collectively by following one leader called (IMMAM) or may also be alone when IMMAM is not available to lead.

(B) These 5- FARAZ are different and completely separate than the Nafil (religious practice).

(C) Nafil (religious practice) is performed (only) individually and may take time.

(D) Nafil application (religious practice) takes time because it composes different aspects of the religious activities, for example, Reading Holy QURAN, Tasbihaat, Zikar and Azkaar: lot of different recitations: many wazaif in routines etc.

Some people make it a routine in their life to spare few hours to practice Nafals as per their religion Islam (as it is highly beneficial and advantageous).

In Islam, a Nafal (religious practice) or (Supererogatory prayers) is a type of optional Muslim Salah (Formal Worship). As with Sunnah prayers, the Nafil are different and practiced to confer extra benefit on the person performing Nafil.

Different people prefer different time to perform nafils- religious practice (as mentioned above in point (D) page: 1)

Some people make it a routine to exercise Nafil-practice in the afternoon after performing Asar to the beginning of Mughrib. Asar's time observed by the DOMINENT opinion in the Hanafi Belief is, when the length of any object's shadow is twice the length of the object plus the length of that object's shadow at noon. The Sunni slightly differ on when the time begins. The Maliki, Shafil and Naftali say it is at the time when the length of any object's shadow equals the length of the object itself plus the length of that object's shadow at noon.

The main point in my letter is to clarify that Nafil religious practice is completely different than the Faraz prayers."

The claimant's own evidence about his practice of Nawfil

53 The claimant's evidence in his witness statement about the practice of Nawfil (which Mr Ali referred to in the main as "Nafil") was in paragraphs 7 (which we have set out in paragraph 22 above) and 62-63. Paragraph 63 was in these terms:

> "I have been left unable to fully practice my religion since being forced to work the late shifts in that I am [unable] to perform NAWFAL as my own personal observance of NAWFIL requires me to perform it before Sunset and therefore, be home from work no later than 4pm or 5pm (depending on timings of Sunset)".

54 However, Mrs Byrne recorded this in her letter of 27 October 2015 at pages 291-292:

> "Following this conversation I asked you what shift pattern was agreeable for you, to which you responded that your preference was to stay as you are on the current rota 07-00 - 15.00, Saturday and Sunday. You advised that you are unable to work the full late shift to 20.30; the latest you could stay is 16.00. You further went on to explain the reason you need to work these particular shifts is due to your planned visits to the library and preparation for your religious prayer which you said you practice on Tuesday Saturdays and Sundays from 17.30 pm."

55 In oral evidence, the claimant said that the evening was the "best time, the recommended time" for the practice of Nawfil. He accepted in cross-examination that other Muslims performed Nawfil in the early morning and at midday, although he said that it was not recommended to do it at midday.

The respondent's document entitled "Managing Organisational Change"

56 Reliance was placed by Mr Welch in his closing submissions on the precise terms of the respondent's document entitled "Managing Organisational Change", of which there was a copy at pages 152-186. We noted that the meeting of 11 July 2015 between Mr Blackman and the claimant was not expressly provided for in that document (in paragraph 11 at page 163), but that after the apparently-intended first formal meeting provided for in paragraph 11.1 of that document, paragraph 11.2 provided:

> "The appropriate manager should continue to meet with the individual employee/s on a regular basis throughout the period of change to discuss progress and any concerns the employee/s may have."

Mrs Byrne's evidence about the reasons for the rostering change

57 Mrs Byrne's evidence about the reasons for the change in the rostering of staff in the catering teams was in part in some of the documents before us and in part given by her in oral evidence. She told us (and this was not in the documents or in her witness statement, but we accepted her evidence in this regard) that one of the concrete benefits of the new regime was that the ward housekeepers did not need to (1) go down to the catering facilities and collect meals on trolleys, and (2) go there to pick up provisions 2-3 times a week.

Instead, the housekeepers were going to be able to spend all of their time on the wards, carrying out their main intended duties.

58 Mrs Byrne's evidence was also that the proposed new rostering pattern would promote the development of the respondent's permanent staff and maximise the avoidance of the use of agency staff. In addition, as she said in the final sentence of paragraph 5 of her witness statement:

> "The objective was to work towards having an overall catering team rather than separate patient dining and retail units and in doing so, reduce the Trust's spend on agency staff and recruit to a large number of permanent vacancies."

59 We accepted that evidence of Mrs Byrne. In addition, we accepted that the following paragraph in the document at page 206 was both genuine and well-founded:

> "**Aims and objectives of the changes**
>
> The aim of this proposal is to ensure that following the catering services review, changes are made where needed to deliver the services and support the operational and clinical objectives of the Trust. These changes improve the affordability of the services and enable us to respond more flexibly as catering providers. The changes will also reduce the numbers of agency staff needed to support the current services and enable us to identify and recruit to vacancies. Both the Chef and Catering Assistants job descriptions have been revised to meet the needs of the service. Copies are attached with this document."

The relevant law

60 Section 19 of the EqA 2010 is in these terms:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are— ... religion or belief".

61 In *Eweida v British Airways plc* [2010] ICR 890, the Court of Appeal considered the application of the predecessor to section 19 to the protected characteristic of religion or belief. In paragraph 15, Sedley LJ said that the natural meaning of what is now section 19(2)(a)-(c) is that "some identifiable section of a workforce, quite possibly a small one, must be shown to suffer a particular disadvantage which the claimant shares."

62 Paragraph 20 of the judgment of Sedley LJ (with which Carnwath and Smith LL agreed), was, we found, helpful here. That paragraph is in these terms:

> "Part of Ms Monaghan's argument has been a criticism of the tribunal for looking for some "barrier" to the manifestation of faith in BA's uniform code, when all that is required is a disadvantage. I have quoted the passage at para 33.5 in which the tribunal use the word (see below the citation from Baroness Hale of Richmond in *Secretary of State for Trade and Industry v Rutherford (No 2)* [2006] ICR 785, para 33.3 from which the word is taken). In my judgment this is a misdirected criticism. The word "barrier" is being used in both instances as a convenient metaphor for the kind of disadvantage described in the legislation; that is all."

63 We noted, but were not in the event required to consider in detail, the discussion in paragraph 18 of the judgment of Sedley LJ about the practical application of the test in section 19(2) of the EqA 2010.

64 Section 26 of the EqA 2010, concerning harassment, applies only where a person "engages in unwanted conduct related to a relevant protected characteristic". Section 27 of the EqA 2010 applies where a "detriment" has been suffered by a person who has done a protected act within the meaning of that section. Although there is (in applying the words of section 27) no need for a comparison to be drawn with other persons who have not done a protected act, it is nevertheless helpful to ask whether or not the claimant has been subjected to less favourable treatment than that to which he or she would have been subjected if he/she had not done the protected act: see paragraph 18 of the judgment of the Employment Appeal Tribunal in *Pothecary Witham Weld v Bullimore* [2010] ICR 1008.

Our conclusions

65 We were given detailed written submissions by both counsel, and we heard additional oral submissions from both counsel. We do not respond below to all of those submissions for the sake of brevity. We took all of those submissions fully into account.

Indirect discrimination

66 The parties agreed that there was a provision, criterion or practice "PCP" within the meaning of section 19 of the EqA 2010 here in the form of a requirement to work to a new shift pattern involving in the claimant's case working on alternate weekends between 12:30 and 20:30 instead of between 07:00 and 15:00.

67 That PCP affected the claimant so far as relevant only in that it interfered with his preferred time of performing Nawfil. The claimant's own best evidence (which was in fact accepted by Mr Shah, who is also a Muslim) was in the statement of Mr Ali which we have set out in paragraph 52 above. While that evidence might have been regarded as expert evidence, and its admission was initially opposed by the respondent on the basis that there was no permission for its adduction, we pointed out that the maker of the statement, Mr Ali, was not present to cross-examined, so that its weight would be a matter for us to judge in the light of that factor. However, we found it to be more helpful to the respondent than to the claimant, in that it drew a clear distinction between the five obligatory prayers and the practice of Nawfil which, as Mr Ali concluded, "is completely different" from those prayers. A key part of the statement was at the top of page SB209, namely that "Different people prefer different time to perform nafils" (which we assumed was a reference to Nawfil). In addition, Mr Ali said that "a Nafal [which we assumed was a Nawfil] is a type of optional Muslim Salah (Formal Worship)". If there was any doubt about the extent to which the performance of Nawfil was optional, it was extinguished by the words in the preceding paragraph, namely:

> "Some people make it a routine in their life to spare few hours to practice Nafals [i.e. Nawfil] as per their religion Islam (as it is highly beneficial and advantageous)."

68 Mr Welch submitted that the fact that some (and he asserted that it was necessarily a considerable number of) Muslims made it such a routine meant that the condition in section 19(2)(b) of the EqA 2010 was satisfied. We disagreed. We concluded that either it could not reasonably be said that they were "[put] at a particular disadvantage when compared with" non-Muslims, or simply that the test in section 19(2)(b) was not satisfied. In our view, that test applies only where there is more than a preference for performing a non-mandatory type of religious practice at a particular time, such as a practice which is not required by the religion in question and is regarded by the individual performing it as best done at a particular time. That was the case here. It was submitted by Ms Stanley that the claimant was not in fact put at any particular disadvantage because the practice that he relied on as putting him at a disadvantage was not in fact so important to him that he could be said to have been put at a disadvantage within the meaning of section 19(2)

of the EqA 2010. This was because he did not refer to it in his letters to Mr Blackman until he wrote his letter of 17 August 2015, at pages 231-233, and because he did not (as we have in fact found) refer to it in his meeting with Mr Blackman of 11 July 2015. We did not need to decide whether or not that submission was correct, but we note here that if we had had to do so, then we would as a first step in doing so have concluded that the claimant did not initially raise his practice of Nawfil in the evenings as an objection to the new shift pattern because he realised that it was not possible credibly to say that it was a requirement of his religion.

69 If we had had to come to a conclusion on the question whether the respondent had a legitimate aim here, then we would have concluded that it did have such an aim. That aim consisted in the factors to which we refer in paragraphs 57-59 above. We would also have concluded that, given the fact that there was only a relatively slight interference with the claimant's practice of Nawfil as a result of the imposition of the new rostering pattern, since he could, consistently with his religious beliefs, practice Nawfil at a different time of the day, the imposition of that new pattern was a proportionate means of achieving that legitimate aim. We did not see the fact that Mr Blackman started the process of consultation with the claimant otherwise than by holding a meeting complying with the requirements of paragraph 11.1 of the document entitled "Managing Organisational Change", to which we refer in paragraph 56 above, as being anything more than remotely relevant to the issues considered in this paragraph.

The claim of harassment

70 We concluded that while the claimant was subjected to a change to his shift patterns, that change did not have the purpose of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. This was because the aims of the change were as recorded by us in paragraphs 57-59 above.

71 We concluded that Mr Blackman at no time treated the claimant rudely or abruptly, and that in any event he did not do anything with the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

72 The conduct referred to in paragraph 5.6.3.1 of the document at page 35 (namely preventing the claimant from going to a funeral on 29 January 2016) did not occur, as the claimant accepted and as we record above. For the reasons stated in paragraph 49 above, we concluded that the conduct referred to in paragraph 5.6.3.2 on that page (namely "Being forced to work under harsh conditions (in particular being made to mop the floor and lift heavy items on 23 January 2016)") also did not occur. We also concluded that Mr Shah did not do anything towards the claimant with the purpose of

violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

The claim of victimisation

73 We concluded that while Mr Blackman was aware that he had been alleged by the claimant to have done something in 2010 which was in some way discriminatory towards the claimant because of the claimant's religion or beliefs, he did not act towards the claimant in 2015 to any extent because of that allegation of the claimant. Therefore, we concluded that Mr Blackman did not subject the claimant to a detriment because the claimant had made that allegation. In any event, as recorded in paragraph 71 above, we concluded that Mr Blackman did not treat the claimant rudely or abruptly at any time.

74 We also concluded (see paragraphs 36 and 37 above) that the claimant did not, in his meeting of 11 July 2015 with Mr Blackman, mention his (the claimant's) religious practices in any way. Thus, the first that Mr Blackman knew that the claimant was relying on those practices was when he read the letter of the claimant dated 17 August 2015 at pages 231-233, which we concluded was 19 August 2015, and Mr Blackman had no further involvement with the claimant so far as relevant after then.

75 Accordingly, we concluded that Mr Blackman at no time subjected the claimant to a detriment because the claimant had done a protected act.

76 As for the claim of victimisation by Mr Shah, we concluded (see paragraphs 49 and 51 above) that he did not know that the claimant had done any protected acts. As a result, we concluded that he also did not subject the claimant to a detriment because the claimant had done a protected act.

In conclusion

77 In conclusion, none of the claimant's claims succeeds.

Costs application

78 The respondent made an application for its costs on the basis that an order for the payment of some or all of the respondent's costs was justified under paragraph (a) and/or (b) of rule 76(1) of the Employment Tribunals Rules of Procedure 2013. After hearing submissions from both counsel, we concluded that an order for costs was appropriate because the claim of harassment contrary to section 26 of the EqA 2010 had no reasonable prospect of success and was brought and pursued unreasonably.

However, having heard about the claimant's extremely limited means, we concluded that we should not after all make an order for costs against the claimant. That was because he had debts which he was plainly having

difficulty paying, and was plainly living on very little income. While he had made a choice about how many hours to week he should work, having made that choice he was so evidently without the means to pay that we concluded that no order for costs should, after all, be made against him.

_____
Employment Judge

Date: 7 July 2017……...

Sent to the parties on: …05/08/2017....

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For the Tribunal Office