VCD

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr A Rahim	**AND**	**R1 Heart of England NHS Foundation Trust**
		R2 Dr. J Shakher

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** **18, 19, 20, 21, 22, 25, 26, 27, 28 September, 2, 3, 4, 6, 9, 10, 11,12, 16, 17, 19, 20, 23, 24, 25 October Reserved decision in chambers 26, 27, 31 October, 1 November 2017, 8, 9, 10 January 2108**

EMPLOYMENT JUDGE VC DEAN

MEMBERS Mrs C Wegg
Mrs I Fox

Representation

For the Claimant: Mr S John, of counsel

For the First Respondent: Mrs H Barney,of counsel

For the Second respondent: Mr E Beever, of counsel

Judgment

The unanimous judgment of the tribunal is:

1. The Tribunal does not have jurisdiction to entertain the claimant's complaints against the respondents in respect of all allegations insofar as they relate to events before 23 September 2015 which were presented out of time.

2. The claimant's claims in respect of unlawful discrimination in breach of section 13 and 27 of the Equality Act 2010 because of the protected characteristic of race discrimination against the first and second respondent were not well founded and are hereby dismissed.

3. The claimant's claims in respect of victimisation contrary to the provisions of section 27 of the Equality Act 2010 against the first and second respondent were not well founded and are hereby dismissed.

4. The claimant claims against the first respondent that they failed to make reasonable adjustments contrary to the provisions of section 20 and section 21 of the Equality Act 2010 are not well founded and are hearby dismissed.

Reasons

1. Background

1.1. The first respondent provides acute hospital and community healthcare from a number of locations including Birmingham Heartlands Hospital, Solihull Hospital and Community Services, Good Hope Hospital in Sutton Coldfield and the Birmingham Chest Clinic. Circumstances which give rise to the complaints brought by Dr. Rahim are based around his employment by the respondent as a

Consultant physician and Endocrinologist working in the main at Birmingham Heartlands Hospital, part of the Heart of England NHS Foundation Trust. The claimant began employment with the respondent on 17 February 2003 as a consultant and he remains in the employment of the Trust in that substantive role.

1.2. The claimant has made claims of direct race discrimination and harassment and victimisation against the first respondent his employer and second respondent another consultant within the first respondents employment and failure to make reasonable adjustments against the first respondent his employer. The claims of direct discrimination and harassment are said by the claimant to date back as far as 2003. The claimant describes his racial origin as being of British nationality, and of Pakistani national or ethnic origin. The claimant alleges that the second respondent, and 2 other alleged discriminators, are of Indian origin however the second respondent states that he is of Burmese origin and he previously held Indian citizenship before obtaining British citizenship in 2005. The claimant complains that he has been subjected to a series of detrimental acts/less favourable treatment from 2003 to January 2016 amounting to direct race discrimination and harassment both individually and collectively as a campaign of targeted and undermining behaviour and by the second respondent, latterly in conjunction with others for which the first respondent is vicariously liable. The claimant also alleges that having done protected acts he is subject to victimisation.

1.3. In addition the claimant asserts that he is disabled by anxiety and depression and that the first respondent failed to make reasonable adjustments and as a result he was treated less favourably because of his disability.

1.4. The hearing of this complaint extended over some twentyfour days and evidence and submissions concluded on 25 October. The decision was reserved and in order for the panel to reconvene it was necessary for the chambers discussions to be interrupted and deliberations were completed and judgement reached on 10 Janaury 2018. We apologise to the parties in this case for the length of time that has passed since the hearing and the delay in producing the judgment. It is regretable that for a variety of reasons, including a lengthy periods of absence because of disabling ill health and other judicial commitments, this judgment is sent to the parties after a significant delay in large part due to the lengthy process involved in completing the production and proofing of the document.

2. Issues

2.1. The agreed list of Issues have been submitted to the Tribunal and identify the issues that are to be resolved by the tribunal in considering the allegations in this case.

2.2. Direct Race Discrimination (s.13 and s.39 Equality Act 2010)

2.2.1. Did the First and/or Second Respondent treat the Claimant less favourably than an actual or hypothetical comparator (not yet specified - there being no material difference between the circumstances of each case) because of his race (nationality and/or national origin), as relating to the allegations set out in the Schedule of Allegations (allegations 1 to 30 excluding allegation 8 and 10 that have been withdrawn – pages 179L-179HH)? In particular:

2.2.2. Has the First and/or Second Respondent treated the Claimant less favourably as alleged. If so,

2.2.3. Does such treatment amount to a detriment? If so,

2.2.4. Are there facts from which the Tribunal can conclude, in the absence of any other explanation, that the First and/or Second Respondent discriminated against the Claimant because of his race? If so,

2.2.5. Has the First and/or Second Respondent shown that it has not discriminated against the Claimant because of his race (nationality and/or national origin).

2.3. Harassment (Race) (s.26 Equality Act 2010)

2.3.1. Did the First and/or Second Respondent engage in unwanted conduct related to the Claimant's race (nationality and/or national origin) as relating to the allegations set out in the Schedule of Allegations (allegations 1 to 30, excluding allegation 8 that has been withdrawn - pages 179L-179HH)? In particular:

2.3.2. Did the First and/or Second Respondent engage in unwanted conduct? If so,

2.3.3. Did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant and

2.3.4. If the complaint is 'effect only', taking into account the Claimant's perception and the other circumstances of the case, was it reasonable for the conduct complained of to have the required effect? If so,

2.3.5. Was that conduct related to the Claimant's race (nationality and/or national origin)?

2.4. Victimisation (Race) (s.27 Equality Act 2010).

2.4.1. Did the Claimant do a protected act or did the First and/or Second Respondent believe that the Claimant had done or would do a protected act as alleged at paragraph 31 of the Schedule of Allegations (page 179II)? If so,

2.4.2. Did the First and/or Second Respondent treat the Claimant detrimentally, as set out at paragraph 31 of the Schedule of Allegations (pages 179II-179KK)?

2.4.3. Did the First Respondent (only) treat the Claimant detrimentally, as set out at paragraph 32 of the Schedule of Allegations (pages 179KK-179NN)?

2.4.4. If so, was the Claimant subjected to a detriment as alleged because he had done a protected act or that the First and/or Second Respondent believed that the Claimant had done or would do a protected act?

2.5. **Disability Discrimination (s.6 Equality Act 2010)**

2.5.1. It is conceded that the Claimant was a disabled person within the meaning of section 6 and Schedule 1 of the Equality Act 2010 by reason of anxiety and depression at the material times identified at paragraphs 33-36 of the Schedule of Allegations (pages 179OO-179UU).

2.5.2. At what point did the First Respondent know or ought reasonably to have known that the Claimant was disabled?

2.6. Failure to make reasonable adjustments (s.20 and s.21 Equality Act 2010)

2.6.1. Do the PCP's relied on at paragraphs 33-36 of the Schedule of Allegations (pages 179OO-179UU) amount to PCP's?

2.6.2. If so, did the First Respondent apply any such alleged PCP(s)?

2.6.3. If so, did the PCP(s) put the Claimant at a substantial disadvantage when compared to a person who is not disabled as alleged at paragraphs 33-36 of the Schedule of Allegations (pages 179OO-179UU)?

2.6.4. If so, did the First Respondent fail to take such steps as it was reasonable to have to take to avoid that disadvantage as set out at paragraphs 33-36 of the Schedule of Allegations (pages 179OO-179UU)?

2.7. **Time limits (s.123 Equality Act 2010)**

2.7.1. Have the Claimant's complaints been brought within 3 months (including any period of ACAS early conciliation) of the date of the act to which the complaint relates?

2.7.2. Has there been a course of conduct capable of amounting to an act extending over a period?

2.7.3. Are any or all of the Claimant's claims out of time?

2.7.4. If so, would it be just and equitable to extend time in the circumstances?

3. **The Law**

3.1. Introduction

3.1.1. This section contains our summary of the applicable legal principles. We did not think it necessary, or helpful, to refer to every authority provided by the parties.

3.1.2. The relevant legislation in respect of the discrimination complaints was dependent upon whether there was a continuing course of conduct or not. If not, the complaints which pre-dated the coming in to force of the Equality Act 2010 ("the EA10") on 1 October 2010 were covered by the previous legislation – the Race Relations Act 1976 ("the RRA") and the Disability Discrimination Act 1995 ("the DDA").

3.1.3. For these purposes, we have set out the law contained in the EA10 but, where it differs from the law under the RRA or SDA, we have explained how.

3.1.4. It should be borne in mind that the legislative intention behind the EA10 was to harmonise the previous legislation and to modernise the language used. Therefore, in general terms, the intention was not to change how the law operated unless the harmonisation involved codifying case law or providing additional protection in respect of a particular protected characteristic, in line with that which had previously been afforded to persons with other protected characteristics. As a result much of the case law applicable under the DDA or RRA is relevant to how the provisions of the EA10 are to be interpreted and appliedDisability and race are protected characteristics as defined by section 4 of the EA10.

3.1.5. Sections 39 and 40 of the EA10 prohibit unlawful discrimination against employees in the field of work.

3.1.6. Section 39(2) provides that:
"An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment."

Section 39(4) provides the same protection in respect of victimisation.

Section 39(5) imposes a duty to make reasonable adjustments.
Section 40(1) provides that:

"An employer (A) must not, in relation to employment by A, harass a " person (B)—

(a) who is an employee of A's…"

The above provisions mirror the protection provided under the DDA and RRA.

3.1.7. Section 120 EA10 confers jurisdiction on an Employment Tribunal to determine complaints relating to the field of work.

3.1.8. Section 136 of the EA10 provides that:

"if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred [but] if A is able to show that it did not contravene the provision then this would not apply".

3.1.9. This provision reverses the burden of proof if there is a prima facie case of discrimination, harassment or victimisation The courts have provided detailed guidance on the circumstances in which the burden reverses Barton v Investec [2003] IRlR 332 EAT as approved and modified by the Court of Appeal in Igen v Wong [2005] IRLR 258 CA but in most cases the issue is not so finely balanced as to turn on whether the burden of proof has reversed. Also, the case law makes it clear that it is not always necessary to adopt a two stage approach and it is permissible for Employment Tribunals to instead identify the reason why an act or omission occurred.

3.1.10. Section 123 of the EA10 concerns time limits. It provides:

"(1) Proceedings on a complaint within section 120 may not be brought after the end of—

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

(b) such other period as the Employment Tribunal thinks just and equitable.

(3) For the purposes of this section—

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

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

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

3.1.11. The EA10 provides that a person with a protected characteristic is protected at work from prohibited conduct as defined by Chapter 2 of it. The types of prohibited conduct complained of in this case are considered below.

3.1.12. In addition to the statutory provisions, Employment Tribunals are obliged to take in to account the provisions of the statutory Code of Practice on the Equality Act 2010 produced by the Commission for Equality and Human Rights. Although we were not referred to any specific provisions by the parties. We had its content in mind when we considered the complaints made under the EA10 and/or the RRA.

3.2. <u>Direct Discrimination</u>

3.2.1. Direct discrimination is defined in section 13(1) of the EA10 as: "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".

4.1.1. In the RRA and DDA the words "grounds of" or "a reason relates to" were used instead of "because of". However, the guidance issued by the Government in respect of the EA10 stated that this was not

intended to change to legal test and commentators have subsequently agreed that it has not done so. This means that the legal principles in respect of direct discrimination remain the same.

4.1.2. The application of those principles was summarised by the Employment Appeal Tribunal in London Borough of Islington v Ladele (Liberty intervening) EAT/0453/08, which has since been upheld. The summary is set out below in 4.17.4 to 4.17.9

4.1.3. In every case the Employment Tribunal has to determine the reason why the claimant was treated as he was By reference to Nagarajan v London Regional Transport [1999] IRLR 572 HL. In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.

4.1.4. If the Employment Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial By reference to Nagarajan and also Igen v Wong [2005] IRLR 258 CA.

4.1.5. Direct evidence of discrimination is rare and Employment Tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test which reflects the requirements of the Burden of Proof Directive (97/80/EEC). The first stage places a burden on the claimant to establish a prima facie case of discrimination. That requires the claimant to prove facts from which inferences could be drawn that the employer has treated them less favourably on the prohibited ground. If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If they fail to establish that, the Tribunal must find that there is discrimination By reference to Igen.

4.1.6. The explanation for the less favourable treatment does not have to be a reasonable one by reference to Zafar v Glasgow City Council [1998] IRLR 36 HL. In the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation by reference to Bahl v Law Society [2004] IRLR 799 CA. If the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. The inference is then drawn not from the unreasonable treatment itself - or at least not simply from that fact - but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, the burden is discharged at the second stage, however unreasonable the treatment.

4.1.7. It is not necessary in every case for an Employment Tribunal to go through the two-stage process. In some cases it may be appropriate simply to focus on the reason given by the employer ("the reason why") and, if the Tribunal is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen test. The employee is not prejudiced by that approach, but the employer may be, because the Employment Tribunal is acting on the assumption that the first hurdle has been crossed by the employee. Brown v London Borough of Croydon [2007] IRLR 259 CA

4.1.8. It is incumbent on a Employment Tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are. By reference to Anya v University of Oxford [2001] IRLR 377 CA. Inferences must be drawn from actual findings of fact. We are assisted by the recent

guidance from the EAT on drawing inferences : In Talbot v Costain Oil, Gas and Process Ltd and ors [2017] ICR HHJ Shanks summarised the principles for employment tribunal is to consider when deciding what inferences of discrimination may be drawn:

> *"on the vexed question of how a Tribunal should approach the issue of whether there has been unlawful discrimination under the **Equality Act 2010** and its statutory predecessors, most importantly **Qureshi v Victoria University of Manchester** [2001] ICR 863 EAT (decided in 1996 though reported much later) and **Anya v University of Oxford** [2001] EWCA Civ 405. Proving and finding discrimination is always difficult because it involves making a finding about a person's state of mind and why he has acted in a certain way towards another, in circumstances where he may not even be conscious of the underlying reason and will in any event be determined to explain his motives or reasons for what he has done in a way which does not involve discrimination. It seems to me that the principles to be derived from the authorities are these:*
>
> *(1) It is very unusual to find direct evidence of discrimination;*
>
> *(2) Normally the Tribunal's decision will depend on what inference it is proper to draw from all the relevant surrounding circumstances, which will often include conduct by the alleged discriminator before and after the unfavourable treatment in question;*
>
> *(3) It is essential that the Tribunal makes findings about any "primary facts" which are in issue so that it can take them into account as part of the relevant circumstances;*
>
> *(4) The Tribunal's assessment of the parties and their witnesses when they give evidence forms an important part of the process of inference;*
>
> *(5) Assessing the evidence of the alleged discriminator when giving an explanation for any treatment involves an assessment not only of credibility but also reliability, and involves testing the evidence by reference to objective facts and documents, possible motives and the overall probabilities; and, where there are a number of allegations of discrimination involving one personality, conclusions about that personality are obviously going to be relevant in relation to all the allegations;*

(6) The Tribunal must have regard to the totality of the relevant circumstances and give proper consideration to factors which point towards discrimination in deciding what inference to draw in relation to any particular unfavourable treatment;

(7) If it is necessary to resort to the burden of proof in this context, section 136 of the ***Equality Act 2010*** *provides in effect that where it would be proper to draw an inference of discrimination in the absence of "any other explanation" the burden lies on the alleged discriminator to prove there was no discrimination."*

4.1.9. It is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The determination of the comparator depends upon the reason for the difference in treatment. The question whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was by reference to Shamoon. However, as the EAT noted (in Ladele) although comparators may be of evidential value in determining the reason why the claimant was treated as he or she was, frequently they cast no useful light on that question at all. In some instances comparators can be misleading because there will be unlawful discrimination where the prohibited ground contributes to an act or decision even though it is not the sole or principal reason for it. If the Employment Tribunal is able to conclude that the respondent would not have treated the comparator more favourably, then it is unnecessary to determine the characteristics of the statutory comparator, reference to Watt (formerly Carter) v Ahsan [2008] ICR 82 EAT.

4.1.10. If the Employment Tribunal does identify a comparator for the purpose of determining whether there has been less favourable treatment, comparisons between two people must be such that the relevant circumstances are the same or not materially different. The Tribunal must be astute in determining what factors are so relevant to the treatment of the claimant that they must also be present in the real or hypothetical comparator in order that the comparison which is to be made will be a fair and proper comparison. Often, but not always, these will be matters which will have been in the mind of the person doing the treatment when relevant decisions were made. The comparator will often be hypothetical, and that when dealing with a complaint of direct discrimination it can sometimes be more helpful to proceed to considering the reason for the treatment (the "reason why" question) See for example Shamoon and Nagarajan v London Regional Transport [1999] IRLR 572 HL.

4.2. Harassment

Harassment is defined in section 26 of the EA10 as:

"(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 the conduct referred to 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."

4.2.1. This is a similar definition to that contained in the RRA although the predecessor legislation used "grounds of" rather than "related to". It is arguable that "related to" could be wider.

4.2.2. As can be seen from the wording, if the Employment Tribunal concludes that unwanted conduct related to a protected characteristic has taken place, there is a distinction between cases where the conduct was for the purpose of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B, and conduct which has that effect.

4.2.3. If the unwanted conduct was for that purpose, it would, as a matter of law, constitute harassment. However, if the conduct was not for that purpose, but had that effect, the Employment Tribunal must also consider B's perception, the other circumstances of the case, and whether it was reasonable for the conduct to have that effect. If so, the conduct would amount to harassment.

4.2.4. It is therefore important for the Employment Tribunal to state whether it is a "purpose" or "effect" case and to explain the reasoning as to why, in an "effect case", the conduct constituted harassment Lindsay v LSE [2013] EWCA Civ 1650. In an "effect" case, there are two questions: the first is whether B felt that their dignity had been violated or that A had created a hostile etc. environment (a factual question dependent on B's subjective perception); the second is whether it was objectively reasonable for B to feel that way EOC v Secretary of State for Trade & Industry [2007] IRLR 327 HC .

4.2.5. It is ever a 'healthy discipline' for Tribunal in any claim alleging unlawful harassment specifically to address in its reasons each of the three elements of harassment claim under section 26(1) unwanted conduct, that has the prescribed purpose or effect, and which relates to the relevant protected characteristic. The guidance of the employment appeal tribunal in the case of Richmond Pharmacology v Dhaliwal [2009] ICR 724, EAT (para 10-16) helpfully summarises the approach.

4.2.6. The test of whether conduct has the effect expressly requires the tribunal to have regard to section 26(4). Paragraph 22 of Richmond Pharmacology reminds us of the threshold to be met.

4.2.7. The law also provides that direct discrimination and harassment are discrete matters, because "detriment" does not include conduct amounting to harassment (section 212(1) EA10).

4.3. Victimisation

4.3.1. Section 27 of the EA 2010 defines victimisation as follows:

"A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act."

4.3.2. Section 27(2) defines the following as constituting protected acts:

"(a) bringing proceedings under the EA10;

(b) giving evidence or information in connection with the proceedings under the EA10;

(c) doing any other thing for the purposes of or in connection with the EA10; or

(d) making an allegation (whether express or not) that the person alleged to have subjected the claimant to detriment or some other person has contravened the EA10."

4.3.3. Section 27(3) provides that 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.

4.3.4. The definition is substantially the same as under the RRA and SDA, save that the predecessor legislation made reference to less favourable treatment rather than subjecting to detriment. The former definition technically required a comparator, although there was a question as to whether a comparator was necessary St Helens MBC v Derbyshire [2007] IRLR 540 UKHL.

4.3.5. The starting point is that there must be a protected act. If the claimant cannot establish that they have in fact carried out a protected act as defined by subsection (2), their claim will not succeed unless the Employment Tribunal concludes that the person alleged to have victimised them believed they had done so or may do so. It is necessary for that person to know of the protected act See Nagarajan & Scott v Hillingdon London Borough Council [2001] EWCA Civ 2005 or, as the case may be, suspect there has been a protected act.

4.3.6. Case law has established that a mere assertion of discrimination without reference to a protected characteristic will not, without more, (for example relevant background information known to an employer)

constitute a protected act Durrani v London Borough of Ealing UKEAT/0454/2012.

4.3.7. If there has been a protected act, the Employment Tribunal must then consider whether the claimant was subjected to detriment because of it. The provisions of the EA10 essentially operate in the same way as the public interest disclosure detriment provisions in the ERA.

4.3.8. In considering allegations of victimisation in the context of litigation or the threat thereof case of CC West Yorkshire v Khan [2001]ICR 1065 (para 31) identified that: *"Employers, acting honestly and reasonably, ought fields to take steps to preserve their position impending discrimination proceedings without laying themselves open to a charge of victimisation…..Acting within this limit, he cannot be regarded as discriminating by way of victimisation against the employee who brought proceedings."*

4.3.9. That approach was approved in BMA v Chaudhary [2007] IRLR 818 at para 177.

4.4. Disability

4.4.1. An individual is disabled for the purposes of the Equality Act if:

"6 Disability

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

4.4.2. Sch 8, Pt 3, Para 20 of the Equality Act 2010 provides as follows:

"Lack of knowledge of disability, etc

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(1) *A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—*

(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

(b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

4.4.3. Underhill P in Wilcox v Birmingham CAB Services Ltd UKEAT/0293/10/DM provided guidance on the predecessor provisions (albeit no material difference arises):

"to spell it out, an employer is under no duty under section 4A unless he knows (actually or constructively) both (1) that the employee is disabled and (2) that he or she is disadvantaged by the disability in the way set out at in section 4A(1). As Lady Smith points out [in Alam], element (2) will not come into play if the employer does not know element (1)." Para 37

4.4.4. The question of whether an employer could reasonably be expected to know of a person's disability is a question of fact for the

tribunal (*Jennings v Barts and The London NHS Trust UKEAT/0056/12*).

4.5. Failure to make reasonable adjustments

4.5.1. The law in relation to the need to make adjustments for disabled persons once the duty is engaged is detailed at s 20 and 21 of the Equality Act 2010. The Duty to make reasonable adjustments at s20 provides:

"20 Duty to make adjustments

(1)Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2)The duty comprises the following three requirements.

(3)The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4)The second requirement is a requirement, where a physical f eature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5)The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6)Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7)A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8)A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9)In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a)removing the physical feature in question,

(b)altering it, or

(c)providing a reasonable means of avoiding it.

(10)A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a)a feature arising from the design or construction of a building,

(b)a feature of an approach to, exit from or access to a building,

(c)a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d)any other physical element or quality.

(11)A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12)A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13)The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column."

4.5.2. We are referred in the issues to be determined to the provision criteria or practice that is appliced and we have regard to the guidance provided by the EAT. The application of a flawed disciplinary procedure on a one-off basis will not amount to a 'PCP' - see Nottingham City Transport Ltd v Harvey *UKEAT/0032/12 EAT* Langstaff (P) Held:

[17] *In applying the words of the DDA, and we have little doubt in*

cases in future dealing with the successor provisions under the Equality Act 2010, it is essential for the tribunal to have at the front of its mind the terms of the statute. Although a provision, criterion or practice may as a matter of factual analysis and approach be identified by considering the disadvantage from which an employee claims to suffer and tracing it back to its cause, as Mr Soor submitted was indicated by Maurice Kay LJ in Smith v Churchill's Stairlifts plc *[2005] EWCA Civ 1220, [2006] IRLR 41, [2006] ICR 524, it is essential, at the end of the day, that a tribunal analyses the material in the light of that which the statute requires;* Rowan *says as much, and* Ashton *reinforces it. The starting point is that there must be a provision, criterion or practice; if there were not, then adjusting that provision, criterion or practice would make no sense, as is pointed out in* Rowan*. It is not sufficient merely to identify that an employee has been disadvantaged, in the sense of badly treated, and to conclude that if he had not been disabled, he would not have suffered; that would be to leave out of account the requirement to identify a PCP. Section 4A(1) provides that there must be a causative link between the PCP and the disadvantage. The substantial disadvantage must arise out of the PCP.*

> ***[18]*** *In this case it is common ground that there was no provision that the employer made nor criterion which the employer applied that could be called into question; the issue was the practice of the employer. Although the Act does not define "provision, criterion or practice" and the Disability Rights Commission's Code of Practice: Employment and Occupation 2004 deals with the meaning of provisions, criteria and practices by saying not what they consist of but what they include (see para 5.8), and although those words are to be construed liberally, bearing in mind that the purpose of the statute is to eliminate discrimination against those*

who suffer from a disability, absent provision or criterion there still has to be something that can qualify as a practice. "Practice" has something of the element of repetition about it…"

4.5.3. We are referred also to Carphone Warehouse v Martin *UKEAT/0371/12 [2013] EqLR 481* in which Shanks J held that:

***"[19]** What the Employment Tribunal found, in effect, was that the lack of competence or understanding by The Carphone Warehouse in preparing the Claimant's wage slip for July 2010 was capable of being a "practice" within the terms of s 4A and that the reasonable step that they should have taken was the step of not delaying payment of the correct amount of pay. Mr Hutchin says, in effect, that this approach is misconceived. We are afraid we agree with him in this contention, for two related reasons. First, a lack of competence in relation to a particular transaction cannot, as a matter of proper construction, in our view amount to a "practice" applied by an employer any more than it could amount to a "provision" or "criterion" applied by an employer. Secondly, the obligation created by s 4A is to take steps, or such steps as are reasonable. However it is phrased, what the Employment Tribunal were saying, in effect, was that The Carphone Warehouse had failed to take proper care in preparing Mr Martin's pay packet in July 2010. Taking care cannot be properly described, in our view, as taking a step or steps for the purposes of s 4A(1) of the DDA. What the Employment Tribunal is seeking to do, perhaps understandably, is to give the Claimant a remedy for what they regard as rather egregious incompetence by The Carphone Warehouse, but we do not think the facts can be shoehorned into the relevant*

provisions of the DDA. Therefore, that finding of discrimination, in our view, cannot stand."

4.6. Once the duty to make reasonable adjustments has been engaged we are reminded Archibald v Fife Council [2004] ICR 954 HL that the duty requires a degree of 'positive action' from employers to alleviate the effects of provisions, criteria or practices and that in contrast to other areas of discrimination law the duty to make reasonable asjustments can require a employer to treat a disabled person more favourably that it would treat others.

4.7. The Equality and Human Rights Commission: Code of Practice on Employment (2011) at paragraph 6.19 provides [Sch 8, para 20(1)(b)] if the employer does not know the worker is disabled that:

"For disabled workers already in employment, the employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they reasonably can be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

Paragraph 6.23 the Code identifies what is meant by 'reasonable steps':

"the duty to make reasonable adjustments requires employers to take such steps as it is reasonable to have to take, in all the circumstances of the case, in order to make adjustments. The act does not specify any particular factors that should be taken into account. What is a

reasonable step for an employer to take will depend on all the circumstances of each individual case."

4.8. Time limits - Jurisdiction

4.8.1. When deciding whether it is just and equitable for a claim to be brought, the Employment Tribunal's discretion is wide and any factor that appears to be relevant can be considered in determining whether that test of section 123 of the Equality Act applies. However, time limits should be exercised strictly and the Tribunal cannot hear a complaint unless the claimant convinces it that it is just and equitable to do so. The exercise of discretion is therefore the exception rather than the rule Robertson v Bexley Community Centre [2003] IRLR 434.

4.8.2. Case law provides that consideration of the factors set out in section 33 of the Limitation Act 1980 is of assistance. The Employment Tribunal should have regard to all the circumstances of the case, and in particular to the following:

4.8.2.1. the length and reasons for the delay;

4.8.2.2. the extent to which the cogency of the evidence is likely to be affected by the delay;

4.8.2.3. the extent to which the party sued cooperated with any requests for information;

4.8.2.4. the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action;

4.8.2.5. and the steps taken by the claimant to obtain professional advice once he or she knew of the possibility of taking action.

4.8.3. In addition, when deciding whether to exercise its just and equitable discretion, the Employment Tribunal must consider the prejudice which each party would suffer as a result of the decision to

be made (sometimes referred to as the balance of hardship test), British Coal Corporation v Keeble [1997] IRLR 336 EAT.

4.8.4. Failure to adopt a "checklist" approach carries the risk that a significant factor will be overlooked, London Borough of Southwark v Afolabi [2003] IRLR 220 CA.

4.8.5. Mental ill health may be a reason to extend time, DCA v Jones [2008] IRLR 128 CA

4.8.6. A number of authorities have suggested that reliance on incorrect advice should not defeat a claimant's contention that their claim should be heard, depending on the source of that advice, See for example Chohan v Derby Law Centre [2004] IRLR 685 EA.

4.8.7. Additionally, the authorities say that the pursuit of internal proceedings is one factor to be taken into account. However, the fact that a Claimant defers presenting a claim while awaiting the outcome of an internal appeal process does not normally constitute a sufficient ground for the delay, Apelogun-Gabriels v Lambeth London Borough [2002] ICR 713.

4.8.8. If the issue is determined as a preliminary issue, it is appropriate for the Employment Tribunal to form a fairly rough idea as to whether the complaint is strong or weak, Hutchison v Westward Television Limited [1977] IRLR 69 & Anderson v George S. Hall Limited UKEAT/003/05.

4.8.9. If a claimant establishes it was not reasonably practicable to present the claim in time, they must then satisfy the tribunal that they presented it within such further period as was reasonable. This means that the Employment Tribunal will want to hear evidence about the

period prior to the expiry of the time limit and evidence about the period between that date and the date the claim was presented.

5. **Evidence and structure of the decision**

5.1. At the start of the hearing in this case we agreed with the parties that in light of the volume of evidence that was presented to us we would ensure that in addition to reading the pleaded case, the List of Issues and the Schedule of complaints would be used as a tool to assist our analysis of the complaints that have been brought against the First and the Second Respondent. The parties had confirmed that the schedule of complaints is a full and accurate representation of the complaints that are brought by the claimant and paraphrase the detail of the allegation that is otherwise referred to within the paragraphs of the claim forms which are referred to in the schedule. In his verbal closing submission Mr John, on behalf of the claimant, has identified that allegation 12 has been incorrectly summarised in the schedule to refer to behaviour in the period 2011-2014 and should instead correctly refer to the period of 2008 – 2015 as described in the pleadings.

5.2. We have been referred to an extensive set of documents, and although the tribunal had been allocated 1.5 days reading time before hearing witness oral evidence the volume of reading was identified, even the initially identified ”Essential reading” was disproportionate to the 26 days allocated to the hearing of this case. The parties agreed that the tribunal, in addition to reading the pleaded case and orders and tribunal correspondence to which we are referred the panel would read all of the witness statements and only those documents referred to therein that were identified as essential before the first witness evidence. Where specific documents were referred to by the parties in verbal evidence they have been considered by the Tribunal and those parts of the documents to which the Tribunals attention has been drawn.

5.3. The parties have helpfully provided a cast list which for ease of reference we had appended to this judgment and reasons for it.

5.4. In light of the very many allegations and the substantial volume of evidence that we have heard and read, we have endeavoured to structure the judgment in a number of sections. We have done so for ease of reading the judgment, however, our conclusions are reached having taken an overview of all of the findings of fact that we have made on the issues that we have to determine that, for the sake of completeness, we have set out in chronological order. The issues that have to be determined in respect of the allegations are determined individually in respect of those allegations. However, the determination of each complaint is informed by our knowledge of all of the evidence and the totality of the findings of fact that we have reached that have enabled us to reach conclusions based on an overview as well as individual consideration of particular incidents.

5.5. Witness statements have been taken as read and the documents referenced in their own trial bundles that are referred to in the witness statements have also been considered by the tribunal.

5.6. The tribunal have considered only those documents within the extensive bundles before us to which we have been referred by the witnesses either in their witness statements or in cross-examination of their evidence. The parties have been told that the tribunal will make findings of fact only upon the evidence that is necessary to determine the issues that are before us and we had not sought to read around the issues and consider documentation to which we have not been referred in evidence. We have advised the parties we have also read the pleadings that have been provided to the tribunal, various orders of the tribunal and the Equality Questionnaire served on the

respondents by the claimant and the replies that have been provided thereto.

5.7. Where witnesses have referred broadly to very extensive documentation within their witness statement, on occasions to documents of considerable length, we have made it plain to the parties that those witnesses are to direct our attention to the passages and pages within that reference documentation to which they wish us to refer as reading time did not allow undirected reading of large tracts of documents.

5.8. Whilst we comment in particular on the findings of fact that we make in respect of the evidence heard from the respondents' witnesses, we would make a number of general observations. The respondents' witnesses have struck us markedly as being witnesses who give an account to their best of their recollection, unlike the claimant they have not as a habit retained at home historical emails they received at work and the nature of change in the respondents business has been that following changes of IT systems it has not been possible to recover all historical data. This case has it's origins in complaints about events dating back to 2003. The respondents' witnesses have, where they are unable to recall the events of earlier years, been clear that their recollection has not permitted them to answer the questions posed by the claimant and equally, where their recollection of earlier events has developed in answer to questions in oral examination from that contained in their witness statements, generally we do not draw an adverse inference from their developing recollection of historic events. In contrast we observe that the claimant having lived the events of which he complains which date back to 2003 and having retained contemporary records and recollections we are careful in considering the integrity of developing accounts of earlier incidents.

5.9. We have been referred on occasions to hearsay evidence in this case. Whenever tribunals admit hearsay evidence it is important that they do not lose sight of the problems associated with such evidence. The drawback is essentially that the maker of the statement that is being reported second hand is rarely called to give evidence him or herself and so the veracity of that statement cannot be tested by cross-examination of the person who made it. We have paid care when assessing the quality of the hearsay evidence and have considered its' credibility and also the whether the statement of the person is being accurately and authentically reported.

5.10. The detailed evidence which we have listened to over an extended period of time and to which we have returned our attention in our chambers discussions in making this reserved judgment has been a relatively long process. We have been at pains to ensure that the evidence heard by us early was as clear in our mind as was later evidence and indeed after a hiatus when the reserved decision was of necessity itself adjourned until January 2018. We have no doubt that lengthy and detailed though our findings of fact are, there are nuances in the evidence that has been presented to us that we have not recited in our findings of fact. We have, to the extent that we have been able, taken a proportionate approach and we have not recited extracts of minutes of meetings or decision letters at length.

5.11. We have considered the allegations of discrimination by the claimant which refer to a chronology of events dating back as far as 2003, and we have addressed the individual allegations each in turn. In the observations that we have made within our findings of fact in reference to the allegations we have informed our findings by the knowledge gained by us in looking at the wider picture and landscape of the claimant's employment by both his employment with the first respondent and his relationship with the second

respondent. The claimant has in his witness statement para 11-14 provided his account of the reasons why in 2016 he reflected upon his interactions with the second respondent Dr Shakher and reached the conclusion that part of the the reason for his having been caused to suffer detrimental treatment at the hands of Dr Shakher and the perpetrators was race. Much of the evidence that the claimant refers to which leads his to the conclusion that the second respondents treatment of him was because of the claimants race appears founded on hearsay evidence.

5.12. The claimant referred to Drs Kamal and Karamat being doctors of Pakistani heritage who in conversation with him had reported things that Dr Shakher had said to them that he found were disparaging of Pakistanis. The claimant confirmed that the comments were hearsay and accepted that both of those doctors had provided letters in support of Dr Shakher [758 and 751 respectively]. Dr Kamal had written:

> *"We interact very well both at work as well as with our families socially. I have never been subjected to any religious /racial prejudice by Dr Shakher. Indeed I have been helped and guided very well by Shakher in my clinical appraisals as well as in other matters of personal and professional nature."*

5.13. The claimant referred to complaints being allegedly raised by two other Pakistani doctors against Dr Shakher. He has provided no evidence of any complaint being raised by Dr Raja and in respect of another Dr Babar who had expressed concern about Dr Shakher being his clinical supervisor in March 2015 [501] although he raised concerns about Dr Shakher's remarks being 'painful' and 'unprofessional and came to bullying' which was against the Trusts guidelines of equality, respect and diversity the theme of the concern

was of Dr Shakher's demeanour that he found was bullying and no reference was made however obliquely to it being racially motivated.

5.14. Similarly with regard to the claimant's assertion that Dr Dar had told him that Dr Shakher had made derogatory comments about Asian women of Pakistani heritage and had said that 'Pakistanis were crazy' the claimant was unable to idendify when the comments were reported to him and we find that they appear to be contradicted by the reference written by Dr Dar on 24 March 2016 in support of Dr Shakher [795] which confirmed:

> *" He treats his patients with kindness and empathy. I have not seen him being rude or made derogatory remarks to anyone. He treats everyone with respect regardless of age, gender, sex, race or ethnicity".*

5.15. Dr Bellary in his evidence has confirmed that despite the claimant's assertion that he had been told by Dr Bellary that Dr Shakher had referred to the claimant as a country cousin he had not. Whilst it was a phrase he had heard Dr Shakher use it was not in reference to Dr Rahim. Dr Shakher has accepted that the phrase 'country cousin' was one that e haad used on occasion, he had understood it to mean that in the context he had used it by saying that he was 'not someone's country cousin' he was referring to the fact that he was 'not their mate'. He had been told by a nurse that the comment was not politically correct, and he had not continued to use the term.

5.16. Mr John on the claimant's behalf has argued that the phrase refers to someone from rural Pakistan and is derogatory and that Dr Shakher having been informed that it was not an appropriate term effectively acknowledged that it was a racist comment and adverse

to the claimant. We find that the phrase was not made in the claimant's presence nor about him and that the comment such as it was reported to the claimant by Dr Bellary in April 2017 [cl w/s 11h] was not a matter of which the claimant was aware, even if misinterpreted, when claiming that it caused him to consider that he was harassed because of his race when he presented his complaint.

5.17. While we are aware that race discrimination is rarely overt the evidence from which the claimant asks that we draw an inference that the behaviour Dr Shakher exhibited towards him was for no other reason and was because of his race does not stand scrutiny.

5.18. We set out below in the chronology the facts as we found them to be in respect of the overview of the key events in the employment history which gives rise to the allegations made in the complaint.We have included within the chronology the

6. **Chronology**

6.1. The relationship between the Claimant and Dr. Shakher the Second Respondent was, as we have described, not an easy one. We deal with the allegations made by the Claimant in respect of incidents and discrimination between himself and Dr. Shakher the Second Respondent in the period 2003 up until his first complaint was presented in March 2016. The Claimant having began employment with the Respondent as a Consultant Physician and Endocrinologist on the 17 February 2003, identifies his first allegation of direct discrimination and harassment because of his race as having occurred on the 31 July 2003, concerning an allegation that Dr. Shakher was aggressive to the Claimant after he had not been included on an abstract for a Case Report [Allegation 1]. On the 27

February 2006 Dr. Shakher had written a letter in relation to a patient that the Claimant asserts included detrimental, and investigated assertions about the Claimant's conduct towards the patient, the so-called iCare letter [Allegation 2].

6.2. In March 2006 [1122] the Claimant was concerned that Dr. Shakher had failed to attend a Clinic that afternoon, as a result of which, the Claimant alleges that Dr. Shakher was abusive and threatened towards him [Allegation 3]. In May 2006, Dr. Shakher raised a concern with Dr. Rahim relating the on-call rota [1124] which led to the Claimant accusing Dr. Shakher of being discourteous towards him [Allegation 4] and subsequently on the 26 June 2006 Dr. Shakher in email exchanges with Dr. Rahim [1123-1125] raised concerns about the Organization of Clinics which Dr. Shakher considered demonstrated that the Claimant was treating him unfairly [Allegation 5].

6.3. Later the same year, Dr. Shakher sent an email to the Claimant [1126] asking for clarification regarding whether a Junior Doctor had been asked to teach Medical Students on the Ward, which caused the Claimant to feel that he has been "harangued" by Dr. Shakher and there was concern with Professor Barnett the then Clinical Director [Allegation 6].

6.4. In May 2007, Dr. Shakher raised his own concerns with Professor Barnett about the Claimants treatment of him [422-424] in which he raised concerns about the working environment with regards to Dr. Rahim which he described as an "*undemocratic and unhealthy internal working environment"* and about his personal and educational development and recognition for his work. Dr. Shakher's Letter of Concern reflected the reality of his relationship with Dr. Rahim as evidence by Professor Barnett [w/s para. 8] as Dr.

Shakher had thought Dr. Rahim gave him a difficult time at work and tended to be quite critical of him, without reason. We accept that Dr. Shakher had raised with Professor Barnett on several occasions that he had felt Dr. Rahim was hard on him. It is the evidence that we heard from Professor Barnett that Dr. Shakher was appointed to the role of Consultant in September 2006, in his opinion a well deserved appointment based upon his skill level, productivity and work ethic and that over the passage of time Dr. Shakher became less willing to accept the behaviour and criticism that he had while not a consultant that he had previously tolerated from Dr. Rahim who he considered treated him unfairly. We find the evidence given by Professor Barnett to be persuasive that Dr. Shakher's work ethic and approach to working patterns and related matters was different to that of Dr. Rahim, Professor Barnett has given an account that the Claimant, after his appointment as Consultant, continued to do six Clinics per week plus his other Consultant duties including emergencies, ward work, teaching, research and mandatory and professional development but was in excess of expectations and he had had to persuade Dr. Shakher to reduce his workload. Professor Barnett gives an account, that has not been challenged, that Dr. Rahim who too was an excellent Doctor had a different in personality to Dr. Shakher, Dr. Rahim working to his agreed job plan and within expectations but not as amenable as Dr. Shakher to go beyond his job plan in times of need. We consider the pragmatic view expressed by Professor Barnett that the different approaches in personalities between that of the Claimant and that of Dr. Shakher caused conflict between them and as he describes [W/S13] :

> *"I believe their different approaches and personalities caused conflict between them. I believe Dr. Rahim may have felt threatened or undermined by Dr. Shakher's work ethic,*

productivity, and in turn Dr. Shakher increasingly felt put upon and unfairly treated."

6.5. Professor Barnett confirms that over the years, the Claimant and Dr. Shakher, the second respondent have complained to him about each other [witness statement para 15], they were each reminded by him to behave in a professional manner towards each other, even if they didn't have to like each other. Professor Barnett was of the view that the ill-feeling and conflict between the two individuals started with Dr. Rahim's relationship to Dr. Shakher when the latter was an Associate Specialist and junior to Dr. Rahim and that atno time did Dr. Rahim suggest to Professor Barnett that such difficulties that existed were because of the Claimant's race or national origin.

6.6. On the 26 October 2007, Dr. Shakher had asked the Claimant to put his name on a poster [1129] which the Claimant declined to do as a result of which the Claimant asserts Dr. Shakher became verbally aggressive and unprofessional [Allegation 7].

6.7. On the 4 September 2008 Dr. Shakher sent an email to the Claimant [1131] regarding the cover on wards asking to be informed of decisions relating to wards and that decisions were not taken unilaterally – Allegation 9. As a result of Dr. Shakher's email to the Claimant on the 5 September 2008 Professor Barnett had cause to ask Dr. Rahim to resolve that Dr. Shakher's concerns about ward cover *"diplomatically*" and for there to be a tripartite discussion to try and defuse points of disagreement [1130]. The Claimant expressed the view that he saw no benefit from having a meeting with Dr. Shakher and had indicated to the Professor Barnett that he considered he had *"little alternative to issue a formal grievance through HR".* Professor Barnett in response indicated that he would not consider a formal grievance was necessary, but rather that that

date would be the last occasion when Dr. Rahim was paired with Dr. Shakher [Allegation 10].

6.8. In 2009, Dr. Mukherjee was appointed to the Respondent Trust and sadly in November 2009 the Claimant began a period of compassionate leave following the death of his Father, from which he returned in January 2010. In March 2015 the Claimant raised a grievance [914] which articulated a concern that, whilst he had been on compassionate leave in 2009, Dr. Shakher had shouted at his Secretary telling her that he was not to be asked to cover any work that would otherwise have been undertaken by the Claimant [Allegation 11].

6.9. The Claimant in his complaint raised concerns about the treatment he received from Dr. Shakher that he alleges was repeated in continuous treatment between the years 2008, from when he was no longer paired with Dr. Shakher, until 2015 [Allegations 12, 13, 16, 17 and 18].

6.10. The Claimant alleges that in the summer of 2013, Dr. Shakher accused the Claimant of trying to trip him up during a meeting [Allegation 14].

6.11. On the 20 December 2013, the Claimant and Dr. Tehrani attended a research meeting in London which the Claimant asserts led to Dr. Shakher raising a complaint to Dr. Bellary, the then Clinical Director, that the Claimant had taken unauthorised absence, leaving the ward to go off site. [Allegation 20].

6.12. It is the claimant's case that in October 2014 following the Claimant's re-appointment as Medical Examiner, Dr. Shakher on the 9 October had berated the Bereavement Officer Tracey Eltham, and

attempted to block the Claimants appointment and asserted that the Claimant was lazy and would only dump his workload on other individuals. Further the Claimant had allegedly made unprofessional and unpleasant comments to Dr. Colloby, the lead Medical Examiner [Allegation 21].

6.13. On the 7 January 2015, the Claimant submitted an application for a Clinical Excellence Award and on 26 Janaury 2015 the Claimant along with twelve other Consultants was appointed to a Panel to assess which applicants were awarded Clinical Excellence Awards. The Claimant was asked to stand down from that Assessment Panel on the 13 February 2015 [491] which subsequently the Claimant complains to have been an act of direct discrimination and harassment because of his race and an act of victimisation.

6.14. On the 2 March 2015, Dr. Shakher was appointed to the role of Clinical Director for General Medicine.

6.15. On the 25 March 2015 the Claimant raised a formal grievance [2005-2008/2009-2015] and raised a second formal grievance [2016-2018] on the 23 April 2015. He raised a concern that he was under stress and pressure on a daily basis and referred to a situation relating to stress caused by Dr. Shakher who over the ten years that the Claimant had worked at the Trust had harassed him directly and indirectly. The grievance was that Dr. Shakher bullied and later harassed him. The Claimant complained that the behaviour was vindictive and resulted in victimisation and he required it to be immediately investigated. The Claimant subsequently produced a document [516-518] which records his recollection of a meeting with Dr. Raghuraman on 23 April 2015 and he subsequently raised a

second formal grievance on the 13 May 2015 [918-919] raising additional issues.

6.16. As a consequence of the Claimants formal grievances, the first Respondent commissioned a fact finding investigation by Marion Pavitt. After the investigation was commissioned to investigate a number of matters that were the subject of the grievance Dr. Rahim confirmed that it was his belief that Dr. Shakher had attempted to influence Dr. Rahim's application for a Clinical Excellence Award which had prompted him to request formal grievance action.

6.17. The Fact Finding Report by Marion Pavitt was undated but issued in October 2015 following a series of interviews in June and July of that year.

6.18. On the 6 October 2015 Dr. Philip Bright raised concerns about working hours by Junior Doctors and raised his concerns with Dr. Shakher [545-546] as a result of which the Claimant sent a third grievance to Marion Pavitt and Philip Turner [920-921] regarding an email from the Second Respondent sent in response to Dr. Bright in relation to the concerns that were raised.

6.19. As a result of the Pavitt Fact Finding Report, a meeting was held on the 15 October 2015 [556-557] at which the Claimant's grievances and the investigation were discussed. Subsequently, the Claimant was signed off work for a period of one month with effect from the 9 October 2015 [1200] and on the 12 November the Claimant was sent a copy of Marion Pavitt's Fact Finding Report. On the 23 November 2015 the Claimant was invited to attend a meeting with Clive Ryder Deputy Medical Director and Alison Murray from HR to discuss the findings of the Fact Finding Report whereupon the Claimant agreed to the instigation of a Maintaining

High Professional Standards in the modern NHS ['MHPS'] Investigation.

6.20. At a meeting held on the 23 November 2015 the Claimant informed Clive Ryder, Deputy Medical Director and Alison Money that he was considering commencing a Tribunal complaint against the Respondents in respect of the harassment and bullying which was in breach of the Equality Act 2010. The Claimant did not notify the Respondents of protected characteristic whereupon which he relied to bring a complaint and his Trade Union Representative Helen Ratley informed the Respondents that she was taking advice from the BMA's legal advisors. On the 27 November the Claimant attended a sickness absence review meeting with Dr. Vijay Suresh [1203-1204].

6.21. On the 28 December 2015 Dr. Arnie Rose was appointed as the MHPS Case Investigator [922-923] unaware that on the 22 December 2015 the Claimant had begun the ACAS Early conciliation process as a precursor to presenting a complaint if necessary to Employment Tribunal. As a result of the Claimant's sickness absence, he was signed off on the 4 December 2015 for a further period of sickness absence [1205] and was invited to a review and subject to an Occupational Health Review on the 8 December 2015 [1206-1207].

6.22. On the 6 January 2016 the Claimant was signed off for a further period of one month [1209] and in January 2016 the MHPS Investigations began their first interviews and the commencement of that procedure was an interview with the Claimant by Dr. Arne Rose transcript [S17-S54] and notes at [1022-1033]. Whilst Dr. Rose conducted interviews with Marion Pavitt on the 21 January, Dr.

Bellary on 5 February, Dr. Raghuraman on 9 February, Dr. Shakher on 11 February and 24 February, Dr. Okubadejo on 25 February. Dr. Mukherjee on 7 March, a second interview with the Claimant on the 15 April [1034-1039D and transcript S78-S117] and with the Second Respondent Dr. Shakher at a third interview on the 18 April [1058-1060] a second interview with Dr. Bellary on the 20 April [1045-1048] and the MHPS Investigation was concluded in May 2016 [859-910] with the appendices [910-1149].

6.23. Whilst the MHPS Investigation was being undertaken the Claimant attended a sickness absence review with Dr. Suresh on the 28 January 2016 [1210-1212] whereupon he was signed off for a further month on the 4 February 2016 [1213].

6.24. On the 25 February the Claimant attended a further sickness absence review meeting with Dr. Suresh [1215-1216] and on the 3 March 2016 the Claimant was signed off unfit for work until the 14 March 2016 [1217].

6.25. On the 3 March 2016 the Claimant presented his first complaint to the Employment Tribunal Case Reference number 1300333/2016 [pages 2-32].

6.26. On the 15 March 2016 the Claimant attended a return to work meeting with Dr. Suresh and with Helen Barnett [1221A-C and transcript pages S55-S77].

6.27. On the 16 March 2016 the Claimant was subject to a review by Occupational Health [1222-1224]. The Claimant's first claim form was sent to the second Respondent Dr. Shakher via the Respondents trust internal post on the 18 March 2016. This was the first occasion when Dr. Shakher was informed that he had been

named as a Respondent in the Claimants complaints to the Employment Tribunal and in particular the first occasion on which Dr. Shakher became aware that the Claimant complained that he had been subject to unlawful discrimination because of his race by Dr. Shakher in a pattern of behaviour that had extended back to 31 July 2003.

6.28. On the 22 March 2016 the Claimant returned to work on a phased return to work having been signed off work since the 9 October 2015 [21A-C] which details the arrangements for the phased return to work, which was proposed to extend over an initial four week period whereby the Claimant would undertake fewer patient clinics initially starting at three clinics per week, no on calls and no in-patient work.

6.29. On the 1 April 2016 a Management Restructure was undertaken at the Trust with various changes in roles including that Dr. Raghuraman became the Divisional Director of Emergency Care at the First Respondent.

6.30. On the 28 April 2016 the Claimant attended a further sickness review meeting [1225-1226] followed by a return to work meeting with Dr. Suresh on the 21 June 2016 [1227-1228].

6.31. In July 2016 the Claimant recommenced on call work at Solihull Hospital rather than at Birmingham Heartlands and the Claimant continued not to be required to be reintroduced to in-patient work.

6.32. The Respondents lodged their ET3 response to the Claimant's first complaint, the First respondent on the 10 May 2016 [33-42], the Second Respondent May 2016 [43-61]. The Claimant subsequently provided further particulars of his victimisation and whistle-blowing

[now withdrawn claims pages 74-76]. The Claimant issued his second complaint to the Employment Tribunal Case number 1302081/2016 [100-126] on 4 August 2016. Shortly after the Claimant submitted his second complaint in which further particulars amongst other things of the impairment which he claimed to be disabling, the Claimant provided further particulars of the Respondents alleged failure to make reasonable adjustments [78-79] on the 9 August 2016 and the Claimant provided details of the impact of his disabilities. The Respondents submitted their ET3 response to the Claimants second claim on the 06 September 2016, the First Respondent [127-147] and the Second Respondents [148-162]. Subsequently the Claimant was reviewed by Occupational Health on the 29 September 2016 [1234-1235] and the Claimant was signed unfit for work from the 10 October 2016 [1236-1237]. Following a formal sickness review meeting on the 25 October 2016 [1238-1240] the Claimant returned to work on the 6 November 2016 [1241-1242] and attended a further return to work interview on the 22 December 2016 [1243-1245].

6.33. The Claimant complains that he had been caused to suffer a detriment in respect of a whistle-blowing campaign and various aspects of his victimisation claims were withdrawn on the 16 May 2017 [172A –B]. Having identified in objective terms the Chronology of events, we remind ourselves that the complaints are about acts of the Respondents up to and including the date of presentation of the second Tribunal complaint presented to the Tribunal on the 4 August 2016 and our Findings of Fact to determine the issues that we are asked to consider are limited, in fact to that date. Having set the Chronology, we make specific Findings of Fact in relation to each of the allegations and in respect of the general working environs and the respondent's policies and procedures that are relevant to the issues in this case.

7. **Findings of fact**

7.1. We are grateful to the assistance provided by the parties in that in large part they have endeavoured to present evidence to us and identified the allegation that they say that the evidence seeks to address. We have therefore made our findings of fact in light of all of the evidence that has been presented to us and our conclusions and findings in respect of the allegations have been reached with the benefit of hearing all of the evidence that has been before us.

7.2. To fix a logic and structure to our findings therefore we have addressed our findings in relation to the facts that are relevant to each of the aspects of the factual matrix and the allegations. We have summarised the complaint and the response made by each of the respondent by reference to the pleaded case and the summary of the complaints and response as they are detailed in the agreed final schedule of allegations. We have made firm findings of fact based upon the evidence presented to us.

7.3. In an effort to avoid repetition of the findings of fact in considering our conclusions we have referenced our conclusions to the findings of fact as we determine each of the allegations. We would remind the parties that these specific conclusions although conveniently located immediately after our findings of fact have been reached, where appropriate, by drawing inference from all surrounding facts as we have found them to be.

7.4. **Re: The NHS Foundation Trust employment environs**

7.4.1. The first respondent provides acute hospital and community healthcare from a number of locations including Birmingham Heartlands Hospital, Solihull Hospital and Community Services, Good Hope Hospital in Sutton Coldfield and the Birmingham Chest Clinic.

7.4.2. The circumstances which give rise to the complaint brought by Dr. Rahim are based around his employment by the respondent as a consultant physician and endocrinologist working in the main at Birmingham Heartlands Hospital part of the Heart of England NHS foundation trust. The claimant began employment on 17 February 2003 as a consultant.

7.4.3. In 1985 a Diabetes and Endocrinology centre was established at Heartlands Hospital which became one of the largest and most renowned diabetes units in the United Kingdom. It provides a wide range of services to patients with diabetes, including inpatient and outpatient diabetes services, screening and treatment of diabetes long-term complications, endocrinology services and weight management clinics. In 2009 the centre was located in a purpose-built facility at Heartlands Hospital.

7.4.4. Dr. Shakher was appointed as an associate specialist working at the respondent in 2001, he became a locum consultant in 2003 and was promoted to a substantive consultant post in 2006.

7.4.5. In contrast the claimant Dr. Rahim was appointed as a consultant endocrinologist in 2003. Dr. Rahim had previously been trained as an undergraduate at the University of Leeds and he qualified as a physician in August 1991 and he completed further postgraduate training obtaining a doctorate in medicine from the University of

Manchester in 1999, he qualified as a consultant in 2002 and in 2010 he was appointed a fellow of the Royal College of physicians.

7.4.6. Dr. Rahim is of British Pakistani heritage. He is a British national of Pakistani origin. He and his family originally lived in Small Heath, a suburb of Birmingham close to the Heartlands Hospital and he was educated at local state schools before going to university. Although he no longer lives in the local area the tribunal panel have been struck by how committed the claimant is to his wish to provide and practice medicine in his former local community in which he seeks to provide the highest level of care for his patients and the local community. Dr. Rahim is not alone in wishing to care for the community. Indeed, we have been struck by the passion which all of the physicians who have appeared as witnesses in this tribunal have to deliver high standards of care to the community which they serve, regardless of the location of families and their primary and secondary education.

7.4.7. In contrast with the claimant whose education has entirely been provided in the UK, Dr. Shakher the second respondent was born in Burma to Burmese parents and that was the language spoken within the family. In 1972 when he was 12 years of age, Dr. Shakher's family emigrated to India, due we are told to the military dictatorship rule in Burma. In order that Dr. Shakher could be educated in India he and his family members took up Indian citizenship and surrendered their Burmese citizenship. Dr. Shakher received secondary education in India where he was taught at a Jesuit college in English. His medical training was at University of Madras, he did a period of training in General (internal medicine) Diabetes and Endocrinology in India and was awarded two degrees, one in Diabetology and one in general internal medicine. He subsequently trained in the UK and was awarded the MRCP (UK) and a certificate of specialist accreditation in those subjects. He gained an MBA (Health and Social Care) in

2010. Dr. Shakher retained his Indian citizenship until he was granted British citizenship in November 2005.

7.4.8. When Dr. Rahim was appointed as a consultant in 2003 Dr. Shakher was already in post as an associate specialist and in 2003 Dr. Shakher was permitted by Prof. Barnett to use the title locum consultant.

7.4.9. As an associate specialist, Dr. Shakher was junior to consultants and, to an extent, his work required consultant supervision. As did many doctors, Dr. Shakher worked very hard and in excess of his contractual hours. We accept the evidence given by Prof. Barnett that Dr. Shakher was a dedicated doctor who worked many additional shifts and undertook a good deal of on-call work and was often the ”go to” Doctor to undertake additional work or to see additional patients in clinic. Prof. Barnett has given account, that is not disputed by the claimant, that the claimant was also a dedicated doctor who worked the hours he was contracted to do under his contractual terms.

7.4.10. Dr. Shakher perceived that the claimant was hard on him and Dr. Shakher raised concerns about Dr. Rahim’s attitude towards him on several occasions with Prof Barnett. We have heard an objective account from Prof Barnett that it was his experience that Dr. Rahim would on occasions question Dr. Shakher’s referrals for investigation or medication and that Dr. Rahim and Dr. Andrew Bates, the endocrinology lead at the time, on occasions raised criticisms of Dr. Shakher’s clinical competence.

7.4.11. In 2006 Dr. Shakher was appointed to the role of a substantive consultant. Dr. Shakher’s appointment was not welcomed by all and Dr. Rahim and Dr. Bates were the most vocal consultants who

challenged Dr. Shakher's appointment and his clinical competence. Dr. Shakher's appointment as a consultant had been unusual insofar as his consultant accreditation had been placed on hold owing to wider issues relating to his Visa allowing him to practice in the United Kingdom. Having heard the explanation for the process of his consultant accreditation we find that Dr. Shakher was appropriately appointed as a consultant and that appointment was progressed through the then medical director Dr. Hugh Rayner. There was no objective concern about Dr Shakher's clinical competence.

7.4.12. We have heard an account also from Dr. Sri Bellary, the clinical director for the diabetes department since 2011 when Prof Barnett retired. Dr. Bellary has given an account that his understanding, gained through department chatter, was that Dr. Rahim and some other consultants who expressed their disapproval about Dr. Shakher's appointment as a consultant, to be because he had not trained by the same pathway as the other consultants. It was Dr. Bellary's perception that Dr. Shakher was aware of and unhappy that a number of his colleagues had not been supportive of his appointment to consultant. We have been referred many times to department 'chatter' and we accept that the relationship between Dr. Rahim and Dr. Shakher was one that was not happy and we find that there has been no evidence put before us that provides any objective justification for the challenges raised by the claimant amongst others about Dr Shakher's clinical competence. We find the unhappiness of the claimant and others about Dr Shakher's experience demonstrates a bias whether unconscious or otherwise about the unconventional training of Dr. Shakher from India. Dr. Shakher felt Dr. Rahim was obstructive and Dr. Rahim in the later years felt that Dr. Shakher was overly critical of him particularly as Dr. Shakher was appointed to the role of consultant and subsequently to management roles.

7.4.13. Both Prof. Barnett and Dr. Bellary characterised Dr. Shakher as being hard-working and an individual who was ‘vocal’ at work and will speak his mind about anyone, irrespective of their position. Dr. Shakher is seen as being proactive in his approach and as quick to give feedback or express an opinion when he does not agree with the view of another individual. Where he has a different opinion his approach can be volatile and aggressive. Dr. Bellary in his evidence has expressed the view that he has witnessed Dr. Shakher in his interactions with Dr. Rahim and with others act in a way that is not entirely professional, he will leave meetings abruptly, ignore people and display dismissive body language. Dr. Shakher does not accept criticism or challenge easily and does not like being challenged.

7.4.14. Having seen Dr. Shakher give evidence in cross-examination and in answer to direction from the tribunal Dr. Shakher has been curt in his response to challenging cross-examination and direction and it has been necessary to give robust direction to him to answer questions when he has been asked them. We observe even in respect of addressing the Tribunal’s direction and questions to clarify their understanding of his evidence Dr. Shakher has demonstrated that he is uneasy and defensive if his view is challenged or questioned.

7.4.15. We observe also that Claimant also needed to be directed by the Employment Tribunal when on a number of occasions he has in addressing cross examination not answered the questions that are put. We have identified that the majority of the consultant and senior clinician witnesses before us, whose professional role requires them to be forthright and confident in their own decisions and directions, have shown it to be difficult for them to cede control of the examination to counsel and the tribunal.

7.4.16. The Claimant has throughout his employment retained all emails he received at work, he gives an account that he retained emails on his computer at home. The claimant's retention of emails dating back as far as 2003 is in stark contrast to the other witnesses, who have not retained personal copies of hospital related emails on their personal computers and have been unable to produce the paper-trail that the claimant has. We find that the claimant in retaining copies of historic emails, whilst not raising grievances in respect of them in a timely fashion, has impeded that ability of the first and second respondent to gather historic information. We have been told that in the passage of time since 2003 the First Respondent has undergone a number of upgrades to the IT systems they employ and that it has not been possible to undertake a comprehensive search of historic data. That fact has implications upon our conclusions in relation to the issue of jurisdiction in relation to historic allegations.

7.5. **The General NHS Foundation Employment Policies and Procedures**

7.5.1. The Claimant is employed by the Respondents as a Consultant Physician with an interest in Diabetes and Endocrinology. His employment appointment contract is contained within the principle statement of terms and conditions [180-188] which refers to a Grievance Procedure within the Trust [245-274] and to an Equal Opportunities Policy [411A-T], a Dignity at Work Policy [275-301] and a Stress Management Policy [375-411]. In 2005 the Claimant accepted the offer of a transfer to the new Consultants contract [191] and the principle Statement of Main Terms and Conditions attached to that Contract [192] which detailed the work allocation including job planning in clause 6 [page 193] and programmed activities clause 7 [193-194]. The Statement of Terms and

Conditions provides in respect of Grievance Procedures paragraph 16 [197]:

> *"If you have a grievance relating to your conditions of service, you should, in the first instance, raise the matter with your Clinical Director, or in the case of a Clinical Director with your Medical Director, orally or in writing and within the specified time limit contained in the Trust's Grievance and Disputes procedure. If the matter is not settled, you may pursue it in accordance with further stages as set out within the document."*

7.5.2. Disciplinary Matters provided for in paragraph 17 of the Contract [197-198] where it confirms that issues relating to conduct, competence and behaviour should be identified and resolved without recourse to form procedures, however should the Trust consider the conduct or behaviour, may be in breach of the Trust rules regarding the Standards of Conduct, the matter will be reviewed through the Disciplinary Procedure for Medical Staff, or its successor policies. We have been referred in evidence of the fact that matters relating to the conduct and capability of members of medical staff are dealt with under the Respondents "Maintaining High Professional Standards Policy 2007" [204-244] ("MHPS"). The policy which was last ratified in September 2014 confirms that it is the policy for employers' procedure for handling concerns about Doctors competent capability and supersedes all previous disciplinary procedures for medical staff. The MHPS Policy provides [clause 4.5 page 207] that :-

> > *"All serious concerns must be registered with the Medical Director or an Associate Medical Director in the first instance. Following discussion of Director or Work Force, the Chief Executive will ensure that a Case Manager is appointed. The Chairman of the Trust Board must*

designate a non-executive member "the designated member" to oversee the case and ensure that momentum is maintained."

7.5.3. Having heard evidence from a number of Senior Consultants and Hospital Managers, we are led to conclude that the MHPS Policy was engaged to protect both patients who may be subject to harm regarding clinical issues of clinical performance and to protect the Doctor, particularly where a decision is likely to invoke either exclusion or restriction of duties. The Policy provides for a Case Manager to be appointed and for a Case Investigator to be appointed where a problem has been identified [209] and the terms of an investigation are detailed in the policy para.4.14–4.19 [210].

7.5.4. In dealing with an MHPS investigation, the policy at para 4.5 requires that:

"4.15 The Practitioner concerned should be informed in writing by the Case Manager, as soon as it has been decided, that an investigation is to be undertaken, the name of the Case Investigator and made aware of the specific allegations or concerns that have been raised. The Practitioner must be given the opportunity to see any correspondence relating to the case together with a list of people that the case investigator would interview. The Practitioner must also be afforded the opportunity to put their view of events to the Case Investigator and give them the opportunity to be accompanied."

7.5.5. The procedures provided in terms of the investigation that:-

"4.17 The Case Investigator has discretion on how the investigation is carried out, but in all cases, the purpose of the investigation is to ascertain the facts in an unbiased manner. Investigations are not intended simply to secure evidence against the Practitioner as information gathered

in the course of an investigation may clearly exonerate the Practitioner or provide a sound basis of effective resolution of the matter."

7.5.6. We have found in the light of the evidence we have heard in particular the Claimants own concerns regarding the breakdown of a relationship with a colleague, Dr. Shakher and the rest of the change management team, Dr. Raghuraman and Dr. Mukherjee, that the allegations that the Claimant made in his third grievance and building upon the concerns raised in his first and second grievances were matters in respect of which it may have proved necessary for there to be a time limited exclusion or restriction of activities of Dr. Shakher and others. We note of course that the Pavitt investigation, having identified serious concerns that required further investigation, was not able to lead to any further action against a doctor if required and we find it was appropriate that the MHPS Policy be implemented.

7.5.7. We have been referred also to the Respondents Grievance Procedure [248-274]. The detail of the Grievance Procedure [253-259] refers to an informal stage, a formal grievance process in respect of which there is no clear resolution of the grievance, it may be possible, at the discretion of the Management that the Trust may decide to suggest mediation and thereafter a right of appeal. The Grievance Policy [248-254] identifies what is a suitable matter for a grievance and specifically excludes from the operation of the policy at 3.8 [249] harassment which is handled under a separate policy.

7.5.8. The policy refers to time limits and states:-

"6.4 Where an individual grievance or collective dispute is raised, the time period for submission of said grievance/dispute is no longer than four weeks following the date at which the party became aggrieved. In exceptional circumstances, the Director of Work may allow this period to be extended when mutually agreed."

We find that despite the clear time limits, the claimant did not employ the grievance procedure in accordance with the time limits that applied.

7.5.9. We note with interest that in respect of time limits the Grievance Policy expressly provides:-

> *"6.7 Providing steps of the Grievance Procedure have been followed and the Employee is still not satisfied with the outcome, the Employer must be aware that any subsequent claims to an Employment Tribunal must be made within strict time limits. In most cases, the Tribunal must receive a claim within three months of the date of grievance."*

7.5.10. We observe that having raised his three grievances in March, May and October 2015, the Claimant and his BMA representative agreed that his complaint should be investigated under the MHPS Policy and has not received an appeal against the decision taken by the Respondents to engage the MHPS procedure.

7.5.11. We have been referred, although not in detail, to the Respondents dignity at work policy (Bullying and Harassment Policy Procedure) [275-301] the Policy defines harassment in its broadest sense 3.1 and states:-

> *"What is harassment? Harassment can be defined as "any unwanted action, behaviour, comment, physical contact or passive intimidation that a person finds objectionable or offensive and which makes that individual feel threatened, humiliated, patronized or uncomfortable, leading to a loss of dignity or respect.*
>
> *Harassment may be persistent or an isolated incident.*

Harassment can create an intimidating office-style environment.

Harassment may be directed towards people because of their gender, age, sexual orientation, race, colour, ethnic origin, religious belief, physical and mental disability, or some other characteristic.

It is important to remember that it is for the Recipient to define what is and is not acceptable".

7.5.12. Having identified Harassment, the policy provides at paragraph 3.2 practical examples of what may amount to harassment in relation to race and 3.3 Harassment in relation to sex. The Policy at paragraph 3.4 provides that the Trust finds bullying at work in any form unacceptable, and sets out general aims and objectives, paragraph 5.

7.5.13. We observe that throughout the written grievances raised by the Claimant, he refers throughout to "harassment" and makes no mention of the harassment being for a specific protected characteristic whether relating to his race, sex or any other matter. The claimant has confirmed in his evidence to the tribunal that he did not at the time consider that the respondents treatment of him was less favourable treatment or harassment or victimisation because of his race or for that matter any other protected characteristic.

7.5.14. We find for the reasons set out below that the Claimant did not refer to the harassment being because of a protected characteristic

until the meeting to discuss the outcome of the Pavitt Report held with him on 23 November 2015 [S1-S16] and [576-577]. The claimant has confirmed also that he did not consider that the treatment of him was because of his race until March 2015 when, as he describes it was like “the dimmer switch” having been turned on. In light of the account that the claimant has given as to when he was taking advice on the issue of a complaint at the Employment Tribunal – as early as the November 2015 meeting and from his friends who were lawyers in January 2016 we find that the claimant’s view that what happened to him in the long period of time from 2003 to 2015/16 was considered to be because of his race only when looked at retrospectively through the lens of knowledge that the ability to present a complaint to the Employment Tribunal whilst in employment was possible only through the vehicle of the Equality Act and a complaint that the treatment was because of a protected characteristic, in this case, his race.

7.5.15. Although we have been referred to the MHPS Consultants Clinical Excellence Award Scheme [302-344] the Parties have made limited reference to the policy documentation.

7.5.16. Referring to the Clinical Excellence Award Scheme reference to paragraph 2.4.3 [312-313] and 3.4.3 and 3.4.4 is made in relation to eligibility for awards is subject to there being no adverse outcomes for a Consultant following a disciplinary action or disciplinary sanction.

7.5.17. Finally, we have been referred to the first Respondent’s Equal Opportunities in Employment Policy [411A-T], in particular the Scope of the Policy, paragraph 2 and the Responsibilities Paragraph 7 page [411E].

7.6. **Re Disability – Knowledge**

7.6.1. A significant part of the claimant's complaint is that he is disabled by reason of anxiety and depression. The claimant's disability complaint is limited to that in respect of his assertion that the first respondent, his employer failed to make reasonable adjustments as they were required to do. The claim is reflected in allegations 33 to 36.

7.6.2. The respondent accepts that the claimant was disabled by reason of anxiety and depression as at November 2015. The first respondent asserts that they acknowledge the claimant to be a disabled person, disability being based upon the knowledge subsequently received but they say that they only had knowledge of the disability from 29 September 2016 following the disclosure to them of an occupational health report of that date [1234].

7.6.3. The first respondent's primary position on knowledge of the claimant's disability is that it had actual or constructive knowledge of the claimant's disability on 29 September 2016 following receipt of the occupational health report [1234-1235].

7.6.4. The claimant's witness evidence [w/s 145-147] asserts that the respondent was fully aware of the effect his disability from 27 September 2015 if not before.

7.6.5. We have considered at length the evidence to which each party directs us and we have considered the contemporary information available to the respondent at the time.

7.6.6. On 25th of March 2015 the claimant had written to his clinical director, Sri Bellary in which he sought to raise a formal grievance that he describes as being caused by:

"the current situation I am facing has reached a point whereby this is now affecting not only my professional life but also my personal life and mental well-being. I feel under immense stress and pressure on a daily basis and am greatly concerned that this will impact on my performance."

7.6.7. The claimant referred to his relationship with the second respondent a work colleague and he referred to the stress that the second respondent's treatment of him caused him to feel.

7.6.8. Subsequently, after a discussion with Dr. Raghuraman on 23 April 2015 the claimant compiled the document which he has variously described as his second grievance, and alternatively as a recollection of the meeting with Dr. Raghuraman. In the agreed chronology that document [516-518] is described as the second grievance and subsequently we have been referred to the second grievance as being raised at a meeting on 13 May 2015 [918- 919]. It is evident that the respondent was provided with both documents and the claimant refers to his feeling *"extremely distressed, anxious and depressed about the situation"*

7.6.9. We find that the claimant made a clear report of how he felt , he was anxious and depressed – however we observe that the claimant was not consulting his doctor at the time and when questioned subsequently in June 2015 he had explained to Marion Pavitt – who was investigating his grievances that he had support of colleagues

and was managing through a difficult time [948]. The claimant reported that it was an intolerable working situation which was taking its toll on his physical and mental well-being and he was given, but declined the opportunity, to take up counselling through the first respondent. We find that a stated experience or indeed a diagnosis of stress, distress, anxiety and depression does not, without more, put an employer on notice that the expressed distress, anxiety and depression is of itself necessarily a disabling impairment.

7.6.10. Subsequently the claimant, following an incident at work, began a period of sickness absence on 8 October 2015. His statement of Fitness for work [1199] signed him unfit to work for 1 month because of a condition described as “Harassment at work”. The subsequent fitness certificate dated 6 November 2015 [1200] stated the same condition prevented his return to work. The claimants subsequent Fit Notes identified the same reason for unfitness for work.

7.6.11. It is evident that the first respondent through HR [547-548] were mindful of the need to support the claimant whilst unfit for work and to support a phased return to work. We find that the first respondent, a large public sector employer, took seriously its responsibility to promote the physical and mental well being of its staff and to put in place arrangements to enable employees to return to work with suitable and reasonable arrangements in place. A referral was made to Occupational Health on 10 November 2015 [1201] and a report to the Clinical Director confirmed the certified absence with ‘work related stress’ - and the GPs diagnosis of ‘harassment at work’.

7.6.12. The first respondent had appointed Dr. Suresh, Associate Medical Director as the claimant’s liaison point with his employer regarding

his sickness absence. Ordinarily the clinical director would have supported the claimant in his absence, however Dr. Bellary was named by the claimant in his most recent grievance and therefore it was not appropriate for him to undertake that role. Following the formal sickness absence review Dr. Suresh on 3 December 2015 [1203-1204] wrote to the claimant acknowledging the claimant work related issues that were causing him *'extreme stress'* and offered his commitment to the claimant's wellbeing and recovery and safe return to work. There were a series of Occupational Health reviews which emphasised the need to support the claimant [1206] and Dr. Suresh confirmed his support of the claimant in the process to affect his safe return to work [1208], including the proposals to make adjustments to the claimant's working arrangements to support his return when fit to do so. We find that Dr. Suresh was supportive of the claimant. At no time during his meetings and discussion with Dr. Suresh, nor with Occupational Health, did the claimant identify any diagnosis other than stress and extreme anxiety.

7.6.13. Following a meeting on 25 February 2016 the claimant informed Dr. Suresh that he was fit to return to work from mid-March 2016. Discussion was had about a graduated return to work and, to ensure that the claimant was indeed fit to return to work and on what basis, he was referred to occupational health for a further assessment.

7.6.14. We have been referred to the consultation information sheet generated by the claimant's GP at St Margaret's Medical Practice [1158-1163]. We note that the GP's computer entries at the time refer on 9 October 2015 to the patient reporting that he was being harassed at work by colleagues and that he had felt low since April. The claimant was prescribed antidepressant medication for the first time. The entries subsequently confirmed that medication was

continued and referred to additional health problems including globus, poor sleep and a migraine, albeit only lasting 10 minutes. The GP entries report the claimant referred to the Trusts investigation into his concerns, and on 4 December 2015 his GP described that the patient reported:

"painted outside of house and bathrooms, been playing football but no running, had meeting at work and trust taking things further spoken to BMA and taking trust to employment tribunal, feeling more positive is more in control. QE taking over Mx of Trust this month. Sleep better, has upped sertraline to 100 mg.'

7.6.15. The tribunal has been referred to a document, addressed 'To whom it may concern' [1150- 1153]. The claimant confirmed in answer to questions that although the first 3 paragraphs of the document are the GPs own the narrative, the remainder bears no reflection of the GPs contemporary computer consultation information sheets. The remainder of the GP's 'report' is, the claimant 'thinks', based upon the claimant's log/diary that he had himself written and provided to his GP to assist in the preparation of the 'medical report'. It is of some concern to the Tribunal that it was only when the information identified in the GP's 'report' was seen at this hearing not to be originally recorded in the contemporaneous GP notes that the claimant told the tribunal that the account was, he thought, based upon the diary/log notes that the claimant had himself provided to his GP.

7.6.16. The GP's report objectively describes the claimant:

"….*he had been a very infrequent attender and rarely is reviewed at the surgery except for blood tests to check his cholesterol. Dr.*

Rahim has no significant medical history of note.

However he has attended more frequently recently due to an ongoing depressive episode associated with anxiety. I have reviewed Dr. Rahim as follows:"

7.6.17. The subsequent note corresponding with some but not all of the dates of the claimant's attendances at his GP's surgery does not reflect the objective information contained in the GP's computer document that was printed on 23 September 2016.

7.6.18. On 16 March 2016 the respondent's occupational health advisers wrote to Dr. Suresh [1222-1224] confirming that the claimant;

> *"felt well in himself with no ongoing symptoms. His concentration is back to normal and his sleep pattern is good. He feels fit to return to work and his GP signed him fit. Is no previous history of problems of this nature."*

7.6.19. Occupational health confirmed that:

"in the short term he would be able to manage with this, without any significant psychological impact, although he does feel that to meet this colleague on a day-to-day basis would be humiliating for him.He is however concerned about the medium to long term impact on his health if this was to continue. I do feel that these are valid concerns and should be explored and addressed."

7.6.20. Although it had been confirmed to Dr. Suresh that the claimant was fit to return to work and he did so on a phased return [1221A-C] Dr Suresh took steps to arrange a return to work review with the

claimant on the 28 April 2016 [1225-1226]. We find that the report from occupational health 1222 – 1224 identified a number of things as risk factors, and suggested some changes to work arrangements to be affected on a phased return to work.

7.6.21. Occupational health did not inform Dr. Suresh that the claimant at that time was a disabled person nor did they inform the first respondent that the claimant's condition was a long-standing diagnosis or one that suggested it would become long term. We find that as at 28 April 2016 there was nothing more than the claimant's bare assertion that the claimant was a disabled person.

7.6.22. Having been absent from work for 6 months the respondent, in particular Dr. Suresh, considered arrangements for the claimant's return to work and Dr. Suresh was to be the claimant's contact should he require his support upon return. Subsequently, having returned to work on 22 March 2016 a further discussion was held on 22 June regarding the graduated return to work discussion [1227-1228] and in particular addressed the claimant's concerns regarding his work environment and a proposal to move certain of the claimant's clinics to Solihull.

7.6.23. We have been referred by Mr John to the typed transcript of the claimant's meeting with the MHPS investigator Dr. Arnie Rose on 25 January 2016 [S19] the transcript which was a record of the claimant reading a prepared statement which records stated:

"Firstly the impact of the behaviour has had on me upon me, I will not go into this in detail as I do not think it is appropriate in the current form, however I will point out that the impact has been

detrimental both my mental and physical health. Moreover, it is severely impaired my ability to function in my personal life and in performing my duties."

7.6.24. We are mindful that Dr. Rose was conducting the MHPS investigation into the claimant's concerns about Dr. Shakher and the alleged bullying and harassment and that the meeting was one attended also by Mark Tipton, the HR business Partner. We find the information conveyed by the claimant at the meeting was consistent with the information most recently conveyed in the claimant's third grievance and the sick notes submitted since his period of sickness absence commenced on 8 October 2015.

7.6.25. Consistent with the respondent's procedures Dr. Suresh took steps to arrange the claimant's phased return to work.

7.6.26. Running parallel with Dr. Suresh's management of the claimant's return to work during the course of 2016 the respondent Trust became aware that the claimant presented a complaint to the Employment Tribunal on 3 March 2016 [2-32]. The claim form indicated that the complaint, amongst other things was because of discrimination relating to the protected characteristics of race and disability that were particularised in relation to a failure to make reasonable adjustments [31]. The particulars of the complaint of disability discrimination are contained at paragraph 9,10 and 35, we find that the complaint does nothing more than raise the allegation of disability and failure to make reasonable adjustments without providing additional information of the impairment that was claimed to be a disability or its substantial adverse impact on his ability to undertake normal day to day activites.

7.6.27. Subsequently the claimant raised a second complaint to the tribunal which was presented to the Employment Tribunal on 4 August 2013 and sent to the respondent by the Tribunal on 9 August [100-126]. In contrast to the first claim form the second complaint provided more detailed information as to the claimant's disability. In addition, the claimant's representatives on 9 August 2016 served the claimant's provisional disability impact statement [1164-1177] on the respondent.

7.6.28. In light of the additional information that was sent to the respondents on 9th August 2016 we find that upon receipt of that information, which for the purpose of service we take to be 10 August, from that date the respondents were provided with actual or at least constructive knowledge that the claimant was a disabled person and from that date the employers statutory duty to make reasonable adjustments in appropriate circumstances took effect.

7.7. **Victimisation**

7.7.1. Within the claimants many complaints he cites that he has been subject to victimisation by the first and second respondent. To consider the merits of each of the complaints we are required to identify what, if any, and when the claimant did a 'Protected act' and to identify when each of the respondents was fixed with knowledge of the protected act. Knowledge by the alleged perpetrator of the doing of a protected act is a prerequisite of victimisation. To this end and to assist us in making our determination of the complaints of victimisation we deal here with our findings of fact in respect of what protected act(s) the claimant did, when they were done and what knowledge of the protected act was had by each of the named respondents and any of the alleged perpetrators of victimisation and when they were fixed of that knowledge.

7.7.2. We consider first when the claimant did a protected act. The claimant asserts that the Claimant did the following protected acts:

7.7.2.1. Claimant lodged a grievance in March 2015

7.7.2.2. Claimant lodged a grievance in April 2015

7.7.2.3. Claimant raised race discrimination in a meeting on 23 November 2015.

7.7.2.4. Claimant instigated ACAS early conciliation on 22 December 2015

7.7.2.5. Claimant lodged a claim with the Employment Tribunal on 3 March 2016

We consider each of the alleged protected acts in turn.

7.7.3. <u>Claimant lodged a grievance in March 2015</u>

7.7.3.1. The claimant asserts that he did a protected act in lodging grievance in March 2015. In 25 March 2015 he submitted a grievance under the respondent's grievance procedures [912]. That first grievance was sent to Dr. Bellary who was the clinical director of the department in which the claimant worked. We have read that grievance document closely, it reflects what has subsequently proved to be a variety of the allegations made by the claimant as detailed in the schedule allegations 1- 11, 14 -17 and 19 – 21.

7.7.3.2. Having carefully considered that grievance we observe that the claimant refers to a pattern of behavior to which he alleges Dr. Shakher subjected him, which he describes as bullying and harassment in the period from 31 July 2003 to October 2014. We find that none of the allegations describe unlawful discrimination because of any protected characteristic including race to be the cause of that behavior on the part of Dr. Shakher. The claimant in cross examination has confirmed that no reference is made to suggest that the

motive for the alleged behavior by Dr. Shakher was the claimant's race or indeed any other protected characteristic.

7.7.3.3. We find that the grievance lodged by the claimant on 25 March 2015 is not a protected act as described in section 27 (2) of the Equality Act.

7.7.4. Claimant lodged a grievance in April 2015

7.7.4.1. In answer to questions in cross examination the claimant confirmed that the second grievance he raised was brought in May 2015 not April 2015. We have been referred to a document created by the claimant following a meeting that he had had with Dr. Raghuraman [516 – 518]. The document is described by the claimant as his 'recollections' of that meeting that are described as being documented by him at 13:15 on 23 April 2015 following discussion with Dr. Raghuram at approximately 12:50. The document was confirmed in evidence not to be a grievance and concerned discussion with Dr. Raghuraman in relation to the claimant's application for a CEA award.

7.7.4.2. We find that nothing in the 'recollection' note nor in the document referencing a meeting of 13 May 2015 that was described as the second grievance [918-921] raises a complaint of race discrimination. Rather the second grievance refers to incidents which have escalated to a higher level which are described as:

"*determined systematic and calculated harassment in order to discredit my professional and personal reputation and integrity."*

7.7.4.3. The claimant identifies the outcome that he required from that grievance to be:

"formal investigation of my complaint and then any necessary action in accordance with HR policy on

bullying and harassment within their legal framework the complaints and set out in that second grievance were against Dr. Shakher and Dr. Raghuraman."

7.7.4.4. The claimant did not make any reference to a protected characteristic within the second grievance nor to an assertion that he had been subject to unlawful discrimination in breach of Equality Act. We find that the claimant had not done a protected act described in section 27(2) of the Equality Act.

7.7.4.5. Although not specifically referred to as a 'protected act' by the claimant in the agreed schedule of allegations, we have been taken to the third grievance submitted by the claimant on 8 October 2015 [920- 921]. Having already raised a grievance in April and May 2015 which had caused the first respondent to employ an investigation known as the Pavitt Enquiry the third grievance of 8 October 2015 was a formal complaint brought by the claimant against Dr. Shakher based upon an email that he had sent to a number of individuals by which the claimant perceived Dr. Shakher was accusing him of a number of things causing junior doctors to feel intimidated and scared. The offending email had been brought to the claimant's attention on 7 October and he had been certified unfit for work from 8 October 2015.

7.7.4.6. The claimant has confirmed in answer to questions in cross examination that his third grievance makes no reference to Dr. Shakher's treatment of him having been because of his race or any other protected characteristic and he does not assert that he was bringing the complaint under the Equality Act. We conclude that none of the claimant's

formal grievance documents submitted in 2015 amounted to protected acts.

7.7.5. Claimant raised race discrimination in a meeting on 23 November 2015

7.7.5.1. As a consequence of the Pavitt enquiry a meeting was convened with the claimant and his union representative Helen Radley with Clive Ryder, Deputy Medical Director of the respondent Tust who was accompanied by Allison Money, Head of Operational HR.

7.7.5.2. We would observe with some surprise that on this occasion one of the senior HR managers within the Trust does not appear to have taken minutes of the meeting with the claimant and his union representative on 23 November 2015. We have however had the benefit of a typed transcript of the recording of the meeting and that transcript has been agreed by the parties.

7.7.5.3. The tribunal has been referred to a supplementary bundle of transcripts of a number of meetings, the transcript of the meeting on 23 November is included in that bundle[S1-16]. The purpose of the meeting was to review the consequences of the Pavitt investigation and the issues that arose from it. It was agreed that the initial findings of the Pavitt investigation and their potential consequences for individuals required a more formal and detailed investigation to be conducted under the MHPS procedures “Maintaining High Professional Standards”.

7.7.5.4. Within that meeting [S3] Helen Radley advised the respondent Trust

7.7.5.4.1. *" it is Dr. Rahim's assertion that the bullying and harassment has erm a discrimination a discrimination aspect to it based on protected characteristics. As a result of which the last instant of such harassment in our view would be the complaint that Dr. Rahim has made."*

Ms Ratley went on to say [S4]:

"Dr. Rahim is of the view that he would like to pursue that through an employment tribunal."

She continued:

"the clock is already ticking on that and so my process is that I have obviously have to have our solicitor's merits assessment of Dr. Rahim's case based on the outcome report of his complaint of harassment."

Later in the meeting that she said:

" obviously that it's a narrow time scale to protect an interest, Dr Rahim's interest on a potential legal claim."

and later that:

"obviously the aspect of discrimination has not been explored in the investigation and it is up to the trust to determine whether they wanted to do that or whether they leave it to a subsequent claim for it to be determined or otherwise."

7.7.5.5. We have heard submissions from the first respondent and note that Mrs. Barney on their behalf confirms in her submission that the respondents deny that the claimant raised race discrimination in the meeting of 23 November 2015. She refers to the fact that at paragraph 18 of the claimant's claim form [22] it records:

"On 23.11.15 a meeting was held between Clive Ryder… The claimant informed the respondent that the reason for the historic detriment and harassment was because of his nationality and national origin. The claimant explained

that Dr. Shakher and lately Doctors Ragurhaman and Mukherjee, had historically bullied and harassed him because he was of Pakistani descent."

7.7.5.6. Having carefully studied the typed transcript we find that no such information alleged in the claim form that he had been discriminated against because of his race was in fact conveyed by the claimant to the respondent. No doubt the claimant may have perceived the harassment and bullying he described to be because of his Pakistani descent however those words were not spoken at the meeting either by the claimant himself or by Ms Ratley on his behalf nor were they inferred. We are mindful that the claimant at the time of the meeting, unbeknown to the respondent, had suffered what he describes as a nervous breakdown and he was certified unfit for work by his GP, his recollection of the meeting which was not then minuted was perhaps uncertain, although he did have in his possession the digital recording of the meeting.

7.7.5.7. Despite this, and knowing with the benefit of the transcript what was actually said in the presence of Mr Ryder and Ms Money, the claimant clearly through his union representative referred to the fact that he considered he was subject to harassment that related to a protected characteristic and that it was a discrimination aspect and that he would like to pursue the complaint through an employment tribunal. The respondent maintain that the words 'race' were not expressly used and on that point we agree with them. However we conclude that the respondent's representative at the meeting with senior members of staff referred to the harassment being because of a protected characteristic, albeit undefined. Dr. Shakher in his answer to questions has confirmed that as a

doctor and a manager within the Trust he understood the expression ‘protected characteristic’ to be language used within the Equality Act 2010.

7.7.5.8. We find that the claimant through his union representatives speaking on his behalf at the meeting made an allegation that Dr. Shakher, and that the other alleged perpetrators of his harassment had harassed him, because of a protected characteristic and that was behaviour referred to in the Equality Act and that there was an intention to bring a complaint in an employment tribunal. We find that the allegation was clear and unequivocal; that the second respondent and others, employees of the first respondent had contravened the Equality Act and it was only the express reference to identify which particular ‘protected characteristic’ he referred in the Act that was omitted.We have considered whether in light of the determination in Durrani v London Borough of Ealing EAT/0454/12 there is more than simply an allegation that the claimant had been discriminated against in the general sense that he had been treated unfairly, we find that there was. We find that the claimant linked the discriminatory behaviour to protected characteristics. Even though the respondent made no enquiry of the claimant to clarify to wich protected characteristic he referred we find that the claimant through his representative clearly on this occasion referred to discrimination in a more specific way to the Equality Act and protected characteristics. We find this in sharp contrast to the earlier complaints raised in the grievances in which the claimant had made references only to the allegation that he had been bullied and harassed, which we find was reference to unacceptable social behaviour that had no proper place in the workplace. Nothing that the

claimant had said earlier suggested that there was more than unacceptable behaviour in the workplace and nothing linked that behaviour to a protected characteristic. Indeed the claimant himself has referred to the fact that he had not previously ascribed a motive to the behaviour being because of his race or ethnicity.

7.7.5.9. We find that the disclosures made by the claimant and his union representative on his behalf at the meeting on 25 November 2015 were allegations making an allegation (whether or not express) that the second respondent or another person had contravened the Equality Act and that the assertion was a qualified acts described by section 27(2)(d).

7.7.5.10. There has been no suggestion by the first respondent that the disclosure made of that matter, the allegations expressed by the claimant on 25 November or at any time thereafter, were allegations made in bad faith.

7.7.5.11. We would add that we find that the allegation made to the first respondent on 25 November was not then communicated to the second respondent and we find that he had no knowledge of the content of the meeting of 25 November until the transcript of the meeting was disclosed to him as directed in these proceedings.

7.7.6. <u>Claimant instigated ACAS early conciliation on 22 December 2015</u>

7.7.6.1. The employment tribunal is aware of the obligation placed upon prospective litigants in the employment tribunal to enter into early conciliation through the offices of ACAS as a

condition precedent of presenting complaint to an employment tribunal. Dialogue between parties with ACAS are subject to the general without prejudice rule and subject also to legal professional privilege. Privilege has not been waived in this case and indeed neither party have disclosed the detail of the discussions with ACAS and the claimant and the first respondent. Privilege not having been waived the tribunal does not have jurisdiction to determine whether in those discussions the claimant did a protected act

7.7.7. Claimant lodged a complaint with the Employment Tribunal on 3 March 2016

7.7.7.1. The first respondents accept that the issue of the first tribunal complaint by the claimant was a protected act.

7.7.7.2. The first respondent was served with the claimant's claim form on which date for the avoidance of doubt they accept that they were given notice that the claimant had done a protected act in accordance with Section 27(2) (a) of the Equality Act 2010 having brought a complaint.

7.7.7.3. We accept the evidence given by Dr. Shakher that he was informed of the Employment Tribunal complaint when it was provided to him on 18 March 2016 and he immediately made an application for an extension of time to present his ET 3 [32E] which was granted. We find, having heard all the evidence, that Dr. Shakher had not previously been made aware of the claimant's complaints of unlawful discrimination and had not been informed of the content of any of the meetings that the claimant had had with the respondent. Moreover, when investigated by the MHPS investigator Dr. Rose, those enquiries were based upon general allegations of

bullying and harassment and it was not asserted to the second respondent Dr. Shakher that it was alleged by the claimant that his behaviour had been because of Dr. Rahim's protected characteristics.

7.7.7.4. We conclude that to the extent that the second Respondent is alleged to have victimised the claimant because he had done a protected act, it was only when Dr Shakher was served with the first of the claimant's tribunal complaints on 18 March 2016 that he had knowledge of the claimant having done a protected act.

8. **Allegations of unlawful discrimination**

We turn next to consider each of the allegations of discrimination raised by the claimant in respect as they are detailed in the Scott Schedule that the parties had agreed was the nature of the claimant's complaints, identifying the gist of the allegation, the factual and legal issues in dispute.

8.1. **Allegation 1**

8.1.1. It is alleged that on or about 31 July 2003 Dr. Shakher was aggressive to the Claimant after the Claimant's colleague Dr. Alan Chookang had written an abstract for a case report which Dr. Shakher stated should have referred to him PoC 22.1). The perpetrator of the alleged discrimination is said to be Dr. Shakher and the prohibited conduct is alleged to be discrimination and harassment because of the protected characteristic of race. The First Respondent asserts that Claimant has not particularised how Dr. Shakher was "aggressive" towards him, for example, whether this was verbal (and what was said) or manifested itself in behavior. It has not been particularised how it is said that this amounts to race discrimination.

8.1.2. Dr. Shakher who is a named respondent asserts that he did not have any aggressive conversation with Dr. Rahim about the incident.

Dr. Chookang was a trainee doctor; Dr. Rahim approved the poster [415] and was responsible for it. Dr. Shakher mentioned to a nurse who had also looked after the patient jointly with Dr. Shakher for 3 years that he felt he should have, as the main physician, been acknowledged. (ET3 30)

8.1.3. The respondents assert that complaint is out of time and it is denied that there is a continuing act of discrimination: the next allegation complained of takes place some 3 years after this incident.

8.1.4. The claimant asserts that his comparators in the case are, Margaret Clark (White British), Dr. Alan Choo-kang (Chinese), Mark Cooper, Sudesh Kumar, Paul Dodson.

8.1.5. Discrimination is denied.

Evidence and Findings

8.1.6. The core witness evidence in relation to the application is found within the claimant's witness statement para16-19, Mr Shakher's w/s para 9 and Prof Anthony Barnett w/s 20. The allegation relates to email sent by Dr. Shaker to the claimant [414] about 3 months after the claimant had been in post. The claimant confirmed under cross-examination that the email to referred was one retained from 2003 and it is not an aggressive email, we agree the email from Dr. Shaker addressed to the claimant is respectful. Dr. Shaker asked the claimant if he could be involved in any case reports in future publication as he had been involved treating the patient. We find the acknowledgement and publications were one of the means by which Dr. Shaker might progress his career. The claimant's response was equally polite.

8.1.7. The claimant asserts that after the emails, 10-14 days later Dr.

Shaker entered his room and had been aggressive, raised his voice, shook his finger and had an angry look on his face, Dr. Shaker denies that he was aggressive and acknowledged in examination that he said in his witness statement he had not had an aggressive discussion with the claimant but he acknowledged that he had a recollection of speaking to the claimant after the email exchange, probably in the corridor.

8.1.8. We are mindful that this allegation, like so many of the allegations brought by the claimant was of an historic nature, in this case more than 13 years before the tribunal complaint was presented. The claimant has told the tribunal that he retained all of his emails throughout his entire employment with the respondent on his home computer. The claimant alleges that Dr. Shakher took issue with him over the publication that did not acknowledge him along with the other named clinicians whose work contributed to the publication. We accept the account given by Dr. Shakher that he had not sent the email to the other named clinicians because the last name credited, in this case Dr Rahim, was that of the person responsible for the content of the poster. Dr. Shakher's account is that the first name on the list is the author of the publication and the last name is the person responsible for the content who had responsibility for checking the accuracy of the poster. We find that as a consequence when concerned that he had not been included on the poster the claimant was properly the person to whom Dr. Shakher's concerns should be addressed.

8.1.9. We find that because of the passage of time before the allegation raised by the Claimant was brought to Dr. Shakher and the First Respondents attention the Respondents and each of them have been denied of an opportunity to present a full account of their evidence in rebutting the allegation. In light of the evidence that we

have heard in particular from Professor Barnett, we conclude that the events were what might have been described by Dr. Rahim as a "run in" and that Dr. Shakher's reaction to the Claimant in any exchange that may have happened is more likely than not to be one that was emotional. Neither the Claimant nor Dr. Shakher can recall exactly what was said. We find that the Claimant was responsible for the poster as he was the Senior Clinician and although Dr. Rahim said that the accreditation in respect of the poster was not important, we find that at the time Dr. Shakher was trying to obtain his specialist registration and to develop his career and academic recognition, however insignificant Dr. Rahim may have considered it to be, it was important to Dr Shakher.

8.1.10. We find that the reason for Dr. Shakher having raised concerns by email and subsequently in any conversation, was emotional as it is acknowledged that Dr. Shakher could be.

8.1.11. We observe having being referred to comments made by Dr. Rahim in discussion [S21] referring to Dr. Shakher's behaviour as *"it's just a little excessive"* and *"words were slightly odd compared to the behaviour of other Consultants".* The Claimant subsequently, in preparation of his written Witness Statement [w/s para.17] states *"berating… shaking his finger…angry".* We conclude that the email from Dr. Shakher was not an unreasonable reaction to concerns about including his name on the poster, Dr. Shakher had a different view as to the importance of the inclusion of his name on any academic or research or clinical participation. The view expressed by the Claimant that was dismissive of Dr. Shakher's participation, was one of at best indifference and at worst antipathy towards Dr. Shakher's standing and aspirations both of which ought reasonably to have commanded respect.

8.1.12. The Claimant has identified as comparators a variety of names associated with the poster, we find however that the Claimant, Dr. Rahim was the lead and was therefore the person responsible for the poster. In considering why Dr. Shakher behaved as he did, to the extent that his reaction was in an unacceptable manner in any encounter with Dr. Rahim, whether in the corridor or in the office, we found that the reason was because of his omission from the poster which he considered was important. In contrast the Claimant was dismissive of Dr. Shakher's concerns in relation to what the claimant considered a minor matter. Whilst Dr. Rahim has been dismissive of the importance of Dr. Shakher appearing in and being named within poster presentations, we note that in the Claimant's own application for Clinical Excellence Awards, 2002 [477] he refers to the fact that in relation to a couple of publications that he had had:

> *"since my last award I've had three papers and eleven abstracts accepted at national/international meetings as poster presentations."*

8.1.13. We conclude that the claimant like Dr.Shakher was aware that to be named on posters as well as other academic papers and report was important to provide objective evidence of professional development and research and academic activity that may be used for future career progression and pay awards.

8.1.14. We find that a concern raised by Dr. Shakher were legitimate concerns raised for objective reasons and in no way connected with race. We find that the events of 2003 were a one off incident. We find that the Claimant has been treated no differently and no less favourably than any of the actual or indeed hypothetical comparators in such circumstances. To the extent that the exchange between Dr. Shakher with Dr. Rahim in the corridor was a heated discussion and

we find that even if such treatment amounted to a detriment, there are no facts from which the Tribunal can conclude and in light of the explanation that we have received, that the first or second Respondent discriminated against the Claimant because of his race.

8.1.15. In light of our Findings of Fact, we find that such conduct by Dr. Shakher as was detrimental and was unwanted by the Claimant, did not relate to the Claimant's race. We find that the reason why the behaviour occurred was plainly because of a legitimate concern that was unrelated to the claimant's race.

8.1.16. We find that the conduct was unrelated to the claimants race and not harassment, it did not have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile degrading, humiliating or offensive environment for the claimant, it was not perceived as that at the time nor was it reasonably perceived as that in retrospect. We find that the events complained of occurred in 2003. The next allegation against Dr. Shakher occurs in 2006 and there are no facts which led the Tribunal to conclude that the incident alleged was one which was part of a continuing act. There are no circumstances that lead the Tribunal to consider it just an equitable to extend time.

8.2. **Allegation 2**

8.2.1. It is alleged that the incident occurred on 27 February 2006 and that Dr. Shakher wrote an official letter which was placed on official records in electronic clinical letters which included unjustified, uninvestigated assertions detrimental to the Claimant. This letter was accessible to a large number of individuals. (PoC 22.2). The claimant identifies that the perpetrator of the discriminatory behaviour was Dr. Shakher in respect of whose behaviour the respondent is liable. The claimant states that his comparators are Andrew Bates and Sudesh

Kumar.

8.2.2. In essence the First respondent says that Dr. Rahim and Dr. Shakher appeared to have shared care of a patient in the obesity clinic. Dr. Rahim saw the patient on 8 August 2005 and the information recorded on the patient's file indicates that Dr. Rahim had a difficult conversation with the patient about weight loss. Dr. Shakher then saw the patient on 13 February 2006 and letters addressed to the patient's GP appeared on the First Respondent's iCare system following the consultation. One letter made reference to the patient being quite upset about patronising comments during a consultation. The version of the letter in the First Respondent's possession was addressed to the patient's GP, not the Claimant and there is no reference to the Claimant in this letter.

8.2.3. During the MHPS investigation, the Claimant p
roduced a further letter, written in similar terms but addressed to himself and not the patient's GP. The Second Respondent challenges the validity of this letter.

8.2.4. In terms of any alleged "patronising comments", the First Respondent submits that the comments amount merely to a factual account of what the patient said. The respondent states that they do not how it is said this was "detrimental" to Dr. Rahim. Only those involved in the patient's care would have access correspondence on the "iCare system" and the Claimant could have requested that letters be removed from the system.

8.2.5. The respondents asserts that it has not been particularised how it is said that this amounts to race discrimination.

8.2.6. The respondents assert that this complaint is significantly out of time, and it is denied that there is a continuing act of discrimination.

8.2.7. Dr. Shakher maintains that the clinical letters dictated by doctors are typed on the system by secretaries, saved under patient electronic records and then printed on letterhead. Dr. Rahim's allegation is regarding a letter specifically addressed to him which does not exist on the electronic record system because the only letter on the system is addressed to the GP. It is denied that this letter was on the system for a large number of Trust workers to see. Dr. Shakher is challenging the authenticity of this letter as he considers it is a different version of the letter which was addressed to the GP by the secretary and he will raise this as part of his defence to this allegation. (ET3 31)

Evidence and Findings

8.2.8. The witness evidence in chief is that contained in the claimants [para 20-22], Dr. Shakher [para 10-12], Prof. Barnet [para21]. We referred also to documents [419-421, 681, 867-868, 1076-1078 and S26]. We observed that we have no original copy of the document [1077] and only a photocopy of the document [1076]. On the 27 February 2006, Dr. Shakher sent a letter to a Patient's GP on the 27 February 2006 [1078], that letter was copied to two Consultants who had treated the patient, Mr Super, Consultant Surgeon and Dr. Rahim, who had been referred to a letter that was saved on the iCare system [1076]. The content of the letter is one which leads us to conclude that it is more likely than not that the letter addressed to the Patients GP was a cut and paste letter, the contents of which were intended to be sent to Dr. Rahim. We have been referred to the letter [1077] of the same date addressed to Dr. Rahim.

8.2.9. We observe that the letter [1077] is a photocopy and on its face appears that it may well have been fabricated, its margins are not in line with the addressee block and salutation, however we conclude it may as easily have been a photocopy of an original piece of paper that had been folded so that the typed body of the letter appears out

of line with the addressee. Dr. Shakher in defending himself to the enquiries of Dr. Rose in relation to a letter that is more than ten years old alleges that the letter is a fraudulent document. We observe that in the eyes of Dr. Shakher, who was a Clinician facing significant allegations against him, raised by Dr. Rahim, unable to find a copy on the Respondent's computer database of an original document in the form copied [1077], it was not unreasonable of him in raising concern that the letter may have been fabricated. That argument is not entirely ill-conceived, however we equally with our objective mind consider it is more likely, in light of the letter recorded on the Respondent's file [1076] addressed to the GP, that the letter whose content appears to have been addressed originally to Dr. Rahim was one created by Dr. Shakher. The Claimant takes exception to the sentence in the letter whether addressed to the patient's GP or to Dr. Rahim himself:-

> *"She is quite upset that you were patronizing to her during the consultation. She explained to me that she gained the weight from 2003 – 2004 was due to a liquid diet which she stopped taking."*

The patient concerned was a lady who wished to be considered as a candidate to undergo laparoscopic banding surgery. Dr. Rahim felt she was not suitable for surgery as she had put on weight since being first reviewed in September 2004 when she attended Clinic in February 2006.

8.2.10. The Claimant did not identify the letter as being considered by him to be part of a campaign of race discrimination at the time that he said the letter was sent to him, he did not raise a complaint about the letter in 2006. We remind ourselves that English is Dr. Shakher's second language not his first and on the understanding of Dr. Shakher, we find he identifies that the content of the letter was a record of what the patient had described to him as having been the Claimant's

treatment of her, namely that Dr. Rahim had been patronizing to her during the consultation.

8.2.11. In contrast Dr. Rahim reads the sentence as being Dr. Shakher's subjective commentary upon how he considered Dr. Rahim had been to the patient during Dr. Rahim's consultation with her in August 2005.

8.2.12. Read objectively, we find, as did Professor Barnett in considering the evidence, that the language used by Dr. Shakher is relatively loose, but is an attempt to record what the patient had said to him and the subsequent content of the letter confirms that Dr. Shakher endorsed the advice given to the patient by Dr. Rahim earlier, which was that the patient was not motivated to lose weight, and she would not benefit from the surgery in the long term.

8.2.13. Having heard evidence from Professor Barnett, we accept his account that, whilst he cannot remember being told by Dr. Rahim about concerns he had about the letter [1077/1076], were the conversation to have been raised with him, he may likely have said to Dr. Shakher that he should be more careful in his wording of letters in the future to identify clearly that comments are prefaced by wording like "*the Patient says*".

8.2.14. We have heard evidence from Dr. Shakher that he has checked the iCare system and that the letter [1077] is not on the iCare system. Dr. Rahim himself has acknowledged that he has not himself checked the iCare system to see if in fact the letter is available for all to see. Dr. Shakher's account is that only the letter on the iCare system is that to the GP [1076] which does not refer at all to the Claimant. We have no reason to doubt the evidence that Dr Shakher has given in this regard.

8.2.15. We find that, absent evidence that the letter the Claimant says was addressed to him [1077] has been placed on the iCare system, which evidence has not been placed before us and the claimant himself confirms that he has not seen the letter on the iCare system, no copy of the letter to which the claimant refers has remained on the iCare system available for all to see and identifying the claimant as the doctor about whom a patient had raised a criticism. We find that the letter addressed to the patient's GP [1076] does not identify the Claimant as the Consultant about whom the patient had been upset and who had described her that Consultant's matter as patronizing during the consultation.

8.2.16. The Claimant has referred to two comparators, Andrew Bates and Sukesh Kumar. The Tribunal has not been referred to how it is said Drs. Bates and Kumar are relevant Comparators. The claimant refers only to the fact that those Doctors also participated in the same Clinic although we are not aware that they advised the particular Patient about whom the letter to her GP was sent. We find that the Claimants complaint relates to the wording in the letter as opposed to Dr. Shakher's subsequent concern that the letter sent to Dr. Rahim [1077] was not falsified or fabricated to make a case against him. The Claimant suggests that the content of the letter was intended to discredit or undermine him [Witness Statement para 22]. In the light of our Findings of Fact, we concluded that the letter was intended to report only what the patient had reported to Dr. Shakher at Clinic and was not Dr. Shakher's own view as to Dr. Rahim's manner that was claimed to be "patronizing".

8.2.17. We find that in circumstances relating to a hypothetical or an actual named comparator with a patient who had referred to a comparator Consultant as having been reported to another

consultant as having been patronised and the patient said that she became “quite upset” it would be fair and reasonable and indeed expected practice for a Consultant to report a patient’s concern to the relevant Consultant.

8.2.18. Although not raised as a complaint by Dr. Rahim that Dr. Shakher had raised a concern regarding an allegation that Dr. Rahim had fabricated a letter [1077], we have considered the evidence before us. We note that the photocopy of the document, of which neither Dr. Shakher nor we have not been provided with the original, does to our own objective eye appear strange and potentially one that had been created after the event from the only letter retained on the Respondent’s iCare system which was addressed to the relevant patients GP and is referred at all to the Claimants [1076]. We find that the circumstances of Dr Shakher having had an accusation brought against him that he had bullied and harassed a fellow consultant was very stressful for him and his reaction was not unreasonable or motivated by or because of the claimants race.

8.2.19. We find with regard to Dr Shakher writing of the letter 27 February 2006, that neither the first nor the second Respondent treated the Claimant less favourably than an actual or hypothetical comparator because of his race and we find there are no facts from which the Tribunal can conclude, in light of the explanation that has been given, that the first and/or second Respondent discriminated against the Claimant because of his race. The explanation provided leads the Tribunal to conclude that neither the first nor the second Respondent discriminated against the Claimant because of his race. Furthermore, in light of our findings, we conclude that neither the first nor the second Respondent engaged in unwanted conduct related to the Claimants race in relation to the allegation.

8.2.20. The Complaint relates to events in 2006 which are significantly out of time. The allegation we find is in respect of a single incident of a letter alleged to have been sent to the Claimant in relation to a patient consultation and not from facts which form part of a continuing act.

8.2.21. For the reasons set out in our general observations, in relation to time, we find there are no reasons which lead us to conclude that it would be just and equitable to extend time to allow the complaint to be considered.

8.3. **Allegation 3**

8.3.1. It is alleged that when on 6 March 2006 the Claimant asked Dr. Shakher about his failure to attend a clinic he became abusive and threatening. (PoC 22.3) The comparator relied upon is a hypothetical comparator and the complaint is that the respondents discriminated against the claimant directly and harassed him because of his race.

8.3.2. Dr. Shakher denies that he was ever threatening or abusive. Dr. Shakher notes that no complaint was made at the time regarding this allegation. Dr. Shakher's contribution to clinics even while on annual leave is well recognized by the clinic manager. (ET3 32)

8.3.3. The first respondent responds that the Claimant emailed Professor Barnett on 6 March 2006 informing him that Dr. Shakher had failed to attend a clinic that afternoon and was not contactable by mobile phone. The Claimant stated he was finding the situation "difficult" but made no mention of Dr. Shakher being "abusive and threatening", as now alleged.

8.3.4. The Claimant has not particularised how he claims Dr. Shakher was "abusive and threatening". Discrimination is denied and the

respondents assert that this matter is significantly out of time, and it is denied that there is a continuing act of discrimination.

8.3.5. We have considered the evidence provided by Witnesses in their Statements, the Claimant [w/s para.23-24], Dr Shakher w/s para.13-14], Professor Barnett [w/s para.22]. We have considered also the documents to which we have been referred [pages 912] Grievance, [1122].

8.3.6. The Claimant asserts that having observed that Dr. Shakher did not attend a Clinic on the afternoon of the 6 March 2006, he had sent an email to Professor Barnett [1122] and that several days later [w/s para.13-24] Dr. Shakher had approached the Claimant in the corridor and had reacted to the Claimant's referral to Professor Barnett by shouting. The Claimant asserts that Dr. Shakher shouted him in the corridor but there were no other witnesses to what he described as a "run in". The Claimant asserts that he believes in retrospect that the motive for Dr. Shakher's outburst was the Claimants race because he would not have taken a similar approach with other Consultants.

8.3.7. The events relate to March 2006, some nine years before the Claimant raised his grievances against Dr. Shakher in March 2015. We accept Dr. Shakher's account that he cannot now recall the particular events. We accept the evidence that has been given to us by Professor Barnett and by others that, if confronted or challenged, Dr. Shakher could be aggressive or volatile, however Professor Barnett had not witnessed the encounter that the Claimant alleges occurred, whether with the Claimant or with anyone else in a corridor. We note that the Claimant did not raise a concern with his then Clinical Director, Professor Barnett on or around the date of the alleged incident in 2006. On balance there may have been what the Claimant describes as a "run in" and exchange of words. However,

given the passage of time and the lack of recollection by any witness other than the Claimant and the Claimant's failure at the time in 2006 to raise any concern, had the incident lead to the alleged "abusive and threatening behaviour," we consider that it is more likely than not that the Claimants recollections are now distorted through the lens of retrospectively considering the behaviour of Dr. Shakher to have been because of his race and not because that was what he felt at the time.

8.3.8. The absence of the complaint that was contemporary with the alleged occurrence leads the Tribunal to conclude that neither the first nor the second Respondent treated the Claimant less favourably than a hypothetical comparator. Moreover, we find that the evidence we have heard leads us to believe that the behaviour of the second Respondent was such that when confronted, or challenged his reaction was that he was inclined to be defensive and volatile or aggressive regardless of the then protagonist's race.

8.3.9. There are no facts from which the Tribunal can conclude, in light of the explanation that we have found credible, or that lead us to find that the first or second Respondent directly discriminated against the Claimant because of his race.

8.3.10. We find that neither the first nor the second Respondent engaged in unwanted conduct related to the Claimants race. We find that the passage of time and the lack of contemporary evidence leads us to conclude that Dr. Shakher and other Witnesses are unable to recall the event and that in the circumstances there is no basis upon which the Tribunal consider it is just and equitable to extend time. Furthermore were the harassment to relate only to the perception of the recipient we find that such a perception of the effect of such

treatment by the claimant that the treatment of him by Dr.Shakher was racially motivated was not a reasonably held belief.

8.4. **Allegation 4**

8.4.1. It is alleged that on 12 May 2006 Dr. Shakher accused the Claimant in writing of being discourteous by not informing him about a change of rota. While this rota was put in place by three individuals only the Claimant was criticized by Dr. Shakher. (PoC 22.4) The claimant asserts that he was treated differently than Alan Jones and Phil Dyer.

8.4.2. The respondents state that on 12 May 2006, Dr. Shakher emailed the Claimant (and copied in Anthony Barnett, Philip Dyer and Alan Jones) stating;

"I do wish you had the courtesy to involve me or at least inform me in advance that you are going to ask me to do the July/ August. You said you decided with Phil and Alan but should have informed me of that decision to via email. I do feel that in future July and August should be split in the middle so that not one person has to do the entire 2 months of holidays".

8.4.3. This the respondent asserts was a perfectly reasonable email and Philip Dyer later responded to the Claimant and said that he felt the Claimant should have spoken to Dr. Shakher personally to inform him of the arrangements.

8.4.4. It is denied by the respondents that this was an act of discrimination. The complaint is significantly out of time, and it is denied that there was a continuing act of discrimination.

8.4.5. In addition Dr. Shakher denies that he made such an accusation. The Claimant was more senior that Dr. Shakher at this stage in their

careers. Dr. Shakher felt that he was treated unfairly by the Claimant at this time and raised this issue internally in 2007. Dr. Shakher does not, recall writing a discourteous letter. The Claimant was asked to produce such a letter if it existed. (ET3 32 and 34).

Evidence and Findings

8.4.6. We have considered the Witness Evidence contained in the Statements, Claimants [w/s para. 25-26], Dr. Shakher [w/s para.25-26], Professor Barnett w/s para.23-24]. The document we have been referred to is not a letter as described in the pleaded case rather we are referred to an email of the 16 May 2006 [1123 –1124] . The email originated from Dr. Shakher to the Claimant, copy to Professor Barnett, Philip Dyer and Alan Jones relating to the call rota that was scheduled for July/August 2006. The Claimant says that Dr Shakher should not have singled out him as having been discourteous to Dr. Shakher and copied the email to Professor Barnett as well as Philip Dyer and Alan Jones the other Consultants who worked on the rota. Professor Barnett responded to the email on 15 May 2006 and suggested that they [the claimant and Dr Shakher and Alan Jones and Philip Dyer], discuss the situation between themselves.

8.4.7. We observe that Dr. Shakher was himself not appointed as a Consultant until September 2006. Within the email exchange, Dr. Philip Dyer on the 15 May [1123] wrote to the Claimant saying

"I think Shakher is concerned with the poor communication. I think you should have spoken to him personally and all this would not have occurred".

8.4.8. We find it is evident from the email exchange that rotas have not been discussed with Dr. Shakher before they had been issued, the rota impacted on Dr. Shakher as he was on rota for the whole of the school summer holidays in July and August which affected the two

weeks holiday he had planned to take. The communication of the rota was poorly done and it was acknowledged, at least by Dr. Dyer, that there had been poor communication with Dr. Shakher by the claimant. Dr Shakher's original email to Dr. Rahim stated

> *"I do wish you had the courtesy to involve me, or at least inform me in advance that you are going to ask me to do the July/August. You said you had decided with Phil and Alan, but you should have informed me of that decision via email. I do feel that in future, July and August should be split in the middle, so that no one person has to do the entire months of holiday.*
>
> *Thanks Shakher".*

8.4.9. We find that the email from Dr. Shakher was, in reasonably moderate terms, raising a not unjustified concern that he was on-call rota, for the entirety of the school holidays in July and August and he was known to have school age children. The Claimant has suggested in his pleadings that the email was an "accusation" of discourtesy against him.

8.4.10. It is not disputed by the Claimant that the Comparators to whom he refers are the two addressees on Dr. Shakher's original email, the first Alan Jones, who was a Biochemist and contributed towards ward cover for four months of the year and played no part in the Diabetes Department, the second comparator being Dr. Philip Dyer who worked within the Diabetes Directorate but with focus on acute medicine and contributing to ward cover. It is evident from Dr. Dyer's own emails [1123] that his own view was that the responsibility for communicating the ward rota was on the Claimant.

8.4.11. The Tribunal finds that the concern raised by Dr. Shakher was an operational concern in respect of which Dr. Rahim the Claimant had been the lead Consultant in organising the rota. In answer to questions in cross-examination the Claimant confirmed that the concerns raised by Dr. Shakher had been a legitimate concern and that Dr. Shakher was required to be on-call throughout the school holiday summer months. It is telling that in answer to questions in cross-examination the Claimant stated

> *"the action in retrospect, everything he did including me was adverse because of my race."*

8.4.12. Mr John, Counsel on behalf of the Claimant has suggested that the email from Dr. Shakher was a singling out of Dr. Rahim and that was part of a cumulative pattern of treatment, the effect of which was likely to undermine the Claimant and constitute less favourable treatment and harassment. We have had to remind ourselves that as at May 2006 the Claimant was the lead Consultant within the Diabetes Department and Dr. Shakher was a Specialist Registrar whose position at that time was junior to the Claimant. We find that the reason why the email was addressed to the Claimant and copied to the then Clinical Director Professor Barnett and to the other Clinicians Dr. Dyer and Ann Jones was because they had discussed the rota in advance with Dr. Rahim, unlike Dr. Shakher. We find that the email was addressed to the Claimant appropriately and without regard to Dr. Rahim's race. Dr. Shakher raised a concern about an operational decision that had an adverse effect upon his holiday arrangements.

8.4.13. We find the concern raised by Dr. Shakher to have been reasonably raised, not in an accusatory way alleged by the Claimant in his evidence to the Tribunal. Professor Barnett has

confirmed that an individual would take the lead to complete the rota, in this case it was the claimant, and the Claimant has not asserted that that view is incorrect.

8.4.14. We observe in considering the exchange of email correspondence that the Claimant copied the email exchange to Andrew Bates on 16 May 2006 [1123] although Dr. Bates had no involvement in the planning of the on-call rota. We observe that this was not the only time when Dr. Rahim shared information with Dr. Bates about Dr. Shakher when Dr. Bates was not directly involved. We observe that Dr. Bates was the Clinician who, together with the Claimant, was resistant to the Claimant's appointment as a Consultant.

8.4.15. We find that neither the first nor second Respondent treated the Claimant less favourably than the actual or indeed any hypothetical comparator because of his race. We find the reason why Dr. Shakher sent the email of the 12 May to the Claimant was because of his belief that the Claimant had taken the lead in scheduling the on-call rota and in light of the Finding of Fact we have made about the tone and demeanor of Dr. Shakher in challenging decisions with which he did not agree, we find that the Claimant was not subject to unlawful discrimination because of his race whether by reason of direct discrimination or harassment because of his race.

8.4.16. Furthermore in the appropriate context of the email dialogue we find that in all of the circumstances of the case it was not reasonable for the conduct of Dr Shakher to have been perceived to have been related to his race and to have had the effect of harassing Dr Rahim the claimant. We note that the Claimant did not raise any contemporary complaint about the email sent from Dr. Shakher, nor did he raise any contemporary concerns that Dr. Shakher's treatment of him was because of race.

8.4.17. We observe with some concern that the Claimant in answer to questions in clarification from the Tribunal confirmed that, in retrospect, he viewed that everything Dr. Shakher did with regard to him that was adverse was done because of his race. Moreover at the time of the events the unwanted conduct, acts or omissions were not thought to have been because of or related to his race.

8.4.18. The complaint detailed at allegation 4 is one which relates to events in May 2006, almost ten years prior to the presentation of the Claimant's complaint to the Employment Tribunal. We find that the allegation did not form part of a continuing course of conduct and was not because of his race. Moreover, given the consideration that we have had to the factors to which we have regard in considering the Limitation Act and the presentation of complaints out of time, we do not consider there are circumstances that lead us to find it just and equitable to extend time to consider the Claimants complaint to be one of which the Tribunal has jurisdiction.

8.5. **Allegation 5**

8.5.1. The claimant complains that on 26 June 2006 Dr. Shakher accused the Claimant by email of organising clinics adversely to him. The organisation of clinics was a matter of Trust policy. (PoC 22.5) The claimant names Dr. Shakher as the perpetrator and identifies his comparators as Angela Spencer and Professor Barnett.

8.5.2. Dr. Shakher identifies that the Claimant was more senior than Dr. Shakher at this stage in their careers and that communications will of course have occurred about rotas and clinics. Dr. Shakher felt that he was treated unfairly by the Claimant at this time and raised this

issue internally in 2007 and denies any unprofessional conduct. (ET3 34)

8.5.3. The Second Respondent responds that Dr. Shakher emailed the Claimant on 26 June 2006 [1125] raising an issue about the booking of clinics when the Claimant was away. He referenced the number of patients and timing of appointments, which he said left 2 or 3 doctors waiting from 4pm without appointments, for patients to attend from 4.30pm onwards. He merely asked that the Claimant rectify these issues. He did not suggest that clinics were organised adversely to him alone: this was a reasonable discussion about operational issues.

8.5.4. Discrimination is denied by the respondents. The respondents assert that this complaint is significantly out of time, and it is denied that there was a continuing act of discrimination.

Evidence and Findings

8.5.5. We have considered evidence from Witnesses contained in their Witness Statements, Claimant [w/s para. 27-28], Dr. Shakher [w/s para.17], and Professor Barnett [w/s para.25]. We have been referred to the documents [1125 and 419-424]. We remind ourselves that the allegation events, relate to a time when the Claimant was a Consultant and Dr. Shakher was a Specialist Registrar. The Claimant raised a concern in relation to the organisation of the Obesity Clinics whilst the Claimant was on leave which was an operational concern that evoked a reasonable discussion about operational issues. The email from Dr. Shakher appears, on an objective reading, to be polite and measured and to deal with operational issues and concerns. It states:-

"The Obesity Clinics appear to be inappropriately blocked whenever you are away….I hope you rectify the issues I have

raised. I have spoken to the other Doctors, Nurses and Clinic Manager and they all feel that booking a last patient at 4.30pm especially for F/UPTS is not productive."

8.5.6. The concerns raised by Dr. Shakher refer to the number of patients and timings of appointments which caused two or three Doctors including him to be waiting from 4pm without patients, awaiting the arrival of 4.30pm patients.

8.5.7. The Claimants allegation it was that, Dr. Shakher *"accused the Claimant by email of organizing Clinics adversely to him."* The Claimant, even with the benefit of hindsight, we would have hoped guided by an objective eye, states that the email made accusations against the Claimant. We find that the accusations made by the claimant about Dr.Shakher's email were not borne out by an objective reading of the plain words. The Claimant's concern about the email is seen to by us to be all the more surprising in light of the Claimant's response to the email which confirms that the last follow-up appointment should be booked in at 4.20pm and not 4.30pm as Dr. Shakher had raised concern that it was.

8.5.8. We observe again that the Claimant forwarded the email exchange to Dr. Andrew Bates on the 29 June 2006 [1125]. Dr. Bates was at the relevant time a Consultant Diabetologist based at Solihull Hospital, not at Heartlands. The email forwarding the exchange states simply: *"This has to stop!!!!"*

8.5.9. We observe that the Claimants email to Dr. Bates appears to demonstrate exasperation and annoyance about a more junior member of staff about whom we have heard a number of Consultants, the Claimant and Dr. Bates included were "chattering"

that he, Dr. Shakher should not be appointed as a Substantive Consultant.

8.5.10. The Claimant has identified that two comparators in relation to the allegation, namely Angela Spencer and Professor Barnett. We note that both of those were copied into Dr. Shakher's original email [1125]. The comparators are identified as Professor Barnett, Clinical Director and Angela Spencer, Clinic Manager of the Diabetes Centre at Heartlands hospital. The Claimant, in answer to questions in cross-examination, has confirmed by way of concession that were the fact of assertions made by Dr. Shakher to have been correct, then it would have been appropriate for Dr. Shakher to have directed the issues to him. Having had regard to the findings we have made about the manner of Dr. Shakher in raising concerns whenever he considered them to exist, we find that the Claimant was treated no less favourably than a real or a hypothetical comparator Consultant who made what was considered to be inappropriate bookings for an Obesity Clinic whilst they were away as it was felt by Dr. Shakher had the claimant.

8.5.11. We find that neither first nor second Respondent treated the Claimant less favourably than an actual hypothetical comparator because of his race as alleged in Allegation 5.

8.5.12. Furthermore, we have considered whether Allegation 5 forms part of a continuing act or was by itself an act of unwanted conduct related to the Claimants race, which we find it did not.

8.5.13. To the extent that the Claimant, through the lens of concern that he had been subjected to bullying and harassment for a protected characteristic in 2015/16, considering events that had not previously been considered by him to have been because of race, we consider

it was not reasonable for the conduct complained of to have the required effect.

8.5.14. We find that the matters complained of in the allegation were not part of a continuing act and the complaint was not presented in time. We have found that there are no grounds on which we can consider that the circumstances lead us to find that it is just and equitable to extend time to give the tribunal jurisdiction to entertain the complaint out of time.

8.6. **Allegation 6**

8.6.1. The complaint is that on 18 September 2006 Dr. Shakher *"baselessly accused the Claimant by email of asking junior doctors to teach on the ward. (PoC 22.6)".* The claimant identifies as his comparators Steve Bain, Steve Gough, Paul Dodson, Alan Jones, Phil Dyer and Professor Barnett.

8.6.2. Dr. Shakher denies baselessly accusing the Claimant in the way it is alleged that he did. Dr Shakher states that at the time of responding to the complaint he cannot recall the alleged incident from 18 September 2006. The Claimant was asked to produce such an email if it exists.(ET3 35)

8.6.3. The Second respondent Dr. Shakher had emailed the Claimant on 18 September 2006 [1126] asking for clarity about whether the Claimant had asked a Senior House Officer (Leila) to teach a group of medical students on a ward round. Leila had indicated that this was the case. Dr. Shakher indicated he had no objection to this, as long as it did not compromise the work on the ward and he referenced there being confusion who was teaching the students.

8.6.4. The respondent answers that there was no baseless accusation: the email was a reasonable request to make of the claimant.

8.6.5. Discrimination is denied. It is maintained that the matter is significantly out of time and it is denied that there was a continuing act of discrimination.

Evidence and Findings

8.6.6. We have considered the evidence that presented to us by the Witnesses, the Claimant [w/s para 29], Dr. Shakher [w/s para 18], Professor Barnett [w/s para 26] and we have been referred in particular to the emails upon which the Claimant bases his allegation [1126].

8.6.7. The allegation relates to events on the 18 September 2006. We have referred ourselves to the email sent from Dr. Shakher to the Claimant [1126] for which Dr. Shakher wrote:-

"I would like a clarification from you regarding the team SHO Leila, was she supposed to be teaching medical students on the Monday morning? and was she trying to get out of the ward round? If so, none of the team were informed about this."

It continued:

"According to her, she said that you told her to teach."

8.6.8. We have reminded ourselves that Dr. Shakher is a Doctor for whom English is not his first language, he is Burmese by birth and because of the political situation in Burma, he and his family subsequently moved to India in 1972 where he continued his education and he was taught in English. In contrast the Claimant, of Pakistani heritage, was born and brought up in Birmingham and went to school half a mile from the first Respondent's Heartlands Hospital. We make this observation because the Claimant has founded this allegation as he has many previously on an email communication, to allege that Dr. Shakher:

"baselessly accused the Claimant by email of asking Junior Doctors to teach on the ward".

8.6.9. On any natural and objective reading of the plain words in the email we find that Dr. Shakher was asking for clarification about information that had been communicated to him by a Senior Household Officer "Leila" who stated that she was supposed to be teaching medical students on that Monday morning, 18 September and moreover that Dr. Rahim had told her to teach the students. We find that Dr. Shakher's email is entirely objective, reasonable, plain and polite. The email itself states *"that it is seeking clarification"* and for the claimant in his pleaded case to view the email from Dr. Shakher as *"baselessly accusing the Claimant*" is an exaggeration and distortion of the truth of the email. We find that Dr Rahim's interpretation of the email is one which cannot reasonably be sustained. The fact that Dr. Shakher seeks clarification as to whether or not the SHO was trying to avoid her responsibilities to complete her ward round because she said she had been asked by the Claimant to teach was not in the least unreasonable and was communicated in polite terms. The Claimant does not assert that he had not in fact asked the SHO to teach and it is plain from Dr. Shakher's email, that he had no objection to the SHO teaching, provided it did not compromise the ward work on a Monday morning.

8.6.10. On the 19 September the Claimant wrote to Professor Barnett [1126]:-

"I am sick and tired of being harangued by Shakher at every opportunity he thinks he has. This really needs to be sorted out."

8.6.11. The Claimant appears to have interpreted the email from Dr. Shakher as amounting to *"haranguing"* him. We find that such perception, given the facts of the events, is not a perception reasonably held. Moreover, the perception whether right or wrong, does not suggest that Dr. Shakher's behaviour was perceived by the Claimant at that time, to have amounted to harassment or discrimination because of the protected characteristic of his race.

8.6.12. The Claimant and Mr John on his behalf has referred to a response provided by Professor Barnett to the Claimants email on the morning of the 19 September 2006 [1126], in it Professor Barnett states:

"I'm really sorry about this. I will personally speak to Shakher on Thursday and tell him this sort of email and attitude is unprofessional. Please leave this with me and I'll sort it once and for all."

8.6.13. The Tribunal has found the observation Professor Barnett made that *"this sort of email and attitude is unprofessional"* strange. In answer to questions in cross-examination by Mr John, Professor Barnett confirmed to Mr John that his response in his email of the 19 September in fact referred to

"many unprofessional communications – emails and corridor discussions – this was an example of Dr.Shakher being at fault, but was a pattern of behaviour on the Unit, they did not seem to be able to get on with each other."

8.6.14. Whilst we accept that Professor Barnett's observation related to the general communication between Dr. Shakher and Dr. Rahim, we find it was an inappropriate and unjustified and unreasonable observation if confined only to the email of the 18 September [1126]. Professor Barnett remained resolute in answer to questions

put to him in cross-examination by Mr John for the Claimant and Mr Beaver for the second Respondent and from the Tribunal, that Dr. Shakher's emotional reaction was one that he dealt out to other members of the Diabetes Department ,and that Dr. Shakher reacted emotionally, to things when he felt something unfair had happened to him within the Department or elsewhere. We have no doubt that the claimant has disclosed to the respondent all of the written communications that he asserts evidence the respondents harassment and unlawful direct discrimination of him. We have read the email evidence to which we have been referred in the above allegations and, on an objective reading of the documentation do not see objective evidence of harassment or haranguing as has been alleged.

8.6.15. In relation to allegation 6, the Claimant has referred to named comparators namely Steve Bain, Steve Gough, Paul Dodson, Ann Jones, Phil Dadd and Professor Barnett. The Claimant has not referred us to any examples where any of those named comparators have been claimed by Junior Doctors to have been asked by them to teach on the ward during the time of their ward duties when the Dr. Shakher had not himself been informed of that fact. We find those comparators are not suitable comparators and we have turned our mind to whether or not the Claimant has been treated less favourably than a hypothetical comparator in such circumstances. We have found the reasons why the email was sent from Dr. Shakher to the Claimant on the 18 September 2006, we consider a hypothetical comparator to be appropriate in relation to a hypothetical Consultant whose Senior House Officer informed Dr. Shakher that she had in fact been instructed by a non Pakistani hypothetical clinical lead, who had been claimed to have given instructions to the Senior Household Officer to teach during ward time. In light of the evidence we have heard, we have no hesitation in finding that the Claimant has not been treated less favourably in

such circumstances than a hypothetical comparator would have been.

8.6.16. We find that neither the first nor the second Respondent treated the Claimant less favourably than an actual or hypothetical comparator because of his race as described at allegation 6. Furthermore, there are no facts from which the Tribunal can conclude, in light of the explanation that has been given about the circumstances of the case that either the first or the second Respondent directly discriminated against the Claimant because of his race.

8.6.17. We have considered whether the Claimant in respect of the email of the 18 September 2006 engaged in unwanted conduct relating to the Claimants race, we conclude that we have been referred to no conduct which had the purpose or effect of violating the Claimants dignity or creating an intimidating, hostile, degrading, humiliating or otherwise offensive environment for the Claimant. Moreover, to the extent that the Claimant complains that the treatment had the effect only of causing him to feel harassed, we find in light of the objective evidence to which we have been referred that the Claimants perception of such and surrounding circumstances of the case to be unreasonable to have that effect.

8.6.18. We find that the actions of Allegation 6 are not part of the continuing course of conduct and in the event that they were, we observe that the events relate to September 2006, we find the allegation does not form part of a continuing act.

8.6.19. We conclude that even were the Claimant to have found that Dr. Shakher's manner in raising operational concerns with him to be a practice or course of conduct that was continuing, such behaviour occurred in 2006. The Claimant had not ascribed race discrimination as a motive for the alleged harassment and, in the circumstances having raised no contemporary complaints that he had been subject to unlawful discrimination because of his race,

albeit at a time when he vociferously responded to the operational concerns raised by Dr. Shakher we do not find the allegation well founded.

8.6.20. Finally the conduct complained of occurred in 2006. The complaint was presented more than10 years after the events and was presented to the tribunal out of time. There are no circumstances that lead the tribunal to determine that the it would be just and equitable to extend time in the circumstances of this case to permit the complaint to be considered out of time.

8.7. **Allegation 7**

8.7.1. It is alleged that on 26 October 2007 Dr. Shakher asked the Claimant to put his name on another poster. When this was declined Dr. Shakher became verbally aggressive and unprofessional. (PoC 22.7)The claimant on this occasion refers to a hypothetical comparator.

8.7.2. The respondents assert that the Claimant has not particularised what Dr. Shakher said and how he was “verbally aggressive and unprofessional”.

8.7.3. The First Respondent say that they considered this complaint as part of its MHPS investigation but concluded that too much time had passed to determine whether this incident occurred or not. There were apparently no other witnesses.

8.7.4. Discrimination is denied. It is submitted that the claim is significantly out of time and that there is no continuing act of discrimination.

8.7.5. Dr. Shakher denies that he was aggressive and unprofessional; he asserts that no specifics were provided in the complaint as to what he is alleged to have said or location of alleged incident (ET3 36).

<u>Evidence and Findings</u>

8.7.6. Evidence is contained within the Claimant's Witness Statement in paragraphs 56-58, Dr. Shakher [W/S para 18], Professor Barnett [W/S para 26] and the relevant document to which we referred is that contained within an email dated 26 October 2007 [1129].

8.7.7. The allegation brought by the Claimant is that Dr. Shakher was "aggressive" and unprofessional. The only contemporary evidence to which we have been referred is that contained in Dr. Shakher's email to the Claimant dated 26 October 2007 [1129] we find it is temperate and raises a reasonable concern that Dr. Shakher did not wish to miss out on being included in an abstract. Surprisingly in answer to questions in cross-examination, the Claimant suggested that it was not important to be included in the abstract and in his witness evidence the Claimant, in disparaging terms, refers to the work that Dr. Shakher did assisting Professor Barnett in his research studies as "*donkey work*" [w/s para 32]. In his evidence, Professor Barnett expressed the view that he couldn't have done his research without the assistance of Dr. Shakher, however the Claimant demonstrates his disparaging view on the contribution made by Dr. Shakher. We find that Dr. Shakher was not in the least unreasonable in asking to be included in the poster. The Claimant says that he considered that the extent of Dr. Shakher's involvement and the patient's involvement did not warrant his inclusion on the abstract and Dr. Shakher has given evidence that he did not pursue his inclusion in the abstract as that decision remained Dr. Rahim's prerogative which he chose not to exercise.

8.7.8. The Claimant's account [w/s para 31] is an account in respect of which no corroborative evidence has been given. Dr. Shakher gives an account that he has no recollection of the alleged conversation, although he acknowledges that he was not the main contributor to the patient investigations and did not pursue the matter further when the Claimant declined to include his name on the abstract.

8.7.9. Dr. Rose in undertaking the MHPS investigation concluded that irrespective of the allegation, the passage of time and the lack of contemporary evidence meant that it was not possible to determine whether or not the incident had occurred as there appeared to be no other witnesses.

8.7.10. We find that the Claimant did not complain about Dr. Shakher's email [1129] or about any subsequent encounter in the Claimant's Clinic Office where the Claimant describes Dr. Shakher was being:

"clearly very angry, he stood in an aggressive posture pointing his finger at me and raising his voice and referred to the previous Case Report. He then accused me of deliberately missing his name off the poster, again this time around."

8.7.11. We would observe, in light of all the evidence we have heard that such an encounter with Dr. Shakher and a reaction to views with which he did not agree, does not seem beyond the realms of possibility. However, given the passage of time and the Claimant's failure to raise a complaint at the time about the alleged behavior it is not possible to make a finding of fact upon the allegation. Dr. Shakher unlike the claimant had given no thought to the events of 2007 and whether they occurred as the claimant alleges or at all. We found that to seek to consider the merits of the allegation the claimants makes almost 10 years after the event would be very prejudicial and unfair to Dr. Shakher the second Respondent and his employer.

8.7.12. Moreover, there was no suggestion that Dr. Shakher's demeanour, even if as alleged by the claimant was exercised in a different way towards the Claimant than to other colleagues with whom he disagreed was because of his race. Without more we find there is no evidence to lead us to conclude that Dr. Shakher's behaviour was less favourable treatment of the Claimant because of his race.

8.7.13. The Claimant has cited Professor Barnett as a comparator. Professor Barnett has confirmed, in answer to cross-examination, that he was not involved at all in the events surrounding allegation 7 at the time, although he has subsequently had sight of the email from Dr. Shakher in which Dr Shakher raised concerns about how Dr Rahim treated him. Professor Barnett has given no evidence to suggest that Dr. Shakher had undertaken work for him, which would have led him to being included in a poster/case report. Professor Barnett did confirm the importance attached to poster recognition for work done contributing to the results that a poster report. Indeed, the Claimant in referring to his own poster accreditations in support of his CEA application e.g.in 2012 [477] has confirmed the importance attached to mention in clinical posters presentations.

8.7.14. We conclude that in relation to the Findings of Fact of the allegation 7 of discrimination and harassment on the grounds of and relating to race has not been made out by the Claimant. In any event, the complaint was presented out of time and there are no circumstances that lead us consider it just and equitable to extend time.

8.8. **Allegation 8 - withdrawn**

8.8.1. For the sake of clarity the allegation is withdrawn in it's entirety. We note however it was alleged that Dr. Shakher instigated a confrontation with the Claimant by email over issues with the rota that had nothing to do with the Claimant. (PoC 22.8)

8.8.2. An email exchange between the Claimant and Dr. Shakher took place on 13 August 2008. It commenced when Dr. Shakher emailed Angela Spencer, Ward Manager, indicated that (as agreed with the Claimant) he would assume the role of "DM1" in September / October, with the Claimant "DM2". DM1 and DM2 are labels Diabetes Medicine uses internally for consultants on call. Dr.

Shakher asked Ms Spencer to look at the rota and make some adjustments to clinics. The Claimant responded confirming that he would be DM1. Dr. Shakher disagreed with this, as he understood the contrary to have been agreed that morning.

8.8.3. It is denied that Dr. Shakher instigated this matter, and it is denied that the matter had nothing to do with the Claimant. At most the respondents assert that it was a dispute about operational matters.

8.8.4. Discrimination is denied. This complaint is out of time and it is denied that there was a continuing act of discrimination.

8.8.5. No corroborative evidence was provided by the Claimant. Dr. Shakher cannot recall such an incident from the scant details provided. The allegation was denied. (ET3 37)

8.8.6. The claimant confirmed in his witness statement as did Mr John on his behalf that the complaint in relation to the allegation is withdrawn in its entirety by the claimant. We make no findings of fact in relation to this allegation in respect of which no evidence was tested and we are not invited to draw inference.

8.9. **Allegation 9**

8.9.1. The complaint is that Dr. Shakher accused the Claimant by e-mail 4 September 2008 of taking control of all the junior doctors when in fact the juniors have always organised their own rotas. (PoC 22.9) The claimant refers to Margaret Clarke, Professor Stevens, Alan Jones and Shared Taheri as being the comparators.

8.9.2. Dr. Shakher has no specific recollection of what he is alleged to have said in the absence of specific detail of the allegation. The second respondent asserts that Dr. Shakher emailed the Claimant on 4 September 2008, raising issues about the workforce covering the ward he was in charge of. He did not accuse the Claimant of taking control of the junior doctors, but suggested some changes and asked

to be informed of any decisions made regarding staffing on the wards. This was entirely reasonable.

8.9.3. Discrimination is denied. It is submitted that the claim is out of time and that there is no continuing act of discrimination.

Evidence and Findings

8.9.4. Evidence is contained within the Witness Statements of the Claimant [w/s para 33-34] and Dr. Shakher [w/s para 21] and Professor Barnett [w/s para 30]. We are referred to the relevant documents [429 and 1131].

8.9.5. Dr. Shakher had sent an email to the Claimant on the 4 September 2008 [1131]. Dr. Shakher by now was a Consultant and on the 4 September 2008 he sent an email to the Claimant raising concerns about who was covering particular diabetic medicine wards 1 and 2 at the relevant time. The email raised a query relating to an operational issue which we find was reasonably raised by Dr. Shakher. The Claimant has described the relevant email to be an accusation that the Claimant was making unilateral decisions in relation to the wards.

8.9.6. To his credit, when taken in cross examination to an earlier exchange of emails relating to the allocation of diabetic medicine wards on 13 August 2008 [1132] Dr. Shakher accepted that his email of the 4 September was inaccurate and quite plainly Dr. Rahim had not as Dr. Shakher had been concerned taken a:

"unilateral decision on who was DM1 and DM2 without giving me any chance and in the future if I have to share the wards with you, I would like to have Margie to be involved in the final decision."

We remind ourselves that English is not Dr. Shakher's first language and although his choice of words referring to "unilateral decision" is a poor one, he explains in his email [1131] the reason for his concern

albeit based upon his mistaken understanding. We find that on the ordinary meaning of the words used, Dr. Shakher's email, albeit based upon a misunderstanding, was not impolite or aggressive. The Claimant responded to Dr. Shakher's email copying it, as had Dr. Shakher to Professor Barnett [429], the Claimant in his reply began:

> *"let me clarify the situation for you as there is obviously some confusion. I have not made any unilateral decisions and really do not understand where you have obtained these ideas from".*

The email attached in the earlier sequence of emails [1132-1134] demonstrated to Dr. Shakher the error of his understanding and identified the path of the earlier decision-making. However, we find that the remaining ten paragraphs of the Claimant's email is a robust response containing intemperate and abrupt terms. Dr. Rahim answered questions in cross-examination and suggested that his email was "*clear, robust and firm*". He confirmed that the email was sent when he was upset, he had used capitals in parts of his email and the Claimant confirmed that he was frustrated and the email was not diplomatic and in answer to the suggestion that the email was an example of the fact that the Claimant and Dr. Shakher did not like each other. The Claimant answered:

> *"given I sent the email – if I'm being harassed - I don't like the individual".*

8.9.7. From our objective eye the content and tone of Dr. Rahim's email to Dr. Shakher was intemperate and abrupt and in its conclusion the Claimant writes:-

"Finally I am fed up of you hounding me at every opportunity that you feel you have. I would ask that you stop sending me emails accusing me of various things to make me look like someone who is being difficult…. I am not".

It concluded:

"please DO NOT send me any further emails in response to this as I really do not have the time to waste reading or responding to you."

8.9.8. The Claimant confirmed in cross-examination that he had kept all emails since 2003 and that the emails to which we have been referred in the earlier allegations are the total of emails in the alleged "*haranguing email correspondence*" that Dr. Shakher had sent to the Claimant.

8.9.9. In his submissions to the Tribunal, Mr John on the Claimant's behalf suggested that the email chain [1131-1132] was Dr. Shakher singling the Claimant out for an unjustified level of criticism which is part of a growing pattern of such behaviour.

8.9.10. We have been referred to the Claimant's response to Dr. Shakher copied to Professor Barnett [429], that document does not include the description of when the email was sent, the hard copy, page printed on the 12 February 2010. The email does not appear to heed Dr. Barnett's instruction sent on the 5 September 2008 at 07.53 to the Claimant [1131] which stated:

"*Hi Asad,*
He's upset. Please try and sort out diplomatically with him! I know it's difficult.
Regards,

Tony".

8.9.11. The Tribunal, like Professor Barnett, as did the Claimant himself in answer to questions in cross-examination considered that the email exchange is an example of a discussion about issues that appeared to be "*petty*". Professor Barnett has given an account that the exchange is an example of the style and approach taken by the Claimant and Dr. Shakher each towards the other and there is a demonstration of the dysfunctional relationship between the two individuals. Notwithstanding Professor Barnett's note of caution to the Claimant that he address the matter with Dr. Shakher "diplomatically" [1131] the claimant in an emotional and intemperate response engaged in an exchange that was not as professional and seemly as might be expected of a mature and senior consultant. The tribunal find that the exchange is one that was borne out of the mutual antipathy which the claimant and Dr Shakher had for each other which sadly reflects upon neither gentlemen well. However we find that Dr Shakher's email was not less favourable treatment of the claimant by Dr Shakher because of his race.

8.9.12. Other than the Claimant suggesting that it is through the lens of reflection in 2015 that he considers that Dr. Shakher's treatment of him was because of his race, there is no evidence to suggest and support the Claimant's assertion that Dr. Shakher's treatment of him was less favourable treatment or harassment related to race. The Claimant has identified four named individuals as comparators, Margaret Clark, Professor Stevens, Alan Jones, Sharad Taheri, the basis upon which those four individuals have been advanced as comparators has not been explained.

8.9.13. Having considered the contemporary documentation to which we have been referred and Dr. Shakher's ready acceptance that with the benefit of reflection upon earlier emails, his concerned about the operational implications of the allocation of wards was

mistaken. We have heard that the reason why the email was sent by Dr. Shakher on the 4 September. The email was in relation to an ordinary operational issue in what is undoubtedly a stressful environment of a hospital and the language used was that of an individual, albeit intelligent and articulate, using English as a second language in a manner which all of the Respondent's doctors, including the Claimant, have confirmed is the manner and tone used by Dr. Shakher in his communication with all of his colleagues regardless of their race. We acknowledge the claimant considered that he was the subject of Dr. Shakher's ire more frequently than his colleagues.

8.9.14. We observe that although Mr John on the Claimant's behalf suggests that the email shows a pattern of behaviour, we remind ourselves that the exchanges that have been referred to in this and preceding allegations are the full extent of the exchanges between Dr. Shakher and the Claimant, none of which we find are because of the Claimant's race, but rather reflect the personality and manner of Dr. Shakher.

8.9.15. We turn to the question of whether or not the complaint is presented in time.

8.9.16. This is a complaint about events that occurred in September 2008, that relates to matters some ten months after the previous act relied upon in Allegation 7 on the 26 October 2007 in relation to the request by Dr. Shakher that his name should be included in a poster and before that Dr. Shakher's email of the 18 September 2006. The issue of concern raised by Dr. Shakher is about his being given credit for his contribution to work that was later referred to in poster presentations.

8.9.17. We find that this is not part of a continuing act on Dr. Shakher's part. Moreover, there was a no suggestion raised at the time by the claimant that the alleged act(s) was because of the Claimant's race. The Claim is presented out of time and the Respondents and each

of them are unduly prejudiced by the late presentation of the claim and there are no grounds we can consider it just and equitable to extend time.

8.10. **Allegation 10**

8.10.1. The allegation 10 is against the First respondent only. Claimant emailed Professor Barnett, Clinical Director, to complain about the constant harassment he was subjected to and was advised not to take the grievance to HR as it would be dealt with and would cause a lot of stress. (PoC 22.10) The alleged harasser/perpetrator in this instance is identified as Professor Barnett. The complaint was originally that of direct discrimination and of harassment. The complaint of direct discrimination is withdrawn.

8.10.2. The first respondent asserts that Dr. Shakher had copied Professor Barnett into his email dated 4 September 2008, and Professor Barnett asked the Claimant to try to resolve this diplomatically with Dr. Shakher. The Claimant responded indicating that he wanted to raise a formal grievance. Professor Barnett responded to say he did not think that was necessary and would put the Claimant through stress he did not need. Professor Barnett said that he would not pair the Claimant with Dr. Shakher again and suggested that they meet to discuss matters.

8.10.3. Professor Barnett tried to manage and mediate the situation between the Claimant and Dr. Shakher. This matter was considered by the First Respondent's MHPS investigation, and the first respondent asserts that the Claimant withdrew this allegation. The claimant pursues the complaint of unlawful harassment because of the protected characteristic of race against the first respondent.

8.10.4. It is denied that this amounted to discrimination: it was reasonable management. The first respondent asserts that this complaint is

significantly out of time and it is denied that there was a continuing act of discrimination.

Evidence and Findings

8.10.5. The evidence in relation to the allegation is set out in the witness statements that were taken as read, the Claimant [w/s para 35-37], Dr. Shakher [w/s para 22], Professor Barnett's [w/s para 32-36] and we have been referred to the relevant documents [900 and 1130]. We remind ourselves that the complaint is against the first Respondent only, not against Dr. Shakher and it is alleged that the perpetrator of the discrimination is Professor Barnett. Mr John on the claimant's behalf confirmed that the complaint is no longer one of direct discrimination but of harassment only. During the course of answers in cross-examination the Claimant confirmed that he does not allege that Professor Barnett discriminated against him at all because of his race.

8.10.6. We have been referred in relation to Allegation 9 to Professor Barnett's email to the Claimant 5 September 2008 at 7.53 [1131] in which the Claimant was counselled to try and sort out Dr. Shakher's concerns diplomatically. Subsequently, Professor Barnett sent an email to both the Claimant and Dr. Shakher at 09.35 [1130] suggesting that both Consultants meet to defuse points of disagreement rather than exchanging emails and that he was happy to meet with both of them on his return to the hospital the week commencing 15 September. In response the Claimant emailed Professor Barnett at 10:52 on 5 September 2008 [1130] concluding:-

"Despite your talks with Dr. Shakher I am continuing to be harassed at every opportunity he believes he has to have a confrontation with me. Furthermore, he continues to discuss

these issues with other members of staff of the Directorate and in doing so, defend my reputation. I have written evidence of all the emails that Dr. Shakher has sent to me and now feel that I have little alternative but to initiate a formal grievance through HR."

The Claimant's complaint refers to Professor Barnett's response to his email later on 5 September at 12:57 in which he informs the claimant:

" I don't think that's necessary and will put you through stress that you don't need. This will be the last time you will be paired with him.

I am away all next week. Let's meet after that to discuss."

8.10.7. We remind ourselves again that the Claimant has confirmed to the Tribunal that all of the emails which he retained and relate to the described "harassment" have been those to which we have been referred in previous allegations.

8.10.8. A one-to-one meeting was held with the Claimant and Professor Barnett as confirmed by the Claimant [w/s para 36] as a result of which the Claimant considered that Dr. Shakher could have no further opportunities to "harass" him and for that reason he did not escalate his grievance further and looked to the future hoping things would get better. The Claimant's witness evidence confirms that he does not consider Professor Barnett discriminated against him, however he raises the matter so that the Tribunal can understand, and he complains that the First Respondent, the Trust permitted the conduct to continue and had Professor Barnett stepped in, or referred the matter at that stage in September 2008, it may have prevented the situation from snowballing as it later was alleged it did. The Claimant asserts that during the MHPS Investigation there was an acknowledgment that "*there were many occasions going*

back to 2003 when the issues we were dealing with in this investigation could have been tackled earlier and potentially resolved earlier". [900]. In answer to questions in cross-examination, the Claimant confirmed that Professor Barnett by his actions or omissions had "*nothing to do with my race*". In the circumstances, we consider whether there is any basis upon which the Claimant's allegations that the first Respondent harassed him because of his race, can be sustained.

8.10.9. On the Claimant's own account, Professor Barnett had a one to one meeting with him [w/s para 32-36]. Professor Barnett was of the view that the email exchanges were manageable operational disagreements that were fairly low level day-to-day working issues. We have accepted the Claimant's evidence that he has included within the bundle and has referred to all of the emails that he identifies as demonstrating harassment in the proceeding allegations in respect of matters, some of which the Claimant acknowledges were "*petty*". We find Professor Barnett's evidence entirely consistent, namely his view that Dr. Shakher and Dr. Rahim did not get on and that as a result he was prepared to take the step to ensure they didn't have to work together in the hope that that would put a stop to operational issues arising between the two of them. We have no reason whatsoever to doubt Professor Barnett's evidence that is not challenged at all by Dr. Rahim.

8.10.10. Had Dr. Rahim mentioned at that time that he considered Dr. Shakher's treatment of him was less favourable treatment because of his race or harassment for a reason related to his race, having heard evidence from him, we have no doubt that Professor Barnett, would without hesitation, have escalated matters to HR to investigate any allegation of unlawful discrimination. Professor Barnett confirmed that the Claimant did not mention racial matters, as the Claimant himself has confirmed. The evidence given by Professor Barnett is that he had called all of the Consultants

together at one point, he believes with a senior manager, possibly the Directorate Manager being present, to remind Consultants that they and all staff needed to work together in a professional manner was a reasonable response to the situation he managed between the claimant and Dr. Shakher in particular. Professor Barnett had hoped that the constant bickering between Dr. Rahim and Dr. Shakher, which was the main reason why he had convened the meeting, would come to an end and it is Professor Barnett's evidence that from September 2008 onwards the Claimant and Dr. Shakher did not work directly together again. The claimant confirmed in evidence that from September 2008 he did not work with Dr. Shakher again.

8.10.11. The Claimant has confirmed that race was not a feature of Professor Barnett's treatment of him and that the staff meeting arranged by Professor Barnett on behalf of the first Respondents was to resolve the differences between him and Dr. Shakher. The allegation of unlawful discrimination by the first Respondent against Dr. Shakher in September 2008 is that it was through Professor Barnett as a perpetrator. In light of the Claimant's concessions the allegation of unlawful discrimination by the First Respondent cannot succeed. We observe that the Claimant did not pursue a complaint of bullying and harassment whether because of the unlawful race discrimination or at all in relation to the events of September 2008 and such a claim, were it to be pursued is significantly out of time and is not part of a continuing act on the part of the first Respondent. There is no ground on which we consider it just and equitable to extend time in this case.

8.10.12. Mr John in his written submissions in relation to Allegation 10 suggests that the circumstances of the Claimant indicating he wished to raise a grievance, evidences the background of the effect which the second Respondent, Dr. Shakher's behaviour at that point had on him. We remind ourselves that the Claimant is a

mature, intelligent and articulate person who had access to all of the Respondent's procedures including a grievance procedure. The Claimant chose not to follow the Respondent's grievance procedure at this time and at no time in 2008 nor until raising a complaint of race discrimination in the MHPS Investigation did the Claimant assert that either of the Respondent's treatment of him was less favourable because of his race or that it was harassment relating to his race.

8.10.13. Professor Barnett may naively and optimistically and, with the benefit of hindsight, unrealistically have credited the Claimant and Dr. Shakher with greater maturity than either of them appears to have possessed. We have no doubt, having gained an insight into Professor Barnett's managerial style, that he would have treated concerns raised by any consultant about a colleague a fellow consultant who did not assert that the complained of behavior was because of a protected characteristic where the complaint was in the context of a comparable personal antipathy, in exactly the same way that he did the claimant.

8.10.14. In the event, Professor Barnett separated the claimant and Dr. Shakher and all parties accept that the Claimant did not thereafter work on the wards with Dr. Shakher. Moreover we have heard and accept the evidence that the Claimant and Dr. Shakher did not after September 2008 speak to each other again unless it was professionally necessary. It is the Claimant's own evidence that he has not spoken to Dr. Shakher since 2009 and that in the period 2008-2015 [w/s para 42] he and Dr. Shakher have had very little contact and as job plans have been reorganized they have never been paired up to cover the wards together.

8.10.15. We find that the Claimant's allegations of harassment against the first Respondent does not succeed and moreover, that such complaint is not presented within time and there are no grounds on

which it is just and equitable for us to extend time to entertain the complaint.

8.11. **Allegation 11**

8.11.1. The complaint is that on 23 November 2011 Dr. Shakher asked the Claimant's secretary, Sangeeta Dhabi, to come to his office for a discussion. Dr. Shakher proceeded to shout at Ms Dhabi telling her not to ask him to cover any work that would otherwise have been undertaken by the Claimant as he would not do it. (PoC 22.11). The alleged perpetrator is Dr. Shakher and the comparators are identified by the claimant as Margaret Clarke and Andrew Bates.

8.11.2. The First Respondent attempted to consider this complaint as part of the Pavitt Report. Ms Dhabi has since left her employment with the First Respondent, and it was not possible to interview her.

8.11.3. Discrimination is denied. The respondents assert this complaint is out of time and it is denied that there was a continuing act of discrimination.

8.11.4. Dr. Shakher denies the allegation. It is asserted that no corroborative evidence has been supplied to date. Dr. Shakher has produced the rota for late 2009 which he maintains shows he did most of the Claimant's work during his compassionate leave absence. Dr Shakher asserts that the Rota and Office Manager, Michelle Maddocks, will confirm this and that she did not receive a complaint from Ms Dhabi. (ET3 40)

<u>Evidence and Findings</u>

8.11.5. The Allegation relates to an incident that is alleged to have occurred on the 23 November 2009. The Claimant's evidence is detailed in his witness statement [paragraphs 38-43], Dr. Shakher [w/s para 23] and Professor Barnett [w/s para 37-38] Michelle Maddocks [w/s para 11]. We have been referred to the relevant documents at 425, 778, 810-816 and 914-915.

8.11.6. We have received no direct evidence from Ms. Dhabi, the Claimant's then secretary in respect of whom the Claimant alleges Dr. Shakher shouted at Ms. Dhabi when she attended Dr. Shakher's office. The Claimant at the relevant time was on a period of compassionate leave between November 2009 – December 2010. The Claimant accepts that Dr. Shakher did cover the Claimant's absence. The allegation is based upon hearsay evidence, the Claimant reports that his secretary Ms. Dhabi reported to him an incident that is alleged to have occurred on the 23 November 2009 involving Dr. Shakher. Although the Claimant in his witness statement paragraph 39 says that Dr. Shakher has character references referring to the fact that Dr. Shakher:

"goes out of his way to help others, often covering extra clinics, ward rounds, on calls etc… when others have gone off sick, I have known him cancel his own annual leave to cover" [778].

The Claimant gives an account that Dr. Shakher has never extended that help to him.

8.11.7. The Claimant has in contrast conceded in cross-examination that Dr. Shakher had in fact covered the period of the Claimant's compassionate leave November 2009 – January 2010 following the sad death of the Claimant's father for which the Claimant adds that Dr. Shakher was paid. The concession makes something of a nonsense of the allegation that the Dr. Shakher:

"proceeded to shout at Ms. Dhabi telling her not to ask him to cover any work that would otherwise have been undertaken by the claimant as he would not do it".

Dr. Bellary confirmed in his evidence that all Doctors covered the Claimant's absence and Dr. Shakher covered a bit more than did he and the other consultants. Ms Maddocks was not challenged in relation to the account that she gave of Dr Shakher's cover of the majority of the claimant's shifts during the period of absence. It is disappointing that the Claimant appears not to acknowledge that Dr. Shakher did provide cover

for him as he did for others and the Claimant seemingly dismisses the disruption and inconvenience caused to Dr. Shakher when providing cover by adding that the hours of cover were paid.

8.11.8. We have not seen or heard any direct evidence from Ms. Dhabi but we have found that Dr. Shakher was one of those consultants who provided cover during the Claimant's period of compassionate leave. There is no direct evidence before the Tribunal to support the allegation that is made. Mr John submits [para 78] suggests that Dr. Shakher is not credible and that the manner of the hearsay allegation that Dr. Shakher berated Ms. Dhabi from the door was consistent with his behaviour. We do not infer that the hearsay evidence is credible as it is accepted that Dr. Shakher did provide the cover and that objective evidence appears to defeat the unsupported hearsay allegation.

8.11.9. The Claimant refers to comparators as being Margaret Clarke and Andrew Bates. The Claimant has not identified the basis upon which the individuals are comparators. In any event we find that the claimant provided cover for the claimants absence as he did for other colleagues when they were absent. Although Mr John on the Claimant's behalf suggests that this hearsay evidence should be accepted and that Dr. Shakher's denials are not credible we find that the account given by Dr. Bellary is persuasive of the contribution made by Dr. Shakher along with his other colleagues to cover the Claimant's compassionate leave as too was Ms Maddocks unchallenged account. Although we have been referred to the fact that Dr. Shakher would not have been eligible for payment for the first week of covering a colleagues absence, it is not suggested by the Claimant that it is only the first week of the Claimant's absence that Dr. Shakher provided cover and the period of absence was not an insubstantial one, it was for a period in excess of two months.

8.11.10. We can conclude in light of the findings that we have made, that there is no foundation for the Claimant's allegation, of less favourable treatment and/or harassment. The fact that there was a reciprocal antipathy between the Claimant and Dr. Shakher is not disputed, however there has been no evidence produced to found the allegation that any less favourable treatment and/or harassment at all let alone that it was because of, or related to the Claimant's race.

8.11.11. We remind ourselves that the complaint is one which did not prompt a complaint or grievance being raised in January 2010 when the Claimant returned to work. The complaint presented to the Tribunal is one which is presented out of time and is not part of a continuing course of conduct relating to absence cover, the complaint was presented significantly out of time and there is no evidence before us that leads us to conclude that it is just and equitable to extend time.

8.12. **Allegation 12**

8.12.1. The complaint is that at various dates between 2008 – 2015 (originally stated in Scott Schedule to be 2011-2014) the Claimant understands that Dr. Shakher made numerous complaints about the Claimant, many of which were rejected as baseless by the Pavitt Report without consultation with the Claimant. (PoC 22.12.1) The claimant relies upon a hypothetical comparator.

8.12.2. The First Respondent answered that they were not able respond to this without knowing who it is alleged Dr. Shakher complained to and specifically when and what the complaints related to.

8.12.3. The second respondent replies that this allegation is too vague to allow for a response in terms of specifics and timings. More generally, Dr. Shakher disputes the fairness and reliability of the Pavitt Fact Find Report that investigated the grievances that had been brought up to

13 May 2015 to which the Claimant refers. However, Dr Shakher asserts that most of the MHPS allegations brought by Dr. Rahim have been rejected and there was no finding of discrimination on grounds of race or otherwise. Dr. Shakher maintains that he was entitled to make complaints against the Claimant.

Evidence and Findings

8.12.4. As originally claimed in the Scott schedule, the allegation was that it covered a period of 2011-2014 although that was corrected by Mr John to reflect conduct between 2008 and 2015.

8.12.5. The complaint is presented prima facie out of time and there are no grounds which lead the Tribunal to consider it is just and equitable that the complaint should be allowed to proceed.

8.12.6. Dr. Shakher in answer to questions in cross-examination clarified that during the period of the Claimant's compassionate leave for which Dr. Shakher provided cover and did not know if he would be paid or not. It is claimed that Dr. Shakher's practice was to step in to cover absence, he recently did when the Claimant was unwell and had cancelled on occasions his annual leave. Dr. Shakher has given an account, that has not been challenged, that his practice was to stand in and provide cover, as he did for the Claimant during his period of compassionate leave and his more recent periods of absence.

8.12.7. Absent any evidence to satisfy the Tribunal that it is just and equitable to extend time, we remind ourselves that both the Respondents are evidentially prejudiced by the fact that the complaint was not raised at the relevant time and the allegation that the complaints were raised because of Dr Rahim's race was not put Dr. Shakher's attention until during the course of the MHPS Investigation in 2016.

8.12.8. Although in the Scott Schedule, the Claimant's case refers to various dates between 2011 and 2014, Mr John reminds us that the pleaded case at paragraph 22.12 [24] refers to the fact that :-

> *"From 2008 and 2015 Dr. Shakher had no direct contact with the Claimant. However, Dr. Shakher continued to harass the Claimant in a less direct way. The Claimant began to experience more covert and direct forms of harassment. The Fact Find Report states that after 2008 the behaviour of Dr. Shakher continued albeit often in a different form. The Claimant experienced incidents of detriment and harassment from 2008 onwards that he is unable to identify by date by virtue of the fact that they were indirect and covert. For the avoidance of doubt, albeit undated, the Fact Find still found that the following acts of detriment and harassment occurred."*

8.12.9. The detail of Allegation 12 is that detailed in the claim form at paragraph 22.12.1 in particular that Dr. Shakher made complaints formally to Professor Barnett and more recently to Dr. Bellary. Professor Barnett identifies that he retired at the end of June 2011 and that Allegation 11 that was referred to as having occurred on the 23 November 2009, an allegation in respect of which he has no recollection whatsoever was the last allegation that was directly referred to him. The evidence in relation to Allegation 12 is contained in the witness statements Claimants [para 43-46], Dr. Shakher [w/s para 24], Dr. Bellary [w/s para 18]. The documents to which we have been referred are those at 419-431, 975, 1040-1041, 1116 and 1126.

8.12.10. In his witness statement, the Claimant refers to a complaint raised by Dr. Shakher against him to Professor Barnett then Clinical Director on the 20 May 2007 [419-421] and those concerns had already been discussed with Professor Barnett at a meeting on the

24 May [422]. The Claimant learnt of the letter of concerns that the Claimant had wrongly described as "complaints" during a disclosure exercise in early 2017. He assumes that the so called complaints must have been deemed to be so petty as he had not been made aware of them. We note of course that the letter of concern to Professor Barnett [419-421] was not a document of which the Claimant was aware until the disclosure exercise in 2017, a considerable time after his two claim forms were presented to the Employment Tribunal during the course of 2016. We have considered all the evidence before us in order that, if necessary, we can consider whether inferences are to be drawn from the evidence even if discovered after the issue of proceedings.

8.12.11. The Claimant's evidence in relation to Allegation 12 in his witness statement [para 43] deals with the subsequently disclosed letter of concern of the 25 May 2007 [419-421] and [para 44] an email of the 29 October 2012 [1116] and the fact that in Dr. Shakher's review of the Pavitt investigation he reported concerns about the Claimant directly to Dr. Bellary [978] and Dr. Bellary reported to the MHPS Investigation that:

"*Dr. Shakher would comment negatively to me about Dr. Rahim*". [1040]

and that:

"Dr. Shakher's emails were persistent and he would carry on raising issues" [1041].

We find that on the 25 May 2007 [419-421] the Claimant sent to Professor Barnett a list of written concerns relating to three main issues. The letter of concern was not formal complaint or a formal grievance and Professor Barnett did not deal with the issues formally and did not elevate it to the first Respondents HR Department.

8.12.12. In light of the evidence that we have heard, we find that this was not a complaint but as stated in its final paragraph, "*genuine issues which would need to be addressed and resolved entirely before they become unmanageable*". Professor Barnett did not agree with the Claimant's view that because Dr. Shakher's concerns were not raised with him, they were baseless. We accept the evidence given by Professor Barnett that he accepted Dr. Shakher's concerns had some merit and that he had seen Dr. Shakher upset and close to tears when he had explained to Professor Barnett the difficulties that he was having with Dr. Rahim and the difficulty he had communicating with Dr. Rahim that led him to believe that he was not getting the right support. We have found Dr. Barnett's pragmatic view that the two individuals should work together more amenably and work professionally together even if they did not like each other was naïve, although not less favourable treatment by him, nor by the first Respondent through him to treat the Claimant less favourably because of his race. Dr. Shakher was cross-examined in detail on each of the concerns raised in his 2007 letter.

8.12.13. Dr. Shakher's letter written in May 2007 expressed concerns that extended over a period of years both after and prior to his appointment as a Substantive Specialist in September 2006. Having heard Dr. Shakher's concerns tested in cross-examination we find that his concerns were genuinely held and reasonably made. Mr John in his submission suggests that the concerns raised by Dr. Shakher were baseless and having heard evidence, we do not agree. Professor Barnett has confirmed in his evidence that the concerns raised by Dr. Shakher [419-421] were not baseless albeit the concerns were not raised with the Claimant by Professor Barnett. Whilst we have sympathy with Professor Barnett pragmatic view that the two Consultants ought to work professionally together his aspiration was naïve, although not less favourable treatment

because of the Claimant's race, as indeed the Claimant has confirmed in his own evidence.

8.12.14. In any event, we find that the Claimant's document of concern relating to his working relationship with the Claimant was expressed in temperate terms and language and expressed positive sentiments. Although Professor Barnett did decline to address the issues with the Claimant himself, his evidence to the Tribunal is that the Claimant Dr. Rahim was "*hard on Dr. Shakher*" and that Dr. Shakher had given him no reasons to take that view either before or after Dr. Shakher's appointment as a Substantive Consultant.

8.12.15. Turning to the email sent by Dr. Shakher to Dr. Bellary on the 29 October 2012 [1116] the email was sent by Dr. Shakher in his role then as Clinical Governance Lead in response to an approach that had been made to him by a number of Junior Doctors regarding the instructions allegedly given to them by the Claimant and the concerns were twofold, one relating to the Claimant allegedly having instructed Junior Doctors to print out EP charts for patients twice a week or so, a practice with which Dr. Shakher did not agree and considered was a matter for the Claimant even if in Dr. Shakher's view it may be a clinical risk. The more important concern, relating to governance, was in the report that Dr. Rahim had asked him to "*not wear a green shirt to wear ironed shirts and to shave clean",* we find that Dr. Shakher informed Dr. Bellary of the concerns that Junior Doctors had raised and concluded :-

"*I want to be completely kept out of this discussion as I do not want him to think it is a personal issue between. The instructions he gave is being emailed by Dr.May to juniors which I do not think is appropriate for Spr to get involved in non-clinical issues. Please leave me out of this. You can enquire this directly from junior doctors*".

8.12.16.We find that Dr. Shakher reported concerns that have been raised with him by junior joctors and, as was proper in light of his governance role, he reported to the Clinical Director Dr. Bellary for him to progress as he thought fit. Mr John describes the intervention made by Dr. Shakher as being "*one way traffic*" of critical communications. Whether one way or not we find that the email traffic sent by Dr. Shakher to Dr. Bellary in 2012 was proportionate and, in light of the earlier directions given to him by Professor Barnett, Dr.Shakher reasonably sought not to be directly involved in concerns raised regarding the Claimant's conduct and direction.

8.12.17.We conclude that the reason why Dr. Shakher sent the email was because junior doctors had raised concerns with him, he acted reasonably by asking Dr. Bellary to make an investigation and he did not criticize Dr. Rahim in the content of his email.

8.12.18.The Claimant in his witness statement refers to the fact that Dr. Bellary in the MHPS Investigation Report is reported as having said that Dr. Shakher would comment negatively about Dr. Rahim [10.40].

8.12.19.To the extent we make findings in relation to later allegations that the Claimant expressed any concerns about that Dr. Shakher raised any concerns about the Claimant's compliance with hospital policies and strategies; any such involvement was limited to objective observations.

8.12.20.We have identified no causal connection between Dr. Shakher's concerns and the Claimant's race. The concerns raised with Dr. Bellary but confirmed by him to be work related and based upon Dr. Shakher's genuine belief in relation to the unfair distribution of work.

8.12.21.The Allegation in relation to the time frame 2008 – 13 May 2015 is one that was not presented in time and refers to historical concerns. We remind ourselves that in respect of the concerns

raised with Professor Barnett in 2007, the Claimant was not aware of those concerns until 2017 after his complaints to the Tribunal had been presented. Were the complaints in reference to the 2007 concerns matters from which we could draw inference in this case, for the reasons set out above we draw no adverse inference. The concerns raised by Dr Shakher were legitimate concerns raised for reasons not relating to the claimant's race.

8.12.22. The complaint refers to a hypothetical comparator. Based upon the evidence that we have heard and the findings of fact that we have made we find that the nature of Dr. Shakher's behavior was that he would have raised the concerns that he did because of the nature of them and regardless of the race of any consultant behaving or treating him in the way that he claimant had.

8.12.23. We find that the Allegation is presented out of time and there are no grounds on which the Tribunal considers it is just and equitable to extend and exercise our discretion to consider the complaints.

8.13. **Allegation 13**

8.13.1. On various unspecified dates between 2008 - 2015 the claimant complains that Dr. Shakher continued to gossip about the Claimant persistently. The claimant claimed that Dr. Shakher has admitted to this gossiping and claims that Dr. Shakher would discuss the Claimant in negative and accusatory manner with other colleagues. (PoC 22.12.2). The claimant asserts that the comparators to whom he refers are Steve Bains, Steve Gough, Sudesh Kumar, Paul Dodson, Alan Jones, Andrew Bates and Phil Dyer.

8.13.2. The respondents assert that it is not possible to respond to this broad allegation in any detail. Discrimination is denied and it is submitted that these claims are out of time, with no continuing act of discrimination.

8.13.3. Dr. Shakher denies this complaint and in particular denies that he '*admitted to this gossiping'*. This allegation is vague in terms of lacking specifics and timings. (ET3 41) The Claimant was asked to provide further particulars.

Evidence and Findings of Fact

8.13.4. The allegation is that during the period of years 2008-2015 Dr. Shakher continued gossiping about the Claimant persistently. The Claimant alleges this is both direct discrimination because of his race and was harassment because of his race. The complaint is detailed in the Particulars of Claim ("POC") at paragraph 22.12.2. The Claimants Witness Statement comments upon the allegation [para 47- 48] and evidence is given by Dr. Shakher [w/s, 25], Professor Barnett, [w/s para.39] and Dr. Bellary [w/s para 19]. The documents that the Tribunal has been referred to are at pages 578, 948, 1144-1146. The Claimant alleges that the so called Pavitt Report in its conclusions [941] in reference to Dr. Shakher's alleged behaviours states :-

> *"For example emails that were provided as evidence and by Dr. Shakher's own admission of gossiping. Taken at face value, many of the concerns raised would be considered valid and appropriate, but given the subject was frequently either overtly or by implication Dr. Rahim would feel that this amounts to a long term vicious campaign. This behaviour falls within the scope of the Dignity at Work policy under the definition of bullying and harassment."*

8.13.5. We find that the Claimants allegation about Dr. Shakher admitting gossiping is founded upon the alleged admission of Dr. Shakher that he had engaged in gossiping. That reference appears to be taken from the conclusions in the Pavitt Report. We have considered the evidence contained within the Pavitt Report of an interview with Dr.

Shakher [964-974] and we find there is not there, nor have we been taken elsewhere within the Pavitt Investigation to any admission by Dr. Shakher that he gossiped and that such gossiping was persistently about the Claimant.

8.13.6. We find that the notes of the Pavitt interview with Dr. Shakher were not sent to him by the author of the Pavitt Report. We find that Dr.Shakher did not see the notes of the interview until they were disclosed to him by Dr.Rose in his MHPS investigation at which time Dr. Shakher made annotations which delete the reference to his having admitted to gossiping. We find that in this respect as in many others the Pavitt report lacked objectivity and lacked integrity.

8.13.7. The Claimant [w/s para47] refers to an email from Dr. Karamat to Angela Spencer [1144-1145] in relation to a SPR Forum held on the 4 December 2015. We have not heard from Dr. Karamat but have been referred to his email which amongst other things states:-

> *"However the biggest disappointment is the interpersonal relationship among Consultants. Individuals commented they were asked by one Consultant to comment on the work of another Consultant and felt really let down by having the choose sides. They felt as if they were children of parents who were getting divorced*!"

8.13.8. Dr. Karamat's email does not identify any of the Consultants nor does it identify the issues about which comments were sought and we find that the sentiments are not attributed to any one Consultant, although Dr. Bellary has confirmed that the Consultants asking for comments about the other were both Dr Shakher and the Claimant Dr. Rahim.

8.13.9. At it's highest, the Claimant's evidence of alleged gossiping refers to Dr. Karamat's email [1145] and to the supposed admission by Dr. Shakher that he was gossiping, which we find mistakenly and

wholly without objective foundation, was referred to in the Pavitt Report. We find no evidence that the Claimants complaint that Dr. Shakher was gossiping about the claimant has been properly established. The Claimant has provided no plausible basis for believing that any gossip or even exchanges amongst work colleagues was race related. In answer to questions in cross-examination, the Claimant admitted that at the time that the Claimant saw the outcome of the Pavitt Report and the conclusions, in November 2015 that he did not believe even on the Pavitt conclusions, that the asserted gossip was because of or relating to race.

8.13.10. We find that the environment of the Hospital was one in which Consultants spoke with each other, including the Claimant with his work colleagues, about Dr. Shakher, as is evidenced by the fact he copied emails sent to Dr. Shakher and Dr. Bellary to others.

8.13.11. Furthermore the Claimant conceded in answer to cross-examination that he did not make a habit of speaking to the Second Respondent Dr. Shakher and he was not aware of Dr. Shakher "gossiping about others".

8.13.12. We conclude that neither first nor second Respondent treated the Claimant less favourably as has been alleged in allegation 13, and on those facts there is no suggestion that Dr. Shakher, the alleged perpetrator, discriminated against the Claimant because of his race.

8.13.13. The facts, as we find them to be, do not establish that the Claimant has been harassed in these circumstances. We would observe that the fact that senior members of the medical staff talk to each other about clinical performance or compliance with management strategy and practice within the directorate is not properly described as "gossip".

8.13.14. In relation to time, the only date on which the Claimant at best asserts that the behaviour concerning the relationship between

Consultants was discussed, was in December 2015 in relation to the SPR Forum 4 December 2015. On the facts, we find that there was no substantive complaint as alleged.

8.13.15. We have heard no evidence to suggest that the allegation forms part of a continuing act. Any prior allegations of the so called "persistent gossiping" were, to the extent they pre-date 23 September 2015, out of time and we do not consider it just and equitable to extend time in the circumstances.

8.13.16. Finally, absent a finding of gossiping, direct discrimination or harassment we note that the claimant has led no evidence to suggest that he has been treated less favourably than any of the named comparators or at all.

8.14. **Allegation 14**

8.14.1. It is alleged that in the summer 2013 Dr. Shakher accused the Claimant of trying to 'trip him up' during a meeting. This meeting was attended by over 15 individuals. None of the other attendees noticed this incident or viewed any attempt by the Claimant to trip up Dr. Shakher. The Claimant does not recall the specific incident. (PoC 22.12.3) The claimant relies upon a hypothetical comparator

8.14.2. The respondent asserts that this allegation has not been particularised sufficiently. The First Respondent does not know the date of when this meeting occurred, what the meeting was about or who the other attendees were. It does not know when it is alleged that Dr. Shahker accused the Claimant of trying to 'trip him up'.

8.14.3. The first and second respondents assert that based on the limited information provided in the complaint, that this allegation is out of time and it is denied that there is a continuing act of discrimination. No complaint has been received by the Trust prior to this Tribunal complaint.

8.14.4. As set out in para 41 of the ET3, Dr. Shakher maintains that he withdrew from attending Endocrine MDT meetings in order to avoid the Claimant's unpleasant behaviour. (ET3 41)

Evidence and Findings

8.14.5. The allegation is that Dr. Shakher accused the Claimant of trying to trip him up during a meeting that occurred in the summer of 2013 that was at a meeting attended by the fifteen individuals, none of whom noticed the incident or viewed any attempt by the Claimant to trip up Dr. Shakher. The Claimant does not recall the specific incident. The allegation is detailed in the Particulars of Claim para. 22.12.3. The Claimants [w/s para 49] refers to the allegation and Dr. Shakher [w/s para.26], Dr. Bellary[w/s20] each give their account. Dr Bellary's has a recollection of an incident that is limited that Dr. Shakher, as they were leaving the meeting, asking if he had seen Dr. Rahim stick his leg out to try and obstruct Dr. Shakher. Dr. Bellary had not and as far as he was concerned neither had Dr. Shakher pursued the matter any further. We note however that Dr. Bellary has a recollection that the incident as having occurred in 2012 not 2013.

8.14.6. The Claimant in answer to cross-examination confirmed that the incident was simply an example of petty and childish behaviour; he does not suggest it was because of his race. We find there was no causal connection between the incident, were it to have occurred, and , much as the claimant acknowledged, the Claimant's race. It is a matter that the Claimant did not raise at the time, is not part of a continuing act and the allegation that this was a complaint of unlawful discrimination because of race which occurred, whether in 2012 or 2013, is out of time and we do not consider it just and equitable in the circumstances to extend time.

8.15. **Allegation 15**

8.15.1. The complaint is that in December 2014 Dr. Shakher made accusations that the Claimant was not contributing to weekend shifts. These shifts were voluntary and reimbursed with additional pay. The Claimant gives an account that he did put himself forward but often relinquished the shift to other doctors who requested the additional pay. (PoC 22.12.4) The comparator is identified to be Dr. Indaril Dasgupta.

8.15.2. The First respondent replies that The Claimant has not particularised who Dr. Shakher made the accusations to, and what these accusations were.

8.15.3. This complaint has not been specifically made as part of the First Respondent's internal investigations. The respondent argues that there is some evidence that a number of consultants believed that the Claimant was reluctant to undertake weekend work.

8.15.4. Discrimination is denied. The respondents assert that this complaint is out of time and it is denied that there is a continuing act of discrimination.

8.15.5. Dr. Shakher responds that the complaint is vague in terms of what was alleged to have been said and when and that colleagues, including the Office Manager, at the Trust are able to give evidence regarding rotas for weekends. Dr. Shakher does not deny that around this time he was simply asking for transparency and equality regarding work distribution for all consultants; Dr. Shakher was Clinical Governance Lead for the department and was conveying this need as part of the Trust's mission for transparency of job plans. (ET3 33 and 42)

<u>Evidence and Findings</u>

8.15.6. The allegation is that in December 2014 Dr. Shakher made accusations that the Claimant was not contributing to weekend shifts. The shifts worked by consultants at the weekend are

voluntary and are reimbursed with additional pay. The shifts were allocated on a rota basis and the Claimant confirms that although he did put himself forward to do weekend shifts, often he would relinquish the shift to enable another Doctor to take his shift so that they could be paid the additional pay, [POC para. 22.12.4]. Evidence is contained in Witness Statements of the Claimant [para.50-55], Dr. Shakher [w/s para.27] and Dr. Bellary [w/s para.21].

8.15.7. The Claimant identifies that his actual comparator in terms of what he says is discriminatory, less favourable treatment because of his race is Dr. Indaril Dasgupta.

8.15.8. We reflect upon the requirement for working at weekends within the Respondent's trust. We have heard from Professor Barnett that the Hospital Management had sought in recent years to introduce a seven day working week and all Consultants are asked to do seven day working with a view to improving the service delivered to patients. The Claimant has suggested that the reason he particularly did not feel able to work at weekends was because he and his siblings looked after his father and after his death his widowed mother, he explained that the commitments he had to work during the week meant that he had to care for his mother at weekends as well as other family commitments. We have heard that neither Professor Barnett nor Dr. Bellary his clinical directors at different times were aware of personal issues that required the Claimant not to work at weekends.

8.15.9. Dr. Bellary became Clinical Director in July 2011 when Professor Barnett retired and we accept his evidence [w/s para.21] that when seven day working was introduced at the Respondents Trust, weekend working was not then provided for as a requirement in the Consultant job plans. There are two types of weekend work; the first, in relation to Ward cover, if a Consultant worked at the weekends, they were given time off in lieu during the week. The

second type of weekend working, was to provide weekend cover to the Acute Medical Unit in respect of which the Consultants received an additional payment. We accept the account given by Dr. Bellary that many Consultants were happy to work weekends on that basis, however Dr. Rahim was not, as he considered that arrangement was not covered within his job plan and he sought to work to the rule of his job plan, as he was entitled to do.

8.15.10. The Tribunal heard evidence from the Claimant that he had received advice from the BMA that he should not be required to work outside of the terms of his job plan. Following discussion with Dr. Bellary the Claimant agreed to do weekend ward cover for which he would take time off, however he was not happy to do the Acute Medical Unit work and his practice was to offer those shifts that were allocated to him to others to fulfil in respect of which the Consultant providing cover would receive a payment. Dr. Bellary accepted that whilst not outside the rules of the then existing job plans, if everyone took the approach taken by Dr. Rahim to covering Acute Medical Unit work, the system, which to an extent appeared to function on the basis of the Consultants goodwill to work at weekends, was likely to be dysfunctional and unable to deliver the required level of service to the patients. Dr. Bellary acknowledges that other Consultants within the Trust held a similar view to Dr. Rahim and did not welcome weekend working however they undertook weekend duties.

8.15.11. During a period of 17 months from February 2010 to July 2011 Dr. Rahim had not undertaken any weekend working. The Claimant in his answer to cross-examination, confirmed that during 2014 he undertook only one weekend shift and relinquished all other shifts to others whilst the payment for the shift was received by those that took the Claimants scheduled duties. The fact that the Claimant absented himself from the weekend Acute Medical Unit work was not considered to be colligate. Dr. Bellary has confirmed that since

the summer 2015, weekend working has become factored into the job plans for Consultants.

8.15.12. We find that the Claimant was the only Consultant within the Diabetes Directorate who regularly did not undertake additional weekend working. The disquiet expressed by his Consultant colleagues was in relation to his reluctance to undertake Acute Medical Unit weekend working. We find that, without more, there is no merit in the claimant's assertion that such comments as were made, that the Claimant was not contributing to weekend shifts, whether by the Second Respondent or others, was because of the Claimants race.

8.15.13. The Claimant has referred to a Dr. Dasgupta as his Comparator. Dr. Dasgupta was a Consultant in the Renal Department not within the Diabetes Directorate. Dr. Bellary has confirmed that within the Diabetes Directorate, Dr. Rahim was the only Consultant who did not undertake the weekend work covering in Acute Medicine and as a consequence it was only the claimant in respect of whom Dr. Shakher and others expressed disquiet as a result of his lack of collegiate approach in that regard. We find that it would not be rational for Dr. Shakher to express disquiet about a Consultant within other Directorates not doing weekend work as that would not impact upon the working within the Diabetes Directorate directly. We determine that Dr Dasgupta is not a suitable comparator within the diabetes department. We find no evidence that leads us to conclude that the claimant has been treated less favourably that a real or hypothetical comparator.

8.15.14. We find that Dr. Shakher's disquiet and views expressed by him were as a consequence of Dr. Rahim's choosing not to undertake the weekend working on Acute Medicine cover and was not in anyway related to the Claimant's race. We find that the claimant's complaint of direct discrimination and or harassment because of race does not succeed in respect of the allegation.

8.15.15.We find in any event that the allegation referring to a conversation in December 2014 was one that is out of time in terms of the presentation of the Claimants complaints to the Employment Tribunal and we find there are no grounds that lead us to consider it is just and equitable to extend time to allow the complaint to proceed.

8.16. **Allegation 16**

8.16.1. The claimant complains that between 2008 -2015 on repeated and continuous occasions Dr. Shakher would refer to the Claimant as 'him' when speaking about him to other colleagues. (PoC 22.12.5) The comparator is an hypothetical one.

8.16.2. The first respondent identifies that this complaint has not been specifically made as part of the First Respondent's internal investigations. The First Respondent does not know to whom it is alleged these comments were made and therefore states they are unable to respond with any further detail.

8.16.3. Discrimination is denied. The respondents assert that many (if not all) of the allegations appear to be out of time. It is denied that there is a continuing act of discrimination.

8.16.4. Dr. Shakher identifies that the complaint is vague as to how this can be construed as a detriment and identifies that no specifics are provided as to which colleagues it is alleged were involved in such conversations. It is denied that Dr. Shakher harassed or bullied the Claimant in this way or at all. (ET3 43)

Evidence and Findings

8.16.5. The Claimant complains that between 2008 – 2015 on repeated and continuous occasions, Dr. Shakher referred to him as "him" when speaking about him to other colleagues – Particulars of Claim paragraph 22.12.5.

8.16.6. Evidence is contained within the Claimants Witness Statement paragraph 56-58; Dr Shakher [w/s para 16], Dr Bellary [w/s 22].

The Claimant asserts that in October 2014 Dr. Bellary informed the Claimant that Dr. Shakher referred to the claimant as “him”. Dr. Shakher acknowledges that he may well have referred to the Claimant as “him”, as he would to anyone when referring a third party to any other person when the subject of a statement or the object of discussion has already been identified. Dr. Bellary’s Witness Statement confirmed that he had heard Dr. Shakher refer to both the Claimant and to others as “him or she or that man/woman” instead of their name and confirmed that the speech pattern was one used not only in relation to Dr. Rahim and not only by Dr.Shakher. We have heard no evidence to suggest that Dr. Shakher never referred to Dr. Rahim by his family name or that the claimant was the only person who was the subject of a comment and referred to thus. Absent more particular evidence we are unable to find that Dr. Shakher’s treatment of the Claimant was because of his race or less favourable treatment on the grounds of his race or was harassment relating to his race. The Claimant himself has confirmed that he had not heard conversations wherein Dr. Shakher referred to him in the manner alleged.

8.16.7. The complaint that this practice was repeated and continuous between 2008 and 2015 is without specific particulars and it is not suggested to the Tribunal that the behaviour was part of the continuing act of discrimination.

8.16.8. For the sake of completeness, we note that the allegation is that the comment was used, repeated and continuously up to 2015 and we note that the Claimants last day at work in 2015 was the 9 October 2015. In the circumstances, the complaint was presented in March 2016 and complaints that occurred on or after the 23 September 2015 are potentially in time. Absent evidence to identify dates between 23 September 2015 and the Claimants last day at work on 9 October 2015, when it is alleged that such detrimental treatment occurred, we do not find that the Claimant was

discriminated against either directly or because of harassment in relation to the Claimants race.

8.16.9. In respect of any occasions when it is alleged that the Dr Shaker addressed the claimant as “he” on or before 22 September 2015 the complaint is presented out of time and the tribunal has not heard evidence to suggest that circumstances are such that it is just and equitable to extend time to present a complaint to consider the complaint.

8.17. **Allegation 17**

8.17.1. On repeated /continuous occasions in 2008-2015 it is alleged that Dr. Shakher demonstrated repeated unprofessional behaviour in respect of the claimant. The claimant suggests that Andrew Bates is the comparator.

8.17.2. The first respondent asserts that it is not possible to respond to such a broad allegation, other than asserting that discrimination is denied and many (if not all) of the allegations appear to be out of time. It is denied that there is a continuing act of discrimination.

8.17.3. Dr. Shakher argues that there is too little detail in terms of alleged accusation made by him. As set out in para 41 of the ET3, Dr. Shakher says that he withdrew from attending Endocrine MDT meetings in order to avoid the Claimant’s unpleasant behaviour. Dr. Shakher in his defence intended to call a Specialist Nurse and Clinical Pharmacists who could confirm this was the reason for Dr. Shakher withdrawal from the clinic. (ET3 41)

<u>Evidence and Findings</u>

8.17.4. The Claimant alleges that Dr. Shakher demonstrated repeated unprofessional behaviour towards him on repeated and continuous occasions between 2008 and 2015. His Witness Statement [para 59-60] refers to the allegation and Dr. Shakher deals with his response [w/s para 29]. We have heard from Professor Barnett [w/s para 41], and Dr. Bellary [w/s 23]. The Claimant refers to his alleged

comparator being Dr. Bates and we have been referred to documents [S27-28 and 965-966]. In particular, the Claimant asserts that the unprofessional behaviour included Dr. Shakher ignoring the Claimants views during meetings and speaking over him. The allegation is that the unprofessional behaviour was demonstrated repeatedly and continuously between 2008 and 2015.

8.17.5. The Claimant in his Witness Statement refers to an incident during a consultation meeting in 2015 amongst Consultants including the Claimant, Dr. Shakher, Drs. Ahmed, Bellary, Clark, Helmy and Professor Martin Stevens at which Dr. Shakher within the group discussing job plans, informed the Claimant, who said that job plans were confidential to employees, that job plans were not confidential. We find, as we have heard the evidence, that the respondent Trust's plan was that job plans should not be confidential but should be public documents so that there was transparency of information relating to what Consultants were required to do.

8.17.6. We find that during the course of evidence, Dr. Shakher confirmed that he had identified that it was Trust policy that job plans were to be transparent and the move had been progressed further in other departments than in Diabetes. Dr. Shakher, like other Clinical Directors in the Trust since his appointment as Clinical Director for General Medicine, was keen that there should be transparent job plans within the Diabetes Department that fell within the wider General Medicine group over which he was the Clinical Director.

8.17.7. The Claimant in his Witness Statement refers to the fact that Dr. Rahim would talk over him during Endocrine MDT meetings. Dr. Shakher has since suggested in his Witness Statement that when he had attended the Endocrine MDT meetings and case discussions, Dr. Rahim asserted his lead role as Endocrine lead for Heartlands Hospital and as a consequence Dr. Shakher said he

withdrew from those Endocrine MDT meetings in order for him to avoid what he describes as Dr. Rahim's '*unpleasant behaviour'*.

8.17.8. We have no doubt that in meetings of the Diabetes Directorate and the Endocrine Meetings the Consultants and Doctors who were present would have heated exchanges and the discussions about matters about which, on occasion, they felt strongly. We have heard no evidence to convince us that the comments were limited to Dr. Shakher speaking over Dr. Rahim. We find that the Claimants complaints are not sufficiently particularized other than in respect of the job planning meeting.

8.17.9. We accept in respect of the job planning meeting that the account given by Dr. Shakher that his aim was that job plans should be transparent within the Diabetes department, as they were elsewhere within the Trust was a view held regardless of the affected consultant. The account provided by Dr. Shakher has been supported by Dr. Bellary who confirms that there were heated discussions about job plan transparency, and that the discussion was one in which two people had opposing views of each others case and that both the Claimant and Dr. Shakher are senior and experienced Consultants who robustly spoke in support of their own views. We have heard nothing to suggest otherwise and that would lead us to find that Dr. Shakher's challenge of Dr. Rahim's view was motivated by or because of race, anymore than Dr. Rahim's opposition to Dr. Shakher's view was motivated by race. We do not find the allegation succeeds on the basis that the Claimant was discriminated against because of his race or was subject to harassment because of his race by the first or second respondent the reason why Dr Shakher behaved as he did is apparent and was not because of the claimant's race.

8.17.10. We remind ourselves that the complaint, unspecific though it is, relates to alleged behaviour up to October 2015 at which point the claimant began a period of extended sickness absence. The alleged

behaviour which took place before 23 September 2015 is prima facie out of time, the claimant having presented his application for early conciliation through the offices of ACAS on 22 December 2015. We have heard no evidence to persuade us that there were circumstances which lead us to consider that it is just and equitable to entertain a complaint in relation to events that had occurred before that date.

8.17.11. Our determination is that even those events about which the claimant complains in this allegation are without merit.

8.18. **Allegation 18**

8.18.1. The complaint is that repeatedly and continuously from 2008 – 2015 Dr. Shakher scrutinised every action of the Claimant, even though he had no line management responsibility to the Claimant. The Claimant was aware that any mistake or error would be used by Dr. Shakher to build a case against him. (PoC 22.12.7)

8.18.2. The First respondent denies that Dr. Shakher *"scrutinized every action of the Claimant"* as alleged.

8.18.3. The Claimant has not particularised how this scrutiny took place, or how it is alleged that Dr. Shakher 'built a case against him'.

8.18.4. As specific events have not been particularised, the First Respondent say that they can only respond in general terms. Discrimination is denied, and many (if not all) of the incidents appear to be out of time. It is denied that there is a continuing act of discrimination.

8.18.5. Dr. Shakher the second respondent denies the allegation which he says is too vague to be answered other than to be denied.

<u>Evidence and Findings</u>

8.18.6. It is suggested that Dr. Shakher scrutinized every action of the Claimant even though he had no line management responsibility for

the Claimant and the Claimant says that he was aware that any mistake or error would be used by Dr. Shakher to build a case against him, [P.O.C.22.12.7]. The witness evidence is contained within witness statements of the Claimant [w/s para 61-67], Dr. Shakher [w/s para30], Professor Barnett [w/s para42], Dr. Bellary [w/s para 24]. We have been referred to Documents 469, 469A, 965, 978, 982, 1041, 1116, 1119 and 1145. The Claimant in his pleaded case does not provide details of the alleged repeated and continuous scrutinisation mounted by Dr Shakher.

8.18.7. The Claimant in his Witness Statement suggested that he became aware from Dr. Christine May in October 2012 and from Dr. Kavish Mundil in October 2015 that Dr. Shakher would scrutinize the Claimants actions and discuss them with other colleagues, particularly junior colleagues, to try and elicit potential problems that he could find with the Claimants work. We have heard no evidence from Dr. May or Dr. Mundil to corroborate the Claimants unspecified assertions. We find that the Claimant's allegations that he was continuously and repeatedly scrutinized do not stand detailed examination, they are not particularised within the Schedule nor the Particulars of Claim and we have been referred to the limited number of examples of scrutiny that the Claimant sets out in his Witness Statement [paras. 61-67]. Having heard no evidence from Dr. May or Dr. Mundil in relation to the alleged scrutiny of Dr. Rahim in October 2012 and October 2015 respectively, the allegation raised lacks particularity.

8.18.8. The Claimant [w/s 62] refers to an email that was sent him on 29 October 2012 from Dr. Shakher to Dr. Bellary commenting upon Dr. Rahim's instructions to Junior Doctors. We have been referred to the email [1116] as it was an email appended to a sequence of emails between Dr. Shakher, Dr. Bright, Dr. Bellary and Drs. Mukherjee and Raghuraman regarding working hours on the Diabetes Ward in October 2015. The sequence of emails began on the 6 October 2015

from Dr. Bright to Dr. Shakher [1111] in which Dr. Shakher was asked to review the situation in respect of Junior Doctors and Trainees purporting that they were working excessive hours on the ward and Dr. Shakher was asked to report back to Dr. Bright. A series of email exchanges then took place which included input from Dr. Bellary. We find that the enquiries made by Dr. Shakher, at the request of Dr. Bright, were fair and reasonable and were not of Dr. Shakher's own making and initiative. Dr. Shakher's enquiries dealt with concerns that had been raised by Junior Doctors about tasks that were required to be done on the ward and the fact that they *"feel intimidated and scared that they would not be able to keep up with this task*". In light of the investigations, Dr. Shakher made a number of recommendations [1114] and Dr. Bright thanked him for his efforts. Dr. Shakher included at the end of the email exchange, an email detailing similar complaints by Junior Doctors that had been raised in October 2012 [1115-1116] that concerned complaints from Junior Doctors in relation to the way in which Doctor Rahim ran his Ward and in particular his direction that Junior Doctors were not to wear a green shirt/scrubs but were to wear an ironed shirt and appear clean shaven.

8.18.9. We find that Dr. Shakher had involved himself in email correspondence in October 2015 as he was Clinical Governance Lead and was under a duty to inform Dr. Bellary of the directions which went against the Trust policy. We have been referred again to the emails in December 2015 [1145] in relation to the SPR Forum. In his closing submissions, Mr John for the Claimant has referred to the email and suggests that it is:

> *"very likely to have been R2(Dr. Shakher) enquiring of Dr. Srikanth Bellary who confirmed in cross-examination that the Claimant was not raising issues about Dr. Shakher in 2011-2016".*

We find that the email from Dr. Karamat is not clear to identify which Consultants are being talked about and for the reasons we have referred to above we do not find that the allegation has been well made and does not succeed.

8.18.10. The Claimant in his Witness Statement has referred to enquiries that Dr. Shakher made about the claimant's job plan, the comments that we have referred to above in relation to Dr. Shakher's concerns about the need for transparency relating to job plans are adopted in relation to this allegation.

8.18.11. We note that the Claimant has referred to his comparator in relation to direct discrimination being Dr. Bates.

8.18.12. We have heard no evidence of Dr. Bates' position being any different to the Claimants, or that the Claimant was treated less favourably because of his race. We remind ourselves that we have identified in our Findings in relation to the application to present claims that are out of time that such concerns that the Claimant has referred to in relation to the allegation that arise on or before the 22 September 2015 are out of time. We have heard no evidence that persuades the tribunal to find that it is just and equitable to extend time to entertain the complaint that is out of time.

8.19. **Allegation 19 withdrawn**

8.19.1. On 6 October 2017 the allegation 19 and the complaint in respect of the First Respondent and the Second respondent was withdrawn the complaints raised in that allegation are dismissed.

8.19.2. The complaint was that in 2013 Dr. Shakher would generate work for the Claimant to do at weekends that was not clinically necessary or could have been undertaken during the week. (PoC 22.12.8). The claimant identifies a number of comparators, M Stevens, M Clarke, Mohamed Ahmed, Ahmed Helmu, Ateeq Syed, Sri Bellary and Abd Tehrani.

8.19.3. It has not been particularised how Dr. Shakher would generate work for the Claimant to do at weekends that was clinically unnecessary or could have been undertaken during the week.

8.19.4. As specific events have not been particularised, the First Respondent could only respond in general terms in their response. Discrimination is denied, and many (if not all) of the incidents appeared to be out of time. It was denied that there was a continuing act of discrimination. The Claimant has not submitted any internal complaint about this.

8.19.5. Dr. Shakher denies the allegation as it stood. No specifics of this allegation had been provided, however Dr Shakher refers to the fact that it is mandatory and good practice, required by the Trust for all consultants to handover a written list of patients who need to be seen over the weekend, with their medical issues noted. This requirement is to ensure patient safety as part of seven day working risk management. (ET3 44)

Evidence and Findings

8.19.6. The allegation has been withdrawn by the Claimant midway through the hearing of this case. The Claimant has withdrawn Allegation 19 that Dr. Shakher generated work for the Claimant to do at weekends that was not clinically necessary or could have been undertaken during the week, [P.O.C 22.12.8]. The allegation was withdrawn by the Claimant after completion of his evidence and following advice. In answer to cross-examination, the Claimant confirmed that it was his perception, but not something that he could prove, that Dr. Shakher was creating unnecessary clinical work for him to do. The Claimant confirmed he did not know if this was a practice but that if it was, Dr. Shakher's practice was one that he operated widely, regardless of who was the Consultant working on the Diabetes Ward at the weekend.

8.19.7. We find there was no evidence at all that Dr. Shakher was compromising the care of his patients by saving work to be undertaken by Dr. Rahim at the weekend, with the specific intent of creating work for the Claimant. In the absence of any such evidence we have no hesitation in finding that the Claimants perception of Dr. Shakher's working practice was entirely misconceived in this respect. We have made a finding in this regard, notwithstanding the withdrawal of the complaint as it is remains relevant to the overall nature of the complaints and is part of the matrix of findings of fact from which we are invited to draw inferences.

8.20. **Allegation 20**

8.20.1. The claimant asserts that on 21 October 2013 Dr. Shakher complained to Dr. Bellary that the Claimant had taken unauthorised absence which included leaving the ward to go off-site. It was confirmed that the Claimant had not acted inappropriately. (PoC 22.13) The claimant identified Dr. Abd Tehrani as his comparator.

8.20.2. The respondent responds that on 13 October 2013, the Claimant and one of his colleagues (Dr. Tehrani) were scheduled to work. They completed ward rounds in the morning, but then left their shift to attend a meeting in London which commenced at 1pm. Dr. Bellary (Clinical Director) became aware that the Claimant and Dr. Tehrani were not present at an internal meeting to discuss their cases. Dr. Bellary established that none of the other consultants were aware that the Claimant and Dr. Tehrani had gone to London. This was outside usual protocol and Dr. Bellary discussed this matter with both the Claimant and Dr. Tehrani, to advise that if they left the hospital during a shift they knew they should alert their consultant colleagues who could cover their cases if required. The Claimant (and Dr. Tehrani) had therefore breached the usual protocol, and Dr. Bellary addressed this informally.

8.20.3. The respondent assert any involvement by Dr. Shakher was incidental and discrimination is denied.

8.20.4. The respondent argues that this complaint is out of time and it is denied that there has been a continuing act of discrimination.

8.20.5. Dr. Shakher says that it was Dr. Bellary who raised the Claimant's absence from the meeting. Dr. Bellary sought Dr. Shakher's advice as to how to deal with this matter and Dr. Shakher suggested it be noted to the Directorate Manager. Dr. Shakher had no further involvement in this matter. (ET3 45)

Evidence and Findings

8.20.6. The Claimant presents his complaint in respect of events that occurred in October 2013, the claim was presented to the Tribunal in March 2016 and the complaint is over two years out of time. We find that the allegations referred to are not part of a continuing act and we find that there are no reasons why it is just and equitable that time should be extended in this case.

8.20.7. Evidence relating to the allegation is contained in the Claimant's Witness Statement [paras. 72-74], Dr. Shakher's [w/s para 32-36], Dr. Bellary's [w/s para. 26]. We have been referred to documents [433 and 981]. We have heard evidence from the relevant Witnesses, in relation to the initial concerns raised about the Claimant having been on unauthorised absence from the Hospital and the Ward on the 21 October 2013. We accept the evidence given by Dr. Bellary that on Monday 21 October 2013, Dr. Rahim and Dr. Tahrani were covering wards at Heartlands. Dr. Tahrani was not a direct employee of the Respondent but he was an Honorary Consultant Physician in Endocrinology and Diabetes and a Clinical Scientist in Diabetic Medicine at the University of Birmingham and on that day Dr. Rahim and Dr. Tehrani were on duty as Consultants covering the ward at Heartlands. In light of Dr. Rahim and Dr. Tehrani's absence from a meeting that Dr. Rahim was expected to attend, it became

evident they were not present at Heartlands Hospital on that afternoon and following enquiry, it transpired they had gone to a meeting in London. The absence of Dr. Rahim was self-evident by his absence from the meeting scheduled to take place in Heartlands Hospital.

8.20.8. It is accepted by the evidence of all Witnesses that from time to time Consultants are required to attend meetings away from their hospital site, albeit usually within Birmingham. There is, in principle, no difficulty in a Consultant attending meetings outside of the Hospital, subject only to their informing the Clinical Director if they are not to be present when they are otherwise scheduled to be covering wards, that arrangement being applied in order that appropriate ward cover can be provided. The Claimant confirms that he left Heartlands Hospital and went to a meeting, not in Birmingham but in London, on Monday 21 October 2013. It is accepted by Dr. Rahim that he did not inform the Clinical Director that he was going to be absent and not readily available at the ward on the afternoon of the 21 October, he did not arrange consultant cover for his absence and that Dr. Bellary was concerned that there was no Consultant cover on the ward in Dr. Rahim's absence.

8.20.9. Dr. Bellary has confirmed that he was concerned by Dr. Rahim's absence and the fact that nobody in the hospital appeared to know where he was and he made enquiries that led him to send emails to Dr. Rahim and Dr. Tehrani after his investigation to ensure that they were aware of the appropriate way to deal with absence in the future [432-433]. Dr. Bellary wrote at 15.42 [433]

> *"I was informed that both of you are away in London this afternoon. I know that you both did your respective ward rounds. However, given the situation we are in at the hospital, it would be good to ensure that at least one of you are around in case there is a problem on the ward. In case this is not possible, please arrange for someone else to*

cover you and let me know. This afternoon both of you are away and only one Registrar is in Solihull. Also, I wasn't even aware of the fact that you would both be in London as there was no study leave or annual leave recorded. You will appreciate that this puts me in a slightly difficult position if I am not aware and questioned by Seniors of the Trust. Please let me know if you are going to be away."

8.20.10. In response to his email, Dr. Tehrani informed Dr. Bellary that he was not prepared to give a track record of his movements to the Trust which did not pay him. Dr. Rahim responded [432] on the 30 October 2013 expressing his disappointment that the issue had been raised, as the aim of attending the meeting in London was to try to raise research funds for the Diabetic Department and the Trust. The Claimant expressed the view that he was disturbed by the fact that the issue was *"raised by a third party with me as a target".* We observe that the Claimant appears to miss the essential point. The Respondent Trust, in particular Dr. Bellary, considered it was unacceptable for a Consultant to be absent from the hospital without first arranging alternative Consultant cover or at the very least informing the Clinical Director that they would be absent and not readily available on site. The Claimant was not located elsewhere in Birmingham, but had travelled to London, and no matter how well intentioned the purpose of the visit he had not given notice of his intended absence from the hospital.

8.20.11. The Claimant has suggested that he had not asked for permission or arranged cover because he had only been aware of the opportunity to attend a meeting on the previous Friday and had not been able to arrange cover. We find that the Claimant is disingenuous; he arranged to complete the ward rounds early before he left but merely referring to the fact that difficulties had not arisen in his absence did not override the fact that difficulties could well have arisen and that

was not consistent of the Trust Policy to leave without arranging cover or at very least notifying the Clinical Director.

8.20.12. We find that the Second Respondent Dr. Shakher had not 'pursued' the issue or initiated the enquiry. When it was raised as a query by Dr. Bellary, we find that not unreasonably Dr Shakher had confirmed he considered the claimants actions to be an inappropriate way of behaving. We note that the claimant originally asserted that Dr. Shakher had raised the complaint to Dr Bellary, and subsequently developed the complaint to claim that Dr. Shakher had pursued the enquiry. We find that Dr. Shakher had not initiated the complaint nor did he pursue the Claimant in this regard at all. Dr. Bellary had spoken to Dr. Shakher about the Claimants absence and Dr. Bellary had initially been concerned whether the attendance in London may have been for a financial incentive and had checked that the Claimant had not booked annual leave. (It is accepted by all parties that it is appropriate for Doctors to engage on medical research for their own financial benefit provided it is undertaken in annual leave time). Dr. Shakher did no more than advise Dr. Bellary, when asked by him to comment, that he should formally document any enquiries that he made. We have heard evidence that, without a satisfactory explanation, there was a concern that if Dr. Rahim had travelled to a meeting in respect of which he was to gain financially, that would have raised issues of financial probity if he gained a payment and the absence was for personal reasons without informing his Clinical Director. In the event Dr. Bellary's enquiries confirmed that there was no personal financial gain for the Claimant.

8.20.13. The Claimant in relation to this allegation did not consider he had acted inappropriately or had committed any wrongdoing. We find, having read his email of the 30 October 2013 [432], that the Claimant sought to justify his behaviour which was in breach of the Trust's expected behaviour and made an unwarranted criticism of third

parties which was his reference to Dr. Shakher which was a misconceived analysis.

8.20.14. All of the relevant witnesses, Professor Barnett, Dr. Bellary and Dr. Rose confirmed that an unauthorised absence was wrong. And not acceptable. The ward had been left without Consultant cover and the fact that no adverse events occurred during the absence was fortunate, but does not justify the flawed decision by the claimant that potentially put at risk patient Health & Safety and did not satisfy a Consultants duty to patients on the ward. No other Consultants were aware that two Consultants, the Claimant and Dr. Tehrani had left the hospital site and the Clinical Director had not been informed and their absence was only discovered by chance. Dr. Bellary confirmed that the hospital had been lucky that nothing had happened during the Consultants' absence, however confirmed that had any incident occurred there would have been serious repercussions for the Trust. Dr. Bellary confirmed in answer to questions in cross-examination:-

> *"I mainly was interested in if others were aware of the absence. If Doctors received payment into the Trust account – my concern is if there was a payment associated with it, I would consider it quite serious, I wanted to be sure that there was not a payment and if there had been a payment, it would have made it more serious."*

He went on to confirm:

> *"it is clear that no Clinical Care incident happened on the day and I was reasonably satisfied that nothing happened. There was no accident – but the whole issue is about communication - it should have been better and clinical incidents can happened that is why people need to be accessable and have to communicate with other colleagues and myself."*

8.20.15. We find that the incident is a demonstration that Dr. Rahim, perhaps with the best of intentions promoting the wider interests of

the Trust, did not accept his culpability in respect of absenting himself without making cover arrangements. Dr. Shakher has described the absence without arranging Consultant cover as *"clinical negligence, had fate not smiled kindly on the claimant".*

8.20.16. It is evident that Dr. Shakher considered the incident was potentially serious. We note that Dr. Shakher did not pursue the matter further as he was satisfied Dr. Bellary was making his own investigations and Dr. Shakher was aware that the very next day Dr. Rahim was admitted to the Hospital by ambulance as he had emergency chest pains and he was in the Emergency Department along with his family and children and there was no further conversation about the incident by Dr. Shakher.

8.20.17. We find that in respect of the events of the 21 October 2013 the interaction between Dr. Shakher and Dr. Bellary relating to amongst others, Dr. Rahim's absence without prior authorization or arranging Consultant cover, was a reasonable conversation to have and was not unreasonably pursued by Dr. Shakher and his comments and concern arose from his genuine concern for patient safety. The concerns were raised in respect of the Claimant and Dr. Tehrani and both individuals were treated in the same way, save that the Claimant was a direct employee of the Respondent Trust and Dr. Tehrani was a Research Consultant employed by Birmingham University. We find that the suggestion made by Dr. Shakher to Dr. Bellary that the fact that Dr. Rahim was absent without notifying his Clinical Director and arranging alternative Consultant cover, was behaviour that should be documented was well within the range of reasonable responses. To the extent it was not dealt with by Dr. Bellary in more formal terms than he did is of some surprise to the Tribunal.

8.20.18. We find that the Claimant had, to the extent it was appropriate, been treated in the same manner as the named comparator Dr. Tehrani. We find that the reason why the Claimant was treated in the way that he was, was because of the Claimants departure from the

Trust's practice and arose from concerns that patient Health & Safety had potentially been placed at risk. We find that the Claimant was not discriminated against or treated less favourably because of his race and the Claimant was not subject to unlawful harassment because of his race by either the first or second respondent.

8.20.19. The claimant was not subject to direct discrimination or harassment because of the protected characteristic of his race. The matter of which the claimant complained was we find not part of a continuing act of discrimination and is presented out of time. We do not consider it to be just and equitable to extend time to entertain the complaint.

8.21. **Allegation 21**

8.21.1. It is alleged that on 9 October 2014, following the Claimant's appointment as Medical Examiner, Dr. Shakher berated the Bereavement Officer, Tracy Eltham, stating, in an attempt to block the Claimant's appointment, that the Claimant was lazy and would only dump his workload on other individuals. In a further attempt to block this appointment Dr. Shakher also made unprofessional and unpleasant comments to Dr. Colloby (Lead Medical Examiner). (PoC 22.14) The claimant identifies Peter Colloby, Joyce Thompson, Sumeet Chadha and Dr. Chandrappa as comparators.

8.21.2. The First Respondent's respond and say that the medical examiner work is managed and distributed by Dr. Peter Colloby (Consultant Histopathologist). Dr. Colloby offered the work out to various consultants at the First Respondent's Heartlands site. Dr. Colloby held a meeting of the medical examiners in 2014, to discuss the candidates for medical examiner posts, one of whom was the Claimant. No-one raised any objection to the Claimant's appointment, although Dr. Colloby confirmed to the First Respondent as part of its MHPS investigation that Dr. Shakher said (at the end of the meeting) that the Claimant was "*only doing it for the money*".

Notwithstanding the comment, made the Claimant was appointed to the medical examiner post.

8.21.3. As part of the MHPS investigation, the First Respondent concluded that Dr. Shakher had made undermining remarks to Tracy Eltham about the Claimant on 9 October 2014.

8.21.4. The First Respondent has dealt with these matters pursuant to its internal processes.

8.21.5. Discrimination is denied by the first respondent. The complaint is out of time and it is denied that there is a continuing act of discrimination.

8.21.6. Dr. Shakher denies that he berated Tracy Eltham although accepts that he did have a conversation with Ms Eltham about the appointment of the Claimant due to the difficult working relationship between the two of them and asked that they not be scheduled to carry out ME duties on the same day (in order to try to preempt any work related issue); it is denied that Dr. Shakher said what he is alleged to have said to Dr. Colloby or that he was unprofessional. In addition it is denied that Dr. Shakher tried to block the appointment of the Claimant as ME.(ET3 46)

Evidence and Findings

8.21.7. The evidence in relation to Allegation 21 is set out in Witness Evidence in Chief, the Claimant's [w/s paras.75-77], Dr. Shakher [w/s paras. 37-41], Dr. Arne Rose [w/s para 60. The key documents to which we have been referred are pages 786, 937, 1108 – 1109.

8.21.8. We have been referred to the fact that the Claimant accepts that following the MHPS Investigation he was informed that the outcome in relation to the ME Appointment was an allegation that was upheld. Although he has not given evidence to the Tribunal, Doctor Colloby was interviewed by Marion Pavitt in her investigation in July 2015 [1107-1108]. Notes are not a verbatim account, the notes that were signed by Dr. Colloby on the 13 April 2016, which were subject to

correction confirmed that when a vacancy had arisen for the appointment of an additional Medical Examiner, Dr. Rahim had applied and, as he had previous experience when the role had been undertaken as a non-remunerated role, Dr. Rahim was seen as an ideal applicant as he had previous experience and had previously done a reasonable job. Dr. Colloby observed that when he had spoken to the team of other medical examiners, including Dr. Shakher, the other examiners, presumably we find including Dr. Shakher, were ok with the appointment, however Dr. Shakher had also commented that "*AR was only doing it for the money."* Dr. Colloby observed that Dr. Shakher's comments were surprising, although he was not aware of the relationship between Dr. Shakher and Dr. Rahim and described Dr. Shakher's comments as *"unfortunate*" [1108]. In any event, Dr. Rahim was appointed to the role as ME and suffered no detriment in relation to the comments attributed to Dr. Shakher other than the hurt that the comments were made in October 2014.

8.21.9. The second strand of this allegation is that Dr. Shakher made comments to Tracey Eltham the Bereavement Officer. Miss Eltham the Group Service Co-ordinator wrote a Statement dated 03 May 2016 that was presented to the MHPS Investigation [1107], she asserts that Dr. Shakher spoke to her in the way she describes:-

> *"Dr. Shakher proceeded to deliver a tirade that I should not let Dr. Rahim be a Medical Examiner as he would not carry out the duties correctly, he would not carry out the work in sufficient numbers and he would pass work on to other people and that he was only interested in the benefits surrounding the role."*

8.21.10. Further, when Miss Eltham had explained that Dr. Rahim had already successfully completed a number of cases earlier that same day, Dr. Shakher was unhappy with her defence of Dr. Rahim and

suggested that Miss Eltham was saying what she was, because she *"was in love with him*". Dr. Rose in the MHPS Investigation, had like Miss Pavitt, found that Dr. Shakher's words had been inappropriate to the extent that Dr. Colloby had described it as "*unfortunate*". We accept that Dr. Shakher had informed Miss Eltham that he did not wish to be put on to work as an ME on the same day as Dr. Rahim as "*our relationship is not good*". We find that although Miss Eltham was not interviewed by the MHPS Investigator Dr. Rose he had sight of her witness statement.

8.21.11. Mr Beaver has suggested that it is open to the Tribunal to make our own Findings of Fact as to the likely events that occurred giving rise to the complaint in October 2014. The Tribunal in an effort to be proportionate in consideration of this case is able to indentify that whilst Dr. Rose the Investigator in the MHPS Investigation was more thorough and more objective than had been Miss Pavitt in the Pavitt Enquiry, there remain certain irregularities in the MHPS investigation in so far as Dr. Shakher was not provided with a copy of Miss Eltham's Statement before Dr. Rose reached his conclusions. However we like Dr. Rose are of the view that, without some motive being ascribed to Miss Eltham that it has not been placed before us, that it would be remarkable for two individuals Dr. Colloby and Miss Eltham, who were not party to the challenging personal dynamics between Dr. Rahim and Dr. Shakher, to have created accounts of conversations with Dr. Shakher that were entirely works of fiction.

8.21.12. We observe that the circumstances of Dr. Shakher's concerns about Dr. Rahim's appointment to the role as ME related, as do many of Dr. Shakher's concerns, to a sense of grievance in relation to pay and the concern that he was not being treated fairly as compared to Dr. Rahim. We have been referred to the contemporary evidence of concerns raised by Dr. Shakher in November 2014 [469] when Dr. Shakher raised concerns about his

job plan and the fact that he was not credited with a PA for undertaking work as an ME. We have been referred to Dr. Bellary's response to Dr. Shakher's email of the 26 November [469] and Dr. Bellary's support of the representations that Dr. Shakher made and agreed to escalate the issue to the Associate Medical Director at Solihull Mr Rex Poulson and to Dr. Raghuraman for them to consider.

8.21.13. We have been referred to the fact finding meeting held between Dr. Rose and Dr. Bellary on the 5 February 2016 [1040] commenting upon the issues raised by Dr. Shakher regarding Dr. Rahim undertaking the role of Medical Examiner. Dr. Bellary confirmed that Dr. Rahim has a job plan for 12 PA's and that taking on the Medical Examiner role increased him to 13 PA's which was above the standard PA's that were permitted by the Trust. Dr. Shakher had asked Dr. Bellary why Dr. Rahim was being treated differently and had been allowed to exceed the 12 PA standards and Dr. Bellary raised the issue and was informed by Clive Ryder that the anomaly would be resolved through the job planning process.

8.21.14. We note with significant interest that the response given by Dr. Bellary to Dr. Rose's query whether he believed Dr. Shakher's behaviour was racially discriminatory, the response to which was given:-

> *"No I don't think this is the case – I don't think his approach is different to different racial or ethnic groups – it's his overall approach that concerns me*."

8.21.15. We accept that open and honest account given by Dr. Bellary to be persuasive particularly in circumstances where Dr. Bellary himself encountered a difficulty in managing Dr. Shakher's style of working and communication of the underlying fact that Dr. Shakher

expresses unhappiness as he felt that Dr. Rahim was *"getting away with doing less work".*

8.21.16. We find that Dr. Shakher did act in an inappropriate way in October 2014 in relation to the ME appointment. We find that Dr. Shakher's behaviour was motivated by his sense of grievance about allocation of work and pay and that in this case was the reason why he behaved as he did. Whilst the working relationship between Dr. Shakher and Dr. Rahim may have been based upon a mistaken belief held by Dr. Shakher, that Dr. Rahim did not work as hard as him, that sense of grievance was genuinely held and was the reason why the behaviour occurred and we have heard no evidence to suggest that its motive was racial.

8.21.17. We find that the Claimant was not treated less favourably by Dr. Shakher as the Second Respondent and by the First Respondent his employer because of his race.

8.21.18. We find that the circumstances of Allegation 21 are not part of continuing course of conduct. Moreover, we find that the allegation refers to events in October 2014 and that the Claimant's complaint about those circumstances, which he says relates to direct discrimination and harassment because of race and victimisation are not presented within time and there are no grounds that lead us to consider that it is just and equitable to extend time in the circumstances.

8.22. **Allegation 22**

8.22.1. On Friday 7 October Mr John on behalf of the claimant confirmed that allegation 22 was withdrawn as a complaint against the second respondent Dr. Shakher, the complaint remains against the First respondent. The complaint in Allegation 22 against the second respondent is dismissed. The complaint is that in January, February and April 2015, following interferences from Drs. Raghuraman and Mukherjee at some time in or around January or February 2015, the

Claimant and a colleague of Pakistani heritage were asked to step down as panel members for the Clinical Excellence Award process by an email dated 13 February 2015 on the basis that each was also an applicant. Applicants had always previously been able to be panel members, on the basis that they had no involvement in the decision about their own application. The Claimant was notified of Doctors Raghuraman and Mukherjee's potential involvement in April 2015, which was then confirmed in the Fact Find Report investigation and report in November 2015. (PoC 22.15)

8.22.2. The allegation is the first in respect of which the claimant complains that as well as being subject to the prohibited conduct of direct discrimination and harassment he was subject to victimisation because he had done a protected act. The claimant identifies all three doctors, Dr. Raghuraman and Dr. Mukerjee and Dr. Shakher as the perpetrators of this discrimination and vistimisation. The comparators are identified to be J Thompson, Neil Jenkins, Dr. Mukerjee, Mehr Ali, Babu Naidu, Dave Sarmarh, Jos Sherin, Robert Palmer and Jammi Rad.

8.22.3. The first respondent replies that during the months November 2014 to March 2015, the Claimant applied for a Clinical Excellence Award ("CEA") for the year 2014. The Claimant had volunteered to sit on the panel determining CEAs, but because he had submitted an application himself, he was asked to step down from the panel. Whilst in previous years, consultants were not precluded from sitting on the panel when they had also submitted applications, in 2015 Dr. Clive Ryder decided that this was contrary to national guidance and was not necessary as the First Respondent had a large number of volunteers to sit on the panel. Another member of the panel (Dr. Rahman) who was applying for a CEA was similarly asked to step down. The first respondent responds that the Claimant's race played no part in this: the respondent says that it was a matter of basic fairness. Dr. Ryder informed the Claimant that he would be welcome

to sit on the panel in future years where he was not a candidate for the award.

8.22.4. Whilst the Claimant did submit a complaint to the First Respondent about this, in his interview as part of the MHPS investigation on 25 January 2016, the Claimant recognised that sitting on the panel would have amounted to a conflict of interest and he withdrew this part of the allegation.

8.22.5. Discrimination is denied. The respondents assert that the Claimant is out of time to present a complaint about this matter in the Tribunal. It is denied that it is part of a continuing act of discrimination.

8.22.6. The First Respondent is not clear what Dr. Shakher's alleged involvement was in this allegation as this has not been particularised.

8.22.7. The respondents assert that the Claimant's first alleged protected act was made on 25 March 2016, and therefore not all of the incidents complained of above can amount to detriment because of a protected act. The Claimant has not particularised the victimisation complaint with sufficient detail.

8.22.8. Dr. Shakher in his defence responds that it is not clear why has this claim been brought against him. Dr.Shakher is not mentioned in this item or in the corresponding paragraph of the claim form (22.15). The Claimant's own case is that the decision to ask panel members to step down was taken by Dr. Clive Ryder after input from Dr. Mukherjee and Dr. Raguhuraman. (ET3 47). The allegation against him is denied. Dr. Shakher had no role in the CEA panel or award system.

<u>Evidence and Findings</u>

8.22.9. We have heard evidence in the main from the Claimant [w/s paras.78-86], Dr. Shakher [w/s para. 42], Dr. Rose [w/s para.42].and we have been referred to a significant number of relevant documents [pages 38-39, 474-479, 483-488, 490-497, 520, 538-539, 625-666, 748e-f, 780 and 948-952]. In essence the Claimant complains that

the allegation relates to the behaviour of the first Respondent through the acts of Dr. Raghuraman and Dr. Mukherjee relating to the decision taken by the Respondents that the Claimant and a colleague of his of Pakistani heritage, Dr Rahman, were stepped down as Panel Members for the Clinical Excellence Awards process by an email dated 13 February 2015.

8.22.10. The claimant complains that he has been discriminated against because of his race directly, that he has been harassed and subject to victimisation.

8.22.11. We have heard evidence also from Mr Steyn who has given evidence during which time he was asked about the CEA Award in 2015. Mr Steyn was very clear in his account; he was involved in the panel and had sat on a number of CEA Awards both locally and nationally. Both Mr Steyn and Dr. Joyce Thompson had been concerned about the fact that people on the local panel were applying for awards and it was an issue they raised with Mr Clive Ryder who in essence was running the process. Mr Steyn's recollection was that he had raised his concerns in January 2015 in advance of the first meeting of the Panel on the 4 February 2015, it is not challenged that Mr Steyn did not speak to Mr Mukherjee about his concerns.

8.22.12. We have been referred to the process of setting up the CEA (Clinical Excellence Awards) meetings on the 10 February 2015. Dr. Joyce Thompson set up a meeting for the 11 February 2015 for the Panel to meet at Heartlands with a video conference linked to Good Hope and Solihull hospitals [489] within the Trust. In response to her email asking for comments about the convenience of the meeting proposed for the 11 February, she received an email from Dr. Neil Jenkins who copied a number of others, including Dr. Mukherjee in on his reply [488]. Neil Thompson had volunteered to sit on the panel as a result of a number of Junior Consultants asking him to do so, in order that the Junior Consultants could better understand what happened behind the scenes and understand the process, to ensure

that they are more transparent than previously. Amongst other things, Dr. Jenkins raised a concern:-

> *"I can't understand how applicants can be allowed to mark competing applications. As far as I can see, this is a direct competition for a limited number of awards. Whether the applicant leaves the room or not, is largely irrelevant."*

8.22.13. Dr. Mukherjee in response to that email referred to the valid objection from Simon Jenkins in correspondence with Margaret Ward [488] and she indicated that she would speak to Ray Reynolds, former Operational Head of HR. Mr Reynolds identified that one of the key elements of the CEA was that scoring was undertaken by a Panel consisting of at least 50% of Consultants and he raised a concern that if competing candidate consultants were removed from the Panel it would be difficult to form a quorate panel. Dr. Mukherjee informed Mr Reynolds that in 2015 the majority of the Panel were non-applicants and there were only two members who were applicants, Mr Reynolds subsequently responded to Clive Ryder and on the 11 February at 11:54 [486] to inform Mr Ryder that the decision whether or not applicants would be excluded from the Panel in 2015 was a decision for him. Subsequently the Claimant and the other Applicant Consultant who had otherwise volunteered to sit on the Panel were informed that their services would not be required on the Panel for that year. The Claimant had written to Mr Jenkins expressing his disappointment that people should question the integrity of Candidates sitting on the Panel to which Mr Jenkins responded on the 13 February at 12:59 [485a]:-

> *"It was raised and I did support not allowing Applicants on the Panel as this is in accordance with the BMA guidance. It is in no*

way a question of their integrity, absolutely not. I hope you believe me, I am sorry if it seems this way."

8.22.14. On the 18 February 2015 the Claimant wrote to a circulation list, [494] to express his surprise that he was being asked to stand down from the Panel as he had understood the discussion the previous week (11 February) to have agreed that the issue would be discussed for the next round and not the current round. Clive Ryder responded to the Claimant's email copying the circulation list at 12:53 on the 18 February [494] writing:

"*Apologies*.
This controversy was sparked by an error in communication. When selecting the Assessment Panel, I decided, in line with national guidance, that those applying should not sit on the Panel.
This perhaps got lost when the invitations were sent out. This is a difficult situation as many Trusts will not have enough Volunteers to exclude applicants. We are fortunate to have plenty of Volunteers. There is a risk that we do not have enough senior Clinicians if you exclude Claim Applicants, but again not a problem for us at this time.
To the Consultants who have been asked to step down this time, I will be very happy to invite you to next year's panel. If you have already completed your scoring, then we will double calculate to see if your scoring has made a substantial difference."

8.22.15. The Tribunal have considered all of the evidence and note the submissions made by Mr John on behalf of the Claimant that the change in practice proposed for February 2015 was more than a coincidence and was a decision that was discriminatory against him and his colleague Dr. Rahman both of whom were of Pakistani

heritage. We are mindful that whenever possible justice and fairness should be seen to be done as well as being done, consistent with that principle we find that the operational decision taken by the Respondents to exclude applicants from being on the Award Panel was fair and reasonable in the circumstances. We find that the decision not to allow candidates for awards to be on the assessment panel was not a proposal instigated by Dr. Mukherjee as evidence by Mr Steyn's evidence. We have heard also from Dr. Rose who conducted the MHPS Investigation who confirmed in his MHPS conclusions that [869] paragraph 4.1.2 that Dr. Rahim recognised that a Candidate sitting on a panel constitutes a conflict of interest and he had since withdrawn that part of the allegation.

8.22.16. The First Respondent acknowledges that in previous years consultants had from time to time not been precluded from sitting on the panel. Mr Steyn indicates the practice varied from time to time when panel members submitted applications.

8.22.17. We note that the Claimant was ultimately awarded a CEA Award [520-521].

8.22.18. We find that the objective rationale for the Respondents decision in 2015 to exclude Candidates from sitting on the assessment panel was not motivated by race; indeed the Claimant's race played no part in the decision which we find sought to introduce an element of objective fairness. Indeed the Claimant at his interview with Dr. Rose held on the 25 January 2016 [S17-S54 and S38] said in terms of removal of applicants for CEA Award from the Panel:-

> *"Well it's not the wrong thing to do and I agree with you that individuals, who are and who can make an argument for it both ways, but yes I could accept your argument that individuals who are sitting, who are applying, should not sit on the Panel, I accept that and it is a very valid point and I would agree with that so there is no dispute about that. My contention is that*

historically within this Trust this has never been the case and that previous individuals have made the application have also sat on the Panel and the practice is that when those applications are discussed, I am sure you are aware, those individuals will leave the room."

8.22.19. The Claimant's complaint was that in 2015, the rule was changed and he was asked to stand down from the Panel. We find that the objective evidence suggests the decision to remove the Claimant and his colleague Dr. Rahim from the Panel was a reasonable one on that occasion and there is no evidence that the step was less favourable treatment of the claimant because of his race. We have been informed by Mr Steyn that in 2016, following the merger with Birmingham University Hospital, the policy was changed again as the two Trusts harmonised their policy. We find that the subsequent return to not excluding candidates from the assessment panel was for a reason unrelated to race.

8.22.20. We have heard that in 2017 Dr. Vijay Suresh, who has also appeared before us, has been a Panel Member and an Applicant for a CEA Award. The First Respondent accepts that it has, since 2015, changed its approach to the composition of CEA Panels and has adopted the University Hospital Birmingham policy in relation to local Clinical Excellence Awards albeit with some disquiet [748T] where concern was expressed at the Committee Meeting 28 October 2016 that concerns were being expressed that applicants were being party to the Panel Membership with the opinion that anyone applying for an Award should refrain from being part of the Scoring Panel. The view is identified as different from that of University Hospital Birmingham where that hospital was happy to accommodate this in respect of local awards that led to Dr. Clive Ryder, Medical Director agreeing to speak to Dave Rosser for clarification. We consider that the subsequent return to allowing

applicants to be member of the Scoring Panel has been because of the need to merge practices with those operated by University Hospital Birmingham and that subsequent changes relate to that process. We find that the circumstances do not cause us to draw an adverse inference that the removal of the claimant from the CEA assessment panel was a decision related to the Claimants race. We note that the change of practice postdates the Claimants application to the Tribunal.

8.22.21. The Tribunal concludes that the complaint in relation to the CEA assessment panel and the Claimants removal from it is, in any event a complaint about events that occurred significantly before 22 September 2015. There are no circumstances in which we consider that this allegation is part of the continuing act, it was a one off decision in relation to a decision that best practice saw candidates for CEA awards to be excluded from the assessment panel and as a result the decision that was taken in February 2015 affected the claimant.

8.22.22. The claimant refers to a list of comparators. We have not heard evidence of how he was treated less favourably than the named comparators. Furthermore we find that, regardless of race, the objective criteria for excluding candidates from the assessment panel in 2015 demonstrates that the claimant was not treated less favourably than a hypothetical comparator, a clinician who was a potential member of the assessment panel who was a candidate in the year of assessment, who we are satisfied would have been excluded from the panel in silimlar circumstances.

8.22.23. We find that there is no case made on which the Tribunal considers it just and equitable to extend the time.

8.22.24. The claimant's complaint of unlawful discrimination is not presented in time and in any event does not succeed.

8.23. **Allegation 23**

8.23.1. On Friday 7 October the Mr John on behalf of the claimant confirmed that allegation 23 was withdrawn as a complaint against the second respondent Dr. Shakher and that complaint is hereby dismissed. The complaint of direct discrimination and harassment because of race remains against the First Respondent.

8.23.2. The claimant alleges that on 11 March 2015, following the Claimant's application for a Clinical Excellence Award Dr. Raghuraman telephoned Dr. Bellary to insist that a number of unsupported and baseless negative comments be included on the Claimant's Clinical Director verification form. During a meeting of Associate Medical Directors Dr. Raghuraman stated that the Claimant did not attend the wards. This information was ultimately placed on the verification form. (PoC 22.16 & 22.17) The claimant alleges that the perpetrator of the discrimination is Dr. Raghuraman and that the discrimination is of direct discrimination and harassment.

8.23.3. The claimant identifies M Clarke as the comparator, and a second comparator is identified by Dr. Raghuraman as a comparator in the Pavitt interview [999], who Dr Raghuraman identified as Dr Raj Chandrappa.

8.23.4. The First Respondent states it has investigated this matter as part of its MHPS investigation. It found that Dr. Raghuraman spoke to Dr. Bellary on the telephone on 11 March 2015 and that he did ask Dr. Bellary to submit a different verification form in support of the Claimant's application for a CEA. Dr. Raghuraman felt a previous unauthorised ward absence of the claimant 18 months prior to the application was reason for the First Respondent to withhold a CEA. The First Respondent found that Dr. Raghuraman's request to Dr. Bellary exceeded what was reasonably required in the situation.

8.23.5. Discrimination is denied. The first respondent asserts that Dr. Raghuraman acted because of concern of patient safety/professional conduct arising from the Claimant's unauthorised absence from the

ward and not due to the Claimant's race. His conduct in raising this matter with the CEA in this way was not acceptable, but was not discriminatory. Once drawn to its attention, the First Respondent says that they have dealt with this matter via its internal procedures.

8.23.6. The respondent asserts that this complaint is out of time, and it is denied that there has been a continuing act of discrimination. This incident involves Dr. Raghuraman alone, and no mention of Dr. Shakher is made in the particulars.

8.23.7. The second respondent denied discrimination and until the allegation was withdrawn against he him had asked why this claim in the schedule of complaints has been brought against him. Dr. Shakher is not mentioned in this item or in the corresponding paragraph of the claim form (ET1 22.15). The Claimant's own case is that the decision to ask panel members to step down was taken by Dr. Clive Ryder after input from Dr. Mukherjee and Dr. Raguhuraman. Dr. Shakher denies making the comments to Dr. Bellary as alleged in para 22.16 of the ET1. (ET3 47 and 48)

8.23.8. The acts of detriment listed as victimisation in the claim form (ET1 32) are those matters set out in paragraphs 22.15-22.17 of the Claim form. These matters only refer to Dr. Shakher in passing. The respondent required the claimant to clarify whether this element of the victimisation claim is brought against second respondent particularly given that until 11 August 2016, when he was served with the second tribunal complaint, Dr. Shakher was unaware of the contents of the grievances. The first he knew about the existence of the March and April 2015 grievances was on 29 December 2015, some nine months after this alleged incident is said to have occurred. On Friday 7 October the Mr John on behalf of the claimant confirmed that allegation 23 was withdrawn as a complaint against the second respondent Dr. Shakher, the complaint remains only against the First respondent.

Evidence and Findings

8.23.9. The key Witnesses in relation to the allegation 23 have given evidence in their Witness Statements, Claimant [w/s para.89-112], Dr. Shakher [w/s para.43], Dr. Raghuraman [w/s para.17-37], Dr. Bellary [w/s para. 27-29]. We refer to a number of documents most significantly 312, 474-479, 500, 504, 667, 748NJ, 869, 939, 954-955, 967, 997-999.

8.23.10. The Allegation relates to the Claimant's application for a Clinical Excellence Award to be awarded to him in 2015. We have been informed that Clinical Excellence Awards are awarded both nationally and locally. The Trust runs a Clinical Excellence Award programme each year which is designed to award Consultants who contribute the most towards the delivery of a safe and quality care to patients. Consultants make an application which is then considered by a Panel, there are a number of standing members of the panel including Senior Management such as Medical Directors and Associate Medical Directors who sit together with volunteers who are prepared to sit on the Panel and undertake the somewhat arduous task of marking/scoring the applications. The process of making the award has three stages, the Application, the Scoring and the Decision Panel. A monetary value is attached to the Award which applies to a permanent increase in salary that, up to the relevant date, was a pensionable increase in salary.

8.23.11. It is clear from the evidence we have heard that the process applied in making the local level CEA Awards is one that has evolved with the progress of time and within the Respondent Trust became increasingly transparent and more fair and seen as such. We recall that Dr. Jenkins had himself volunteered to be on the panels so that more Junior Consultants would have an internal understanding of the process of the Award of CEA's which was not as transparent as one might have hoped it should be. The CEA process is such that the local CEA Awards can equate to 9 points in addition to basic salary.

Public Health England issues guides as to the CEA process and each year they announce the value of the pot available to each Trust to be distributed, each point has an increase in value, 1 point being worth around 3% of basic salary and 3 points may increase to be worth about 10% of basic salary. The points awarded amount to a permanent increase in salary that is also pensionable as the Scheme applies up to 2018. No more than 3 points can be awarded per application although that can be increased over the years with subsequent applications to the maximum of 9 points. In addition to basic salary.

8.23.12. We are mindful that in 2015 the Respondent Trust was implementing a medical redesign which was a project led by Dr. Raghuraman one of the Clinical Directors. At that time, Dr. Raghuraman, Dr. Mukherjee and Dr. Shakher were involved in discussion on the wider issues regarding the ongoing process of medical redesign and Consultant cover and we accept the evidence that has been given, that is not disputed by the Claimant, that the Diabetes Department was one of those Departments that had difficulty embracing the change and the aims behind the process of the medical redesign and Consultant cover. We accept the evidence given that during one of the meetings, Dr. Mukherjee had informed Dr. Raghuraman that, in the context of non-compliance and failure to engage in the medical redesign and Consultant cover issues, Dr. Mukherjee had witnessed an example where he had been required to attend the Diabetes Wards to provide specialist input in a review of a patient and he discovered there were no Diabetic or Diabetes Consultants present on the ward. Dr Mukherjee had been informed by staff that that was a regular occurrence and the staff had reported one occasion when Dr. Rahim and a colleague had been absent from the ward without authorisation to travel to London. Dr. Raghuraman was concerned about the issue of an unauthorised ward absence.

Consultant engagement and attendance on wards was an issue about which Dr. Raghuraman felt strongly.

8.23.13. During the MHPS investigation Dr. Raghuraman confirmed [999] that the Claimant, Dr. Rahim was not the only individual who Dr. Raghuraman had identified as absent and the absence had caused him concern. Dr Raghuraman referred during the course of the MHPS investigation to a Consultant who had been absent because he had to leave to collect his children and although that Consultant had been able to return to the Respondent Trust premises within 30 minutes once contacted, the incident had caused the Associate Medical Director to subsequently write to Consultants reminding them that an unauthorized absence was not acceptable and must not be allowed to happen again. The note was written in February 2014 before the concerns were raised in respect of the Claimants absence.

8.23.14. We note that Dr. Raghuraman had identified that the Consultant who was absent to collect his children in 2014 had been able, with relative ease, to return if required to the Trust premises in contrast to Dr. Rahim who was attending a meeting in London. It is apparent that Dr. Raghuraman when made aware of the Claimants absence was reminded of it when at a meeting with the CEA scoring panel he was reminded by Dr. Ryder that shortly afterwards that if there were any concerns over any of the Applicants for awards, they should be raised. Dr. Raghuraman raised a concern relating to Dr. Rahim and the issue of unauthorised ward absence and whether that matter made him unsuitable for the award of the CEA. Dr. Raghuraman was informed by Dr. Ryder that if there was evidence about the unauthorised ward absence, that evidence should be forwarded to him.

8.23.15. Subsequently, Dr. Raghuraman contacted Dr. Bellary on the 11 March 2015 and asked whether the issue of an unauthorised ward absence had been included on the Clinical Directors verification form to support the Claimants CEA application. At that time, Dr. Bellary

had not completed the form and Dr. Raghuraman asked that reference be included. We find that Dr Raghuraman's enquiry was to gather any evidence of unauthorised absences as Dr Ryder had requested he should so that it could be forwarded to him.

8.23.16. We have been referred to the verification form subsequently completed by Dr. Bellary on the 11 March 2015 [504]. The form confirmed that the Consultant was working to the standards of professional and personal conduct required by the GMC and fulfilled his contractual obligations and complied with the private practice code of conduct, it noted however at item 3:-

> *"Most things quoted in application are part of job plan. Acute Medical Unit presence over weekends is inconsistent. One incidence of being off-site and absent without prior approval. This was challenged. Clinical work was undertaken. No further incidences noted following such incident. The Panel may wish to take note of these comments."*

8.23.17. We find that the comments included at box 3 are entirely consistent with the evidence we have heard and the findings of fact that we have made. The Claimant accepts that he preferred not to work weekends as frequently as his colleague Consultants within the Department did. He has accepted that he was absent from the Heartlands site on a visit to London and that he had left site without prior approval. Whilst the Claimant challenged the fact that there was no Health & Safety risk, the Respondents view and indeed our own, is the risk was seen to be negative only in retrospect and on any reasonable Health & Safety Assessment the absence of Consultant cover places patients at potential risk particularly when absence is not to elsewhere in the local region. We note that the Claimant's allegation suggests that the annotations included by Dr. Bellary at Dr. Raghuraman's urgings were as he states "*unsupported and baseless*

negative comments". We must disagree with the Claimant. The comments we find were an accurate reflection of the truth.

8.23.18. We note that Dr. Rose in his MHPS Investigation found that Dr. Raghuraman had acted in a way that overstepped his remit and Dr. Rose considered that Dr. Raghuraman's actions had been unreasonable and that he could have taken a different approach to expressing his concerns. To that extent, the investigation upheld the allegation that Dr. Raghuraman had interfered with the CEA process. Dr. Rose considered that Dr. Raghuraman's motivations for doing so were based on a genuine concern about the fairness and robustness of CEA process, but that Dr. Raghuraman had not gone about expressing his concerns in an appropriate way. Indeed Dr. Bellary, who was not himself on the Panel for the CEA Awards, felt that when Dr. Raghuraman telephoned him on the 11 March, he felt pressured by Dr. Raghuraman and Dr. Raghuraman had gone so far as to say that he felt that Dr. Bellary was not managing the Department properly, such that Dr. Bellary felt under pressure to complete the form [503-504]. It remains telling however that Dr Bellary has not suggested that the information he committed to the completed form [504] was inaccurate or wrong. In the event we note that the Claimant was successful in his application to be awarded a CEA Award.

8.23.19. We find that there is no evidence to lead the Tribunal to conclude that Dr. Raghuraman or Dr. Mukherjee in referring to the Claimants absence from the ward made any Statements that were untrue. We accept the account of the witnesses from whom we have heard that Dr. Mukherjee, Dr. Raghuraman and Dr. Shakher were all charged in varying degrees with the implementation of the Medical Redesign and it was in the effort to improve the operation of the Respondents delivery of service to patients that led to their various discussions and them acting in the way that they did which we find was the reason for reasonable and truthful raising of concerns and supported all the comments being included in the Clinical Directors verification form.

The reason for Dr Raghuramans action was because of his genuinely held concerns that were unrelated to the claimants race.

8.23.20.Turning to the manner in which Dr. Raghuraman dealt with Dr. Bellary that led to Dr. Raghuraman giving an apology to Dr. Bellary about his behaviour on that occasion, we do not find that there is evidence before us directly or by inference to lead us to find that Dr. Raghuraman treated the claimant less favourably because of his race. We find that without more the conduct of the Respondent through the actions of Dr. Raghuraman and Dr. Mukherjee did not amount to direct discrimination because of the protected characteristics of the Claimant's race. We find that the actions of Dr. Raghuraman and Dr. Mukherjee were indicative of their rigorous pursuit of implementing the Medical re-design and securing consultant cover and the maintenance of standards. We find that the respondents actions did not amount to harassment because of or for reasons related to the Claimant's race nor direct discrimination less favourable treatment of the claimant because of his race when compared to the actual named comparators or for that matter hypothetical comparators and those complaints do not succeed.

8.23.21.Dr M Clarke, the consultant identified by the claimant was not a person known by Dr Raghuraman to have taken unauthorised absence nor was she to his knowledge an applicant for a CEA award. Dr Raghuraman in interview [999] identified a doctor who he has confirmed to the tribunal was Dr Raj Chandrappa. Dr Chandrappa had been absent without arranging cover or notifying the clinical director when he had been absent unexpectedly but locally to collect his child who was unwell and return the child home. Dr Chandrappa had been able to return to the hospital site within 30 minutes when contacted. We find that the claimant's circumstances were different to those of Dr Chandrappa. Neither Dr Clarke nor Dr Chandrappa were candidates for CEA awards and are not therefore suitable comparators as their position was not truly similar to the claimant who

had prearranged to be absent from the ward and had not notified his clinical director or arranged cover in advance and they were not CEA candidates. We find that in similar circumstances a hypothetical comparator, a consultant who had notice of a future absence, who had not arranged cover for his absence and had not notified his clinical director before leaving the hospital and had travelled to London, Dr Raghuraman would have treated a hypothetical comparator in the same way as he did the claimant.

8.23.22. Mr John in his submissions has suggested that Dr Bellary was pressurised to change the verification form by Dr Raghuraman. That is not the evidence given by Dr Bellary to the tribunal [w/s para 27 - 29] who confirmed that when Dr Raghuraman contacted him Dr Bellary had not already completed the form but that he felt pressurised to include comment on the form about the unauthorised absence issue [504] as well as the comments about his inconsistent attendance at the weekend on the Acute Medical Unit which Dr Bellary had always intended to comment upon. Whilst we understand that Dr Raghuraman was required to apologise to Dr Bellary for the manner in which he approached him, that is far away from requiring Dr Bellary to falsely record the CEA application verification form as is alleged by the claimant.

8.23.23. We note further that the incident was a single act and not part of a continuing course of conduct or practice or policy and furthermore that the Claimants application in respect of Allegation 23 which occurred on 11 March 2015 was not presented within time. Prima facie we do not have jurisdiction to entertain the complaint and we have been provided with no evidence to persuade us that circumstances are such that it would be just and equitable to extend time to allow the application to be heard.

8.24. **Allegation 24**

8.24.1. On Friday 7 October Mr John on behalf of the claimant confirmed that allegation 24 was withdrawn as a complaint against the second respondent Dr. Shakher and it is hereby dismissed, the complaint remains against the First respondent.

8.24.2. The complaint is of direct discrimination and harassment because of the protected characteristic of race and of victimisation that occurred in April and June 2015. It is complained that, by his own admission, Dr. Raghuraman accessed the Claimant's personel records, aided by the Trust's Caldicott Guardian Dr. Deji Okabedejo, without the Claimant's permission and in breach of The Data Protection Act and Trust Data Protection Policy. The Claimant learned of this in April 2015. In June 2015 Dr. Raguhuraman then contacted Human Resources in an attempt to resurrect the complaint relating to the "unauthorised absence" that had occurred in October 2013. Dr. Raguhuraman stated that he had reverted to HR as a result of the Claimant's April 2015 Complaint. (PoC 22.18)

8.24.3. The claimant identifies his comparators to be the consultant identified by Dr. Raghuraman in interview [999] and David Sandler [561] and Andrew White Woodhouse.

8.24.4. The First Respondent say that they investigated this complaint as part of its MHPS investigation. Dr. Raghuraman denies accessing the Claimant's personal records, or that he asked Dr. Okubadejo or Human Resources for access. Human Resources confirmed that they received no such request from Dr. Raghuraman or anyone else. Dr. Okubadejo denied giving anyone access to the Claimant's revalidation portfolio or appraisal record. The First Respondent asked Equinity 360, the software supplier for appraisal records, to check its systems and they determined that no-one changed the Claimant's appraisal record between the Claimant accessing it in October 2014 and Equinity accessing it in June 2015, but that Equinity themselves do not log viewing activity, so it was not possible

to determine whether the appraisal had been accessed for viewing only.

8.24.5. It is denied that Dr. Raghuraman accessed the Claimant's personal records. It is further denied that Dr. Okubadejo aided any improper access to the record.

8.24.6. Dr. Raghuraman considered that the unauthorised absence matter had not been properly addressed, and he felt that it should have been as a matter of probity and good practice, potentially impacting on the applicability of a clinical excellence award. The Claimant's race or any complaint was not relevant to Dr. Raghuraman's view. The First Respondent's HR team has taken no action against the Claimant arising out of the absence issue.

8.24.7. Discrimination is denied. The respondent argues that the complaint is out of time and it is denied that there is a continuing act of discrimination.

8.24.8. Dr. Shakher in his response asks why this claim been made against Dr. Shakher. The second respondent is not referred to in this item or the corresponding paragraph of the claim form (ET1 22.18). The complaint against the second respondent was withdrawn at the hearing.

Evidence and Findings

8.24.9. The Claimant has referred to a number of comparators the first of whom he identifies by reference to him being the doctor referred to in the Pavitt interview [999]. Dr. Raghuraman confirms he individual was Dr Chandrappa. The second comparator was David Sandler and the third as Dr Andrew White Woodhouse.

8.24.10. We have been referred to the enquiries made by Dr. Raghuraman in respect of Dr. Chandrappa's absence. We accept that Dr. Raghuraman's enquiries identified that Dr. Chandrappa had arranged Consultant cover to continue after 12 o'clock until Dr. Chandrappa was able to return to the premises and Dr. Chandrapp

had had to return home as his child was unwell and he returned to the hospital to resume his duties. He had been absent from the hospital for approximately 30 minutes in circumstances that are significantly different to those when the Claimant confirmed he was absent without prior authorisation from the hospital as he journeyed to a meeting in London. Unlike the claimant this comparator had not made an application for a CEA award. Notwithstanding the unexpected nature of Dr Chandrappa's absence Dr Raghuraman gave an account that he had informed Chandrappa's clinical director about absence and he expected it to be dealt with in his appraisal.

8.24.11. The second comparator was David Sandler who had taken unauthorised absence in November 2015. Dr Sandler was not a CEA candidate. Dr Raghuraman was made aware of Dr. Sandler's absence and wrote to him regarding the absence of a Consultant from ASU in strong terms:

> *" I am sorry this is not an acceptable way of working. The nursing tiers are challenged every day for their performance on the wards only to find out that ward rounds are not happening on time in clinical areas. Every work station i.e.has specific start times in the interest of patient safety and site flow. Breach of this expectation is not acceptable. I will be meeting with both of you to understand how your directorate functions."*

Although the incident post dates Dr Raghuraman's concern about the claimant's absence it is we find indicative of his view of ward absence by the consultant scheduled to be there. It has not been suggested that Mr Sandler was a candidate for a CEA.

8.24.12. The third comparator is identified as Andrew White Woodhouse. In answer to cross examination Dr Raghuraman described that he was told he was late attending ambulatory care, however he had rung in to speak to charge nurse of ambulatory care to inform them that he was returning from working at Good Hope Hospital, another trust site and that he was running late and on his way to Heartlands to resume

duties. It was not challenged when Dr Raghuraman confirmed that to his knowledge the comparator had not applied for a CEA award.

8.24.13.The comparators we have been referred to are not similar to the claimant in so far as they were not candidates for a CEA award and in the case of the first and third comparators their absences from the ward were not prearranged and they were within relatively close proximity to the hospital and were returning. The second comparator, Mr Sandler demonstrates Dr Raghuraman's expectation of maintenance of standards and his concern led him to escalate the incident to Clive Ryder, Deputy medical Director and an Andrew. However the examples Dr. Raghuraman had no recollection of having said at the meeting with Associate Medical Directors that the Claimant did not attend wards and no evidence has been put to substantiate the claim or to provide a link to the Claimant's race if such allegation was made.

8.24.14.We have heard evidence from the Claimant [w/s paras.111, 113-115] Dr. Shakher [w/s para. 44], Dr. Raghuraman [w/s paras. 32-34], Dr. Arne Rose [w/s paras.50-58]. We have been referred in particular to documents including pages 516-518, 561, 940-1004. The Claimant has withdrawn the complaint about Dr. Shakher in respect of the allegation but identifies the two perpetrators of the alleged less favourable treatment because of the characteristic of race and harassment because of race and victimisation to be Dr. Raghuraman and Dr. Okabedejo. We deal with the issue of victimisation in light of the findings of fact that we have made in respect of allegation 23 above as well as the findings that we make above.

8.24.15.We have made findings of fact that the Claimant did not do a 'Protected Act 'under the terms of the Equality Act 2010 until he did so by reference to complaints that he indicated he intended to make to the employment tribunal in respect of breach of the Equality Act at the meeting on 23 November 2015 for the reasons we have identified. In those circumstances therefore, we have found that

events pre-dating that date of the Protected Act cannot amount to victimisation.

8.24.16. The Claimant had during the early part of 2015 raised a number of grievances, the first on the 25 March 2015 and the second on the 13 May 2015 [912-915 and 918-919]. As a result of the grievances the Pavitt Investigation was commissioned. The allegation suggests that Dr. Raghuraman by his own admission accessed the Claimants personal records aided by the Trusts Caldicott Guardian Dr. Deji Okabedejo without the Claimants permission and in breach of the Data Protection Act and the Trusts own Data Protection Policy. We found that on the contrary that Dr. Raghuraman denied consistently accessing the Claimants appraisal record or that he had asked Dr. Deji Okabedejo for access to the Claimants appraisal record.

8.24.17. We first observe that the Claimant in setting out his Allegation 24 appears to have interpreted that the notes of the Pavitt Investigation and interview with Dr. Raghuraman to state that Dr. Raghuraman accessed the Claimants personal records by his own admission. We have looked at the notes which we observe somewhat surprisingly have not been signed by Dr. Raghuraman. We accept the account given by Dr. Raghuraman that, despite being informed at the start of the interview that he would be sent two copies of the interview notes to verify or amend, those notes were not sent to him until a copy of them was provided at the MHPS Investigation. We accept Dr. Raghuraman's account that the notes were not an accurate reflection of the interview. Having considered the notes of the interview, particularly the questions[Q16,17 and 26 [1000-1001]] to which we have been referred by Mr John in his submissions [para120] we have found no evidence to support any suggestion that Dr Raghuramna had sight of the claimant appraisal record. In her conclusion in the Pavitt report Ms Pavitt [940] states:

> "*Dr Raghuraman confirmed that he had requested and accessed the appraisal record"*

We, like Dr Rose in the MHPS investigation, find that there is no evidence to support that assertion.

8.24.18. The best account, such as it is, [1000] states that:

> *"GR said that he had requested to see AR's appraisal as he had wished to be assured that the unauthorised absence had been discussed and recorded on AR's appraisal document. GR believed that as an issue, the unauthorised absence was sufficiently serious that it required recording as part of AR's appraisal. "*

8.24.19. In considering the documentation, we find that Dr. Deji Okabedejo denied giving anyone access to the Claimant's appraisal records [1070-1071] and the account given by Dr. Raghuraman is that he had spoken to Dr. Deji Okabedejo who is the Trust's Revalidation Officer (the person with responsibility for ensuring that all Doctors have annual appraisals and that their portfolio of work meets the GMC's revalidation requirements). Dr. Deji Okabedejo and Dr. Raghuraman had regular contact in their professional roles for Dr. Raghuraman to seek advice about how to record probity in disciplinary issues on amongst other things appraisal documentation. We have no doubt, given Dr. Raghuraman's rigorous standards and expectations of probity and performance of Doctors, that had a Consultant within his clinical directorship been absent without arranging cover and having pre-authorized the absence, that he would have recorded it if the Consultant was not easily able to access the hospital as a matter to be recorded on the appraisal. Dr. Raghuraman confirms that Dr. Deji Okabedejo had expressed the view that if the matter was dealt with informally, it would not be necessary to reflect any informal discussion on the appraisal, much depended upon the Clinical Directors approach.

8.24.20. We have found that Dr. Bellary's approach as the Clinical Director of the Diabetes Department was very different from that of

Dr. Raghuraman who had a rather more robust approach to dealing with unauthorised absence. However, in the case of Dr. Bellary taking steps following the absence of ward cover, we remind ourselves that he sent an email to both the Claimant and Dr. Tahrani on the 21 October when their unauthorised absence was discovered [433].

8.24.21. We find that the notes of the interview with Dr. Raghuraman have not been accepted by him and we find it is more likely than not that the notes are not an accurate reflection of the discussion that Dr. Raghuraman had with Dr. Deji Okabedejo. Furthermore, we find that even were the note to be accurate, which we find it is not, there is nowhere within the note confirmation or admission by Dr. Raghuraman that he accessed the Claimant's personnel records and the words noted on the record simply state:

> *"GR said that he had requested to see AR's appraisal as he wished to be sure that the unauthorised absence had been discussed and recorded".*

That is very different to confirming that the records themselves had been accessed. We are satisfied that Dr. Raghuraman was sufficiently aware that he would not, without permission of the individual, have authority to access personal information and the personnel records, the position being confirmed by Dr. Deji Okabedejo.

8.24.22. Miss Pavitt did not consider it necessary to interview Dr. Deji Okabedejo, a flaw in the integrity of that investigation amongst other things. However, Dr. Rose interviewed Dr. Deji Okabedejo on the 25 February 2016 [1070] and Dr. Deji Okabedejo confirmed to Dr. Rose that had such a request to access Dr. Rahim's appraisal records been made, he would not have granted it. Furthermore, Dr. Deji Okabedejo said that he had not accessed Dr. Rahim's record in order to provide any information to Dr. Raghuraman as it would not be appropriate. Dr. Rose subsequently undertook an independent

investigation by asking Equinity 360, a software supplier for appraisal records to check its records to determine whether anyone had changed or accessed the Claimants appraisal records. Equinity confirmed that although it was not possible to identify who had logged on to or viewed a particular user's account, they were able to provide a history version of the user profile on appraisals which confirmed to Dr. Rose that the Claimant's appraisal record had not been accessed between October 2014 and Equinity accessing it June 2015. The confirmation from Equinity further undermines the integrity of the Pavitt Report and that investigation.

8.24.23. We have had sight of the signed record of Dr. Rose's interview with Dr. Raghuraman February 2016 [1061-1069] to which Dr. Raghuraman appended his annotated response to the notes of the Pavitt interview that had not previously been provided to him. In particular we note that the amendments in relation to this allegation [1067] which identified the incorrect notation. The Pavitt investigation and report was flawed in this respect as were the conclusions reached based upon an inaccurate and unapproved record.

8.24.24. Having considered the evidence that has been placed before us; we find that Dr. Raghuraman did not admit accessing the Claimant's personnel record aided by Dr. Deji Okabedejo. We find that when Dr. Raghuraman made contact with Human Resources in June 2015 to seek to raise the issue of the Claimants unauthorised absence, his decision to do so was based upon his own view of the way in which he considered rigorous standards in relation to unauthorised absence should have been followed and his own discontent with the approach that had been taken by Dr. Bellary. Whilst Dr. Raghuraman's criticism of Dr. Bellary and the approach that he had taken may have been inappropriate, as was found by the MHPS investigation, we do not find that it was less favourable

treatment of the Claimant or that it was harassment of the Claimant because of his race.

8.24.25. Dr. Raghuraman has admitted that he made contact with Human Resources in June 2015 about the unauthorised absence [667] in his effort to establish whether or not the matter had been addressed through HR at the time of the absence and the investigation into whether or not the incident was investigated fully. Dr Bellary had been asked by Dr. Raghuraman to produce any copies of emails or actions that he had taken in relation to the unauthorised absence and although Dr. Bellary did not send Dr. Raghuraman copies of the emails we have of course been referred to the Findings of Fact in relation to the email chain [432-433].

8.24.26. Having heard collateral evidence, we are particularly persuaded by the account given by Mr Steyn in his evidence which describes Dr. Raghuraman's style and approach is that of "*a dog with a bone* " and that his approach was very direct and focused and indeed Mr Steyn had himself encountered friction in his own dealings with Dr. Raghuraman when the agendas between Directorates did not align with each other.

8.24.27. The Claimant has identified a number of comparators in relation to Allegation 24. David Sandler, who took unauthorised absence in November 2015 (the Claimant became aware of the comparator in the disclosure made in September 2017 [561]), Andrew White Woodhouse and Dr. Chandrappa [999].

8.24.28. We have referred in respect of Allegation 23 above that Dr. Chandrappa's circumstances were different to those of the Claimant and he is not a direct comparator and we found that such different treatment was for a reason unrelated to race.

8.24.29. Considering the comparator Dr David Sandler we have been referred the incident [561-562] in which Dr. Raghuraman instigated an email chain to clarify a concern that no Consultant was available to do ward rounds on ASU on the 27 November 2015. The

absence was described to be a Consultant having completed the ward rounds, as had the Claimant on the occasion of his absence; however the ward had been left without a Consultant when a Consultant been called to a ward round in ward 21 and it was necessary to prioritise reviews based upon clerical needs. We find, notwithstanding that seemingly reasonable explanation in respect of Dr Sandlers absence from his ward Dr. Raghuraman was dissatisfied and considered the breach of expectation to be "*not acceptable*". We note that unlike the Claimant, this Comparator was still on site at the Respondent's hospital and different treatment such as it was, was by reason of the Consultants location and availability should a clinical need arise to be able to return to his ward within a reasonable period of time.

8.24.30. The final Comparator Andrew White-Woodhouse arrived late at ambulatory care as he was travelling between duty at the Respondent Trust's site at Good Hope Hospital to his duty at Heartlands site, the Consultant telephoned in advance to explain his delay and to inform the Charge Nurse of his expected arrival. We find such differing treatment to be for a reason unrelated to race and Andrew White-Woodhouse being available within a reasonable period of time albeit travelling from one to another of the Respondent's locations rather than travelling to the capital city.

8.24.31. We find that the Claimant was not subject to unlawful discrimination because of his race, was not harassed because of his race and was not subject to victimisation because he had done a protected act which had not been done until 23 November 2015. We find that events occurring in April and June 2015 did not prompt a complaint to the Employment Tribunal until March 2016 and are out of time and there are no reasonable grounds for us to consider it is just and equitable to extend time in this case.

8.24.32. We are satisfied that the enquiries made by Dr. Raghuraman though more stringent and rigorous than those employed by Dr.

Bellary are entirely consistent with his robust and dogged approach to investigating matters of probity and standards in respect of which he was concerned.

8.24.33. We find that the approach Dr Raghuraman took is one that had an equality regardless of the individuals race or ethnic origin. We have no evidence to suggest that Dr. Raghuraman's motivation related to the claimant's race, we find that the Claimant was not treated less favourably because of his race. The Claimant was not harassed because of his race in relation to Allegation 24 and in light of our findings of fact, the Respondents treatment of the Claimant in so far as Dr. Raghuraman pursued enquiries about the management of the claimant's unauthorised absence was not and could not have been an act of victimisation.

8.24.34. For the avoidace of doubt the matter of which the claimant complained was we find not part of a continuing act of discrimination and is presented out of time. We do not consider it to be just and equitable to extend time to entertain the complaint.

8.25. **Allegation 25**

8.25.1. The complaint of direct discrimination and harassment because of the protected characteristic of race and victimisation is that on 6, 7, and 8 October 2015 Dr. Shakher conducted interviews with two junior doctors who had been working with the Claimant. Dr. Shakher is alleged to have sent an email to multiple recipients claiming a number of issues had arisen caused by the Claimant and provided suggested corrective measures. (PoC 22.19 & 15 – 17). The claimant identifies the comparators as being Dr. Syed, Martin Stevens and Margaret Clark.

8.25.2. The first respondent responds that, in October 2015 some junior doctors raised concerns about working hours and working practices

during the Claimant's ward rounds. These concerns were raised to Dr. Phil Bright, Head of Education, who asked Dr. Shakher (as Clinical Director for General Medicine) to investigate these matters. Dr. Shakher spoke to some of the doctors involved and reported back to Dr. Bright, with some suggested action points. Dr. Shakher copied in appropriate colleagues, and in any event at no time referenced the Claimant by name: he was referred to as "*Consultant A*" only. This matter was considered as part of the First Respondent's MHPS investigation and there was no evidence that Dr. Shakher pursued the matter inappropriately.

8.25.3. Race discrimination and victimisation is denied.

8.25.4. Dr. Shakher the second respondent says, as he responds, ET3 27, that Dr. Shakher was asked, by Dr. Bright, Royal College Tutor, to investigate the junior doctors' complaints of long working hours as it was within his remit as Clinical Director for General Medicine and Dr. Shakher has produced the emails to confirm this. Dr. Shakher did not refer to Dr. Rahim by name in of any of these emails.

8.25.5. In regard victimisation, the second respondent asserts that there cannot be a connection between the March and April 2015 grievances and this alleged detrimental treatment by him in October 2015 because Dr. Shakher only knew that the grievances existed in late December 2015 and only saw them in mid August 2016. See para 32-34 ET1.

<u>Evidence and Findings</u>

8.25.6. The allegation is that the Claimant was subject to direct discrimination and harassment because of the protected characteristic of race and was subject to victimisation. The allegation refers specifically to the conduct of interviews by Dr. Shakher with Junior Doctors who worked with the Claimant and the Claimant has identified a number of comparators, Dr Syed, Martin Stevens and Margaret Clarke. In relation to the allegation, we have heard

evidence from, in the main the Claimant [w/s paras.118-126], Dr. Shakher [w/s para. 45, Dr. Bellary [w/s para.30], Dr. Arne Rose [w/s paras. 66-68].

8.25.7. In his submissions to the Tribunal, Mr John on behalf of the Claimant has combined his Submissions in relation also to allegation 26. We deal with each of those allegations in turn.

8.25.8. The perpetrators of the alleged discrimination are identified as Dr. Shakher, Dr. Raghuraman and Dr. Mukherjee. The complaint is that on the 6, 7 and 8 October 2015 Dr. Shakher conducted interviews with Junior Doctors. We have been referred to the first in a chain of emails that began on the 6 October 2015 [545-544] from Dr. Phil Bright, Director of Medical Education at the Respondent Trust and Head of School of Medicine. Dr. Bright's email related to working hours on the Diabetes Ward and raised concerns about Trainees reporting that they were working excessive hours on the ward. We would note at this point that the reference to Trainees is in fact a reference to qualified Junior Doctors.

8.25.9. Dr. Shakher responded shortly after Dr. Bright's email, copying his response to the Clinical Directors Dr. Srikanth Bellary, Dr. Rahul Mukherjee and Dr. Govindan Raghuraman. Dr. Shakher raised the fact that one of the complaints was that one of the current Ward Consultants insists that prescriptions are printed off the E-Portfolio as he would not look at prescriptions on-line. We note that Dr. Shakher in his response confirmed that the issue of printing medication letters had been raised in the past in October 2012 [1116]. Dr Shakher confirmed that Dr. Bellary would need to provide feedback to the particular Consultant as his local Director. Dr. Shakher confirmed in his response to Dr. Bright that he would speak to Dr. Bellary once he (Dr. Bellary) had spoken to the Consultant to ascertain what was happening and is still on a regular basis and it is evident that Dr. Shakher intended to conduct investigations as he ended:

"I will respond to you when I have determined the facts."

8.25.10. Dr. Bellary responded [546A] later in the afternoon of the 6 October 2015 referring to the fact that when he had spoken to Junior Doctors in September, they had been happy. Within half an hour, Dr. Bright had responded to Dr. Bellary and to Dr. Shakher confirming the position in October to be that the Junior Doctors were *"pretty unhappy*". On the 7 October 2015, Dr. Shakher, having spoken to two Junior Doctors, reported to Dr. Bright copying in Drs. Bellary, Mukherjee and Raghuraman on the outcome of his discussions relating to the practice of requiring the printing of the medication lists and prescriptions and the second issue that the Junior Doctors reported they felt they were:

> *"intimidated and scared that they would not be able to keep up with this task".*

8.25.11. In light of the information provided to him, Dr. Shakher made a number of recommendations as Clinical Director for General Medicine. The recommendation was threefold:-

8.25.11.1. That the practice of printing prescriptions was to be discontinued, the printing of the medication lists was not welcomed by Pharmacists and posed a potential clinical risk that lists would not be kept up-to-date, the issue has been raised previously by Junior Doctors but no definite action had been taken.

8.25.11.2. Junior Doctors would be given better support with regard to teaching on the ward round.

8.25.11.3. That there should be a weekly meeting with Junior Doctors to ascertain any difficulty issues on the wards.

8.25.12. Dr. Shakher asked Dr. Bellary to speak to the Consultant known as "A" with a view to resolving the issues. Although the allegation is that Dr. Shakher has sent an email claiming a number of issues had arisen caused by the Claimant, we have considered the documentation carefully and nowhere on its face do we see reference to Dr. Rahim. On the contrary, Dr. Bright has confirmed that when

he sent his email he was unaware of the identity of the Consultant about whom the Junior Doctors raised concerns and we find that none of the email correspondence identifies the Claimant as being the Consultant identified only as “A”.

8.25.13. We have been unable to identify any evidence whatsoever to suggest that the reason for Dr. Shakher’s response to Dr. Bright’s email was because of the Claimants race. On the contrary we find that the reason Dr Shakher acted in the way that he did was in response to an appropriate enquiry.

8.25.14. The Claimant submitted a third grievance on the 8 October 2015 [920] in which he raises a further formal complaint against Dr. Shakher based upon the “*email below”* that he had sent to a number of individuals. The email to which the Claimant refers is that of the 7 October at 15:43 [921/1113] which for the avoidance of doubt we find makes no reference whatsoever to Dr. Rahim but describes him only as Consultant A. Notwithstanding the Claimants explanation for the behaviours which caused the Junior Doctors to raise their concerns with Dr. Bright, we find that Dr. Shakher on receipt of any such request from the Director of Medical Education would have implemented and taken the steps that in fact he did take.

8.25.15. The Claimant has referred to a number of named comparators, Dr. Syed, Martin Stevens and Margaret Clark. We find that the Claimant was the Doctor responsible for Ward 29 at the relevant time and had those others been responsible for the ward at the time, which has not been asserted, then we have heard nothing to suggest that Dr Shakher would have acted any differently and treated the comparators more favourably than he did the Claimant.

8.25.16. We acknowledge that the Claimant had been sent a copy of the email exchange between Dr. Bright, Dr. Shakher, Dr. Bellary, Dr. Mukherjee and Dr. Raghuraman by Dr. Bellary on the 8 October at 08:44 [991B]. The Claimant is asserts that he was treated differently

to the three comparators who he identifies as Dr. Syed, Martin Stevens and Margaret Clark.

8.25.17. Under cross-examination, the Claimant has confirmed that those comparators identified by him in his Witness evidence [w/s para.126] were Dr. Syed and Professor Stevens described as Indian Egyptian and British respectively Dr Helmy and Dr Margaret Clark. We observe that those are individuals who, with the exception of Dr. Syed are not identified as the comparators in the Schedule of Comparators provided by the Claimant's Counsel Mr John.

8.25.18. In the event the Claimant has confirmed in answers to questions in cross-examination that the comparators have no foundation, we have no hesitation in finding that whichever Doctor was identified to have been the consultant working on the ward on which the junior doctors worked and in respect of whom the concerns were raised by the Junior Doctors would have caused the investigation undertaken by Dr. Shakher and Dr. Bellary to have ensued.

8.25.19. We find no evidence to support a finding that the Claimant was discriminated against because of his race by either respondent. The grievance submitted by him on the 8 October [920] does not identify an allegation that he had been subjected to discrimination because of his race which is not specifically mentioned until January 2016 during his MHPS interviews with Dr. Rose.

8.25.20. We find that to the extent the claimant complains that Dr. Shakher copied the email exchange to others we note that the claimant does not complain that the email was copied to Dr. Bellary only that it was copied to Drs. Mukerjee and Raghuraman. We find that the email was not circulated as it was, with the purpose of escalating the concern. The email contained nothing adverse to the claimant nor did it identify him and it was circulated to appropriate recipients who were part of the site medical management and leadership team, finally responsible for junior doctors working hours. We find that Dr.Shakher dealt with the concern appropriately and regardless of the claimant's

race and no less favourably than an appropriate or hypothetical comparator.

8.25.21. The claimant raised a third grievance on 8 October 2015 [920] in which he raised a further complaint against Dr. Shakher, he did not at that time assert that Dr Shakhers behavior was because of race.

8.25.22. We find that the investigation made by Dr Shakher and his emails were appropriately completed by him and the allegation of race discrimination harassment and victimisation does not succeed against either first or second respondents.

8.26. **Allegation 26**

8.26.1. The claimant alleges that on 6 January 2016 Dr. Shakher sent an email to a junior doctor in which he claimed that this doctor had raised concerns over the Claimant. While there was no response to this email by the junior doctor, Dr. Shakher continued to investigate the Claimant on the basis of the doctor's previous complaints. (PoC 22.20) The claimant compares himself to a hypothetical comparator in respect of his complaint of direct discrimination.

8.26.2. The first respondent says that in October 2015 some junior doctors raised concerns about working hours and working practices during the Claimant's ward rounds. These concerns were raised to Dr. Phil Bright, Head of Education, and Dr. Bright asked Dr. Shakher to investigate these matters. Dr. Shakher spoke to some of the doctors involved and reported back to Dr. Bright. This matter was considered as part of the First Respondent's MHPS investigation and there was no evidence that Dr. Shakher pursued the matter inappropriately.

8.26.3. Race discrimination and victimisation is denied by the respondents.

8.26.4. Dr. Shakher responds, as he did in respect of allegation 25 regarding his being tasked with investigating issues raised by doctors re working hours. (ET3 27)

Evidence and Findings

8.26.5. The Claimant had not as at 6, 7 or 8 October 2015 raised any assertion that he had been subject to unlawful discrimination and he had done a 'protected act' falling within the scope of Section 27 of the Equality Act. The Claimants allegations in respect of direct discrimination, harassment and victimisation in relation to allegation 25 do not succeed.

8.26.6. The evidence in relation to the allegation 26 is contained in the Claimants Witness Statement [w/s paras.118-126] and in Dr. Shakher's Witness Statement [para. 46] and concerns documentation [1119-1120]. On behalf of the Claimant Mr John in his written submissions asserts that Dr. Rose had confirmed that he had spoken to Dr. Shakher warning him against any involvement with the Claimant. The Tribunal panel has been taken to no record of any such confirmation provided by Dr. Rose. On the contrary our first record of Dr. Rose's involvement with Dr. Shakher was during the course of his MHPS interview which was held on 11 and 24 February 2016 [1049-1057]. We have been referred to a letter sent by Mr Steyn the Associate Medical Director and Case Manager into the MHPS investigation which was sent to Dr. Shakher on the 29 December 2015 [586-587]. It was confirmed to Dr. Shakher that a MHPS (Maintaining High Professional Standards) Investigation was to be conducted following the Report conducted by Marion Pavitt regarding concerns raised by Dr. Rahim; specifically that over a 10 year period it was alleged that Dr. Rahim been subjected to bullying and harassment by Dr. Shakher and that Dr. Shakher had attempted to block the appointment of Dr. Rahim to the post of Medical Examiner. In addition, there were two separate complaints received which would

form part of the investigation, one of those complaints is redacted however it was confirmed that a complaint was received from Dr. Rahim in an email dated the 8 October 2015 [920] following an email that Dr. Shakher had sent on the 7 October regarding "*working hours on the Diabetes Ward alleging that Junior Doctors felt intimidated and scared*". We have made our Findings of Fact in respect of that email in relation to Allegation 25 above.

8.26.7. We find nowhere any reference to Dr. Shakher having been warned against involvement with the Claimant contained within the letter of the 29 December 2015, nor have we been able to find any evidence that a verbal warning had been given to Dr. Shakher in respect of any involvement with the Claimant. Mr John in his submissions states [para125] that Mr Rose in cross examination confirmed that before January 2016 he had spoken to Dr Shakher warning him against any involvement with the claimant, The tribunal has a careful and full note of the evidence and have been unable to find that proposition having been put to Dr Rose by Mr John in cross examination or at all. We note that at this stage that the claimant was certified unfit to work from 9 October 2015 and was not in attendance at the respondent's hospital until his return in March 2016.

8.26.8. The Claimant had been informed by letter 29 December 2015 that the investigation was to be conducted in accordance with the MHPS policy and we refer to that policy ourselves [204-244]. We find that there is no reference to Dr. Shakher, as the subject of an investigation, being prohibited from making any contact with anyone during the course of the investigation, the terms of the investigation as set out at paragraph 4.14 – 4.19 of the policy pages [210-211]. We note that the Practitioner, in this case Dr. Shakher was to be informed in writing of the case to be investigated and the Practitioner is to be given the opportunity to see any correspondence relating to the case and:

"be afforded the opportunity to put their view of events to the Case Investigator and be given an opportunity to be accompanied."

8.26.9. We find such enquiries as Dr. Shakher subsequently made in order to verify his earlier investigation into the junior doctor concerns and the causes of it were reasonable and consistent with the operation of the MHPS policy. In particular the email exchange that Dr Shakher had with Dr Kavish Mundil [1119-1120] sought to confirm what Dr Shakher had understood the concerns of the junior doctors to be when, at Dr Bright's request, he had investigated the concerns that he had received from junior doctors. We find that Dr Shakhers January email was not as the claimant alleges a further investigation, rather it was his effort to gather information to confirm the details previously given to him in October 2015 so that he was in a position to respond to the MHPS investigation when he was interviewed which we find was not an unreasonable enquiry and consistent with the MHPS policy.

8.26.10. We have had sight of the email chain which Dr Shaker provided to the MHPS investigation team. We do not hesitate to find that the enquiry Dr Shakher made was one that he would have made had a hypothetical comparator raised grievances against him that led to the instigation of an MHPS investigation in the terms of reference set by the MHPS investigation [586-587].

8.26.11. In his submission Mr John on the claimants behalf [para 126] suggests that Dr Shakher:

"has been likely warned by Rose at this stage, knows he is the subject of complaint re a course of harassment but still appears to be looking for dirt on C. this again must constitute less favourable treatment and harassment"

We do not agree with Mr Johns submission, we have not heard evidence from either Dr Rose or from Dr Shakher of Dr Rose issuing a warning to Dr Shakher before he met with him in first on 11 February 2016.

8.26.12. There is no evidence whether direct or from which we can draw inference that the actions of Dr Shakher were because of the claimant's race. While reasonably Dr Shakher made a request for confirmation of the information given to him by the junior doctors in October 2015 that request was not a detriment because the claimant had done a protected act rather it was to confirm information previously given to him to enable Dr Shakher to respond to an MHPS investigation. Dr Shakher we find was not aware of the reference to the Equality Act raised by the claimant and his BMA representative during the meeting with the first respondent on 23 November 2015. We remind ourselves that an MHPS investigation has potentially career changing consequences. Even though the Tribunal have found that the First respondent was seized of knowledge at the meeting on 23 November 2015 that the claimant asserted that he was subject to bullying and harassment potentially because of a protected characteristic albeit not identified we have found Dr Shakher was not informed that it was alleged that his behaviour was because of the claimants race or contrary to the Equality Act until he was served with the first Employment Tribunal complaint on 18 March 2016.

8.26.13. The claimant has confirmed in answer to questions from the tribunal that the first time he articulated that he considered that the Respondents' treatment of him was because of the identified protected characteristic of race was at his interview with Dr Rose in the MHPS investigation on 25 January 2016.

8.26.14. We find that the complaints set out in allegation 26 of direct discrimination and harassment because of race and or victimisation by either of the respondents do not succeed. We have asked ourselves why the second respondent Dr. Shakher sent the email to Dr Kavish Mundil which founds this complaint. We determine the email was sent to confirm the position regarding the junior doctors concerns as Dr Shakher investigated them in October 2015 and to

enable him to respond to the allegations made and detailed to him for the first time in the letter 29 December 2015 relating to " intimidated and scared junior doctors" that were to be the subject of the MHPS investigation [586].

8.27. **Allegation 27**

8.27.1. The allegation raised by the claimant is that in February – March 2016, shortly before his return to work, he was presented with a list of complaints Dr. Shakher had made about him. These had been listed in a document dated February 2016 [606-610]. The claimant says that these issues had never formally been raised with him nor had he previously been given the right of reply and yet the MHPS investigation was considered the appropriate vehicle in which to first investigate these complaints. These complaints the claimant says were baseless and only raised by Dr. Shakher to treat him less favorably on the basis of his race. The complaint is that the Trust should not have investigated the complaints using the MHPS investigation and used these complaints to legitimise the dilution of the findings of the Pavitt Report. (PoC (2) 33.1)

8.27.2. This complaint which is brought against both respondents is of Direct discrimination because of race and a failure to make reasonable adjustments. The claimant in respect of direct discrimination refers to an hypothetical comparator.

8.27.3. The first respondent responds that on 21 March 2016, the Claimant attended a meeting with Richard Steyn, Case Manager for the MHPS Investigation. Dr. Steyn informed the Claimant that the Second Respondent had submitted complaints about him and that these complaints would be integrated into the current MHPS investigation, as opposed to a parallel investigation being commenced. The Claimant was provided with details of the complaints made and opportunity to consider them.

8.27.4. The First Respondent's assert that the decision to investigate these issues as part of the extant MHPS investigation was reasonable and non-discriminatory. It is denied there was any attempt to *"legitimise the dilution of the findings of the Pavitt report*" as alleged. The respondent says that it was practically sensible for the First Respondent to consider all complaints and cross complaints together, so that the final MHPS report was a comprehensive investigation of the related issues.

8.27.5. Race discrimination and a failure to make reasonable adjustments is denied by the respondent and it is not accepted that the section 20 claim has been appropriately pleaded in particular that the Claimant has not pleaded what the substantial disadvantage alleged is.

8.27.6. Dr. Shakher as the second respondent [PoC(2) 33.1 and 35.1] admits that he raised issues about the Claimant.

8.27.7. Dr. Shakher states that he raised issues initially via his BMA representative to Dr. Clive Ryder. This took the form of a request that the investigation be widened so that it would be fairer. This request was made and repeated in January and at a meeting on 12 February 2016. The alleged list of "complaints" came about only after the verbal requests of the Second Respondent's BMA Rep.

8.27.8. The chronology of events confirms that the timing of this request was made before the Second Respondent was aware that a Tribunal claim had been made against him and/or that the Claimant was alleging race discrimination (which was on 18 March 2016). (ET3 (2), at paragraph 22.1.1)

8.27.9. It is denied that the Second Respondent made "vexatious and baseless" counter allegations against the Claimant or that he supplied discriminatory evidence as alleged by the Claimant. The Second Respondent asserts he always held an honest and genuine belief that his allegations were accurate and fair. (Second Respondent's ET3(2) paragraphs 18 and 21.1)

Evidence and Findings

8.27.10.We have considered the evidence presented to us by the Witnesses in the largest part from the Claimant [w/s paragraph 156-157] and Dr. Shakher as well as Dr Rose and Mr Stein. We have been referred to key relevant documents [419, 578, 580, 601, 602, 606-607, 611, 609, 620, 556, 576, 581, 589a and 680a-d]. The Claimant's allegation relates to the document submitted by the Dr Shakher on the 15 February 2016 to the Medical Director of the Respondent Trust Dr. Andrew Catto [606-610]. The document is a letter formally submitted by Dr. Shakher lodging a bullying and harassment complaint against two individuals, the Claimant and Dr. Sri Bellary. Dr Shakher asserts that the list of complaints in relation to the Claimant are those described using the proforma in the respondent's template schedule [609]. The concerns were raised first verbally to Dr. Catto, Dr. Shakher's BMA representative during January 2016 and followed then by discussion between Dr Shakher's then BMA representative, Ian McKivett having spoken with Mark Tipton, HR Business Partner who is supporting Dr. Rose, the investigator on the MHPS Investigation. Mr McKivett had asked that the current MHPS Investigation be widened so as to investigate concerns that Dr. Shakher had, that he wished to raise about the Claimant and other colleagues. Mark Tipton stated that unless concerns were raised in writing, they would not be dealt with within an extended MHPS Investigation and as a result Dr. Shakher's letter of concern dated 14 February was sent to the Medical Director. Following the letter of concern, Mr McKivett wrote on the 17 February [611-612] inviting the First Respondent to widen the investigation:-

> *"Now a separate investigation will have to be mounted that will in turn duplicate much of the investigation that you are currently conducting at significant costs to both HEFT and BMA of time and resource".*

8.27.11. In essence the Claimant's complaint is fourfold, namely:

(i) He should have had the opportunity to answer the complaints in a Dignity at Work investigation before moving directly to an MHPS investigation.

(ii) Dr. Shakher only raised the complaints against the Claimant to treat the Claimant less favourably because of his race, it was direct discrimination and harassment,

(iii) the Trust should not have investigated the counter complaints using in the MHPS procedures, and

(iv) that the MHPS investigation diluted the findings of the Pavitt Report.

8.27.12. By the 5 February, Dr. Shakher had been given a redacted copy of the Pavitt Report, however he had not been given the opportunity to see and make comments upon the notes of the various investigations undertaken by Pavitt upon which she purported to base her conclusions.

8.27.13. The complaints raised by Dr. Shakher using the Respondent's harassment and bullying complaints template, were sent under a cover of a letter [606]. It is evident from the covering letter [606] that at that time, Dr. Shakher was suffering from stress in what was an already stressful time of his life. Dr. Shakher describes that, in addition to his work he is the main carer for his wife who had had a bone marrow transplant for incurable bone marrow cancer and the investigation and the way in which it had been conducted had placed an enormous stress upon him on his personal and mental health, he wrote:-

"I would appeal to you as Medical Director of the Trust that this investigation is carried speedily in a fair and balanced way. There is a problem in my perception that when I had the first fact finding meeting with Dr. Arne Rose, I do get the impression that I

am already a guilty person from the line of his questioning. This I feel in based on the inaccuracies of fact finding conducted by Pavitt and Turner."

We find that Dr. Shakher had been provided with a redacted copy of the so-called Pavitt Report [583-584] and he had been informed on the 29 December 2015 that an MHPS investigation would take place, however he was not informed that the allegations against him were claimed by the Claimant to be because unlawful discrimination on the grounds of the Claimant's race or for that matter because of a protected characteristic.

8.27.14. Dr. Shakher had attended the first fact finding meeting with Dr. Rose on 11 February [1049] and he raised his concerns and the request that the MHPS investigation be expanded to include his concerns on the 15 February 2016. The essence of Dr. Shakher's complaint was that he raised grievances against both the Claimant Dr. Rahim and Dr. Shri Bellary.

8.27.15. Having heard evidence from Dr. Rose and from Mr Stein we would have found them both to have given an objective and measured account of the investigation that was undertaken in accordance with the MHPS investigation procedure. Mr Stein has given an account that in 2015 he was the Associate Medical Director of the Respondent Trust Hospital at Solihull, he is a Consultant Surgeon. Since April 2016 Mr Stein has held the position of Divisional Director of Surgery in Gastroenteritis. In September 2015, Mr Stein covering the role of Associate Medical Director for Solihull Hospital on a temporary basis had written an email 29 September 2015 [553]. It is evident to us that Mr Stein was aware of concerns regarding the management of the Speciality Directorate – Diabetes. In addition, Mr Stein had been aware from the Doctors in Difficulty update [556-557] held on the 15 October

2015 that Dr. Shakher, because of the allegations raised by the Claimant, was identified as a Doctor in difficulty. Moreover, the first Respondents had already identified that, subject to the outcome of the Dignity at Work investigation undertaken by Marion Pavitt which may impact on an MHPS investigation, it would be necessary to conduct an MHPS investigation if further action was required.

8.27.16. The concerns raised by Dr. Shakher make no reference to the Claimant's race and similarly Dr. Shakher was not aware that the nature of the Claimant's complaints against him described his treatment to be race discrimination against the claimant.

8.27.17. Considering the evidence we have heard from Mr Stein, we find that even before the Pavitt Report, Mr Stein was of the view that Dr. Shakher was a Doctor in Difficulty and the allegations which were being investigated against him ought properly to be investigated under an MHPS Investigation were any steps to be taken against Dr. Shakher. To take any action against Dr. Shakher it would be necessary to commission an MHPS Investigation in any event. We find that Dr. Shakher had understood that the MHPS Investigation that had been notified on the 29 December could be widened to include Dr. Shakher's concerns.

8.27.18. Having been notified that an MHPS Investigation was to begin [586] Dr. Shakher was provided with a redacted copy of the Pavitt Report and only informed that there was a requirement to investigate his inappropriate behaviour as identified in the Pavitt Report. The behaviour to be investigated included the allegation that Dr. Rahim had been subjected to bullying and harassment by Dr. Shakher and that Dr. Shakher had attempted to block the appointment of Dr. Rahim to the position of Medical Examiner, in addition, further complaints had been received from Dr. Rahim on 8 October, following Dr. Shakher's email relating to alleged intimidation of Junior Doctors.

8.27.19.In relation to the complaints of victimisation of the claimant by Dr. Shakher, we find that Dr. Shakher's complaint [606-610] was not an act of victimisation by Dr. Shakher who at the relevant time was unaware that the Claimant had asserted that he had been bullied and harassed because of a protected characteristic and/or contrary to the Equality Act.

8.27.20.In addition to his complaints about Dr. Rahim, Dr. Shakher's formal bullying and harassment complaint was also against Dr. Bellary, a critical comment about Dr. Rose and the so called "*unprofessional remarks of Professor Cooke*".

8.27.21.Dr. Rose had initially indicated that he did not consider Dr.Shakher's complaints of bullying and harassment against him to be suitable for investigation and the MHPS Investigation, Mr Stein considered Dr. Shakher's concerns and discussed the same with Dr. Rose. Although some aspects of Dr. Shakher's concerns related to a colleague other than Dr. Rahim and Dr. Bellary, there was a significant amount of overlap between the complaints that already been investigated and the events giving rise to Dr. Shakher's own complaints that Mr Stein identified [WS para 21]. The Tribunal has considered Mr Stein's evidence and accept the objective account he gave [w/s para 22] that Dr. Shakher's complaints against Dr. Rahim and Dr. Bellary overlapped the matters that were being investigated against Dr. Shakher and it was his view that it would be impractical and not proportionate or effective to run two completely separate investigations given the overlap. We find that Mr Steins determination was a reasonable view which would ensure that any inconsistent or contradictory findings reached in two separate investigations would be avoided. The decision to combine the investigations had the added advantage that they could be dealt with more quickly together rather than commissioning a second investigation and was a proportionate response.

8.27.22.We find that Mr Stein's view that if further action was required, that it could only be taken under the framework of an MHPS Investigation was a pragmatic and sensible one. Given the nature of the allegations against Dr Shakher, Mr Stein acknowledged [w/s para 25] with the benefit of hindsight, an MHPS Investigation should have been instigated initially instead of as a Dignity at Work investigation in the Pavitt Turner Report into the Claimant's original complaints against Dr. Shakher.

8.27.23.On the17 March, Mr Stein as Case Manager under the MHPS Investigation wrote to the Claimant [620] and to Dr. Shakher [621] to confirm that Dr. Shakher's concerns in relation to Dr. Rahim, Dr. Bellary and Professor Cooke would be considered alongside the current MHPS Investigation.

8.27.24.We have considered the preamble to the Shakher complaints [607] which is telling. Dr. Shakher was of the view that the Claimant and Dr. Bellary:

> *"have been colluding together to damage my reputation and character. I am basing my perception on a series of events that have taken place since I took up my role as CD for GIM in February 2015. I have outlined the issues below and I have enough detailed evidence to show that I was the victim of this recent bullying and harassment complaint by these two individuals."*

8.27.25.The detail of matters complained of, whilst focusing upon the time since Dr. Shakher had been appointed Clinical Director for GIM in February 2015, referred back to earlier events in relation to Dr. Rahim back to 2005 and to Dr. Bellary to 2013.

8.27.26.We observe that the escalation of Dr. Shakher's complaints to include them in the MHPS Investigation in respect of Dr. Rahim, the Claimant, meant that the investigation included Dr. Shakher concerns in relation to Dr Bellary and Dr Clarke as well as the

claimant. We find the the decision of the first respondent to expand the scope of the MHPS investigation was a pragmatic operational decision in which the claimant's race was wholly immaterial. The decision made by the first Respondent to include the second Respondent's counter-allegations into the MHPS Investigation and that the terms of reference were expanded to include the Claimant's complaints against Dr. Shakher, Dr Bellary's complain against Dr Shakher and Dr. Shakher's complaints against Dr. Rahim and Dr. Bellary. The relevant question is not, as Mr John suggests, that the MHPS Investigation did not in the end uphold Dr. Shakher's complaints against Drs. Rahim and Bellary, rather whether his complaints and allegations of harassment and bullying by Dr. Rahim and Dr. Bellary of him were, prima facie complaints that were appropriately considered together through the vehicle of an MHPS Investigation and that a single investigation into the various complaints about consultant behaviour to each other all within the Diabetes directorate was undertaken. We find that the decision to include the investigation of all of the various complaints within a single MHPS investigation was one that was not less favourable treatment of the claimant because of his race and was a reasonable decision untainted by discrimination or victimisation.

8.27.27. We find that in a number of respects and with good reason, Dr. Shakher was concerned about the integrity of the Pavitt Investigation, the outcome of it and his concerns that Dr. Rahim and Dr. Bellary were colluding. The Pavitt Investigation had been one in which Dr. Shakher had not been informed he was the subject of the complaints, giving rise to the investigation [505-508/912-915], he had not been provided with details of the allegations that were investigated by Pavitt, he was not provided with the letter of concerns raised by Dr. Rahim nor was he given the opportunity to have sight of the notes of his interview with Pavitt or to make corrections to them before they were relied upon by Pavitt to

compile her report. The Pavitt Report itself had made a number of unsubstantiated conclusions; for example, suggesting that Dr. Shakher had *"admitted gossiping"* [988] and emails referred to by Pavitt were not shown to Dr. Shakher [981]. Having considered the allegations raised by Dr. Shakher with an objective eye, the concerns he raises, were serious and if proven requiring disciplinary or other action to be taken, would have required the legitimacy of an MHPS Investigation.

8.27.28. We find that on the face of it, the complaints were not "baseless" and moreover, having gained a measure of the nature of Dr. Shakher in his behaviour under cross-examination and questioning, and we conclude that Dr. Shakher had every belief in the reasonableness of his case.

8.27.29. We find that when Dr. Shakher presented his complaint, he had not then had sight of the unredacted Pavitt Report, he was unaware that the claimant had asserted to the first respondent that he was bullied and harassed because of a protected characteristic. In January 2016 Dr. Shakher had an exchange of emails with his BMA Representative [589a] raising concerns that having initially been named as a witness in the investigation, allegations were now raised against him that there was a bullying and harassment complaint against him.

8.27.30. The Tribunal finds that the first Respondent's decision to investigate the issues raised by Dr. Shakher within the existing MHPS Investigation was a reasonable one in all of the circumstances and was not less favourable treatment because of the claimant race. The first Respondents took a practical, pragmatic and proportionate decision to ensure that the case investigator could be apprised of the entire situation that existed in the Diabetes directorate and the concerns that a number of consultants had about each other and could avoid a duplicated and

disjointed investigation process that would be a disproportionate waste of costs, resources and time within the organisation.

8.27.31. We find that the complaints raised by both Dr. Rahim and Dr. Shakher and also of Dr Bellary had a reasonable degree of overlap included in particular the matters in respect of which Dr. Shakher complained also about Dr. Bellary. We note that Dr. Bellary is of Indian ethnicity and Professor Cooke is White British and we find that without more, there is nothing to suggest that the complaints raised by Dr. Shakher were less favourable treatment of the Claimant because of his race, nor that the Respondent's decision to combine the complaints in a single MHPS Investigation was unlawful discrimination because of his race.

8.27.32. In considering whether the complaints raised by Dr. Shakher was baseless, we do not agree with the Claimants view of that the fact that the complaints were not upheld establishes that they were baseless.

8.27.33. We have heard evidence from Mr Stein and from Dr. Rose and are concerned to note that the MHPS Investigation was extended to include the complaints raised by Dr. Shakher once many of the interviews had already been conducted and not all of those interviews were revisited as fairly they ought to have been. Save for interviewing Drs. Bellary and Rahim, the MHPS Investigation did not interview any of the witnesses proposed by Dr. Shakher in his complaint [609]. Although the MHPS Investigation concluded that *"counter allegations can seem to lack detailed evidence".* Dr. Rose under cross-examination acknowledged that that lack of detailed knowledge may have arisen because he had not investigated further the complaints that Dr. Shakher had made.

8.27.34. Having heard evidence particularly about the earlier relationship between Dr. Rahim and Dr. Shakher, we conclude that a reasonable employer, aware of the background and circumstances ought properly to have investigated the counter-allegations; we

have heard compelling evidence from Professor Barnett regarding Dr. Shakher's wish to develop professionally in complex endocrine work and that his aspiration was being hindered specifically in respect of the endocrine hypotension clinics. Although the Claimant asserts that such clinics did not exist, both Dr. Bellary and Professor Barnett agreed that there was one.

8.27.35. Dr. Shakher had raised concerns before, notably in 2007 when he wrote to Professor Barnett on 25 May 2007 [422-424] about which Dr. Rose may have interviewed the relevant witnesses Angela Spencer and Lisa Shepherd.

8.27.36. It is a concern that whilst Dr. Shakher was informed that the investigation was still open, the Claimant was met by Mr Stein in June 2016 and told that there was no case against him following the completion of Dr. Rose's investigation and that in relation to the investigation of his complaints, he had been informed that if there was a need to proceed to a disciplinary hearing he would be contacted again.

8.27.37. In the light of the evidence we have heard, we cannot agree with the Claimant that the decision by the first Respondent to expand the terms of reference of the MHPS Investigation was a step to legitimise the dilution of the Findings of the Pavitt Report. The fact of this case is that Dr. Rose, albeit without fully investigating the complaints against the claimant, dismissed Dr. Shakher's counter-allegations against the Claimant and we find that he did not dilute the Pavitt Report. The MHPS Investigation which could have led to disciplinary action against a Consultant was one which investigated the Claimant's complaints against Dr. Shakher and reached a different finding.

8.27.38. We find that the Claimant's complaints under allegation 27 do not succeed, we conclude neither of the Respondents discriminated against the Claimant because of his race and indeed in answer to questions in cross-examination the Claimant confirmed he had no

evidence to support his complaint that Dr. Rose reached the conclusions that he did because the Claimant is British Pakistani. We find that Dr. Rose reached the conclusions that he did based on findings of fact in light of the information and evidence before him, such as it was.

8.27.39. We have asked ourselves the reasons why Dr. Shakher put in the counter-allegations that he did, we find that he wanted an opportunity to tell his side of the story. In addition to his complaint against the claimant Dr Shakher's complaint related to two other individuals, neither of whom were Pakistani. We find that the breadth of Dr Shakher's complaints against a number of consultants, together with the reason why he put in the complaints tends to evidence the nature of Dr Shakher's psyche which, without more, does not support the allegation of unlawful discrimination. In light of the evidence we have heard about the nature of Dr. Shakher's approach when criticised by his colleagues, as evidenced before us in the Employment Tribunal hearing when he has been challenged, we are satisfied that had a non-hypothetical comparator, a non-Pakistani Consultant raised criticisms against Dr. Shakher, he would have taken steps to raise a complaint to put his version of events and to raise wider issues of concern.

8.27.40. Dealing with the first Respondent's decision to extend the MHPS Investigation, we are satisfied that had a hypothetical non-Pakistani Consultant raised a concern, in respect of which a counter-complaint had been raised that dealt with the overlapping issues, the first Respondent would have taken steps to amalgamate the complaints and cross complaints in a comprehensive investigation of related issues to avoid duplication of process and waste of resource and costs.

8.27.41. In his written submission Mr John on behalf of the claimant at para 127, in reference to the Allegation 27 refers the Trinunal to his earlier submission at para 88-90. That submission deals with the

counter allegation and argues that they lack merit. The submission does not deal with the argument of failure to make reasonable adjustments. In so far as the allegation relates to the complaint of failure to make reasonable adjustments we conclude that it s not against the Second respondent at all and we deal with it at allegation 33 below.

8.27.42.The complaint is brought in relation to the investigation of the cross complaint brought by Dr Shakher against the claimant and others in February 2016. It is the raising of the complaint and its' incorporation into the MHPS investigation that is the issue. The claim in respect of Allegation 27 was raised for the first time in the 2nd ET1 complaint presented on 4 August 2016 at para33.1.The complaint was presented in respect of the issue that the claimant was presented with Dr. Shakhers complaints of 15 Febraury 2016 [600-610] on his return to work on 21 March 2016.

8.27.43.Despite the agreed schedule indentifying the allegation to be a complaint of Direct Discrimination and a failure to make reasonable adjustments, on close reading of the words of the original complaint [21 para 33] the complaint is identified only as Direct Discrimination and Harassment.

8.27.44.In light of the findings of fact we have made, mindful that Dr Shakher's complaints were against not only the claimant but also against Dr Bellary and Professor Cooke [607-610]. Whilst the actions of by both Respondents may have had the effect of causing the claimant to feel harassed we conclude that the respondents actions were not in fact conduct related to the claimant race. We find it was not reasonable in all of the circumstances of the case for the conduct complained of to have that required effect.

8.27.45.To the extent that the complaint is about the conclusions reached by Dr. Rose in his outcome conclusions in May 2016 [859-910] the claimant acknowledged in answer to cross -examination that he had no evidence to support his complaint that Dr Rose

reached the conclusion he did because he, the claimant, is a British Pakistani. The Tribunal has heard no evidence to persuade us that, to the extent this allegation is in relation to the outcome of the MHPS investigation and therefore presented in time, that the determination was one that would have been different because of the claimant's race.

8.27.46. To the extent that the claimant considered the raising of complaints by Dr Shakher and the first respondent investigating them within the MHPS investigation was an act of unlawful discriminationany such compliant to the Employment Tribunal ought to have been presented on or before 20 June 2016 (subject to any Early Concilliation time adjustment), and it was not. The complaint is prima facie out of time and the Tribunal does not have jurisdiction to entertain the complaint. We have heard no persuasive evidence to lead the Tribunal to consider that it is just and equitable for the Tribunal to consider the complaint that is presented out of time.

8.27.47. The claimant's allegation 27 does not succeed against either respondent and is dismissed.

8.28. **Allegation 28**

8.28.1. The complaint is that Dr. Shakher was in possession of an email that Dee Narga sent to Dr. Raghuraman on 6 October 2015 about the Claimant. This e-mail formed the basis of one of the complaints raised by Dr. Shakher about the Claimant. The claimant asserts that the fact Dr. Raghuraman provided this e-mail to Dr. Shakher when he had no reason to, is illustrative of the collusion between the two of them. No measures were put in place to prevent this level of collusion by the Trust. (PoC(2) 33.2) The complaint is that this allegation was direct discrimination because of the protected characteristic of race and failure to make reasonable adjustments.

8.28.2. The alleged perpetrators are Dr. Shakher and Dr. Raghuraman. (since provision of disclosure the Claimant was made aware that Dr.

Raghuraman's secretary provided this e-mail to Dr. Shakher. It is the Claimant's belief that this was done on the instruction of Dr. Raghuraman and therefore the substance of the claim is unchanged). The claimant relies on an hypothetical comparator.

8.28.3. The First Respondent assert their understanding that it was Ms Narga who forwarded this email to the Second Respondent herself, not Dr. Raghuraman (see page 1142A). It is denied that Dr. Raghuraman "induced" this email from Ms Narga, as alleged in the ET1. It is denied that there was any collusion between Dr. Raghuraman and the Second Respondent to discriminate against the Claimant.

8.28.4. The respondents refer to the fact that the Claimant has not particularised how he has "*been made aware"* of this. This allegation is denied.

8.28.5. The allegation of "*collusion"* is denied, and it is further denied that the First Respondent has failed to take appropriate measures to ensure its employees behave appropriately rather it has investigated all of the Claimant's complaints and taken action as appropriate.

8.28.6. Race discrimination and a failure to make reasonable adjustments is denied. It is not accepted that the incident was pleaded as a failure to make reasonable adjustments in the ET1.

8.28.7. Dr. Shakher the second respondent responds that Dee Narga emailed Dr. Shakher directly [1142A] regarding the Claimant's behaviour in the AEC department as can be seen from the email in the bundle. Dr. Shakher was AEC lead at this time and had legitimate reason to be aware of the issue. The email from Dee Narga was headed: "*fyi as you are AEC lead*".

8.28.8. It is denied there was collusion between Dr. Shakher and Dr. Raghuraman in relation to this matter.

8.28.9. The second respondent asserts that the reality was completely different since the Second Respondent did not discuss the email with Dr. Raghuraman and did not escalate the matter at all

notwithstanding that he could have done bearing in mind that he was the AEC lead and the fact that the Claimant had publicly made negative comments regarding the AEC (and possibly by extension about the Second Respondent). [ET3(2), paragraph 10 and 21.2]

Evidence and Findings

8.28.10. The evidence we have heard in relation to the allegation is that provided by the Claimant [w/s Dr. Ragharaman para48]. [Documents 1141-1142a]

8.28.11. The AEC Rota was one of the changes that had been made by the Respondent Trust through the process of medical redesign to increase consultant cover at the front end of the hospital with the aim of reducing admissions as far as possible by facilitating early consultant decision making. Dee Narga is a Project Manager who supported Dr. Raghuraman in the project in particular in introducing the rota.

8.28.12. Dee Narga was Interim Project Manager for the implementation plan in relation to AEC had provided feedback to Dr. Raghuraman who had been referred to an email sent in confidence to him, copied to Dr. Mukherjee [1142a] dated 06 October 2015 at [1559] the email was copied to Dr. Shakher on the 08 October at 13.30 because he was the AEC lead. The email stated:-

"Last Friday 02 October 2015 Dr. A Rahim was the Consultant in AEC. The feed back from staff was "worrying" to put in mildly – he was openly commenting on the AEC Clinic as needing to be closed and saying he should be at home and even when he is on call, he is at home. He finished at 8pm even though the Clinic finishes at 8pm."

She had sent an earlier email to Dr. Raghuraman copied to Dr. Mukherjee and subsequently copied to Dr. Shakher on the 08 October regarding Dr. Bellary's negative feedback from AEC[1142c].

8.28.13. The email reported that Dr. Bellary had at night been *"disruptive*". We find that the emails evidence the reluctance of consultants within the diabetes team to engage in the ambulatory emergency care rota. Ms. Narga forwarded the email to Dr. Shakher as he was the AEC lead. The allegation is that Dr. Raghuraman provided the email to Dr. Shakher when he had no real reason to and that that was evidence of the collusion between the two of them. The Claimant conceded in cross-examination that he had no evidence to support the allegation that he made notwithstanding the allegation of collusion goes so far as to suggest that [w/s para 191] that:

> *"I believe Dr. Raghuraman put Dee Narga up to writing this email. At the very least, the email must have been provided to Dr. Shakher by Dr. Raghuraman for the very purpose of trying to undermine me yet again."*

8.28.14. We find the Claimant's speculation misconceived and without foundation. The evidence before us shows that Dee Narga forwarded her emails regarding negative feedback on both the Claimant and Dr. Bellary from AEC to Dr. Shakher on the 8 October [1141a and 1142c] because he was the AEC leader. We find that a more objective and natural reason why the email was forwarded to Dr. Shakher was because of his responsibility as AEC lead. The Claimant's assertion that Dr. Shakher, Dr. Raghuraman and Dr. Mukherjee colluded between them to harass the Claimant because of his race is misconceived. We find that because of the managerial responsibilities, Drs. Raghuraman, Mukherjee and Shakher were responsible for implementing the change, much of which was not embraced by the Diabetes team and that it was as a

consequence of that responsibility that was the reason why the Claimant's behaviour was challenged to ensure the effective implementation of Trust policy and was not because of the Claimant's race.

8.28.15. The Claimant's allegation in respect of the first Respondent that they put no measures in place to prevent the level of collusion by the Trust is, in light of our findings that no collusion was in place, one that does not succeed.

8.28.16. The Claimant's complaint that he was subject to unlawful discrimination by the actions of Dr. Shakher and Dr. Raghuraman amounted to direct discrimination and harassment and by the first Respondent does not succeed.

8.28.17. For the sake of completeness we note that the schedule identifies this allegation to be one of a failure to make reasonable adjustments contrary to s20 of the Equality Act 201. However, mindful that Mr John's written submissions relating to failure to make reasonable adjustments on behalf of the claimant does not address this complaint and the original pleaded allegations do not frame this allegation in terms of a failure to make reasonable adjustments, we find that there is no substance to such a complaint.

8.29. **Allegation 29**

8.29.1. The claimant complains that between October 2015 and March 2016 Doctors Shakher, Raghuraman and Mukherjee approached individuals in the Trust actively seeking incidents from colleagues which he could use to form the basis of his counter allegations against the Claimant. (PoC(2) 33.4, 36.2) [122-123]. No measures were put in place by the Trust to prevent this.

8.29.2. The complaint articulated in the Schedule is that of direct discrimination because of the protected characteristic of race and a failure to make reasonable adjustments. In the pleaded case the

complaint is of Direct Discrimination and harassment and victimisation.

8.29.3. The claimant relies upon an hypothetical comparator. The perpetrators of the alleged discrimination are claimed to be Dr. Shakher, Dr. Mukherjee and Dr. Raghuraman.

8.29.4. The first respondent respond that it is not clear what paragraphs of the ET1 this relates to (paragraph 36.2 of PoC(2) refers to a *"watering down the Pavitt Report findings*") and it has not been particularised in the schedule whom it is believed either the Second Respondent, Dr. Mukherjee or Dr. Raghuraman approached. The First Respondent is unclear whether this is in fact a new allegation.

8.29.5. It is denied that First Respondent failed to take steps to ensure its employees behaved appropriately.

8.29.6. Race discrimination and failure to make reasonable adjustments is denied.

8.29.7. Dr. Shakher responds that the Claimant has not particularised in his claim the allegation that Dr. Shakher had actively sought incidents from colleagues in order to construct his counter-allegations. It is not clear that paragraph 36.2 of POC(2) which refers to vistimisation is relevant to this allegation.

8.29.8. Insofar as there is any correlation, the Claimant may be referring to the incidents set out and dealt within Allegations 25 and 26 above.

8.29.9. In any event, there were no illegitimate investigations at any time: where Dr. Shakher was involved in complaints made about the Claimant by others it was because he was the appropriate person to do so and/or was appropriately tasked to do so (for example by Dr. Bright, as per Allegation 25 above)

8.29.10. This allegation is denied. [Second Respondent's ET3(2) at paragraphs 18, 19 and 21.4.]

<u>Evidence and Findings</u>

8.29.11. The Allegation 29 as detailed in the Scott Schedule refers to the Claimant's complaints as pleaded in the second claim [para 33.4] – referring to "*canvassing the hospital actively seeking incidents from colleagues which he could use to form the basis of his counter allegations against the Claimant."* [122] and paragraph 36.2 "*watering down the Pavitt Report findings*" [123] the allegation is that the second Respondent Dr. Shakher, together with Drs. Mukherjee and Rahim were the perpetrators of the discrimination which was alleged to be direct discrimination and harassment. It is further alleged that no measures were put in place by the first Respondent, the Trust to prevent that behaviour.

8.29.12. We have heard evidence from the Claimant and from Dr. Shakher, however the allegation was not particularised to identify who it was alleged had been approached by the three so called perpetrators. When cross-examined, the Claimant explained the detail of the allegation to mean that it was regarding the approaches to Junior Doctors on the 6 January 2016 and the 15 January 2016 to seek a response from Junior Doctors that "*I had tried to scare them*". The Claimant confirmed that that was the full extent of the detail of the allegations and made no references to Dr. Shakher making any other approaches or Dr. Raghuraman or Dr. Mukherjee having approached individuals to seek instance from colleagues to form the basis of his counter-allegations against the Claimant.

8.29.13. We have made our findings of fact in relation to Dr.Rahim's Allegation 26 and we do not repeat those findings of fact here. Although Dr. Rahim did not refer to the email from Dee Narga, we have made findings in respect of the allegation concerning that email at Allegation 28 above.

8.29.14. In his submissions, Mr John on behalf of the Claimant [paragraph 129-130] appears to conflate Allegations 28 and 29 referring to canvassing for instance and petitioning by referring to the petitions or

testimonials that were produced which form the subject of Allegation 30 which we deal with below.

8.30. **Allegation 30**

8.30.1. It is claimed that between October 2015 and March 2016 and upon the Claimant's return to work Dr. Shakher openly sought out character references and testimonials and openly discussed the investigation. (PoC(2) 33.5, 35.2)

8.30.2. The perpetrator of the discrimination is identified as Dr. Shakher and the comparison is to a hypothetical comparator. The claimant refers to Direct discrimination because of the protective characteristic of race and a failure to make reasonable adjustments.

8.30.3. The First Respondent accepts that character references were sought by the Second Respondent, and the First Respondent requested that he make these requests appropriately and with respect the Claimant's confidentiality. The First Respondent does not believe the Second Respondent openly discussed the investigation.

8.30.4. Race discrimination and failure to make reasonable adjustments is denied.

8.30.5. Dr. Shakher's response is that this allegation is denied that Dr. Shakher openly sought out character references and testimonials and openly discussed the investigation.

8.30.6. The Second Respondent requested character references to assist him in being able to respond to the MHPS allegations. Both the manner in which he sought those references and the content of the references – including the fact that they did not mention the Claimant's name or implicate the Claimant however indirectly; and instead they related to the Second Respondent's character and work commitment – it is argued, show that the Second Respondent acted reasonably and appropriately.

8.30.7. It is the respondents case that the proper context in which to view this allegation is that character references are a common place feature of the workplace. Mr Steyn, at paragraph 51 of his statement, confirms this context.

8.30.8. Many of the references were provided voluntarily and not as a result of a request by the Second Respondent. The letter of support the second respondent says was volunteered and in fact was compiled while the Second Respondent was on sickness absence (and in any event prior to the Claimant's return to work).

8.30.9. The allegation Dr. Shakher openly discussed the investigation is denied. The second respondent maintains that it is not possible to respond specifically to such a general allegation. Dr. Shakher acted reasonably and in a non-discriminatory manner at all times. [Second Respondent's ET3(2), at paragraphs 19 and 21.5]

8.30.10. The Claimant complains in allegations 31 – 32 that he is victimised by the first and second respondents.

Evidence and Findings

8.30.11. We have heard evidence from the Claimant and from Dr. Shakher,as well as Dr. Rose, Mr Stein and Dr. Javaid Mehmood in respect of the Allegations and Allegation 30 as detailed in the Schedule, as set out in the claim form [paragraphs 33.5 and 35.2] the complaint, is one of direct discrimination and harassment against the first and second Respondents. The allegation relates to the period October 2015 to March 2016. We note that the Claimant was certified unfit for work from the 9 October 2015 until his return to work eventually on the 22 March 2016.

8.30.12. During the Pavitt Investigation, Dr Shakher was only aware that he was a witness that was being investigated by Pavitt into allegations of bullying and harassment. On the 29 December 2015 Mr Stein, Associate Medical Director and Case Manager wrote to Dr Shakher [586-587] informing him that an MHPS Investigation had

been instigated. The behaviour was identified as requiring investigation under the MHPS including a number of serious allegations, which the Claimant has confirmed in answer to questions in cross-examination, that were potentially career-ending for Dr. Shakher. The Tribunal has been referred to a number of character references and testimonials [749-797] largely from individuals with the exception of [781-786] a letter of support dated 24 January 2016 signed by a number of individuals.

8.30.13. In January 2016, Dr Shakher, who at that time was not at work as he was unfit, was not aware that the Claimant asserted that the allegations of bullying and harassment and other complaints he brought against Dr. Shakher were alleged to have been because of the protected characteristic of Claimant's race. A number of character references were provided for Dr. Shakher. The Claimant confirmed that the information provided in the documents were akin to letters of support and testimonials. The letters are described as being in two tranches, the first in January 2016, and the second in mid-March onwards. The last of the letters of support sent in January 2016, dated the 24 January [781-786] has been described to us as the "Nurses letter" to which signatures were affixed in the period 25 – 28 January to the 3 February 2016. Within the January letters with exception of the letter of support with multiple signatures dated 24 January there is no reference to equality and diversity, the letter of support refers to Dr. Shakher and states:

> *"He has been strictly against bullying and undermining behaviour amongst colleagues in the hospital and has always encouraged everyone to raise concern on such issues. He believes in equality and diversity and is always helpful and supportive to all his staff, Juniors and colleagues equally."*

8.30.14.We accept the evidence given by the second respondent Dr Shakher who confirmed that having received the letter from Mr Stein in December 2015, he was distraught and contacted some people, mostly verbally and told them he was being investigated for amongst other things harassment and bullying and he asked for a character reference. When on or about the 18 March 2016 Dr. Shakher became aware that there was an Employment Tribunal claim identifying him as a Respondent which made allegations that he had discriminated against the Claimant because of his race, he asked people to give him a reference to confirm that in their experience he was not a racist. Having heard evidence from Mr Stein, we accept that it is "fairly common" for Trust employees who are the subject of an MHPS Investigation to seek character references. The letters of support are, by any other name, character references.

8.30.15.We have had sight of evidence that Dr. Shakher, when he had been the subject of a complaint made by Dr Reggie John, an Indian doctor in 2014, had taken an approach that was been similar to that he demonstrated in January 2016 and he sought letters of support [773-779]. We are satisfied that character reference of the type to which we have been referred are fairly commonly used within the Trust for employers who are subject investigation. The references to which we have been referred are all positive. Mr John on behalf of the Claimant suggests that they are "*excessively glowing descriptions*" and are suggestive that Dr. Shakher had an active part in their composition, a propostition with which we do not agree; the overwhelming evidence before us is that Dr Shakher was well liked and work colleagues of various standing wished to support him.

8.30.16.We have heard that during January 2016 Dr. Shakher was unfit for work because of stress. We have heard evidence from Dr. Javaid Mehmood whose witness statement was taken as read. Dr.

Mehmood was born and brought up in Pakistan where he completed his basic medical training and he had worked in the Respondent's Trust in Heartlands Hospital in 2011, he works as a Medical Registrar. Dr. Mehmood confirmed that Dr. Shakher had no hand in composing the letter of support that Dr. Mehmood had signed [781] nor a subsequent letter of the 1 April 2016 [753-754]. Dr. Mehmood confirmed that these were not the first letters of support he had been asked to sign, previously he had for another Doctor who had faced complaints of bullying a number of years previously. Dr. Mehmood's account is that a number of Junior Doctors had heard that Dr. Shakher was facing a complaint and as Dr. Shakher was off sick, in January and February 2016 a number of other Junior Doctors, Dr. Amsema, Dr. Osman and Dr. Herra had drafted the notice and Dr. Mehmood, who was the most senior of the Junior Doctors who described himself as one of the most senior Registrars in the department, had been asked to sign the letter first.

8.30.17. The Tribunal have not found any evidence to suggest that Dr. Shakher himself openly sought character references and testimonials other than his initial phone calls immediately upon him having received the letter notifying him that he was to be the subject of an MHPS Investigation. Subsequently, after being served on 18 March 2016 with the First Employment Tribunal complaint presented by the claimant, Dr Shakher asked people if they would be able to confirm that he was not a racist. We have heard no evidence that Dr. Shakher openly discussed the investigation or its nature and indeed none of the references indicate that those signing the references were aware that the complainant was either or both Dr. Rahim or Dr. Bellary. We find that the claimant having commenced litigation, alleging that he had been the victim of race discrimination at the hand of Dr Shakher, Dr Shakher had the right to take steps to prepare his defence and to make such enquiries as

he did and he was not subject to a bar against discussion about the litigation which was a matter of public record.

8.30.18. The Claimant in the meeting with Mr Stein on the 8 August 2016 confirmed [707] that one was probably acceptable to seek character references, he stated:-

> *"I can accept that. However, given that there's a confidentiality issue here and there are very sensitive issues here, to petition 100 people within the trust I think is slightly excessive."*

8.30.19. The so called "petitions" [753-754,772 and 781-786] we find were not initiated by Dr Shakher. We have heard evidence from Dr Javaid Mahmood and from Michelle Maddocks about how the documents were brought into being. The evidence we have heard was clear, Dr Shakher had not asked for the documents to be produced and at the time they were produced neither Dr Mahmood or Ms Maddoks were aware that the claimant was involved.

8.30.20. We have heard no evidence to suggest that Dr. Shakher breached confidentiality. The Claimant himself accepts that within the hospital environment there is a "*lot of chatter*" and the Claimant himself confirmed that he discussed details of his claim against Dr. Shakher with Dr. Kamarl [W/S para 169].

8.30.21. Having considered the evidence and made our findings of fact, we find that the reason why Dr. Shakher in January initially asked for character references and then in March 2016 references expressing the views to whether he discriminated on the grounds of race is that he sought references about himself and his positive attributes in a way that was wholly consistent with previous practice in answer to investigations and in particular potentially career ending investigations under the MHPS policy. The references make no adverse or negative comment about the Claimant and the majority of the references have been provided without seeking them out from Dr. Shakher. We have heard no evidence whatsoever to

support the Claimant's allegation that Dr. Shakher openly discussed the investigation.

8.30.22. Having identified the reason why Dr. Shakher acted as he did, we find that there was no less favourable treatment of the Claimant because of his race. We refer to a comparator who is described as a hypothetical non-Pakistani Doctor who raises complaints of bullying and harassment against Dr. Shakher. We have seen from the complaints against Dr. Shakher brought by Dr. Reggie John in 2004 that similar references had been provided. We have found that the practice of individuals being provided with references and testimonials from colleagues in support when faced with an MHPS investigation was commonplace. The consequence of the investigation may have been career ending for Dr Shakher and an individual might reasonably seek supportive evidence. We find no evidence to lead us to conclude that the claimants race had any bearing on Dr Shakhers request for testimonials and character references. The fact that the signatories were so numerous and from a wide variety of sources including domestic cleaners, nurses and doctors is a testament to Dr Shakher's standing and reputation within the hospital community.

8.30.23. The Claimant's allegation that Dr. Shakher and the first Respondent the Trust discriminated against him and treated him less favourably because of his race, do not succeed, nor do the allegations that the Respondents harassed the Claimant because of his race as alleged in Allegation 30. The Respondents treatment of the claimant was not detrimental treatment and was not less favourable treatment because of his race.

8.31. **Allegation 31**

8.31.1. The Claimant asserts that he did the following protected acts:

8.31.1.1. Claimant lodged a grievance in March 2015

8.31.1.2. Claimant lodged a grievance in May 2015

8.31.1.3. Claimant raised race discrimination in a meeting on 23 November 2015

8.31.2. Claimant instigated ACAS early conciliation on 22 December 2015

8.31.3. Claimant lodged a claim with the Employment Tribunal on 3 March 2016

8.31.4. The Claimant **suffered the following detriments** by virtue of the aforementioned protected acts:

8.31.4.1. The Second Respondent made counter allegations against the Claimant

8.31.4.2. The Second respondent initiated petitions amongst colleagues

8.31.4.3. The Second respondent said “the Pakistani’s are ganging up on me” (POC 1302081/2016 paras 34 & 35)

8.31.5. The First respondent responds:

8.31.5.1. It is not accepted that the March 2015 grievance was a protected act.

8.31.5.2. It is not accepted that the April 2015 grievance was a protected act.

8.31.5.3. It is not accepted that the Claimant raised race discrimination in a meeting on 23 November 2015.

8.31.5.4. It is denied instigating ACAS Early Conciliation proceedings amounts to a protected act.

8.31.6. It is accepted that the first ET claim was a protected act.

8.31.7. All detriments are denied by the First respondent.

8.31.8. It is denied that the Second Respondent’s counter allegations were produced as a result of a protected act. It is understood the Second Respondent had no knowledge of any protected act until after he submitted his complaint about the Claimant (and others) on 15 February 2016, this date being prior to the first ET claim was lodged which was not served on him and of which he had no knowledge until 18 March 2016.

8.31.9. It is denied that any “petitions” were circulated, although character references were sought by the Second Respondent. The First Respondent denies that there was any impropriety in this or in any of its actions. Race discrimination and/or harassment is denied.

8.31.10. It is denied the Second Respondent made the comments at para 34 & 35. The first respondent argues that the allegation has not been sufficiently particularised as to when these comments were made and to whom.

8.31.11. Dr. Shakher , the second respondent responds that with regard to Protected Acts:

8.31.11.1. It is denied that acts listed at 1-3 in this allegation constitute protected acts under s27(2) of the Equality Act 2010: the Claimant did not raise any allegation of race discrimination.

8.31.11.2. It is not accepted that the ACAS Early Conciliation (“EC”) or the lodging the EC forms can constitute a protected act, on the basis that EC is a privileged conciliation process.

8.31.11.3. It is accepted that the bringing of the Original Claim constitutes a protected act but it is denied that the Claimant suffered any detriment by the Second Respondent. The Claimant has not fully particularised which alleged protected acts led to the alleged detriments.

8.31.12. For the reasons that the Tribunal have explained at 6.7 above we find that the claimant did a protected Act which was made to the First Respondent on 23 November 2015. The second respondent had no knowledge of any protected act until he was served with the claimant’s first complaint to the Employment Tribunal on 18 March 2016.

8.31.13. The second respondent argues that in respect of the detriments allegation:

8.31.13.1. The counter allegations are not a detriment. The Second Respondent had raised the issues through his BMA rep prior to setting out the counter-allegations. At all times, the Second

Respondent held a genuine and honest belief in the accuracy and fairness of the issues that he was raising [Second Respondent's ET3(2), paragraph 22.1.1]

8.31.13.2. Petitions: the Claimant's use of the word "petitions" is misleading. The Second Respondent received character references and a letter of support, many of which were voluntary provided and in any event were intended by the Second Respondent as no more than a genuine attempt to support his response to the MHPS investigation. [Second Respondent's ET3(2), paragraph 22.1.2].

8.31.14. The Second Respondent's alleged comment: the Second Respondent denies making this comment. It is not alleged by the Claimant that it was made to the Claimant or in the Claimant's hearing and in any event therefore the context in which any alleged comments were made cannot be explored.[Second Respondent's ET3(2), paragraph 22.2].

8.31.15. "Because of" a protected act: It is denied that any detriment was as a result of the Claimant doing a protected act: the Claimant has not particularised which detriment was the result of which act. The Second Respondent was not aware that the Claimant was bringing any race discrimination claim until he received the Original Claim on 18 March 2016 and did not see the ACAS early conciliation forms or the statement referred to at paragraph 34.3 of the ET1.

Evidence and Findings

8.31.16. We have analysed the claimant's assertion that he did a protected act above and we have determined that the claimant did a Protected Act, as defined by s27(2)(d) of the Equality Act on 23 November 2015 and that act was known to have been done by the first respondent but was not known to the second respondent. We

do not rehearse again here the reasons why we made that finding however for the avoidance of doubt, although the claimant we found did not articulate that he had had been discriminated against because of race the reference was clear that it was based on protected characteristics. The claimant subsequently in his meeting with Dr Rose in the first MHPS investigation meeting on 25 January 2016 referred him to:

"I feel I have no option but to raise my concerns which I have had for sometime now as to why I have been subject to such a long and pernicious campaign by several individuals in such a coordinated manner. I would therefore bring to your attention that it is my belief that in part at least there is an ethnic aspect to this complaint. I am of British Pakistani heritage and a Muslim." [S20]

Both respondents were aware that the claimant had done a Protected Act when they were served with the claimant's first complaint to the Employment Tribunal, this was not brought to Dr Shakhers attention until on 18 March 2016. We find that Dr Shakher was not aware of the claimant's assertion that he had done a protected act in November 2015 and that he was not made aware by Dr Rose that the claimant had asserted at the meeting on 25 January 2016 that the protected act specified was in respect of the protected characteristic was race.

8.31.17. We have considered the relevant evidence from all of the witnesses who have appeared before us. We have made our findings of fact in respect of when the claimant made protected acts at paragraph 6.7 above in relation to our analysis of the generic victimisation complaints, we turn now to consider in turn if either or both of the respondent victimised the claimant following their knowledge of the protected act having been done.

8.31.18. It is alleged that the detriment was that the Second Respondent made counter allegations against the Claimant. We have made extensive finding in relation to this alleged detriment in our findings in

response to Allegation 29. We do not repeat here the detail of the findings of fact which we have already made which related to the conduct of Doctors Shakher, Raghuraman and Mukherjee. The allegation of detriment is made against only Dr Shakher and the claimant had clarified that he was referring to the approaches Dr Shakher had made on 6 January 2016 and 15 January 2016 to seek a response from junior doctors that Dr Rahim had "tried to scare them". In the event our findings of fact in respect of the enquiry of Junior Doctors are contained in the findings in respect of Allegation 26 above.

8.31.19. To the extent that Dr Rahim means to extend the nature of the counter allegations against him, which are said to be acts of victimisation, we consider whether the grievance raised by Dr Shakher against the claimant and two other doctors was an act of victimisation. Our findings of fact in relation to Allegation 27 above deal with the complaint that in February - March 2016, shortly before his return to work, the claimant had been presented with a list of complaints listed in Dr Shakher's document dated February 2016 [606-610]. Our detailed findings and conclusions in respect of the allegation lead us to conclude that not only was Dr Shakher unaware of the Protected Act that had been done by the claimant we find on 23 November but that the complaints that he raised were not, as the claimant asserted, wholly unfounded. We have found that the decision of the First Respondent to investigate the Shakher complaints within the MHPS investigation was for a reason unconnected with the claimant's race or the fact that he had made a Proteced Act.

8.31.20. We are mindful that the claimant during his interview with Dr Rose on 25 January 2016 in answer to Dr Rose's question whether Dr Rahim had any other concerns [Q8 p1026] stated:

" I believe that the behaviour towards me has been in part at least related to the fact that I am Pakistani".

Dr Rose has given evidence that when he subsequently interviewed Dr Shakher on 11 and 24 February 2016 [1049 – 1057] he did not ask Dr Shakher any questions to address Dr Rahim's belief that his behavior related to the claimant's race or was reacially motivated. We find that Dr Shakher the second respondent was not made aware of any protected act, until he was served with the claimant's tribunal complaint on 18 March 2016.

8.31.21. The allegation that the Second respondent initiated petitions amongst colleagues is a detriment is the matter complained of in Allegation 30 above. To the extent that Dr Shakher sought to obtain references or testimonials from work colleagues prior to 18 March 2016 they predate any knowledge by him of the claimant having done a protected act and cannot therefore be detriments because of the protected act.

8.31.22. To the extent that Dr Shakher, after receipt of the first claim form alleging that he was guilty of discrimination because of race, asked if colleagues would provide references expressing a view whether he discriminated on grounds of race, we have found that such requests did not refer to the claimant as being the claimant in a tribunal complaint against Dr Shakher and in those circumstances we do not find that the claimant suffered any detriment at the hand of the Second respondent. We accept the account given by the second respondent that when he was informed by the first respondent that he was a named respondent in the tribunal complaint and that his employers had declined to support him, he was distraught. Dr Shakher as a result asked people if they were able to give him a reference that he was not a racist. The second respondent's account has been corroborated by the evidence of Prof. Barnett and of Dr Suresh. In the event all of the character references that were provided for Dr Shakher were positive expressions of support for Dr Shakher and make no mention of the claimant at all. We observe also

that the claimant seems to us to have accepted that it was not inappropriate to obtain letters of support/ references etc but that he considered that the volume of them was excessive and the claimant said that there was a 'confidentiality issue' to be considered. As we have referred above there was no breach of confidentiality and, faced with the MHPS investigation, it was a reasonable and honest response and not an excessive reaction that Dr Shakher had.

8.31.23. The claimant has asserted [w/s173] that *"the Trust's inaction, failing to prevent his canvassing was due to my allegations of discrimination also".* We have neither seen nor heard any evidence to support such a complaint and we find that the Trust were under no duty to prevent an employee, in the face of an MHPS investigation of the kind that Dr Shakher was subject, from gathering supportive information and testimonials.

8.31.24. The third detriment is alleged to be that the Second respondent said, "*the Pakistani's are ganging up on me*" (POC 1302081/2016 paras 34 & 35). Other than the claimant's bare assertion we have heard nor seen any evidence to support the claim. The claimant confirms that the comment he attributes to Dr Shakher was not one witnessed by him but founded on a comment allegedly made by Dr Shakher to Dr Kamal. We have been referred to the failure of Dr Rose in the MHPS investigation to interview Dr Kamal, and we have considered in some detail the claimants account of this allegation to Dr Rose in his interview on 25 January 2016 [S17-54] at S45. Dr Rose has given his account in response to cross examination that in light of the claimant's lack of particularity of the allegation he did not consider it necessary to interview Dr Kamal. We have been referred to email correspondence between Ms Hargreaves, the solicitor acting for the first respondent and Dr Ali Kamal [748a-b] in July 2017 seeking clarification from him on the allegation made by the claimant that Dr Kamal had told the claimant of Dr Shakhers alleged comments. Dr Kamal wrote:

"I cannot recall any "derogatory" comments made by Dr Shakher against Pakistani's. I am proud of my Pakistani heritage and would not take kindly to any obvious or perceived insult towards the country or its people.

With regards to the Peshwar school massacre which is still is deeply upsetting to me, I do remember that Dr Shakher asked me if I knew someone directly affected by the tragedy. I appreciate the concern he expressed on the occasion.

I do not remember the comment "the Pakistanis are ganging up on me".

8.31.25. We are mindful too that the claimant was not the only consultant within the department, there were also Doctors Karamat, Kamal and Altaf a trainee who Dr Shakher helped gain her consultancy. In addition to the clear written response by Dr Kamal [748(a-b)] and the lack of particulars raised by the claimant we recall Dr Shakher's response when it was put to him that he was prejudiced against Pakistanis. Dr Shakher referred to the number of Pakinstani patients that he sees, that 50% of junior doctors are Pakistani and he has assisted in their career progression and appraisals. In particular Dr Shakher had assisted Dr Ashfar Tahir, one of the signatories [782] who was a young Pakistani doctor who had lost her husband and he had sat with her and helped her to get her a job at Solihull and he remained in touch with her. The evidence to which we have been referred leads us to draw an inference and find that it is most unlikely that Dr Shakher had a prejudice against Pakistani people or more particularly Pakistani doctors or consultants.

8.31.26. In light of the evidence or lack of it and the lack of detail of even the claimant's hearsay account, we do not find that Dr Shakher made the comment that the claimant alleges was made by him to Dr Kamal and that the claimant was not caused to suffer a detriment because of it as alleged.

8.31.27. In relation to the claimant's allegation that Dr Shakher victimised him because of his having done a protected act we find that the detriments to which the claimant refers are in fact steps taken by Dr Shakher the second respondent which in respect of the first and second alleged detriments were taken in a reasonable and honest step to protect his position as a defendant to allegations that were the subject of an MHPS investigation. To the extent that the claimant alleged that the Dr Shakher was bullying and harassing him we find that the second respondent reacted in a manner, that even the claimant acknowledges he was want to do, by defending his position.

8.31.28. To the extent after he was served with the tribunal complaint on 18 March 2016 the second respondent sought to gather information we find it was an appropriate and reasonable and honest step to take to preserve his position in the pending discrimination proceedings. The steps taken by Dr Shakher were reasonable and honest in order to protect himself in litigation and did not cause the claimant to suffer a detriment because he had done a protected act.

8.31.29. The Claimant's allegation that the Claimant suffered the detriments refered to in Allegation 31 by virtue of the relevant protected acts does not succeed.

8.32. **Allegation 32**

8.32.1. The Claimant did the following protected acts:

8.32.1.1. Claimant lodged a grievance in March 2015

8.32.1.2. Claimant lodged a grievance in April 2015

8.32.1.3. Claimant raised race discrimination in a meeting on 23 November 2015

8.32.1.4. Claimant instigated ACAS early conciliation on 22 December 2015

8.32.1.5. Claimant lodged a claim with the Employment Tribunal on 3 March 2016

8.32.2. The Claimant alleges that in the period March 2015 to March 2016 he suffered the following detriments by virtue of the aforementioned protected acts. This victimisation complaint is against only the First respondent that they:

8.32.2.1. Used the MHPS process to minimise and water down the impact of Pavitt findings;

8.32.2.2. Water down the Pavitt findings;

8.32.2.3. Incorporated the second respondent's allegations within the MHPS investigation;

8.32.2.4. Failed to take any or any appropriate steps to prevent the second respondent from circulating petitions;

8.32.2.5. Failed to engage in or take protective measures;

8.32.2.6. Conducted the MHPS process in a closed and non-transparent manner;

8.32.2.7. Left the Claimant himself to request a meeting to discuss the report;

8.32.2.8. Failed to adequately investigate C's complaints of race discrimination;

8.32.2.9. Failed to inform C of the outcome of the allegations in a timely manner;

8.32.2.10. Failed to take any appropriate action in respect of Pavitt findings in a timely manner or at all;

8.32.2.11. Extensive delay in the MHPS process and outcome.

(POC 1302081/2016 paras 34 & 36)

8.32.3. The First respondent answers that:

8.32.3.1. It is not accepted that the March 2015 grievance was a protected act.

8.32.3.2. It is not accepted that the April 2015 grievance was a protected act.

8.32.3.3. It is not accepted that the Claimant raised race discrimination in a meeting on 23 November 2015.

8.32.3.4. It is denied instigating Acas Early Conciliation proceedings amounts to a protected act.

8.32.3.5. It is accepted that the first ET claim was a protected act.

8.32.4. All detriments are denied:

8.32.4.1. The First Respondent asserts that they did not use the MHPS investigation to minimize, water down or dilute the findings of the fact finding / Pavitt report. In the event that there are material differences between the findings of the Pavitt report and the MHPS report, it is submitted that these differences are unrelated to any protected act.

8.32.4.2. The decision to incorporate the Second Respondent's allegations against the Claimant was not because of any protected act: it was a sensible way of addressing all the complaints which were clearly related in nature.

8.32.4.3. It is denied that any "petitions" were circulated, although character references were sought by the Second Respondent. The First Respondent denies that there was any impropriety in this or in any of its actions.

8.32.4.4. The First Respondent did act on the fact finding report, by commissioning an MHPS investigation into the behaviour of the Second Respondent. The Claimant commenced a period of sickness absence from 9 October 2015, and on his return to work adjustments were made so that his contact with the Second Respondent and Dr.s Mukherjee and Raghuraman was restricted. Any defects in this (which are not admitted) was not because of a protected act.

8.32.4.5. It is denied that the MHPS investigation was closed or lacked transparency. Appropriate information about the investigation has been shared with the Claimant. Any defects in the investigation (which are not admitted) were not because of a protected act.

8.32.4.6. It is denied that the Claimant was forced to request a meeting with the MHPS investigators in June 2016. A meeting was offered and has taken place. Any defects in the MHPS process (which are not admitted) were not because of a protected act.

8.32.4.7. It is denied that the First Respondent has failed to investigate the issues of alleged race discrimination, as raised by the Claimant. The Claimant was given every opportunity to present evidence to the investigators, and the investigators reached the conclusion that there was no racial motive behind any of the actions of the Second Respondent or the other doctors the Claimant complained of based on the evidence. Any defects in the MHPS process or outcome (which are not admitted) are not because of a protected act.

8.32.4.8. The Claimant has been informed of the outcomes to the MHPS investigation. Any defects in the MHPS process or outcome (which are not admitted) are not because of a protected act.

8.32.4.9. The First Respondent has taken action under its policies to address the outcomes of the fact finding and MHPS investigation.

8.32.4.10. It is denied that the MHPS process or outcome has been delayed, whether extensively or at all. The investigation was complex and involved historic allegations involving numerous

individuals who all had to be interviewed. Any defects in the MHPS process or outcome (which are not admitted) are not because of a protected act.

8.32.5. Evidence and Findings

8.32.6. We do not repeat here the rational we have given previously in respect of the finding we have made that the claimant did a protected act on 23 November 2015 of which the First Respondent had notice. The First respondent was made aware that the protected characteristic to which he referred was race at the first meeting between the claimant and Dr Rose in his MHPS investigation that was held on 25 January 2016 [S17 at S20]. We make our findings of fact on the allegation that, as a result of the protected act(s), he was caused to suffer detriments made by the Second respondent Dr Shakher based on the evidence that we have heard.

8.32.7. In considering the complaint of victimisation, we remind ourselves that the Tribunal has found that the Claimant first did a Protected Act in 23 November 2015. The Claimant asserts that detriments have occurred in the period March 2015 to March 2016 and we remind ourselves that for an act of victimisation to be done it is necessary for a protected act to have occurred. The Findings of Fact we make of necessity focus upon the events after the Protected Act was done and the Findings of Fact that we make in respect of events that pre-date that Act are limited to the relevant issues. We have made in our earlier findings, general comments about the operation of the first Respondent's Hospital Trust and steps that they were taking to improve their performance and management of it. We have heard the extensive evidence given by Mr Steyn who is the Trust's Divisional Director of Surgery and Gastroenteritis, having held that post since April 2016 when the Trust reorganised its medical leadership. Before April 2016 Mr Steyn was the Associate Medical Director for the Trust's Solihull Hospital and who, in September 2015 was temporarily

covering the position of Clinical Medical Director for Solihull Hospital and consequently had line management responsibilities over the entire Diabetes function.

8.32.8. Mr Steyn, with disarming honesty, has provided the Tribunal with an objective insight into the functional operation of the Trust in the period during which the Claimant says that the first Respondent subjected him to unlawful victimisation. The Trust was in a period of special measures and subject to an imposed Improvement Officer. Mr Steyn described the operation of the Trust as being in "chaos". The Trust were missing critical targets and were in the process of undergoing a merger with University Hospital of Birmingham. As the Trust was required to report to a number of Regulatory bodies and was under pressure to deliver, the operation of the Trust was such that it was of crucial importance that targets were met at "almost whatever cost". The Trust was a failing Trust and the culture at the time was one of a demoralised and despondent staff who, in response to surveys, confirmed the demoralisation and despondency of the staff. Mr Steyn describes that because of a lack of resources and a lack of ability to cope, the Trust had a "victim mentality". Mr Steyn explained that whilst the Pavitt Investigation was in progress, in September 2015 Mr Steyn was of the view that the Pavitt Investigation and its failure to reach conclusions was out of control and that at that time it had been identified that if the matter was to go to potential discipline of any medical staff, such discipline would have to be undertaken via a MHPS Investigation for all consultant medical staff who were considered potentially to be culpable. Mr Steyn described that whilst the Pavitt Report was delayed, he was not in a position to intervene as the management of the reporting process was within the hand of Medical Director Dr. Catto and the Human Resource Advisors. In context, Mr Steyn observed that the Trust was subject

to scrutiny in news and media reports, including the now well-publicised Patterson Enquiry that had been undertaken by a QC and as a result, the management of the Trust in particular and Human Resources were concerned to ensure that all investigations were treated with the utmost confidentiality and there was a reluctance to provide parties with reports. On reflection Mr Steyn was of the view that the Respondent Trust ought to have been more transparent and clear in the processes that they undertook and why. His view was that in limiting what individuals saw, by way of reports, the Respondent Trust caused more damage than they would have done had they been open and not redacted reports and circulation. We find that the explanation for the way in which and why the first respondent managed the process as they did was credible and moreover we found that the process was not employed in reaction to the claimant having done a protected act.

8.32.9. Mr Steyn's understanding of the outcome of the Patterson Enquiry which had been undertaken by an independent QC, inter alia was that it had led the Trust to be at pains not to breach confidentiality of anyone and as a result, had not exposed the reputation of Mr Patterson. Since the conclusion of that report the evidence given by Mr Steyn is that the Trust has had a significant change in senior management of the Chief Executive, Deputy Chief Executive and Medical Director and they are aligning more closely with University Hospital Birmingham trying to create fairer processes. We accept that objective account of the operation and political environment within the first respondent Trust.

8.32.10. The first Respondent acknowledges that it did not at all times follow its processes and procedures correctly. Regrettable though those flaws were, the first Respondent denies that they give rise to and sustain a claim of victimisation, such omissions were the product of "chaos" as described by Mr Steyn and flaws and cracks

in the handling of the Claimant's complaints lead to the breadth of the investigation and its complexity. The first Respondent acknowledges, with the benefit of hindsight, that the Marion Pavitt investigation, which was allowed to continue under the Dignity at Work Policy was an enquiry that was not complaint with the MHPS policy to be able to determine any disciplinary investigation or action to be taken in respect of any medical doctor or staff.

8.32.11. The Claimant's complaint of victimisation is as he describes in his Witness Statement [para 142] to be that

> *"as soon as I was alleging race and intended to bring a claim, the Trust appeared to want to ignore this and avoid resolving it."*

8.32.12. The Claimant had been sent a copy of the so-called Pavitt Report on the 12 November 2015, that Report [929-947] included within it recommendations [942-947]. The Claimant at the time was signed unfit for work and in his witness statement [para 134] the Claimant identifies that at that point he was:

> *"reaching the conclusion that my race was the reason for the treatment of me, was a difficult realisation for me to admit to myself, and one I did not make easily or lightly."*

As we have confirmed in our Findings of Fact earlier, despite confirming to the tribunal that his conclusion, reached by the 12 November 2015, was that race was the reason for the Respondent's treatment of him, the Claimant did not refer to the fact in the meeting at which he was accompanied by his Trade Union Representative on the 23 November 2015. The claimant did not refer to race being the protected characteristic in respect of which he claimed he had been treated in breach of the Equality Act.

8.32.13. We have referred in our earlier Findings of Fact to the shortcomings of the Findings of a number of aspects of the Pavitt Enquiry and lack of objective foundation and integrity of that investigation process. Notwithstanding the shortcomings, the Pavitt recommendations concluded that, having found that the Claimant had been subject to bullying and harassment by Dr. Shakher and Dr. Raghuraman, further action should be considered under the appropriate Trust policy. The Pavitt recommendation acknowledged that further action required that the MHPS procedure had to be engaged as confirmed by Dr. Steyn. In his evidence the appropriate respondent Trust Policy was that of an MHPS Investigation. We consider that from an early date, the Claimant's first and second grievances might more properly have been investigated sooner under the more appropriate MHPS procedures as was subsequently adopted in relation to Dr Shakher's complaints about the claimant and others in his 2016 grievance.

8.32.14. It is evident that even before receipt of the Pavitt Report, the first Respondent had identified Dr. Shakher as being a Doctor in difficulty and at the meeting on the 23 November 2015, it was agreed with the Claimant and his Representative that an MHPS investigation ought to be undertaken in accordance with the Trust policy and at that meeting, Clive Ryder confirmed that:

"The potential consequences for individuals here are such that it needs a more formal detailed investigation having identified the seriousness of the outcome of the Pavitt Report, Clive Ryder confirmed that they would make recommendations upon which the Medical Director would make the ultimate decision and having identified the need for an MHPS Investigation, the Claimant's Trade Union Representative subsequently referred to the Claimant asserting that the bullying and harassment had

a discrimination aspect to it based upon protected characteristics and that it was Dr. Rahim's view that he would like to pursue that through an Employment Tribunal". [S3].

8.32.15. Based upon the Claimant's agreement that an MHPS Investigation and process should be commenced, Clive Ryder had identified that the process would be commenced.

8.32.16. At the meeting on the 23 November 2015, the Claimant's BMA Representative referred to the allegation of harassment as articulated by the Claimant in his October 2015 grievance [580-581] in respect of which no reference was made to race discrimination. The Claimant in his evidence [para 141] has suggested that:

"inexplicably and despite me having raised discrimination as an issue during this meeting, this was not included in the terms of reference" ("TOR")

8.32.17. The claimant was referring to the TOR for the MHPS investigation team [585-587] and [862-863]. The inference which the Claimant seeks to make that the Respondents had disregarded the complaint of discrimination is we find not a reasonable one. Neither the Claimant nor his representative had identified the nature of the discriminatory behavior other than to bullying and harassment, and had not identified that it was because of protected characteristic of race.

8.32.18. The terms of reference were set out ultimately by Mr Steyn to Dr. Arne Rose, the Associate Medical Director who was commissioned to undertake the investigation regarding Dr. Shakher in respect of his inappropriate behaviour which required investigation under the Trust's Maintaining High Professional Standards ("MHPS") policy was specifically identified in the terms of reference [583-584] which, in addition to the matters investigated

by Marion Pavitt, included also the Claimant's further complaint/grievance raised in the email dated the 8 October 2015 from the Claimant to Marion Pavitt and Philip Turner, which the Claimant describes as his third grievance [920-921].

8.32.19. We find that the first Respondent's failure to include the issue of race discrimination within the original terms of reference for the MHPS Investigation was based upon the lack of particularity of a race discrimination claim and the Claimant's own statement through his representative Helen Ratley from the BMA who had indicated that the Pavitt Investigation had not explored the aspect of discrimination and that it was up to the Trust to determine whether they wanted to do that or whether they wanted to leave it to a subsequent claim for it to be determined or otherwise. [S6]. We are conscious that discrimination is less favourable treatment for any reason and is unlawful only if because of a protected characteristic.

8.32.20. We find that the original terms of reference issued for the MHPS Investigation were proportionate in response to the concerns raised by the Pavitt Enquiry and the claimant's third grievance as they were articulated by the claimant at the meeting on 23 November 2015. In light of the fact that serious concerns were raised in the Pavitt investigation, were the Trust to take disciplinary steps against amongst others Dr. Shakher it was necessary to commission an MHPS investigation to found any later disciplinary sanctions. We find that the MHPS process was not used as a devise to minimise or water-down the impact of the Pavitt findings, rather it was to reasonably subject that Pavitt information gathering exercise to more objective scrutiny together with the claimants third grievance to found, if appropriate, the commencement of disciplinary action in respect of Drs. Shakher and Raghuraman as foreseen in the very first of the recommendations in the Pavitt Report [946].

8.32.21. The Claimant in his witness statement [143] suggested that the Trust's attitude towards him changed significantly as soon as he

raised race as a potential motive for the treatment and that they were notified that he intended to lodge proceedings to protect his legal position. The evidence leads us to conclude that although the Claimant via his BMA Representative, had indicated on the 23 November that he believed the bullying harassment was discrimination. He had not identified the protective characteristic to which he referred. We have seen no evidence to suggest that the Respondent's attitude towards the Claimant significantly changed or changed at all after he raised discrimination as a potential motive for the treatment and that it would be necessary to lodge proceedings to protect his legal position.

8.32.22. It was not until Dr. Rose met with the Claimant on the 25 January 2016 [S17-S54] that the Claimant, who was accompanied again by his BMA Representative Helen Ratley, informed Dr. Rose that it was his belief that at least in part there was an ethnic aspect to his complaint [S20]. We have been referred to the detail of transcripts of the meeting recorded by the Claimant and also to the summary notes of the meeting taken by the Respondent [10.22-10.33] included the Claimant's position statement dated 25 January 2016 [10.27-10.32] which had been read by the Claimant at Dr. Rose's interview.

8.32.23. During the course of his interview with Dr. Rose, the Claimant indicated that based upon the Pavitt factfinding Report and not based the MHPS Investigation, he had been advised that there was sufficient for legal action. With regard to Dr. Shakher, the Claimant indicated: -

> *"I do not believe that any type of mediation will be appropriate given that this has failed in the past. Given the long term pernicious campaign that was pursued, his attempts and successes in recruiting others from what appears to be a lack of insight into his actions and consequences, I do not feel I could*

return to a Trust where he is employed. Therefore, I believe that dismissal is the appropriate course of action and the Trust should take the consideration of the GMC referral. So again, it's up to you what you do, but given that I have gone through, that's my view, you may decide differently". [S51].

8.32.24. With regard to Dr. Raghuraman, the Claimant indicated that he wanted the Trust to subject Dr. Raghuraman to full disciplinary procedure and that the Claimant:

"must also be given a guarantee that he will not be allowed to apply for any senior positions within the Trust as I am not convinced he won't use this to pursue me at a later date."

We have had the benefit of reading the transcribed notes of the first interview undertaken by Dr. Rose with the Claimant on the 25 January. Notwithstanding, the discussion went beyond the strict limits of the terms of reference, we have been impressed that Dr. Rose, who was based at Good Hope Hospital within the Trust, undertook a professional and independent investigation. We have found no evidence to support the Claimant's suggestion in his witness statement [143] that his meeting in January with Dr. Rose had been:

"notably different than the meeting in November".

The Claimant conceded in cross examination that the interview was long and comprehensive and that he had had every opportunity to raise the points that he wished.

8.32.25. The Claimant has suggested that he had been asked to withdraw some of his allegations and to provide only his top three. The verbatim transcript reflects the breadth of the discussion during the second interview with Dr. Rose on the 15 April 2016 [S78-S117]. At [107] the meeting in January Dr Rose canvassed the possibility of focusing in respect of the most recent and serious

allegations upon which the claimant relied and the Claimant interpreted Dr. Rose's suggestion to mean that he was requiring the Claimant to pick his top ten. We find that no such limitation was suggested by Dr. Rose, however when put by the Claimant to him, he conceeded that it was his view that focusing on the most important allegations and grading them by their severity, may have assisted the investigation. When the Claimant indicated he considered all of the allegations were relevant Dr. Rose left it to the Claimant to decide whether he wished to focus on less, which may have been more, in terms of supporting his complaints. The Claimant informed Dr. Rose that he did not have a Top 10 of allegations and was seeking to demonstrate a pattern of behaviour. Dr Rose thereafter conducted his investigation into all of the allegations that the claimant raised.

8.32.26. Although the Claimant did not assert at the time of his appointment that Dr. Rose was not appropriate to conduct the investigation, we have heard the claimant assert that Dr. Rose had, during his training, been trained by Dr. Raghuraman and that Dr Rose was not sufficiently independent. We are satisfied however that at the time of the investigation, Dr. Rose who had worked for the Trust as a Junior Doctor in 1999, had worked for them again between 2005 and 2007 as a Senior Registrar and had been appointed a Consultant in Emergency Medicine in 2008 and had become Associate Medical Director of Good Hope Hospital in 2013. He had been identified in December 2015 as a Doctor who had already given notice to leave the Respondent Trust. Indeed Dr. Rose had resigned from his employment with the Trust on notice without immediately having found an alternative appointment to undertake. Dr. Rose had worked with Dr. Raghuraman when he had been a Senior Registrar between 2005 and 2007 but had not been directly subordinate to him and had worked in the intensive care unit for only a three-month period. Although Dr, Raghuraman

held a supervisory capacity at that time he was not Dr. Rose's direct supervisor.

8.32.27. We have found Dr. Rose to be a robust and compelling witness, he has identified those limited areas within his investigation which had not met entirely the standards of an MHPS Investigation however, his investigation was extensive. We accept that he was at no time asked to water down or minimise the findings of the Pavitt and Turner Report and the approach he took was to assess the evidence himself and to reach evidence based conclusions. The MHPS Investigation Report extends over some 52 pages [859-910]. The Report confirmed that the investigation had been undertaken following the Trust's MHPS Policy and also the standards definitions and expected behaviours set out in the Trust's "Dignity at Work Policy". It is evident that the MHPS Investigation had regard to the Pavitt Report [929-947] and also to Dr. Rahim's third grievance of the 9 October 2015.

8.32.28. The MHPS Investigation Report also reflected the fact that during the course of the MHPS Investigation Dr. Shakher had submitted his own counter-allegations and complaints in writing on the 15 February 2016 [606-610] and that although that complaint had not formed part of the initial terms of reference it had been determined by the Case Manager Dr. Steyn and Dr. Rose to investigate those concerns for reasons of fairness and because the overlap in respect of the historical complaints raised by the Claimant against Dr. Shakher. The claimants allegations, subject to the addition of the October allegations were those set out in the Claimant's various grievances and we accept the account given by Dr. Rose that in considering the allegations the investigation also considered whether or not the behaviour of Dr. Raghuraman and Dr. Shakher against the Claimant were acts of unlawful discrimination because of the protected characteristic of his race

was raised by the Claimant for the first time in the meeting on the 25 January 2016.

8.32.29. During the course of the MHPS Investigation, Dr. Rose met with the Claimant twice, Dr. Shakher on three occasions, Miss Pavitt on the 25 January 2016, Dr. Raghuraman on the 9 February, Dr. Okubadejo on the 25 February and Dr. Mukherjee on the 7 March 2016. He met with Dr. Bellary on the 5 February 2016 and again on the 20 April 2016.

8.32.30. We have been referred to the completed MHPS Report, albeit in redacted form. The summary of allegations and findings of fact, opinions and conclusions [866-880] analyses the findings of fact in which, for objective reasons, Dr. Rose concluded that none of Dr. Shakher's counter allegations were upheld and that in respect of the Claimant's complaints against Dr. Shakher, it was found he had, on the balance of probability, made remarks undermining of the Claimant and had attempted to interfere with the Claimant's appointment and work as a medical examiner in October 2014. In respect of the claimant's complaint against Dr. Raghuraman that he had sought to interfere in the Clinical Excellence Awards Application and that Dr. Shakher had in October 2015 used concerns raised by Junior Doctors to bully and undermine Dr. Rahim were not upheld.

8.32.31. We find that based upon all of the evidence that has been considered by us that Dr. Rose conducted a reasonable investigation into the Claimant's allegations and reached conclusions which had reasonable foundation. The investigation was not forensic however there is no requirement for it to be. It is evident from the transcripts of meetings and the account that Dr. Rose has provided to the Tribunal, that he did consider the Claimant's allegation in respect of a ten-year campaign of bullying and had found two allegations of undermining behaviour to have been proven. However he observed in the executive summary, that he had found little evidence of:

> *"a sustained campaign of bullying and harassment specifically against Dr. Rahim, as we have similar frequency and weight of evidence of Dr. Shakher exhibiting the same behaviour against other colleagues. We did not find evidence of a pre-planned systematic campaign lasting over ten years*". [900].

In his summary, proffering opinions on the main run of Doctors in the Trust in the investigation, Dr. Rose has identified that: -

> *"We find that Dr. Shakher's style of written and verbal communication is defensive and antagonistic, particularly when it comes to challenging others or himself being challenged. During our interviews, as well as any evidence provided, it is clear that Dr. Shakher often exhibits an exaggerated and emotive response to challenge or criticism. This often results in further allegations/counter allegations by Dr. Shakher that further inflame the situation".* [899].

8.32.32. Whilst it is plain that the MHPS Investigation undertaken by Dr. Rose was not completed within the timescale originally anticipated by Mr Steyn, we accept the account given by Dr. Rose that its scope required a number of witnesses a number of whom were consultants to be interviewed, often on more than one occasion and that his investigations and interviewing was required to be undertaken at the same time as he was continuing to undertake his substantive role and not insignificant role as Associate Medical Director for Good Hope Hospital.

8.32.33. We found also that Mr Steyn sought to hasten the completion of the investigation which was completed by Dr. Rose, latterly in some haste, without first giving Drs. Shakher, Raghuraman and

Mukherjee an opportunity to give final approval to their final interview notes.

8.32.34. Having considered the detail of Dr. Rose's investigation and his report, and having heard his answer to questions in cross-examination, we conclude that the conclusions reached by Dr. Rose were unaffected by the alleged protected acts or any of them. The MHPS Investigation and Report was conducted independently of the matters raised by the Claimant in his first claim form to the Employment Tribunal. As evidenced in the report and in his evidence to us, we are satisfied that Dr. Rose considered the allegations and the extent to which, if at all, the behaviours of which the Claimant complained, perpetrated by Dr. Raghuraman and Dr. Shakher were because of his race.

8.32.35. Mr John on behalf of the Claimant has suggested that the failure to interview Dr. Kamal was one which suggested that the Claimant's complaint of race discrimination was not investigated as it ought to have been. We found however that based upon the Claimant's own lack of detail about his hearsay account of what Dr. Kamal had said to him, Dr Rose did not consider it necessary to enable him to reach his conclusions. Dr. Rose has accepted in answer to questions in cross-examination that at least interviewing Dr. Kamal may have allowed him to gain a greater understanding of Dr. Shakher's comments about Pakistanis, from which he may have been able to draw an inference. The Tribunal has had the benefit of seeing Dr. Kamal's email correspondence with the Solicitors instructed by the Trust and in light of that evidence, it is evident that no such corroboration of the Claimant's allegation would have been forthcoming. Moreover, we conclude that in the light of the Claimant's account given to Dr. Rose in January 2016 about that hearsay evidence, nothing in fact had been said to the Claimant to support his assertion that Dr. Shakher's behaviour was discriminatory against Pakistani's and a report to Dr. Rahim of

comments that even secondhand could have been described as harassment behaviour that had the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment, Dr. Shakher's alleged comments to a third party were not established.

8.32.36. To the extent that the findings reached by Dr. Rose were different to those findings and conclusions reached by the Pavitt Investigation, we find that Dr. Rose's conclusions were reached his having more objectively tested the evidence than had Miss Pavitt, for the reasons that we have described in our findings of fact in relation to the allegations that pre-date the Claimant's second grievance.

8.32.37. More particularly having regard to the allegation that the conclusions of the MHPS Investigation had watered down the Pavitt findings because the Claimant had raised a complaint of race discrimination in November 2015, race discrimination on the 25 January 2016 and also submitted a complaint to the Employment Tribunal in March 2016, we have heard no evidence to support such a claim. Moreover, we accept the account given that neither Dr. Rose nor Mr Steyn had had sight of and read the Claimant's Employment Tribunal claim at the time that the Report was concluded. Indeed, Mr Steyn is clear that it was his understanding that the MHPS Investigation was a process entirely separate to the Employment Tribunal and was not to be confused with it and that he understood that the commencement of an Employment Tribunal complaint should have no bearing on the MHPS Investigation and we find that it did not.

8.32.38. We turn to consider the complaints that it was an act of victimisation on the part of the first Respondent to incorporate into the MHPS Investigation, the second Respondent's allegations against the Claimant.

8.32.39. For the reasons we have set out in our findings of fact in relation to Allegations 27 and 29. We do not repeat our findings in that regard here, however, we conclude that the decision to incorporate the second Respondent's allegations against the Claimant was not because of any protected act. The second Respondent was not aware of the Claimant having done any protected act, neither in October or in November 2015, nor in January 2016 and the first Respondent's decision to include the investigation of those counter allegations was proportionate, reasonable and sensible and was not an act of victimisation against the Claimant because he had done a protected act.

8.32.40. The Claimant asserts that the first Respondent failed to take any, or any appropriate steps to prevent the second Respondent from circulating petitions. We have made extensive findings of fact in relation to the steps taken by the second Respondent and by others on his account in petitions in reference to allegation 30 and for the reasons we have found in that regard, we conclude that the first Respondent took such steps as were appropriate to ensure that the second Respondent did not make inappropriate contact with members of their staff.

8.32.41. The Claimant alleges that there was an act of victimisation, the Respondent failed to engage in, or take any protective measures. We remind ourselves that the Marion Pavitt Report was concluded in October 2015 by which time the Claimant had been certified unfit for work since the 8 October 2015. During the meeting between the Claimant and the BMA Representative and Mr Clive Ryder on the 23 November 2015 to discuss the Pavitt Report and the Respondent's proposal to conduct an MHPS Investigation, it was confirmed to the Claimant and his Representative that the issue was being taken seriously and would be dealt with under the MHPS Investigation. We find that the Claimant and his BMA Representative agreed with the proposed approach not least we

observe that it was a necessity that that process be undertaken if the sanction that the Claimant sought, that is the dismissal of Dr Shakher, was to be considered and if appropriate implemented [SBS14-15].

8.32.42. We find that the MHPS procedure was the only permitted mechanism by which Doctors can be subject to disciplinary action and indeed disciplining a Doctor, absent of the engagement of the MHPS procedure, would be in breach of the Trust's duties as evidenced by Mr Steyn and as accepted by the Claimant in cross examination. We are reminded too by the first Respondent of the decision in Mezey -v- South West London & George's Mental Health NHS Trust [2010 IRLR512] The case cited as highlighting the granting of an injunction following a Trust's failure to follow the MHPS procedures of investigation to lead to disciplinary proceedings.

8.32.43. Following the initial fact find undertaken by Marion Pavitt, both the second Respondent Dr. Shakher and Dr. Raghuraman were subject to the MHPS Investigation [586-588] and, as had been requested by the Claimant at his meeting with Clive Ryder on the 23 November 2015, no contact was had with him by the second Respondent Dr. Shakher, nor Dr. Raghuraman or Dr. Mukherjee who the Claimant identified as his harassers.

8.32.44. In addition to the Claimant being offered counselling by the first respondent which he declined, Dr. Suresh was appointed by the Respondents to address the Claimant's return to work and he sought to introduce measures to minimise the level of contact between the Claimant and Drs. Shakher, Raghuraman and Mukherjee to take effect upon his return to work. The Claimant had been certified unfit for work from the 9 October 2015 to the 22 March 2016 and Dr. Suresh met with the Claimant on the 27 November 2015 [1203].

8.32.45.Dr. Suresh is an employee of the Respondent Trust as a Consultant Nephrologist since 1997, he was the Clinical Director for renal medicine and since April 2016, has held the post as Divisional Director of Medicines for Specialties, his role involves the managerial responsibility over ten departments operating across the Trust's three sites and he is responsible for the delivery of community services in Solihull. Dr. Suresh is required to ensure that within the division quality, safety, governance is delivered and to align the divisional strategy with the Trust's strategy. He is required to ensure that resources are spent properly and are not overspent beyond the budget of £123,000,000.00 (one hundred and twenty-three million pounds). As Divisional Director, he is responsible for the strategic priorities of individual departments, each of which departments has a clinical lead and an operational manager reporting directly to him. The Diabetes Department falls within Dr. Suresh's responsibilities and its Clinical Director Dr. Bellary reported to Dr. Suresh.

8.32.46.Before April 2016, Dr. Suresh's role was as Associate Medical Director of the Solihull Hospital and the Diabetes Department fell within his remit as diabetes had historically be managed from Solihull, notwithstanding that many of the services are delivered at Heartlands. Since December 2015, following changes in the management structures of the Trust, Dr. Suresh's role changed to a cross-site Divisional Director role. In December 2015, Dr. Suresh had commenced his Divisional Director role and was asked to become involved in the management of the Claimant's sickness absence. Ordinarily, a Doctor's manager would manage the sickness process, however the Claimant had asked for an alternative manager to manage his sickness absence as he felt Dr. Bellary's involvement might complicate his circumstances further.

8.32.47.Dr. Suresh met with the Claimant for the first time on the 27 November 2015 and the terms of his former sickness absence

review were confirmed to the Claimant in Dr. Suresh's letter of the 3 December 2015 [1203-1204]. Dr. Suresh acknowledged that the Claimant's recovery to health, he having been absent from work since the 9 October 2015, was largely dependent upon the resolution of the contributory issues and that the Claimant's anxiety was heightened by attending meetings associated with the processes for the resolution of his issues. Dr. Suresh undertook to do what he could to ensure that the other issues were resolved as quickly as possible and the Claimant confirmed that the same commitment had been given by Clive Ryder.

8.32.48. The Claimant returned to work on the 23 March 2016 and Dr. Suresh met with the Claimant and separately with Dr. Shakher to remind them of the need to work together professionally and that he expected their behaviour would not cause upset to each other. Alison Money, Senior HR Business Partner at Heartlands Hospital wrote to Dr. Shakher on the 23 March 2016 [621A] reminding him that whilst the MHPS Investigation was ongoing, and an Employment Tribunal had been received that referred to Dr. Shakher as a Co-Defendant, but he was required to demonstrate appropriate professional behaviors in his approach to colleagues involved and to ensure the continuation of an excellent patient service. Subsequently, Mr Steyn on the 1 April 2016 wrote to Drs. Mukherjee and Raghuraman [625-626] reminding each of them of their need to demonstrate appropriate professional behaviours in their approach to colleagues involved.

8.32.49. We detail below in response to our findings of fact regarding Allegation 35 that upon the Claimant's return to work, the first Respondent introduced a number of adjustments to the Claimant's working environment, to assist his return to work and provide a supportive work environment . In particular, the first Respondent agreed to the Claimant not undertaking any inpatient ward work at the Heartland's site due to the crossover with general medicine by

removing any jurisdiction of Dr. Shakher or Mukherjee over the Claimant. Dr. Raghuraman had changed role from Associate Medical Director at the site to Divisional Director for emergency care across all three sites and therefore removing him from jurisdictional crossover with the Claimant.

8.32.50. Following the Claimant's return to work, he was not required to undertake inpatient ward work at Heartlands and his on-call duties were moved to Solihull, nearer to home so as to remove any potential for crossover. Acknowledging the Claimant's concern about the proximity of his office to that of Dr. Shakher and following the advice of the Occupational Health & Wellbeing Service, [1222-1224] and we have heard evidence and make detailed findings in respect of reasonable adjustments that were made, in particular that one of the Claimant's concerns was that he would have an office in close proximity to that of Dr. Shakher, as we have detailed below. We have heard evidence and find that upon his return to work, the Claimant did not raise with Dr. Suresh in the return to work meetings, concerns about daily contact with Dr. Shakher and we find that their working duties were sufficiently different that they did not encounter each other to any degree of regularity and that their offices could be accessed from separate ends of the corridor [412]. We conclude that whatever serendipitous encounters in hospital corridors may have occcured, the truth of the matter was that Dr. Shakher and Dr. Rahim did not have cause to encounter each other in the work environment and, having regard to the clinical and operational contribution made by each of the senior employees, it would not have been a reasonable adjustment to relocate Dr. Shakher to another one of the Respondent's sites in light of his substantive roles at Heartlands.

8.32.51. In light of the findings, we find that the Respondents engaged wholly with the investigation of the Claimants complaints within the MHPS Investigation and took steps to prevent repetition of the

alleged bullying and harassing behavior and took appropriate steps to protect the Claimant's health and wellbeing on his return to work.

8.32.52. We turn to the allegation that the Respondent's investigation, commissioned in December 2015 conducted within the MHPS process, was closed and non-transparent in its manner and that that was an act of victimisation because of the protected acts.

8.32.53. We remind ourselves that the MHPS process began with the Claimant's agreement following a meeting that took place on the 23 November 2015. We have referred above to the implementation of the MHPS investigation being proposed before the Claimant did a protected act at all. The Claimant did not at the commencement of the MHPS process allege that it was not conducted openly and the Claimant conceded under cross-examination that Mr Clive Ryder was open and transparent in setting out the reasons why an MHPS investigation was required. To the extent that the Claimant has since complained about the way in which the MHPS process was conducted and that it was an act of victimisation the complaint has been in respect of the delay in the investigation reaching its conclusions and recommendations. During the course of the investigation, the Claimant made no criticism of the appointment of Mr Steyn as the Case Manager nor of Dr. Rose as the Investigator.

8.32.54. In our Findings of Fact that we have set out above, we have concluded that the investigations undertaken by Dr. Rose with the Claimant and the interviews with him on the 25 January 2016 and subsequently in a second interview on the 15 April 2016, Dr Rose gave the Claimant a full opportunity to expand upon all of his complaints which were subsequently the subject of investigation. Moreover, when the Claimant and his representative declined to identify the key themes of his allegations and to consider focusing upon the most recent and crucial, the Claimant indicated that he did wish all of the circumstances of his three grievances with the allegations that they contained, to be investigated. We find that

whilst Dr. Rose understandably did not conduct a forensic investigation into all of the allegations, particularly those that were historic, we have found his investigation to be extensive, proportionate, independent and objective.

8.32.55. In this case, we have found that the Trust, like many other Trusts who appear before an Employment Tribunal, have shown that they have struggled to meet the timetable set out in the framework of the MHPS process which, in extensive investigations, is far from realistic in practice. We have found that when the Case Investigator continues to have clinical and managerial responsibilities and has to integrate the investigation into their working day alongside clinical responsibilities, the timetable that aspires to complete an investigation within a period of four weeks from the appointment and to submit their report to the Case Management within a further five days [paragraph 4.19 page 210] is difficult, if not on occasions impossible to achieve. The breadth and depth of the allegations that the claimant required to be investigated extended the length of time that the investigation took.

8.32.56. Having appointed Dr. Rose as the Case Investigator, a first meeting between him and the Claimant, who at the time was certified unfit for work, was scheduled to take place on the 25 January 2016.

8.32.57. Having met with Clive Ryder on the 23 November 2015 and having had sight of the Pavitt Report and its conclusions and recommendations, the Claimant subsequently received correspondence from Dr. Ryder [576-577] on the 3 December in which he was informed that a formal investigation under the MHPS was to be commenced and he would be contacted directly by Dr. Arne Rose the Associate Medical Director at Good Hope who would be the Case Investigator. The Claimant was offered the opportunity to raise any concerns or request further support of Dr. Ryder, and the Claimant did not do so, nor did his BMA representative.

8.32.58. In contrast to the MHPS investigation during the Pavitt investigation the Second Respondent Dr. Shakher had been interviewed by Marion Pavitt on the 30 September 2015 [967-968] as a witness. Dr. Shakher had not been made aware of the details of the complaints that had been raised against him and was not provided with a copy of the record of the interviews upon which the Pavitt Report was based before the conclusions were reached nor its conclusions, nor recommendations in so far as they referred to him. Dr. Shakher received a letter from Mr Steyn the Case Manager [586-587] dated the 29 December 2015 informing him that following receipt of a report conducted by Marion Pavitt regarding concerns raised by Dr. Rahim that the Report had identified inappropriate behaviour by himself which required investigation under the MHPS procedures.

8.32.59. It is evident to the Tribunal that during the course of the Pavitt investigation, those who were interviewed as "witnesses", including Dr. Shakher and Dr. Raghuraman, were not provided with copies of the notes of the interviews which were given, which as we have identified above, contained within them disputed accounts and decisions were taken upon the Claimant's complaint without prior reference to the witnesses nor approval of the interview records. Based upon a subjective and subsequently disputed account of the interviews, Marion Pavitt made her recommendations. Likewise, valiant though his efforts were to conclude as full and objective investigation as he could, Dr. Rose has conceded in his evidence to this tribunal that not all witnesses, which Dr. Shakher had invited the investigation to interview, had been subject to interview in the investigation namely Professor Barnett and Angela Spencer, Sharon Parkinson, Lisa Shepherd and Grainne Clarke. Likewise the Claimant invited Dr. Rose to interview Dr. Kamal and he had not done so.

8.32.60.We find, despite its shortcomings, that the investigation was reasonable and proportionate and reached objective conclusions in relation to the claimant's complaints.

8.32.61.Mr Steyn has accepted in cross-examination in answer to the Tribunal's questions that the Respondent has not been as clear in their communications regarding the Claimant's grievances and the outcome of them in the MHPS investigation as they may have been. The Respondent had failed to inform the Claimant of the outcome of the investigations into the various allegations and to communicate and report to him what had been upheld and what had not was not communicated to him in a timely manner.

8.32.62.We have referred to the evidence given by Mr Steyn as to the chaotic state of the Respondents trust in 2016 above. We find that to the extent the Respondent's communication with the Claimant was not as prompt nor as open as it might have been it was not a detriment because of the claimant's race or otherwise an act of vicitmisation. We conclude that were the Respondents to have demonstrated such poor communication only to the Claimant, we would have considered that the burden of proof had transferred to the Respondents to establish that the reasons for their conduct had not been one to victimise the Claimant. However, we have, having considered the context of all of the investigations, seeing that the Respondent's communication pathways were not always as clear or efficient as they ought properly to have been, we have referred already to the lack of communication between the Pavitt enquiry and Dr. Shakher and other witnesses to approve their witness statements or to communicate in detail, the outcome of that investigation and we have referred already to the lack of objectivity in a number of the conclusions reached by the Pavitt investigation. Furthermore, under pressure of time and his impending departure from the Trust, it is regrettable that Dr. Rose's investigation report under the MHPS procedures was distributed, on his own

acceptance, without first Dr. Shakher and Dr. Raghuraman having had the opportunity to approve the notes of his investigation interviews with them.

8.32.63. In the circumstances, we conclude that to the extent there was a lack of openness and transparency within the conduct of the MHPS process, we find that the reason for that was a combination of the unrealistic timetable contained within the MHPS procedure, the chaotic state of the Respondent's management of the Trust and lack of resources, capacity and an inability to cope as have been described by Mr Steyn.

8.32.64. The claimant asserts that he was required to request a meeting to discuss the MHPS report and suffered detrimental treatment as a result of having done a protected act. The claimant under cross examination conceded that throughout his communications with Mr Steyn [692-698] he had been clear that he was happy to meet with the claimant and having considered all of the surrounding evidence we are not led to conclude that such an arrangement and expectation that the claimant was invited to ask for a meeting can sensibly be considered to be a detriment because of a protected act. Rather we find that the course of communication between the claimant and Mr Steyn was because of the nature and consequence of Mr Steyn's other commitments.

8.32.65. We have made plain from our findings of fact outlined above that Dr Rose was made aware of the claimant's assertion that he was subject to race discrimination during the MHPS interview 25th of January 2016[SB45-49]. Both Dr Rose and Mark Tipton at that meeting sought to explore and understand the claimant's race discrimination claim and its detail. The claimant conceded in cross-examination that his complaint of race discrimination was explored at that meeting and that he was given a chance to explain why you believe the actions were because of race. As well as providing to the investigation team the email trails, that been brought to our

attention too, he provided to both of the interviews that he had with Dr Rose additional written statements of his position [1027-1033 and 1036-1039].

8.32.66. It is plain from the evidence that has been given by Dr Rose that he had an appreciation of the importance of the race discrimination complaint that the claimant brought and in focusing on the reason why question he looked for signs of overt and covert behaviours of discrimination. In his evidence to the tribunal and contained within his report Dr Rose explained that when Dr Shakher believed he was in the right he had an inability to remain objective and did not always communicate in a polite manner that was sometimes bullying and sometimes not. Dr Rose gave an account that having spoken to other consultants who were on the receiving end of Dr Shakher's behaviour had they found, as did he it was necessary to give Dr Shakher time to calm down.

8.32.67. To the extent that the claimant complains about the behaviour of Dr Raghuraman we have found Dr Rose fully investigated the complaints raised against him by the claimant and Dr Bellary. Dr Raghuraman's persistence in his concerns about the claimant's behaviour demonstrated to Dr Rose a similar pattern of behaviour to that of Dr Shakher.

8.32.68. Dr Rose dealt with the claimant's allegations in so far as they referred to Dr Mukherjee's involvement in discriminatory behaviour in his report [868-870] and in his witness statement [para42-46].

8.32.69. In the event Dr Rose was of the opinion that as clinical director Dr Bellary had a clear objective overview of Dr Shakher's conduct when asked if he had experience of or cause to believe his behaviour was racially discriminatory he replied:

"no I do not think this is the case – I do not think his approach is different to different racial or ethnic groups – it is his overall approach that concerns me." [1042]

8.32.70. Dr Rose in cross-examination accepted that Dr Kamal, who the claimant had identified as someone Dr Shakher had made comments to generically about Pakistani's would have been a useful witnessed interview. At the time of the investigation however Dr Rose, not unsurprisingly took the view that the details the claimant provided that the hearsay evidence that Dr Kamel may have given was not then considered by him at the time to be *"a reasonable line of enquiry".*

8.32.71. Having had the benefit of sight of the notes of the claimant's 2nd MHPS interview on 15 April 2016 having been given on an opportunity to raise any additional matters that he wanted including about issues they had discussed previously the claimant did not do so. Tribunal has had sight of Dr Kamal's subsequent email [748b-a and 758] which does not support the claimant's account of Dr Shaker's alleged racist comments about Pakistanis

8.32.72. We conclude that any shortfall in the breadth and depth of Dr Rose's investigation into the claimant's complaint of race discrimination falls far short of leading us to draw an adverse inference that such inadequacy in the investigation of the race discrimination allegations was because the claimant had one a protected act.

8.32.73. The claimat asserts that the respondent failed to inform him of the outcome of the allegtions in a timely manner. We have made findings of fact in respect of the commumications that Mr Steyn had with the claimant and Mr Steyn has acknowledged the shortcomings of the communication that was had with he claimant about the outcome of his grievances. The claimant was informed of the outcome of the allegations of bullying and harassment that the second respondent Dr Shakher had brought against him. We have however been unable to find that such delay as there was in informing the claimant of the outcome of the MHPS investigation as it related to him was because the claimant had done a protected act.

8.32.74. Claimant asserts that the respondents failed to take appropriate action respect of the Pavitt findings in a timely manner or at all. To the extent that we have found the claimant made a protected act at the meeting on 23 November 2015 no detriment could have been suffered by the claimant before that time that was an act of victimisation. We have made detailed findings that the claimant and his BMA representative agreed that the appropriate next step was to commission an MHPS investigation and that decision was taken not because the claimant had done a protected act nor was it a detriment.

8.32.75. The sanctions which the claimant sought to be imposed upon Drs. Shakher, Raghuraman and Mukherjee were pre-emptive of the conclusions of an MHPS investigation and meanwhile we find that the respondents took such safeguarding steps as were reasonable.

8.32.76. Our findings in respect of the time taken to complete the MHPS investigation have been detailed above and we do not repeat them here.

8.32.77. We conclude that the Claimant was not victimised because of having done a protected act.

8.33. **Allegation 33 – this claim is of failure to make reasonable adjustments and is brought against the First Respondent only**

8.33.1. The PCP as described by the claimant are alleged to be that the First Respondent superseded the outcome of the Pavitt Report by commissioning the MHPS investigation which the claimant agreed to being commissioned in November 2015

8.33.2. The claimant asserts that he was disabled by anxiety/depression from October 2014 and that the respondent was aware of the disability from March 2015. Reasonable adjustments that should have been made by the respondent are:

8.33.2.1. Avoiding placing the Claimant under any duties that Drs Shakher, Raghuraman or Mukharjee had any jurisdiction until

the outcome of the MHPS given that there had been findings in the Pavitt report (the previous formal investigation) of a "long term, pernicious campaign of bullying". (POC 1302081/2016 para 40.1)

8.33.2.2. Move Dr. Shakher to an appropriately distant office (POC 1302081/2016 para 40.2)

8.33.2.3. In the alternative, move the Claimant to an appropriately distant office (POC 1302081/2016 para 40.3)

8.33.2.4. Assist the Claimant to move clinics so that he could work on a different site to Dr. Shakher. (POC 1302081/2016 para 40.4)

Substantial disadvantage

8.33.3. The failure to make reasonable adjustments placed the Claimant at a substantial disadvantage in that his depression and anxiety worsened leading to him being signed off work on 8th October 2015.In reply the first respondent says that:

8.33.3.1. It is denied that there was practice of superseding the outcome of the grievance by commissioning the MHPS investigation. If this practice is found, it is denied that amounts to a PCP and/or that it placed the Claimant at a substantial disadvantage in comparison with a non-disabled comparator. The Claimant references being signed off work due to sickness on 8 October 2015, but this pre-dated the decision to commission an MHPS investigation which was discussed with (and agreed to by) the Claimant at a meeting on 23 November 2016.

8.33.3.2. In relation to the pleaded adjustments (although it is not understood by the respondent how these relate to the claimed PCP which is about the instigation of the MHPS report (or how

these pleaded adjustments would remove any substantial disadvantage caused by that PCP)):

8.33.3.3. The First Respondent did make adjustments so that the Claimant did not undertake any duties where he would come into contact with the Second Respondent, Dr. Raghuraman or Dr. Mukherjee. This included adjustments to his duties and workplace locations. The Claimant's Wednesday afternoon clinic was transferred to Solihull, as well as his on call general medicine commitments. He was not required to undertake any in patient activities.

8.33.3.4. Advice received from Occupational Health, and the Claimant's own submissions, was that the Claimant was satisfied with his office arrangement and could manage incidental contact with the Second Respondent. It is denied that the proximity of the Claimant and Dr. Shakher's offices resulted in any disadvantage to the Claimant: their working duties were sufficiently separate that they did not encounter each other with any degree of regularity and the offices could be accessed from separate ends of the corridor. Space is extremely limited at Heartlands Hospital with many consultants sharing offices. It is denied it would have been a reasonable adjustment to re-locate Dr. Shakher to another of the Respondent's sites.

8.33.3.5. The Claimant's Wednesday afternoon clinic was moved to Solihull, as well as his on call commitments. It was not possible to transfer all of the Claimant's clinics to Solihull. This would have had a disproportionate impact on patients, and one of the consultants at Solihull would have had to transfer to Heartlands, which they did not agree to do. The Claimant and Dr. Shakher did not share clinic lists or work together in clinics

at all. The Claimant was not required to undertake any on call or inpatient work at Heartlands.

8.33.4. Evidence and Findings

8.33.4.1. The allegation is the first that the Claimant brings against the first Respondent only that, because of his disability the Respondents failed to make reasonable adjustments which should have been made and that the Respondents had operated a provision criteria or practice that caused the Claimant to suffer a substantial disadvantage because of his disability. Inherent in the duty to make reasonable adjustments falling upon an employer is the requirement that the employer has knowledge of the employee's disability or had imputed knowledge of that disability or ought to have had.

8.33.4.2. We have set out in detail above the reasons when the Tribunal has determined that the Respondents had or ought to have had knowledge of the Claimant's stress and anxiety amounting to a disability. We have found that, that knowledge became fixed, or ought to have become fixed on 9 August 2016 following service of the second Employment Tribunal complaint on the 4 August 2016 [100-126] and service of the Impact Statement [1164] on the first Respondent on the 9 August 2016. Our findings are clear, that at the time the Claimant asserts that the Respondent operated a PCP it is alleged in superseding the outcome of the Pavitt Report by commissioning the MHPS Investigation, the Respondent did not have, nor ought reasonably to have been expected to have had knowledge of the Claimant's disability.

8.33.4.3. We could of course end our determinations there. However, the Claimant asserts that he was disabled from October 2014 and that from the latest March 2015 the

Respondents had knowledge of his disability. Whilst we disagree, we hope it will resolve the Claimant's understanding of his complaints if we make Findings of Fact in relation to the Respondent's treatment of him in the relevant period referred to in Allegation 33 and the subsequent Allegations all of which touch upon the assertion that he has been discriminated against because of his disability in the Respondents failure to make reasonable adjustments.

8.33.4.4. The Claimant asserts that there was a provision criteria or practice by which the Respondent superseded the outcome of the Pavitt Report by commissioning the MHPS Investigation. The authorities to which we have been referred clearly establish what is required to be present for a practice to be established. Whilst we seek to interpret the legislation as liberally as possible to eliminate discrimination against those who do suffer from disability we are mindful that in the absence of a provision or criteria for circumstances to qualify as a practice, we are reminded by the Authorities that a "practice" has something of an element of repetition about it rather than a single one-off decision.

8.33.4.5. In the Claimant's complaint, no evidence has been put to the Tribunal that there was a practice operated by the Respondents whereby they routinely superseded the outcome of a Grievance Hearing by commissioning an MHPS Investigation. The Claimant considered the behaviour to which he had been subjected by the second Respondent Dr. Shakher and by Dr. Raghuraman and Dr. Mukherjee to be so serious that disciplinary action ought to be taken against them. The circumstances of the Claimant's case were such that the grievance investigation undertaken by Marion Pavitt did not comply with BMA standards to allow disciplinary action to be taken against a Doctor. We have reminded ourselves that the

Claimant considered Dr. Shakher's behaviour to be such that he sought Dr. Shakher's dismissal. We conclude that not only did the Respondents have no notice that the Claimant at that date was a disabled person but moreover the Respondents did not apply a provision criterial practice but took a decision based upon the circumstances that applied to the Claimant's case. We find that the decision was one with which the Claimant himself, at a meeting held on the 25 November 2015 [SB.S1] and his BMA Representative agreed.

8.33.4.6. When the Respondent communicated their proposal with which the Claimant agreed that an MHPS Investigation should be commenced, at the meeting on the 23 November 2015 the Claimant we find had already begun a period of sickness absence that commenced on the 08 October 2015. Following events in respect of which the Claimant issued his third grievance, we find that by the meeting on the 23 November 2015, the Claimant had received the outcome of his grievance complaints in respect of Drs. Shakher, Raghuraman and Mukherjee. The Claimant had received a copy of the Pavitt investigation report under cover of the letter of the 12 November 2015 [558] and the meeting of the 23 November had been arranged to discuss the findings of the report and to determine how the concerns that had been raised could be addressed. Subsequently, the Claimant attending on his GP on the 20 November 2015 informed his GP that the Trust had found in his favour and that:

> *"the Trust found in his favour and have discovered that poor practice by consultants not sure how he's going to respond as the Trust needs to sort out this problem".*

After the meeting at which the Claimant and his BMA Representative agreed to the commencement of an MHPS Investigation, the Claimant met his GP on the 4 December 2015 who noted:

> *"third episode of migraine… only lasted 10 minutes then settled, painted outside of house and bathrooms, been playing football but no running, had meeting at work and Trust taking things further, spoken to BMA and taking Trust to Employment Tribunal, feeling more positive as more in control*" [1158].

8.33.4.7. We observe that the consultation information records provided by the Claimant's GP [1158-1162] do not contain any suggestion that the claimants condition deteriorated whether as a result of the commissioning of the MHPS Investigation or at all. On the 6 January 2016, the Claimant's GP notes:

> *"little change, process slowed right down, BMA suggested not going back to work, med 3, 1 month, harassment at work, started to run more"*

On the 04 February 2016, it noted:

> *"Doctor at hospital harassing him, gone off sick, so feels he can go back in 6 weeks' time pulled his hamstring, med 3, 1-month harassment at work".*

On the 03 March 2016, the history notes:

> *"feeling better, wishes to return to work". "Med 3 to return 14.03.16 amended duties and hours continuous sertraline see one month."*

8.33.4.8. The claimant suggests that the substantial disadvantage was that the Claimant was disabled with anxiety and depression and having his grievance subject to this change, to an MHPS Investigation, would further delay and uncertainly render his condition worse. In considering the

Claimant's allegation in relation to Allegation 33, we have reminded ourselves that the Pavitt Investigation was one arising from the Claimant's grievances that were brought under the Respondent's grievance procedures [245-274]. The grievance procedure does not incorporate consideration of harassment complaints [249] and bullying and harassment is referred to in the dignity at work policy and procedure [275-301]. The Pavitt Investigation [289] was commissioned upon the Claimant's first grievance 25 March 2015 [505 and 912] which was supplemented by a document the Claimant later submitted (which was not identified formally as a grievance amounting to his recollections of a discussion with Dr. Raghuraman on the 23 April 2015 [516-518]) Subsequently a second grievance letter was raised on the 13 May 2015 [918] raising allegations of bullying and harassment. Where a complaint under the Respondent's dignity at work policy in relation to bullying and harassment was upheld, it was to be dealt with under the Trusts disciplinary procedures which, in respect of conduct in disciplinary investigations in relation to Clinicians [209], is to engage the operation of the MHPS policy and at the meeting held between the Claimant with Dr. Clive Ryder [S1-S16] the Claimant agreed to the escalation of his complaints including that contained in his third grievance dated the 8 October 2015 [920].

8.33.4.9. As set out in the facts as we find them to be, the decline in the Claimant's health followed the events of the 7 October 2015 which led to the Claimant's grievance on the 8 October [920] led to a period of extended sickness absence. The deterioration in the Claimant's health that began with his sickness absence on 8 October, predated the decision conveyed to him to convene an MHPS investigation. The claimant and his representative agreed that the Respondent's

proposal to open an MHPS investigation was the appropriate next step to take to enable the Claimant's stated intention, that Dr. Shakher should be subjected to discipline leading potentially to his dismissal to be a possible outcome. We do not find that the decision with which the Claimant agreed, that an MHPS Investigation should be instigated made on the 23 November 2015, caused worsening of the Claimant's depression and/or anxiety.

8.33.4.10. At the Tribunal Hearing, it was agreed on the first day in which evidence was heard, that the decision to commission an MHPS Investigation was communicated to the Claimant and his BMA Representative at the meeting on the 23 November 2015. Subsequently, in cross-examination, the Claimant suggested that the first time he had been told of the decision to consider an MHPS Investigation had been in early October albeit after the 8 October when he had begun his period of sickness absence. We find that the Claimant's evidence in respect of the suggestion he had been told earlier in October that an MHPS Investigation would ensue, is without foundation and we consider it more likely than not that his understanding that Mr Steyn had first expressed a view that an investigation into Dr. Shakher might be considered under the heading "Doctors in Difficulty" became known to the Claimant only on disclosure of documentation in these proceedings.

8.33.4.11. The medical records provided from the Claimant's GP do not suggest the alleged worsening of the Claimant's depression and anxiety on being told on the 23 November 2015 that an MHPS process would be instigated and that would supersede the findings of the Marion Pavitt Report. On the contrary, we have been referred to a document described as the Claimant's log/diary [1151-1153] which is described as being a document he produced and gave to his GP that has

been incorporated into Dr. Love's "Medical Report through Dr. Asad Arahim" dated 01 July 2016 addressed "to whom it may concern". The Claimant's evidence has been that the log was produced to Dr. Love, although evidently after Dr. Love had complied the contemporary consultation information sheets [1158-1162].

8.33.4.12. We conclude that on the 23 November 2015 the Claimant and his BMA Representative both welcomed and agreed to the commissioning of the MHPS process which we conclude was not a practice and that even if it were as such, the Claimant was not caused to suffer a substantial disadvantage because of his race. The claimant had expressed the desire that Dr. Shakher's employment should be terminated and the only way in which that might come to pass would be if an MHPS investigation concluded that a disciplinary hearing which may consider sanctions up to and including dismissal ought to be convened.

8.33.4.13. The Claimant in his Scott Schedule identifies the substantial disadvantage to be *"that his depression and anxiety worsened leading to him being signed off work on the 8 October 2015".* It does not escape our notice that the complaint made by the Claimant identifies the substantial disadvantage being the worsening of his anxiety and depression leading to him being signed off work on the 8 October 2015 which pre-dates the 'provision criteria or practice' to which the Claimant refers, namely the commissioning of the MHPS Investigation and its commissioning with his agreement on the 23 November 2015.

8.33.4.14. Notwithstanding the fact that we have identified that the Respondents did not have knowledge of the Claimant's disability in November 2015 nor did they apply a provision criteria or practice. We find the matter that the Claimant asserts

was the PCP did not place him at a substantial disadvantage as the disadvantage identified pre-dated the operation of any such PCP. Furthermore, the Claimant asserts that a number of reasonable adjustments should have been made that would have avoided the Claimant being placed at a substantial disadvantage that he asserts placed people who are not compared to a person who is not disabled and the Respondent ought to have taken steps as is reasonable to take to avoid the disadvantage. The reasonable adjustments to which the Claimant alludes in relation to Allegation 35 are adjustments that he has suggested ought to have been made in relation to Allegation 35. Allegation 35 identifies eight reasonable adjustments, only the first three of which are referred to in relation to Allegation 33. To avoid making repetitive Findings of Fact we deal with the suggested reasonable adjustments in relation to Allegation 33 in our Findings of Fact as they will apply at Allegation 35 below.

8.33.4.15. In light of the Findings of Fact that we have made, we observe simply that the suggested adjustments appear to relate to the Respondent's decision to await the outcome of the MHPS Investigation before engaging in any protected measures. The reasonable adjustments do not seem directly to refer to the Respondent's decision to commission an MHPS Investigation at all.

8.33.4.16. We conclude that in relation to Allegation 33 the Respondent did not engage in a provision criteria or practice which, because of his disability, caused the Claimant to suffer a substantial disadvantage that did not apply to those who did not suffer with the same disability.

8.33.4.17. Moreover, we have found that the Respondents neither had knowledge of the Claimant's disability at the relevant time, nor did the Claimant suffer a substantial disadvantage. Absent

knowledge of the claimant having disabling impairment the Respondent's duty to make reasonable adjustments was not engaged. The Claimant's allegation of unlawful discrimination does not succeed.

8.34. **Allegation 34**

8.34.1. The allegation is brought only against the First respondent in respect of the duty and failure to make reasonable adjustments.

8.34.2. The PCP is identified as that incorporating counter- allegations made by an individual who already was the subject of adverse findings into a pre- commissioned MHPS investigation.

8.34.3. The claimant asserts that Reasonable adjustments that should have been made were not to subsume Dr. Shakher's counter allegations into the MHPS investigation when there had been no formal process to investigate them prior to this. Instead they should have been investigated in the same manner as the Claimant's original complaints (by way of a Fact Finding investigation) (POC 1302081/2016 para 40.5)

8.34.4. The claimant asserts that he suffered a substantial disadvantage in that two different approaches were taken by the First Respondent when dealing with complaints made by the Claimant and Dr. Shakher. The Claimant asserts that he suffered a disadvantage in that his anxiety and depression worsened.

8.34.5. It is denied by the First Respondent that the incorporation of the Second Respondent's counter complaint into the MHPS investigation placed the Claimant at a substantial disadvantage in comparison with a non-disabled comparator. The Second Respondent's complaints against other individuals were also incorporated into the MHPS investigation and the first respondent maintains that it was a sensible way of ensuring a comprehensive investigation was carried out. Substantial disadvantage is denied.

Evidence and Findings

8.34.6. The allegation relates to the Claimant's assertion that a duty to make reasonable adjustments was engaged in February 2016. The claimant complains that the first Respondent applied a provision criteria or practice of incorporating counter allegations made by Dr. Shakher, the second Respondent, against whom the Pavitt Investigation had made adverse findings. The claimant asserts that as a result of that provision criteria or practice, the Claimant, a disabled person, was placed at a substantial disadvantage in relation to a relevant matter in comparison with a person who is not disabled, such that the Respondent was required to take such steps as were reasonable to have to take to avoid that disadvantage.

8.34.7. The Claimant asserts that the decision taken by the Respondents to include within the MHPS Investigation, an investigation into a number of allegations made by Dr. Shakher against the Claimant and others in February 2016 was a PCP. We have already identified in the Finding of Fact that the Respondent did not have knowledge of the Claimant's disability until August 2016. For that reason alone, the Respondent's duty to make reasonable adjustments is not engaged. We for the same reaons we had set out in respect of Allegation 33 set out or findings of fact in any event.

8.34.8. The Claimant in the submissions made by Mr John on his behalf refers to the substantial disadvantage being suffered by the Claimant being that his anxiety made it difficult to cope with application of the decision to incorporate Dr. Shakher's allegations against the Claimant and others into the MHPS Investigation and that increased his anxiety. We consider first whether there is a provision criterial practice operated by the Respondent that puts a disabled person at a substantial disadvantage. We have made detailed Findings of Fact in relation to the events that led to the inclusion of a number of complaints raised by Dr. Shakher raised in a document dated February 2016 in relation to Allegation 27 and in respect of the

complaints of victimisation detailed at Allegation 31 in relation to detriments, Allegation 31 and 32.

8.34.9. There has been no evidence placed before the Tribunal that there was a practice operated by the Respondents of incorporating counter-allegations into a pre-commissioned MHPS Investigation by the first Respondent. Our findings in respect of the allegations to which we have referred have led us to find that the Respondent made a pragmatic and objective decision in the particular circumstances of this case following the deliberations of Dr. Rose and Mr Steyn that it was proportionate to incorporate Dr. Shakher's complaints that the Claimant described as counter-allegations into the pre-commissioned MHPS Investigation. We conclude that the decision was based upon the individual circumstances of the case and does not amount to a practice.

8.34.10. The substantial disadvantage to which the Claimant refers is that there was a worsening in his anxiety and depression as Mr John describes it at paragraph 13 of his submissions on disability, that the application of the decision to the investigation increased his anxiety. We have referred to the medical report prepared by hius GP Dr. Peter Love on behalf of the Claimant [1154-1156]. The entries in the Report which are a diary/log narrative in particular for the period for February 2016 to June 2016 [1155] even in the Claimant's own subjective analysis of his mood and condition do not assert that the decision to include an investigation into Dr. Shakher's allegations was one which increased the Claimant's anxiety. In his answer to questions in cross-examination the Claimant accepted that the Respondent Trust incorporated Dr. Shakher's counter-allegations in this case as they considered the complaints on a case by case basis.

8.34.11. The Claimant confirmed in answer to Mr Barnett's enquiries that he was informed of the allegations raised by Dr. Shakher against him and others that were to be investigated as part of the extended MHPS Investigation and he acknowledged that the counter-allegations were

upsetting for him as they would be for anyone told of counter-allegations in an MHPS Investigation. The Claimant also expressed surprise that the allegations raised by Dr. Shakher against Dr. Rahim had not been raised by him sooner than they had. We recall that many of Dr. Shakher's concerns in relation to Dr. Rahim were historic concerns much like many of the Claimant's allegations in his first and second grievance against Dr. Shakher.

8.34.12. The Claimant confirmed that having returned to work in March 2016, he had no further absences because of ill-health between the period of March to October 2016 save in respect of annual leave and attending a conference.

8.34.13. Finally, the Claimant asserts that reasonable adjustments that ought to have been made in relation to Allegation 34 would have been not to include Dr. Shakher's counter-allegations against the Claimant and others into the MHPS Investigation when there had been no formal process to investigate them prior to the MHPS Investigation. Instead, the claimant asserts the allegations in Dr Shakher's grievance should have been investigated in the same manner as had the Claimant's original complaints by way of a fact-finding investigation under the grievance procedure and/or the bullying harassment procedure.

8.34.14. For the reasons we have detailed in respect of previous allegations, we find that the decision to incorporate all allegations into the MHPS Investigation to include Dr. Shakher's grievances was not an unreasonable one, that it was pragmatic in all of the circumstances. It was identified in respect of the allegations raised by the Claimant against Dr. Shakher that if proven, the allegations of misconduct and bullying and harassing behaviour would require an MHPS Investigation to found any necessary disciplinary action. Similarly, if proven Dr. Shakher's allegations against the Claimant would require a similar level of investigation because a mere fact-

finding investigation would not satisfy the threshold required to take disciplinary action against a Clinician under the MHPS procedures.

8.34.15. To have commenced a separate fact-finding investigation into Dr. Shakher's allegations against the Claimant and others including Dr. Bellary would have involved the need to appoint another different investigator whose investigations would, to the extent that they related to Dr. Rahim, have duplicated much of the issues and relationships being interrogated by Dr. Rose in the MHPS Investigation. The commencement of a non MHPS compliant investigation would have resulted in additional delay to the counter-allegations being addressed, no doubt to have hung like a sword of Damocles above the Claimant's head and in addition would have caused duplication of interviews, reconsideration of the same evidence and required a further report to be produced. The course of action would not have been a proportionate or reasonable adjustment in the circumstances. The most efficient and pragmatic way to address the counter-allegations was to consider them and to have them considered by the existing case investigator whose understanding was informed by many of the same circumstances.

8.34.16. We conclude that although Dr. Rose and Mr Timpton raised valid concerns as to the increased complexity of incorporating Dr. Shakher's allegations into their investigation, Dr. Rose's investigation became marginally more difficult, the hopeful consistency of the investigation which would involve interviewing many of the same individuals was a proportionate decision to be taken in the circumstances. To have required a separate investigation to be undertaken would we conclude would not have been reasonable.

8.34.17. We consider what the case would be were the respondent to have had relevant knowledge of the claimant being disabled that would then have engaged a duty to make reasonable adjustments before August 2016. We conclude that the incorporation of the counter allegations was not a provision criteria or practice employed by the

first respondent. Moreover, were it to be a PCP we find that it did not place the claimant at a substantial disadvantage in comparison to a non-disabled comparator.

8.34.18. The claimant's allegation of unlawful discrimination does not succeed.

8.35. **Allegation 35**

8.35.1. The claimant identifies the PCP to be the need to wait the outcome of a second investigation before the First Respondent engaging in any protective measures (including interim measures) where there are previous adverse findings of harassment and bullying (by the Pavitt report).

8.35.2. Reasonable adjustments that should have been made by the First Respondent are identified by the Claimant to be:

8.35.2.1. Avoid placing the Claimant under any duties that Drs. Shakher, Raghuraman or Mukharjee had any jurisdiction until the outcome of the MHPS given that there had been findings in the Pavitt report (the previous formal investigation) of a "long term, pernicious campaign of bullying". (PoC 1302081/2016 para 40.1)

8.35.2.2. Move Dr. Shakher to an appropriately distant office (POC 1302081/2016 para 40.2)

8.35.2.3. In the alternative, move the Claimant to an appropriately distant office (PoC 1302081/2016 para 40.3)

8.35.2.4. Assist the Claimant to move clinics so that he could work on a different site to Dr. Shakher. (PoC 1302081/2016 para 40.4)

8.35.2.5. The Claimant made multiple requests for the imposition of reasonable adjustments, these are further particularized at paragraph 19 PoC 1302081/2016.

8.35.2.6. Apply the findings of the Pavitt Report throughout the MHPS and apply interim protective measures which could be

removed if sufficient evidence was uncovered to overturn the findings of the Pavitt Report (PoC 1302081/2016 para 40.6)

8.35.2.7. A stress risk management should have been undertaken for the Claimant (PoC 1302081/2016 para 40.7)

8.35.2.8. Failure to provide an independent mentor for the Claimant (PoC 1302081/2016 para 40.9)

8.35.3. The complaint of failure to make reasonable adjustments is brought only against the First respondent.

8.35.4. The first respondent answers that it is denied that the First Respondent awaited the outcome of the MHPS investigation before engaging in any protective measures. Considerable adjustments were made on the Claimant's return to work from 22 March 2016. If such a PCP is found, it is denied that it placed the Claimant at a substantial disadvantage in comparison with a non-disabled comparator. The respondent asserts that the Claimant has not pleaded what his substantial disadvantage was.

8.35.5. In relation to the pleaded adjustments the First Respondent asserts that:

8.35.5.1. The First Respondent did make adjustments so that the Claimant did not undertake any duties where he would come into contact with the Second Respondent, Dr. Raghuraman or Dr. Mukherjee. This included adjustments to his duties and workplace locations. The Claimant's Wednesday afternoon clinic was transferred to Solihull, as well as his on call general medicine commitments. He was not required to undertake any in patient activities.

8.35.5.2. Advice received from Occupational Health, and the Claimant's own submissions, was that the Claimant was satisfied with his office arrangement and could manage incidental contact with the Second Respondent. It is denied that the proximity of the Claimant and Dr. Shakher's offices

resulted in any disadvantage to the Claimant: their working duties were sufficiently separate that they did not encounter each other with any degree of regularity and the offices could be accessed from separate ends of the corridor. Space is extremely limited at Heartlands Hospital with many consultants sharing offices. It is denied it would have been a reasonable adjustment to re-locate Dr. Shakher to another of the Respondent's sites.

8.35.5.3. The Claimant's Wednesday afternoon clinic was moved to Solihull, as well as his on call commitments. It was not possible to transfer all of the Claimant's clinics to Solihull. This would have had a disproportionate impact on patients, and one of the consultants at Solihull would have had to transfer to Heartlands, which they did not agree to do. The Claimant and Dr. Shakher did not share clinic lists or work together in clinics at all. The Claimant was not required to undertake any on call or inpatient work at Heartlands.

8.35.5.4. In relation to paragraph 19 of the POC, it is submitted the First respondent have responded to these matters above.

8.35.5.5. The First Respondent asserts they acted appropriately and non-discriminately. Various steps were taken to make adjustments for the Claimant, as set out in their Response. It is not understood by the respondent if this is a repetition of the other adjustments pleaded.

8.35.5.6. Dr. Rahim was reviewed by Occupational Health a number of times and was confirmed to be fit to return to work. Extensive discussions took place with him about his return to work arrangements and it is submitted that reasonable adjustments have been made. It is denied that a stress risk assessment in itself amounts to a reasonable adjustment: Tarbuck v Sainsbury Supermarkets Ltd [2006] IRLR 664

8.35.5.7. It is not understood by the respondent how this relates to the PCPs pleaded. The First Respondent does not believe that the Claimant ever requested this adjustment. Dr. Suresh volunteered to be a point of contact for the Claimant in any event to assist with any difficulties he encountered.

Evidence and Findings

8.35.6. The Claimant suggests that the Respondent's awaited the outcome of the second investigation (MHPS) before engaging in any protected measures (including interim measures where there are previous adverse findings of harassment and bullying). In short, it is asserted that in taking a decision in November 2015 to commission an MHPS Investigation the Respondents did not engage in any protective measures before the outcome of the MHPS Investigation. Despite referring to the PCP as being waiting to engage protective measures, in answer to questions in cross-examination, the Claimant seems to conflate the concept of "protective measures" with "sanctions". The Claimant sought the ultimate sanction in respect of Dr. Shakher that he wished that his employment with the Trust should be terminated. It is consistent with his hope of sanction that in explaining his understanding of there being a PCP before engaging in protective measures, was his understanding that: -

"Given there are strict criteria before applying sanctions, I would presume they await the outcome of MHPS rather than relying on preliminary investigations."

8.35.7. Having heard all of the evidence we have found that the first Respondent, though not on notice at the time that the claimant was disabled within the meaning of the Equality Act, to engage the statutory duty to make reasonable adjustments did notheless put in place measures and adjusted his working environment to address the claimant concerns as far as they reasonably were able.

8.35.8. The Scott Schedule does not identify the substantial disadvantage that the claimed PCP is alleged to have caused. In answer to cross-examination, the Claimant asserted that the substantial disadvantage of the Allegation 35 was the same as that he was caused to suffer in respect of Allegation 34, namely an increase in his anxiety and depression which the Claimant says was increased within four weeks of his returning to work in March 2016. The Claimant in the diary/log that he had produced and is incorporated in his GP's report [154-156] confirmed – 3 March 2016 that:

> *"his mental state had improved and his was able to function at a level which would allow a graduated return to work."*

It continued on the 11 April 2016 that:

> *"Dr. Rahim was back at work but was finding that this was becoming stressful. Felt constantly anxious. Sleep pattern had deteriorated and he was double-checking everything at work."*

On the 16 May 2016:

> *"Dr. Rahim reported further weight-loss, continued poor sleep, mood was getting lower. It was suggested he should take some more time off work but it was decided to wait and see."*

The objective contemporary notes recorded on the electronic GP's consultation information sheet confirmed that March 2016:

> *"feeling better, wishes to return to work. Med 3 to return 14.03.16 amended duties and altered hours".*

On the 11 April 2016, it records:

> *"back at work, colleague made accusations vexatiously about him, trust not implemented any changes they proposed"*

and on the 16 May, that:

"still walking on eggshells at work. Nothing changed, has asked to move most of his work to Solihull, this would make a big difference to have time off if gets any lower."

In his closing submissions in relation to disability, Mr John on behalf of a Claimant has suggested that the substantial disadvantage was that the Respondents allowed the three perpetrators (identified as Drs Shakher, Raghuraman and Mukherjee) to have jurisdiction over the Claimant causing him to be subject to further acts of harassment and worsened anxiety.

8.35.9. In December 2015, Dr. Suresh became involved in the management of Dr. Rahim's sickness absence, he had been certified unfit for work since the 9 October 2015 and Dr. Bellary had referred him to Occupational Health who had reviewed Dr. Rahim on the 10 November 2015 [1201-1202]. A meeting was held with Dr. Rahim on the 3 December 2015 and the detail of the discussion was confirmed in a letter [1203-1204], the Claimant was supported by his BMA Representative Helen Rateley during which Dr. Rahim had referred to the ongoing HR investigations in relation to his work-related stress issues of which Dr. Suresh was not fully aware. Dr. Suresh agreed to give information on any ongoing investigations and did what he could to move things along as quickly as possible with a view to supporting the Claimant's return to work when he recovered from illness and that a graduated return to work would be implemented when the time was right. Following that meeting, Dr. Clive Ryder Deputy Medical Director asked Dr. Shakher to focus on supporting Dr. Rahim in the terms of his sickness absence and informed him that a separate process was ongoing in relation to the issues that Mr Rahim had raised about Dr. Shakher. By that time following a meeting on the 23 November 2015, Dr. Rahim had agreed with his BMA representative that an MHPS Investigation would be

commenced following an Occupational Health Review with Dr. Rahim on the 8 December 2015 [1206] Dr. Suresh met the Claimant again on the 21 January 2016 [1210-1212].

8.35.10. At the meeting with Dr. Rahim on the 21 January 2016, as recorded in the follow-up letter 28 January 2016 [1210-1212], the Claimant had identified that he was feeling somewhat better but he was declining counselling provided by the Respondents and had undergone private care counselling and that he hoped to return to work but that a full recovery was needed before he returned. The Claimant had explained that no adjustments had been made to facilitate a return to work. The Claimant also explained that the main perpetrators who were the subject of his complaints continued to work in senior positions in the Trust and no remedial action had been put in place by the Trust despite months passing since the Report was issued in response to his complaint. Dr. Suresh indicated that when the Claimant's health enabled him to consider a return to work, modifications to his clinical commitments would be considered including a graduated return to work if this were prior to the conclusion of the investigation that would restrict the Claimant from undertaking general medicine on call or board cover in the first instance and limiting work to his specialist Endrochrinology Clinics as the Claimant had sought.

8.35.11. Dr. Suresh had identified that the adjustment to his working would ensure that the Claimant did not encounter Doctors Raghuraman or Mukherjee. In answer to cross examination the claimant has confirmed that upon his return to work at the hospital he was not under the supervision, management or control or required to work with the Second respondent Dr. Shaker or Drs Raghuraman or Mukerjee. However, the Claimant was concerned that his office and that of Dr. Shakher were located near to each other in the Diabetes Centre.

8.35.12. In answer to Dr. Suresh's enquiries how the Claimant would feel about incidental contact with Dr. Shakher in corridors, the claimant had confirmed that that would not be a problem but that day-to-day contact would be of concern. We have heard no evidence that day to day contact has taken place. Dr. Suresh offered to be the Claimant's point of contact should there be any element of untoward intervention after he had returned to work and it was agreed that a further sickness review meeting would be held in February. A further meeting was held on the 25 February 2016 and a plan for return to work proposed if the claimant was fit with effect from mid-March [1214]. A graduated return to work would be initially for five weeks and would comprise of: -

- No in-patient work five weeks
- No on-call work for five weeks on any of the three on-call Rotas
- Weeks one to two working Tuesdays Antenatal Clinic, Wednesdays Dendrochronology Clinic, Friday Pretuatory Clinic
- Weeks three and four introducing Thursday afternoon Dendrochronology Clinic.
- Week five full Clinics

8.35.13. It was proposed to have a further review meeting on the 28 April to review progress of the return to work. A letter confirming the terms following the formal sickness review meeting was sent to the Claimant on the 29 February [1215-1216] and indeed the Claimant's fitness certificate was issued in March that confirmed his fitness to return on either phased return on amended duties consistent with the return to work that had been agreed. Having identified that Dr. Rahim would not be working on call alongside either Dr. Shakher, Dr.

Raghuraman or Mukherjee, it was identified his contact would likely to be with junior and medical and nursing teams, it was identified that Dr. Rahim being restricted from on-call work and in patient ward work, would undertake outpatient clinic work only that would eliminate entirely the contact with Dr. Raghuraman and Dr. Mukherjee as they would not be present in the Diabetes Centre which is located in a separate building in the Heartlands site.

8.35.14. Dr. Suresh had identified that the possibility of the Claimant interacting with Dr. Shakher was also extremely limited as they did not share patients or undertake clinics at the same time and Dr. Shakher spent only 1.5 days per week undertaking work in the Diabetes Department.

8.35.15. In terms of the issue of the location of Dr. Shakher's offices, and that of Dr. Rahim, both have separate offices on the first floor of the Diabetes Department [site plan page 412]. The offices are private and not shared. Between the offices of the Claimant and Dr. Shakher there are three offices. We accept the account given by Dr. Suresh that he considered the possibility of relocating Dr. Shakher's office to the main Heartlands site and into General Medicine, however that was not feasible given the limitation on office space at the hospital and within general medicine, Consultants in that Department were already sharing office space with four or five Consultants to an office, one physician already having to use an office far away from the Department. Dr. Suresh spoke to Dr. Bellary and he shared Dr. Suresh's view that likely contact between Dr. Shakher and Dr. Rahim due to their offices being in the same corridor would be limited. A further review of the Claimant's health was undertaken by Occupational Health on the 16 March [1222-1224]. At the return to work meeting held with Dr. Suresh on the 15 March the Claimant read a pre-prepared statement [1218-1221] which Dr. Suresh summarised in his follow up letter [1221A-1221C]. The Claimant had been re-referred to Occupational Health and attended a consultation with the

Occupational Health Physician Dr. Hughes on the 16 March 2016, her Report [1222-1224] contained information about Dr. Rahim's feelings about returning to work including the fact that he remained unhappy to be relocated and felt that the 'other Consultant' who was taken mean Dr. Shakher should be relocated instead. The Report referred to the approximate locations of Dr. Shakher and Dr. Rahim's offices and noted that in the short-term Dr. Rahim felt that he would be able to manage this, but if he were to meet Dr. Shakher on a day to day basis, that would be humiliating and he was concerned about the medium to long-term impact on his health, if that was to continue.

8.35.16. In light of the findings of fact that we have made, we conclude that given the pressure on office accommodation that the suggested adjustment that the claimant makes in his complaint that in the alternative he should be moved to an 'appropriately distant office' was not reasonably practicable for much the same reason that it was not practical nor reasonable to relocate Dr Shakher. Moreover we have heard no evidence to suggest that the claimant asked to be moved to an appropriately distant office. We have considered the steps that Dr. Suresh took to try and ensure that contact between the Claimant and Dr. Shakher was minimal were reasonable proportionate and effective. Dr. Suresh confirmed that he, as well as Dr. Bellary, would be available if the claimant had any concerns about the behaviour of the individuals upon his return and reassured the Claimant that any such concerns would be addressed. A further formal sickness review meeting was held with Dr. Rahim on the 28 April 2016.

8.35.17. We find that the arrangements made by the respondent were such adjustments and accommodations for a senior member of staff as were the most effective that it was reasonable to expect the First respondent to make in the circumstances. Prior to the claimants return to work Dr Suresh made further enquiries of Occupational Health and obtained their guidance which he followed.

8.35.18. The Claimant complains that a reasonable adjustment would have been to have assisted the Claimant to move Clinics so that he could work on a different site to Dr. Shakher.

8.35.19. We find Dr. Suresh, having met with the Claimant and his BMA Representative Helen Ratley on the 22 June 2016 [1227-1228] sought to move Dr. Rahim's working environment during on-call slots to Solihull, rather than to Heartlands. He had identified that there was a Wednesday on-call slot available at Solihull, which the Claimant agreed to look to accommodate by rearranging a family commitment taking his daughter to a ballet lesson late afternoon on Wednesday. Subsequently on the 2 July 2016, Dr. Suresh wrote to the Claimant [1229] to confirm, as the Claimant had requested, that his on-calls on a Wednesday would be undertaken at Solihull rather than at Heartlands In addition in order to accommodate his request to make travelling easier, Dr Suresh had made arrangements for an outpatient room to be available for clinics on Wednesdays, having rescheduled the existing clinic room arrangements for that day.

8.35.20. As well as arranging for the Claimant to undertake his on-call duties in Solihull, we find that following his initial meeting with Dr. Rahim in May, Dr. Suresh had made enquiries as to whether it was possible to move Dr. Rahim's outpatient clinics to Solihull, however he identified that that was difficult to do for a number of reasons. Many of the diabetes patients are seen by the same Consultant and had been for many years and were treated in the location closest to their home. The Claimant himself referred to the fact that he considered it rewarding to be able to provide expert medical care to the local community to Heartlands Hospital from which he had himself originally come. Mr John does not challenge Dr. Suresh's account that it is not ideal for patients to be switched to different Consultants, nor that it was not ideal for them to travel to another location to continue to attend upon their original Consultant. Following Dr. Suresh's enquiries, it was evident that there was not sufficient space

for Clinics to be undertaken in Solihull, a small hospital compared to Heartlands, which had a purpose-built building dealing with diabetes. We find Dr. Suresh considered whether it was practical or reasonable to require two of the Consultants, Dr. Bates and Dr. Karamat, who were based at the Solihull hospital and who ran their clinics in Solihull, to move their patient commitments to Heartlands. Dr. Suresh determined that it was considered that that move would be disruptive and unreasonably so to make those changes to accommodate Dr. Rahim's clinic.

8.35.21. Notwithstanding the difficulties, we find that Dr. Suresh in his email to the Claimant on the 2 July, had arranged for an outpatient room to be made available for him to hold his Wednesday afternoon clinics in Solihull, rather than at Heartlands so that he could then go on to undertake his on-calls on Wednesdays at Solihull. The Claimant at this time had been at work since the 22 March 2016. Having identified to the Claimant in his email of the 2 July that an outpatients room was available for him on Wednesdays to undertake a clinic, Dr. Suresh had an expectation that the Claimant, a hospital Consultant should make contact with Karen Kirby to finalise arrangements for the Solihull Clinic. Dr. Suresh's email to the Claimant concluded "*please get back to myself or Sarah Thomlinson if you have any further queries*". The claimant raised no such further queries.

8.35.22. The Claimant in his witness statement to the Tribunal did not deal with his suggestion that the Respondents failed to make reasonable adjustments in moving his Clinics to Solihull so that he could work at a different site to Dr. Shakher. It was only in answer to questions in his oral evidence, that the Claimant asserted for the first time that he had informed Dr. Suresh *"on numerous occasions*" that the Wednesday Solihull Clinic was not available following the email of the 2 July 2017 [1229]. It is surprising that it was only in his answers to questions in cross-examination, when answering whether

it was unreasonable of Dr. Suresh to expect him to contact Karen Kirby at Solihull to explain what Clinic arrangements he wanted put in place on a Wednesday, that the Claimant suggested for the first time that he had told Dr. Suresh that he had been in touch and that he had been told by Karen Kirby that there were no rooms available in Solihull. He said, "*this happened on numerous occasions*", that is that he contacted *"Dr. Suresh and told him numerous times there were no rooms available".*

8.35.23. Although beyond the chronology of the matters of which the Claimant now complains, we have been referred to a letter Dr. Suresh sent to the Claimant on the 12 October 2016 [1236] in which he wrote to the Claimant identifying the steps that had been taken to support his return to work since March 2016 as being: -

- Graduated return to work – hours reduced for five weeks, on full pay.
- Graduated return to work - clinical duties modified since returning with ongoing review.
- AEC on-call, - not reintroduced since return to work.
- Ward-work – not reintroduced since return to work.
- Consideration in the event of where there are gaps for Clinics and Ward work on other sites.
- Offered to move the outpatient clinic at Solihull instead of Birmingham Heartlands Hospital with clinic room confirmation.
- Change of location of general medicine on-call from Birmingham Heartlands Hospital to Solihull Hospital with Rota arrangements to suit your personal circumstances and holiday arrangements.
- Open-door access to me with agreed arrangements for you to contact me direct if any environmental difficulties arise.
- Regular reviews held with me and the Human Resources Manager".

8.35.24. Dr. Suresh invited the Claimant to indicate what, if any other further adjustments he or his GP felt would reduce his symptoms or what consideration could be given to further adjustments. The Claimant confirmed that the Outpatient Clinic had not in fact moved to Solihull, although the adjustments offered had been implemented.

8.35.25. The conflict of evidence is stark on the issue of the so-called Wednesday Clinic at Solihull. We are conscious that the Claimant throughout the period was represented by his BMA Representative and the Claimant has been seen to be an individual who does not hesitate to reduce his concerns to writing. The absence of any written confirmation of the Claimant's allegedly having spoken to Dr. Suresh on "*numerous occasions*" together with the fact that the account was forthcoming for the first time only under cross-examination, leads us to conclude on balance that we prefer the consistent account given by Dr. Suresh that the Claimant did not make contact with him or Karen Kirby with a view to finalising the arrangements that Dr. Suresh had put in place for the Claimant to undertake a Wednesday Clinic at Solihull. We identify a further corroboration of the account given by Dr. Suresh in his later letter to the Claimant 26 April 2016 [1238-1240] in response to a meeting that had occurred on the 25 October 2016 in which Dr. Suresh wrote: -

> *"Whilst the Wednesday afternoon clinic move had been offered, nothing had happened to action. I apologised as it had been my understanding that things had got to the stage with Karen Kirby that she was waiting for you to indicate when this would start and therefore, I had not done anything further to move this forward. This was not your understanding and therefore the*

result is that the move had not occurred. I explained that, in principle, the agreement is there for you to move your Endrochronology Clinic on Wednesday afternoons to Solihull and I agreed to liaise with Karen over room availability. Since then, I have been able to confirm with Karen that there is availability for you to conduct Wednesday afternoon clinic from Solihull Hospital once you are ready to return to work".

The Respondents and Dr. Suresh's account of the arrangements for the Solihull Clinic have been consistent.

8.35.26. We conclude that the Respondents accommodated the Claimant's request not to share clinic lists with Dr. Shakher and that the Claimant, prior to his return to work in March 2016 chose the clinic times for his return to work. We find that the first Respondent made such adjustments as were reasonable to the Claimant's clinics and duties both in time and location that was reasonable.

8.35.27. The Claimant in regard to this allegation has not identified the substantial disadvantage that he suffered other than in so far as he suggests in his answer to questions in cross-examination that the substantial disadvantage was as identified in respect of Allegation 34 in that his anxiety and depression worsened. We refer to our Findings in that regard and conclude that the claimant did not suffer the substantial disadvantage that he claims or at all.

8.35.28. The Claimant asserts that he made multiple requests for the imposition of reasonable adjustments as particularised at paragraph 19 of the Particulars of Claim at 1302081/2016, the second claim. We have set out above the various adjustments to the Claimant's working conditions that the Respondents made, in an effort to accommodate a return to work for a senior member of staff, notwithstanding that they did not consider that the adjustments were to address the Claimant's condition which was not then identified as

a disability, rather it was to implement a fair employment practice. We find however that the adjustments put in place by the first Respondent were those of a reasonable employer which would have been such reasonable adjustments to the Claimant's working environment, were they required to be made to comply with an Equality Act obligation. To the extent that paragraph 9 of the second Particulars of Claims refers to the conduct of the MHPS Investigation we deal with those matters that arise under Allegation 36.

8.35.29. The Claimant suggests that a stress risk management should have been undertaken for the Claimant [Particulars of Claim paragraph 40.7]. The Claimant was provided with a formal Stress Risk Assessment document which he did not complete until it was reviewed by him with Dr. Bellary in December 2016. In answers to questions in cross-examination the Claimant confirmed that he had frequent dialogue with Dr. Suresh about his health and the issues that were causing him concern prior to his return to work in March 2016 and thereafter on a regular, almost monthly basis. We find that the reviews by Occupational Health together with meetings with Dr. Suresh and the extensive discussions that took place with the Claimant about his return to work and ongoing discussions about working arrangements perceive stresses and adjustments that could be made were all reasonable adjustments. The completion of a form to evidence a reasonable adjustment that had been made is not we consider necessary when the Occupational Health Reviews and the one to one discussions had addressed all matters to take steps to minimise the risk to the Claimant of stress at work.

8.35.30. In his second complaint, Particulars of Claim 1302081/2016 paragraph 40.6 the Claimant asserts that a reasonable adjustment would have been to apply interim protective measures, applying the findings of the Pavitt Report during the currency of the MHPS Investigation, such that any interim protected measures could

subsequently be removed if sufficient evidence was uncovered to overturn the findings of the Pavitt Report. We have made Findings of Fact about the protective measures put into place by Dr. Suresh who identified himself and Dr. Bellary as the immediate point of contact in an effort to reassure the Claimant of his safety upon his return to work.

8.35.31. We remind ourselves that from 9 October 2015 until his return to work on the 18 March 2016, the Claimant was not at work. We have reminded ourselves of the recommendations contained within the Pavitt Report [929-947] at [946-947] which recorded amongst other things that the Claimant

> "*was also offered Counselling by the Investigation Team at the beginning of this process and declined*".

The Claimant had declined subsequent offers of counselling preferring to engage private counselling in late 2015. The general conclusions of the Pavitt Report confirmed:

> *"we found during our discussions that there is general discord in the directorate and a feeling that the good clinical work that is carried out is being undermined by a perception of the directorate as dysfunctional. Whilst this is not necessarily due to issues stemming from the longstanding antagonism between Dr. Rahim and Dr. Shakher, this is undeniably having an influence on the moral of the directorate members".*

The report made recommendations which identified that consideration should be given to the appropriate Trust policy in respect of the evidence found by that investigation in support of a claim of bullying and harassment. We find that the Respondent engaged in that recommendation and, with the Claimants consent, the Respondents initiated the MHPS Investigation as they were required to do, were Dr. Shakher, Dr. Mukherjee and Dr. Raghuraman to have been subject to any disciplinary action.

8.35.32. The report recommended that mediation be attempted between the Claimant and Dr. Shakher and we have made Findings of Fact that course was offered to and declined by the Claimant.

8.35.33. The recommendations within the Pavitt Report in relation to roles and responsibilities and developing leadership and management skills for managers and the process for assessing CEA awards, has we have found have been superseded by the steps separately taken by the Respondent. The claimant acknowledged the steps taken by the respondent as acknowledged by the Claimant in his reference to the fact of the reorganisation in discussion with his GP that the Respondent was more closely aligning itself with the procedures adopted at the Queen Elizabeth University Hospital, Birmingham.

8.35.34. We conclude that the Respondents took all reasonable steps to act upon the recommendations of the Pavitt Enquiry and whilst the MHPS Investigation was undertaken and following the Claimant's return to work in March 2016, we find the Respondent did not fail to make reasonable adjustments as alleged or at all. We find that the Claimant did not suffer substantial disadvantage as a result of the steps that the Respondent took.

8.35.35. Finally, the Claimant identifies that he considers a reasonable adjustment that ought to have been made, would for the First respondent to have been to provide him with an independent mentor and he identifies that a failure to do so amounts to a failure to make a reasonable adjustment [Particulars of Claim 1302081/2016]. The Claimant's witness statement and evidence in chief makes no mention of his having asked Dr. Suresh to appoint an independent mentor. In cross-examination about the assertion that an independent mentor ought to have been appointed as a reasonable adjustment the Claimant suggested for the first time that he had asked Dr. Suresh for a mentor to be appointed verbally and

informally. Though Dr. Suresh had identified himself as the Claimant's main contact and support in respect of matters concerning his stress and anxiety, as acknowledged by the Claimant in cross-examination and as recorded at Dr. Suresh's interview with the Claimant on his return to work meeting on the 15 March 2016 [S63] when the Claimant had voiced concerns that Dr. Bellary the Clinical Director was "*compromised*" because he is part of this kind of complex tangle. Dr. Suresh confirmed:

> *"we understand your anxiety that you might have to see him. You can turn your face and still go and concentrate, but if there are any physical gestures or any emails or any silly comments, just ring me, because I think the thing is that one of the reasons for the return to work is to me that it normally happens that your Line Manager and I understand you want me to undertake this role then".*

8.35.36. The Claimant confirmed that he trusted Dr. Suresh to take action were there any incidences that required to be dealt with and the Claimant acknowledged that the notes of the transcript of the meeting were accurate and that when Dr. Suresh identified that the Respondents were put in place reasonable adjustment and assurances for him to come back to return to work, the Claimant confirmed:

> *"I trust you implicitly and your assurances for me are fine ok"*

and that the Claimant trusted Dr. Suresh to take action if there were any further incidences that needed to be dealt with.

8.35.37. Other than discussion in which the Claimant acknowledges Dr. Suresh agreed to be a point of contact and support to the Claimant we have seen no evidence from the transcripts of meetings or in subsequent correspondence in emails that the Claimant ever asked

Dr. Suresh to appoint a mentor to support him prior to his making the suggestion in his pleaded second complaint.

8.35.38. We find that no oral request was made to Dr. Suresh for the appointment of a mentor and furthermore we conclude that the Respondent put in place such steps to support the Claimant's return to work in March 2016 and subsequently as were later outlined in Dr. Suresh's letter of the 12 October 2016 [1236-1237].

8.35.39. Addressing the PCP to which the Claimant refers in this allegation we find that the Respondent did not wait the outcome of the MHPS Investigation before engaging in any protective measures where there were previous adverse findings of harassment and bullying. On the contrary, the Respondent took steps and met with the Claimant with a view to affecting his return to work in a safe working environment making such adjustments as we have identified above. We find that the PCP, as described by the Claimant was not applied by the Respondents and their reaction to the Claimant's return to work was in response to the Claimant's individual circumstances and does not form part of a PCP. Furthermore, the Claimant did not suffer a substantial disadvantage and the Respondent did not fail to make reasonable adjustments.

8.36. **Allegation 36**

8.36.1. The claimant identifies that the PCP he complains about is:

8.36.1.1. Conducting the MHPS investigation in a closed manner

8.36.1.2. Reasonable adjustments that should have been made are identified by the claimant to have been providing information about the process, findings and outcome in an open and transparent manner (PoC 1302081/2016 para 40.8)

8.36.2. In reply the first respondent answers that it is denied that there was a practice (or criterion or provision) of conducting the MHPS

investigation in a closed manner. If this practice is found, it is denied that it placed the Claimant at a substantial disadvantage in comparison with a non-disabled comparator. The Claimant the respondent says has not pleaded what his substantial disadvantage was.

8.36.3. It is averred that the Claimant has been provided with appropriate information about the MHPS process, findings and outcome.

Evidence and Findings

8.36.4. The Claimant's final allegation, allegation 36, is brought against the first Respondent only and it is alleged that the Respondent's conducted the MHPS Investigation in a closed manner that forms the "provision criteria or practice" which put the Claimant at a substantial disadvantage when compared to a person who is not disabled.

8.36.5. Mr John in his written submissions addressing the disability issues, identified that the substantial disadvantage caused by the *"closed conduct of the MHPS Investigation in a closed manner"* was that the Claimant was more prone to worsening anxiety by such acts. On closer examination, we find that the complaint refers not to the conduct of the investigation on a day-to-day basis by Dr. Rose being managed in a closed manner, rather it refers to the manner in which the outcome was communicated. For the avoidance of doubt, we have found no evidence to support the suggestion that the MHPS Investigation undertaken by Dr. Rose was anything other than an open undertaking and extensive enquiry that was reasonable in all of the circumstances. For the reasons we have detailed above, it is disappointing that the expectation of the time that would be taken to conclude an MHPS Investigation was wholly unrealistic and inadequate to enable an investigation to be undertaken as extensively as that which the Claimant's complaints required.

8.36.6. During May 2016, the MHPS Investigation undertaken by Dr. Rose, was completed and a report prepared [859 -1149]. The Report is extensive and identifies the methodology and deals with each of the allegations in turn. As well as including an overview of the issues and allegations as at 30 April 2016 which were some of the matters being investigated, whether the allegation related to that being brought by Dr. Rahim or by Dr. Shakher, the executive summary and conclusions [900-902] is clear. In summary the investigation concluded that evidence of two significant allegations of Dr. Shakher having conducted undermining behavior was found proven. However, the investigation did not find evidence of a preplanned systematic campaign by Dr. Shakher against Dr. Rahim. In respect of the investigation as to whether or not Dr. Shakher had attempted to block the appointment of Dr. Rahim to the post of Medical Examiner, the allegation was upheld that comments made by Dr. Shakher had amounted to directly undermining the work of Dr. Rahim.

8.36.7. The Claimant's allegations identified in his third grievance, that Dr. Shakher had harassed the Claimant by sending an email on the 7 October 2015 regarding "working practices on the Diabetes Ward" alleging that Junior Doctors felt intimidated and scared, was not upheld. The report concluded that it was demonstrated that Dr. Shakher had been asked by Dr. Bright, in his capacity as Clinical Director for General Medicine, to investigate the matter, which Dr Shakher had done in an appropriate manner.

8.36.8. The MHPS Investigation had investigated Dr. Rahim's concerns that some of the actions or perceived actions against him are racially motivated and found that there was no evidence whatsoever of racial or ethnic discrimination. We have commented above upon the investigation undertaken by Dr. Rose and we do not repeat that analysis here and we find that the MHPS Investigation itself was

conducted in a manner compliant with the MHPS policy, save in respect of the length of time it took in reaching its conclusions. Following the completion of the MHPS Investigation, Mr Steyn reviewed the report and, as Case Manager, he considered the conclusions and he was satisfied that the process had been followed and he determine the next steps to be taken.

8.36.9. Mr Steyn on 7 June 2016 wrote to the three protagonists who were the subject of the investigation, Dr. Rahim the Claimant, Dr. Shakher the second Respondent and Dr. Raghuraman, the letters were separate. The letter sent to the Claimant [689] was short, informing him that the MHPS Investigation was complete and that Mr Steyn was considering the findings in detail, that for confidentiality reasons the full report would not be shared and that appropriate actions would then be taken. Dr. Rahim was informed that Mr Steyn would write to him again advising him of the next steps and that he may be required to attend a Hearing as a witness. Understandably, the Claimant emailed Mr Steyn on the 10 June [692] asking for clarification as to whether or not the outcome meant he had no case to answer in respect of Dr. Shakher's complaints against him and the nature of any Hearings that he may be required to attend. The Claimant on the same date the 10 June contacted Mr Steyn on his mobile whilst Mr Steyn was in Brighton at a conference. Without the benefit of the letter that had been sent on Mr Steyn's behalf on the 7 June to the claimant, the mobile telephone conversation does not appear to have answered the queries raised by Dr. Rahim upon the letter, which Mr Steyn had not seen. We are satisfied that in response to the Claimant's subsequent email after the telephone call [693] Mr Steyn wrote to the Claimant on the 20 June [694] to confirm that there was no case for the Claimant to answer and that should there be a need to proceed to a Disciplinary Hearing, against Dr. Shakher and/or Dr. Raghuraman, Dr. Rahim may be called as a witness. Dr. Rahim

was reminded of the support that was available to him either from Mr Steyn or from Dr. Suresh. In his letter, Mr Steyn invited the Claimant, should he wish, to discuss the findings of the investigation. Mr Steyn met with Dr. Rahim and his BMA Representative Helen Ratley on the 5 August 2016. The meeting was recorded by Dr. Rahim [697-711] and after the meeting, Mr Steyn wrote to the Claimant [718-719].

8.36.10. Our earlier Findings of Fact deal with the Respondent's belief that other than information personal to an individual, there should not be disclosure of matters relating to others. As a result of their beliefs, albeit mistaken, regarding confidentiality the first Respondent was reluctant to disclose an unredacted copy of the MHPS Investigation Report compiled by Dr. Rose to the claimant or any others who were the subject of the investigation. We are satisfied however that within the Respondent's decision in respect of the MHPS Investigation conducted in 2016 in the context of a number of other investigations into the conduct of Consultants within the Trust, the Respondents to the extent, full disclosure of the Report was not made, did not apply a provision criteria or practice. The respondent applied the same misguided view of the confidence to be held of information and its redaction in respect of all of the parties. At Mr Steyn's meeting with the Claimant and his BMA Representative, there was a discussion in relation to the Claimant's health and any reasonable adjustments in support that the Respondents were able to offer in addition to Occupational Health Support.

8.36.11. In contrast to the Claimant, Drs. Shakher and Rahim had been found to have behaved in a way that Mr Steyn considered required further steps to be taken within the operation of the MHPS Investigation, or the MHPS procedures. Because there had been findings made in the report against both Dr. Shakher and Dr. Raghuraman, further action was warranted in relation to each of them and Mr Steyn proposed to meet with them to discuss his

recommendations. Within the Trust's disciplinary policy, Mr Steyn considered that the circumstances may be dealt with under the fast track section to discuss with each of them whether they would be willing to agree a sanction or whether it would be necessary to convene Disciplinary Hearings. Letters were sent to Dr. Shakher and Dr. Raghuraman [690-691] on the 7 June 2016 where they were each invited to attend meetings with Mr Steyn on the 17 June to discuss the findings of the report relating to each of them and to take matters further.

8.36.12. The difference in treatment in the nature of the letters sent to Dr. Shakher and Dr. Raghuraman compared to that sent to the Claimant, Dr. Rahim we find was because adverse findings had been found against each of them and not against Dr Rahim.

8.36.13. A meeting had been held with Dr. Raghuraman to discuss the findings of the investigation report relating to him and Dr. Raghuraman accepted a sanction in that regard. At a meeting with Dr. Shakher on the 8 July 2016 to discuss the MHPS Report, Dr. Shakher, like the claimant was not provided with a full copy of the MHPS Report as it contained information relating to other parties that he should not be privy to. Dr. Shakher challenged a number of the findings in the investigation report and the process to be followed [712-717] and on the 15 August 2016 Mr Steyn wrote to Dr. Shakher as discussed in their meeting on the 8 July [720-722]. Mr Steyn set out that further consideration of Dr. Shakher's behaviour was required under the disciplinary policy and it was proposed that, subject to Dr. Shakher agreeing to the imposition of a six-month warning on his file under the fast-track process, the matter would not proceed to a Disciplinary Hearing. Under the fast-track process, there was an exchange of correspondence seeking clarification. Dr. Shakher was finally provided with a redacted copy of the MHPS Report on the 13 October 2016 [730] to which Dr. Shakher raised a

number of challenges in a document of the 2 November 2016 [731-735]. Eventually, Dr. Shakher accepted a written warning under the fast-track process which was imposed with effect from the 5 December 2016 [740-741].

8.36.14. During the course of answers in clarification to the Tribunal, Mr Steyn confirmed that in retrospect, the outcome of the MHPS Investigation and the decisions taken by him as Case Manager might have been managed differently. We find that the initial letter sent to the Claimant on the 8 July was not as clear as it may have been, however clarification was provided by Mr Steyn on the 10 June and subsequently in his letter to the Claimant that was clear and unequivocal confirming what had already been advised to him that none of Dr. Shakher's allegations against him were upheld.

8.36.15. Whilst the Trust was "overly worried about confidentiality and should have been far more open", we do not find that the Claimant, having to ask for a meeting which he did and was then provided, was caused to suffer a substantial disadvantage in comparison with a non-disabled comparator. The manner in which the MHPS investigation was conducted, its duration and the maner in which its outcome was communicated would, we have no doubt had caused frustration to anyone awaiting the outcome of the investigation and a report at its conclusion whether disabled or not.

8.36.16. We have been provided with no evidence in the medical report to support the proposition that the Claimant has suggested "*more prone to worsening anxiety*" by the conduct of the MHPS Investigation in what was alleged to be a closed manner. [1161-1163]. In his Impact Statement, [1173] the Claimant asserts that he was only informed of the allegations made against him by Dr. Shakher had been dropped by the Trust with a no case to answer. We do not find that confirmation to be anything other than open and not in the least

secretive.

9. Conclusions

9.1. **Jurisdiction**

9.1.1. We find that the fact that the claimant seeks in 2016 to challenge behaviour in tribunal proceedings that he refers to happening as early as 2003 has caused the respondent witnesses to be disadvantaged in their ability to recall the events that passed unchallenged in 2003 and later. We find that the ability for the respondent witnesses to recall the detail of events and encounters that are historic undermines the ability of the respondents to defend many of the complaints and allegations made against them that prevents the evidence being fairly tested.

9.1.2. The claimant presented his first complaint to the Employment Tribunal on 3 March 2016 having made a reference to ACAS in the Early Concilliation process on 22 December 2015, Early Concilliation closed on 5 February 2016 and his complaint was presented on 3 March 2016. We conclude that all of the events pre-dating 23 September 2015 are allegations which took place more than three months prior to the presentation of the first claim. We find that the events that took place prior to 23 September 2015 were matters which did not amount to conduct extending over a period to be treated as having taken place at the end of the period. In the event we have found that the day of the alleged event or the period over which some

of them did extend we concluded that the last such continuing event ended more than three months prior to the presentation of and commencement of the claim. The acts of which the claimant complains, that date back as far as 2003, are all claimed by him to be allegations that found his complaints of discrimination and are not raised merely as background.

9.1.3. The tribunal has considered the detail of each of the allegations that the claimant makes and we have been unable to identify a link between those events that amount to a 'continuing state of affairs' that give rise to an act extending over a period. The chronology of events demonstrates a series of unconnected occasions that are fractured by lengthy periods of time and changing personalities. To the extent that the claimant identifies the second respondent as the main perpetrator of acts of discrimination prior to the incident in relation to junior doctors that led to Dr Shakher sending an email to Philip Bright on 7 October 2015 the only previous allegation against the second respondent was that in relation to Allegation 21 concerning the appointment of the Claimant as a Medical Examiner on 9 October 2014.

9.1.4. The claimant at the meeting on 23 November 2015 to discuss his third grievance at which it was agreed would be investigated under the MHPS procedure was one in which he referred to potential complaints. We turn to consider whether it would be just and equitable in the circumstances of the case to hear all or any of those

matters that are out of time in reliance of Section 123(1)(b) of the Equality Act 2010 and, if so, to what extent.

9.1.5. The claimant asserts that he did not perceive the bullying and harassment to which he was subject for the period from 2003 to be because of the protected characteristic of his race until March 2016 and that it would be just and equitable that time should be extended to his benefit. That assertion is we find contrary to the claim he makes, we find without foundation, that in the meeting of 23 November 2015 he claimed that he was discriminated contrary to the Equality Act by reason of his race. We find that the claimant referred to discrimination because of a protected characteristic in November 2015 however he did not particularise it until he met with Dr Arnie Rose on 25 January 2016. We have no doubt however that the claimant was of the view that he intended to assert that he was subject to harassment although he did not articulate it to be because of his race in November 2015.

9.1.6. In his evidence in chief the claimant in his witness statement is inconsistent, he states [para 8] that when he raised his grievances, the first of which was on 25 March 2015, he suspected that race might be the reason. At para 256 the claimant suggests that when he reached '*the view that race was the reason*' he took advice from his BMA representative Helen Rately in October 2015 and she informed the Trust of his belief that he had been discriminated against.

9.1.7. The claimant has suggested that it was only in October 2015 that he came to a realisation that all of his interactions with the second respondent Dr Shakher that were adverse to him and, in retrospect, to do with his race. We find the claimants assertion that it was only in 2015 that he identified race as the cause of all of the adverse interactions with the respondent to not be inconsistent. The claimant is articulate and intelligent. His continuing professional development has caused him to undergo equal opportunity training and it is a topic which is well published in the hospital environs. The claimant has asserted his contractual entitlements, as he is rightly able to do, and has sought advice from the BMA on his rights including about weekend working and the submission of his grievances in March and May then later in October 2015. We find that the truth of the matter is that the claimant and Dr Shakher did not get on with each other and had not done for a good number of years, there was a personality clash between the two and in the early years of their working relationship Dr Rahim did not value Dr Shakhers standing and his pathway to consultant status. Latterly it is evident that Dr Shakher did not consider that Dr Rahim worked as hard as him and did not embrace the medical redesign within the Trust.

9.1.8. We remind ourselves that, in considering whether the claim was presented within such further period as we consider to be just and equitable to extend time, we are required under Section 123(2)(b) to consider the relative prejudice to each party as a result of granting or

refusing an extension of time and have regard to all the other circumstance in this case. We have had regard to the guidance provided in British Coal Corporation -v- Keeble [1997] IRLR 336 para 8. and the provisions of section 33 of the Limitation Act 1980.

9.1.9. The claimant has accepted that he has since 2015 had the assistance of BMA representation. The claimant accepts that he did not articulate to the respondents his belief that their treatment of him over the period of his employment from 31 July 2003 until November 2015 had been bullying and harassment discrimination because of a protected characteristic. The claimant did not articulate to the First respondent that it was treatment that discriminated against him because of his race until the first interview with Dr Arnie Rose on 25 January 2016 [1022-1026].

9.1.10. We found that the claimant despite his knowledge of time limits which had been alluded to by his BMA representative in the November 2015 meeting has given no reason for the delay in pursuing his complaints in the Employment Tribunal other than that he was pursuing his claims under the Grievance Procedure despite decisions having been taken under that procedure. The claimant suggests [para 254] that it was only after the 8 October 2015 incident that his suspicions of a '*campaign and the joined-up approach taken by the Perpetrators became really apparent .*' That suspicion the claimant asserts [255] *'I do now believe that the likely motive was my Pakistani heritage'.*

9.1.11. We have regard to the extent to which the cogency of evidence is likely to be affected by the delay. The ability of the respondents to defend themselves against the claimant's allegations has, we have found, been severely and adversely restricted. Their recall has been assisted to a limited degree, where they exist, by written records however it has made the best of a bad job. Recall is not as robust as it may have been if recollection was captured and recalled closer to the event. The first respondent's own grievance procedures address the need for contemporary complaint to be made as they require grievances to be raised within 4 weeks of a matter/event complained of taking place. Indeed, the credibility of the claimant's account, as to why he did not bring his complaint sooner than he did asserting unlawful discrimination because of his race, is less credible given that it was not raised at the earliest time when he described the light coming on like a dimmer switch becoming brighter in March 2015. Despite the clear direction of the grievance procedure the claimant did not raise his historic complaints under that procedure at the time they occurred nor even if he is to be believed when Dr Rahim first considered that his insight that he was discriminated against because of his race in early 2015. The behaviour about which he complains was behaviour that might have been raised within the formal grievance procedure even though he did not then fully perceive the behaviour to be unlawful discrimination because of his race.

9.1.12. The first respondent was unable to investigate the allegations of discrimination until the claimant chose to disclose details of complaints of bullying and harassment, though not its racist motivation in March and May 2015, despite the grievance procedures themselves urging that grievances should be raised within 4 weeks of the matter about which a complaint is made. The ability of both respondents to investigate as they would have done if a contemporary complaint was raised has been severely compromised as has been Dr Shaker's ability to defend himself.

9.1.13. We have had regard to the extent to which the parties had cooperated with any request for information. We find that the disclosures that have been made by the respondents have been extensive and in the circumstances of this case we draw no adverse inference from those limited occasions when information has not been supplied and reasons for non-disclosure have been given.

9.1.14. We are concerned that criticism is made of Dr Shakher for not having produced evidence of events that occurred a number of years ago. We note that the first respondent's information technology systems have been updated over the long number of years and, without the foresight shown by the claimant to retain copies of all emails he sent and received at work on him home computer, the respondents have not been able to recover and search historic records.

9.1.15. This is a case in which we find the claimant has not acted promptly at all in asserting that he had a cause of action against the respondents by acting promptly once on his account he knew of facts giving rise to a cause of action. In particular the claimant having suggested in his evidence that he had a dawning realisation that he had been discriminated against in March 2015 which was consolidated in November 2015 when he says that he complained of discrimination because of a protected characteristic of race the claimant did not act promptly. Despite the respondents' Grievance Procedures requiring individuals to present the information in a timely fashion, the claimant did not do so when his employment began in 2003 and he alleges he began to have concerns about Dr Shakher's treatment of him. When the claimant was aware of facts that gave rise to a cause of action, on the claimant's account as early as March 2015, he did not present a complaint. The claimant had obtained appropriate professional advice from the BMA. The claimant did not raise race as an issue in his third grievance and it was only on 23 November 2015 at the meeting to discuss the outcome of the Pavitt Report that he referred to the fact that he was considering going to an Employment Tribunal. Even at the November 2015 meeting the claimant did not refer to the behaviour of which he complained being because of his race. Indeed the claimant had no cause of action against either respondent in the Employment Tribunal unless it was to assert discrimination because of a protected characteristic.

9.1.16. In all of the circumstances, we remind ourselves that whilst the tribunal have discretion to allow a claim to be presented outside the three month time limit if it is considered to be presented within such time as is just and equitable to entertain a claim, this is not one such case. Time limits even in discrimination claims are there for a purpose. We do not consider that it is just and equitable to extend time in this case. The prejudice to the two respondents in allowing out of time allegations to be brought is we find disproportionate. The claimant having referred to incidents occurring during the course of his employment from 2003 which he articulated for the first time in January 2016 as being an acts of unlawful discrimination because of the protected characteristic of his race.

9.1.17. In respect of all of the allegations that have been raised by the claimant in his complaints we find that the tribunal has jurisdiction in respect of time in respect of only those allegations, namely allegations identified 25 -36 in so far as they occurred on and after 23 September 2015. We have made our findings of fact in respect of the events of each of those allegations and we do not repeat those findings here.

9.1.18. We have found that the claimant presented his claims in respect of all matters occurring before 23 September 2015 out of time and it is not just and equitable to extend time to allow those complaints to proceed. However, the observations that we make in respect of the merits of the timely complaints apply as equally to those that we have

considered and in respect of which we have made findings of fact in respect of which we do not have jurisdiction as they are time barred.

9.1.19. Indeed, the findings of fact in respect of the allegations that we find are not timely are circumstances and facts from which we must consider if it is appropriate for us to draw an adverse inference against the respondents or either of them. Were we to have found that those other allegations were circumstances which, despite being out of time, showed that either or both of the respondents had behaved in a way that could lead the tribunal to conclude in the absence of an adequate explanation, that the respondent had treated the claimant in a prohibited way because of a protected characteristic(s) we would have considered if an adverse inference was to be drawn. In effect whilst examining individual incidents and details we have also looked at the wider landscape of the claimant's employment and working relationship with colleagues with a broad perspective. We have been at pains to consider both the wood and the trees.

9.1.20. We have made findings in respect of the reasons why the respondents treated the claimant in the way that they did in respect of each of the alleged discriminatory behaviours. We find that on the balance of probabilities the conduct of the respondents and each of them had nothing to do with the claimant's race and was not unlawful conduct under the provisions of Section 13, 26 or 27 of the Equality Act 2010. We have taken account of the guidelines in relation to the

burden of proof from Wong -v- Igen Ltd [2005] IRLR 258 and the provisions of Section 136 of the Equality Act 2010 and have had regard to the Codes of Practice.

9.2. **Direct discrimination**

9.2.1. In relation to each of the allegations in respect of which direct discrimination is alleged to be the prohibited conduct and in respect of each prohibited characteristic the tribunal is asked to consider:

9.2.1.1. Has the first and/or second respondent treated the claimant less favourably as alleged. If so,

9.2.1.2. Does such treatment amount to a detriment?

9.2.1.3. Has the claimant demonstrated facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondents are committed or is to be treated as having committed an unlawful act of discrimination (Section 36 of the Equality Act 2010 ("EqA");

9.2.1.4. Has the respondent shown on the balance of probabilities that the conduct had nothing to do with the claimant's race; and

9.2.1.5. Accordingly was such conduct unlawful under Section 13 or any other provision of the Equality Act;

9.2.2. In respect of the allegations for which we find we have temporal jurisdiction, we have considered in respect of the allegations of direct discrimination either the named comparator and if an hypothetical comparator it is identified to be an individual in respect of whom there was no material difference between the circumstances relating to each case other than not possessing the claimant's relevant protected characteristic(s). In respect of each of the allegations against each of the relevant respondents, we find that the claimant was treated no differently than the comparator, hypothetical or named

was or would have been, were they of a different race. We find that in respect of each circumstance of which the claimant complains, that every step taken in relation to his circumstances would have been taken against the named comparator or a hypothetical comparator who displayed the same behaviours or made the same grievances. The claimant has not demonstrated facts from which we can conclude that the respondents or either of them has committed any act of unlawful discrimination.

9.2.3. We have considered the respondents treatment of the claimant in comparison with either an actual or hypothetical comparator as we have analysed the individual allegations and do not repeat here our findings. We have in respect of the individual allegations identified the reason why the claimant was treated the way that he was. We have found that the reason why the claimant was treated by either of the respondents in respect of each of the allegations that have been analysed in our findings of fact had nothing to do with the claimant's race.

9.2.4. In the event, having regard to the Barton guidelines, the respondents have provided clear and cogent oral and documentary evidence to explain the reasons for the respondents' acts and/or omissions and we find that they had no connection whatsoever with the claimant's race.

9.2.5. We find that the claimant was not in respect of the allegations of which he complains been subject to unlawful direct discrimination because of his race by either of the relevant respondents or both. The claimant asserts that he views the respondents treatment of him as detrimental, while the claimant may view the respondents on occasion robust treatment of him as detrimental he has not established that it is less favourable than the treatment meet to appropriate comparators named or hypothetical nor that the treatment such that it was because of his race.

9.2.6. Race has been identified by the claimant as the only plausible explanation for the respondents conduct. We have found the claimants view to be predicated in no small part on his mistaken belief that Dr Shakher was of Indian ethnicity. Moreover in our findings of fact in relation to each of the allegations we have identified the reason why the incidents giving rise to the allegations occurred which we found were not because of the claimants race. The complaints of unlawful discrimination because of the protected characteristic of race do not succeed.

9.3. **Harassment**

9.3.1. In relation to each of the allegations in respect of which harassment is alleged to be the prohibited conduct in respect of each prohibited characteristic the tribunal is asked to consider:

9.3.1.1. Did the respondent engage in unwanted conduct relating to the claimant's sex and/or race as alleged in his allegations, which had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him contrary to the provisions of Section 26 of the Equality Act;

9.3.1.2. In determining the above paragraph, given the claimant's perception and the circumstances of the case, was it reasonable for the conduct in question to have that effect?

9.3.2. The claimant asserts that the respondents' behaviour towards him amounts to a continuing act of harassment. We have no doubt that the claimant perceives that he has been subject to behaviour that has the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. The claimant complained about harassment and bullying formally in March and May 2015 and then in his October 2015 grievance. However it was not asserted that the bullying and

harassment was because of a protected characteristic until 23 November 2015 and that was not clairified to be because of his race until 25 January 2016

9.3.3. The claimant has, since March 2015 suggested that the respondents' conduct was unwanted, and that is not in dispute. However, we have heard no evidence to support the claimant's allegation that the respondents and each of their conduct towards him had the "purpose" of creating an intimidating environment for the claimant because of his race. Although the claimant in the email of concern to Prof Barnett 4 September 2008 suggested that he felt "picked upon", he did not articulate directly or indirectly that he considered the behaviour causing that effect related to the relevant protected characteristic, because of race. Similarly in his three grievances raised in March, May and October 2015 he did not articulate directly or indirectly that he considered the behaviour causing that effect related to the relevant protected characteristic, because of race nor did his BMA representative on his behalf.

9.3.4. Key to the question of harassment in this case is whether the conduct "related" to the relevant protected characteristic. We have been presented with no evidential connection between the allegations that the claimant makes and the protected characteristic of race. In any event the respondents have explained the reasons for their behaviour about which the claimant complains and we have found that the reasons are not related to or because of the claimant's race.

9.3.5. Although we find that the unwanted conduct did not relate to a relevant protected characteristic, we have considered also, were that conduct to have been related to the relevant protected characteristic, whether the conduct had been in fact referred to race taking into account:

9.3.5.1. the perception of the claimant,

9.3.5.2. the other circumstances of the case, and

9.3.5.3. whether it reasonable for the conduct to have that effect.

9.3.6. Even were the unwanted conducted to have related to the relevant protected characteristic(s) we conclude that, having regard to the provisions of Section 26(4)(c) of the Equality Act, the perception of the claimant was distorted such that he was unreasonable in perceiving that conduct to have the effect. Whilst harassment is in the eyes of the beholder, we conclude that the claimant's perception of the respondent's conduct, both their acts and omissions towards him in respect of the in time allegations, and indeed all of them, was such that in the circumstances of the case that it was unreasonable for the conduct (or omissions) to have had that effect.

9.4. **Victimisation**

9.4.1. In relation to each allegation that is said to be an act of victimisation the tribunal has considered:

9.4.1.1. What protected act does the claimant seek to rely upon and does that act(s) in fact amount to protected act(s);

9.4.1.2. Was the claimant subject to a detriment, as set out in his allegations because he had done the alleged protected acts or the respondent believed that he had done those acts

9.4.2. The claimant has articulated in his evidence to the tribunal the protected act upon which the claimant seeks to rely in respect of each of his claims of victimisation. He has referred us to the pleadings in the case and asserts that he did a protected act sooner than the tribunal find that he did which we have determined to have been at the meeting on 23 November 2015 in respect of the First Respondent. Despite his assertion to the contrary we have found that neither the claimant nor his BMA representative made reference to the particular protected characteristic in the meeting of 23 November 2015, referring only to his having done a protected act

having raised his grievances. The claimant suggests that in respect of each of the incidents or allegations that he makes that he relies upon the previous complaints of allegations, behaviours and actions as the protected act. We find as a fact that the earliest date on which the claimant did a protected act as defined at Section 27(2)(d) of the Equality Act 2010, was in discussion about the outcome of the Pavitt Report and the proposed commencement of an MHPS investigation held on 23 November 2015.

9.4.3. It is a requirement when identifying an act of victimisation that it is clear in respect of what protected act has been done such that the prohibited conduct to give rise to "proceedings under the Act" has been done. Prior to January 2016 we have found that although the claimant referred generically to "bullying" and "harassment" and "discrimination" he did not either expressly or by inference at anytime refer to that behaviour being because of a particular protected characteristic(s) of any kind. However, we do not agree with the representations made by Ms Barney that the assertion of discrimination because of a specified protected characteristic must be made. We conclude that it is sufficient for the purposes of section 27(2)(d) that an allegation, that a person has contravened the Equality Act is sufficient whether or not expressed in relation to a particular protected characteristic.

9.4.4. In light of the findings of fact that we have made we have not found that any of the events that took place after the protected act was done on 23 November 2015 in respect of the first respondent or any subsequent protected acts led to the respondents or either of them subjecting the claimant to a detriment because he had done a protected act, or because the respondents believed he may have done a protected act.

9.5. **Disability Discrimination – Failure to make Reasonable Adjustments**

9.5.1. It is conceded that the Claimant was a disabled person within the meaning of section 6 and Schedule 1 of the Equality Act 2010 by reason of anxiety and depression at the material times identified at paragraphs 33-36 of the Schedule of Allegations (pages 179OO-179UU). The issue that the tribunal are asked to determine is whether the first respondent has failed in its obligation to make reasonable adjustments. The questions that the Employment Tribual is to determine in that regard is at what point did the First Respondent know or ought reasonably to have known that the Claimant was disabled?

9.5.2. The findings of fact that the tribunal has reached with regard to the first respondent's knowledge of the claimant's disability are detailed at paragraphs 7.6 above. The tribunal has reached the conclusion that from 10 August 2016 the respondent were provided with actual or at least constructive knowledge that the claimant was then a person disabled by the impairment of anxiety and depression and had been at the material times identified in paragraphs 33-36 of the Schedule of Allegations.

9.5.3. In considering the complaint that the respondent failed to make reasonable adjustments contrary to s.20 and s.21 of the Equality Act 2010 we consider;

9.5.3.1. Do the PCP's relied on at paragraphs 33-36 of the Schedule of Allegations (pages 179OO-179UU) amount to PCP's?

9.5.3.2. If so, did the First Respondent apply any such alleged PCP(s)?

9.5.3.3. If so, did the PCP(s) put the Claimant at a substantial disadvantage when compared to a person who is not disabled as alleged at paragraphs 33-36 of the Schedule of Allegations (pages 179OO-179UU)?

9.5.3.4. If so, did the First Respondent fail to take such steps as it was reasonable to have to take to avoid that disadvantage as

set out at paragraphs 33-36 of the Schedule of Allegations (pages 179OO-179UU)?

9.5.4. We do not repeat here the findings of fact that we have made in respect of the allegations 33-36. We have found that the claimant has not established that the respondent applied the PCP's alleged in paragraphs 33-36 and that the claimant did not suffer the substantial disadvantage that he asserts compared to a person who did not have his disability. We have reminded ourselves of the law in particular Schedule 8, Part 3 of the Equality Act 2010 which reminds us that the duty to make reasonable adjustments is not engaged if the employer does not know and could not reasonably be expected to know that the interested disabled person was disabled and the authorities to which our attention has been directed.

9.5.5. Mr John for the claimant understandably maintains that the claimant was disabled by his mental health impairments of anxiety and depression and that that fact was plain to the respondent. Our findings of fact do not agree with his proposition and in those circumstances the duty to make reasonable adjustments is not engaged.

9.5.6. Notwithstanding our determination that at the relevant time the respondent did not have the knowledge that the claimant was disabled, we have, in our findings of fact in respect of the each of the allegations, considered whether there was in operation a provision criterion or practice which placed the claimant at a substantial disadvantage compared to a person without his disabilty. We have not found such substantial disadvantage and do not find that the respondent has failed to make reasonable adjustments in breach of a statutory obligation. On the contrary we have found that the respondent took such steps as were reasonable in the circumstances to avoid the disadvantages of which the claimant complained.

9.6. In reaching our conclusions the judgment of the Tribunal is that:

9.6.1. The Tribunal does not have jurisdiction to entertain the claimant's complaints against the respondents in respect of all allegations insofar as they relate to events before 23 September 2015 which were presented out of time.

9.6.2. The claimant's claims in respect of unlawful discrimination in breach of section 13 and 27 of the Equality Act 2010 because of the protected characteristic of race discrimination against the first and second respondent were not well founded and are hereby dismissed.

9.6.3. The claimant's claims in respect of victimisation contrary to the provisions of section 27 of the Equality Act 2010 against the first and second respondent were not well founded and are hereby dismissed.

9.6.4. The claimant claims against the first respondent that they failed to make reasonable adjustments contrary to the provisions of section 20 and section 21 of the Equality Act 2010 are not well founded and are hearby dismissed.

Employment Judge Dean

21 October 2018

Appendix

Cast List

Witnesses

Name	Job title
Dr. Asad Rahim	Consultant Physician and Endocrinologist at First Respondent
Dr. Jayadave Shakher	Consultant Physician and Endocrinologist at First Respondent, also Clinical Site Lead for General Medicine at Heartlands Hospital and Clinical Director for General Medicine.
Professor Anthony Barnett	Former Clinical Director and Consultant Diabetologist / Endocrinologist at First Respondent (until 2011) Former line manager of Dr. Rahim and Dr. Shakher
Dr. Srikanth Bellary	Clinical Director of Diabetes at Heartlands Hospital (stepped down in June 2017). Remains employed as a Consultant. Line manager of Dr. Rahim and Dr. Shakher
Dr. Govindan Raghuraman	Former Divisional Director of Emergency Care at Heartlands Hospital Consultant Anaesthetist
Dr. Rahul Mukherjee	Consultant in Respiratory Physician and General Medicine. Former Group Clinical Director (between 1 October 2014 and 1 April 2016). Former Clinical Director for General

	Medicine (between 1 April 2016 to 31 March 2017).
Dr. Arne Rose	Former Consultant in Emergency Medicine at and Associate Medical Director for Good Hope Hospital. Associate Medical Director of Acute Care at Burton Hospitals NHS Foundation Trust. MHPS Case Investigator
Mr Richard Steyn	Deputy Medical Director. Formerly Divisional Director for Surgery and Gastroenterology (2016 – 2017). Former Associate Medical Director for Surgery (January 2013 – 2016) Former interim Associate Medical Director for Solihull (between 28 April 2015 and 7 December 2015) MHPS Case Manager
Dr. Philip Bright	Director of Medical Education for the First Respondent and Head of School of Medicine for Health Education West Midlands
Dr. Vijay Suresh	Divisional Director for Medicine Specialties. Managed Dr. Rahim's sickness absence
Farida Chiragdin	Diabetes Asian Link Worker at Heartlands Witness for Dr. Shakher

Michelle Maddocks	Office Manager, Diabetes directorate at Heartlands Witness for Dr. Shakher
Dr. Javaid Mehmood	Medical Registrar at Heartlands Hospital. Witness for Dr. Shakher
Sadaf Ulnasah	Endocrine Nurse Specialist at Derby Hospital Former Staff Nurse and Endocrine Nurse Specialist at Heartlands Hospital Witness for Dr. Shakher

Other individuals

Dr. Aresh Anwar	First Respondent's former Medical Director
Dr. Munir Babar	Former Specialist Trainee.
Helen Barlow	HR Business Partner.
Dr. Andrew Bates	Consultant Diabetologist, based at Solihull hospital
Dr. Andrew Catto	First Respondent's former Medical Director
Dr. Alan Chookang	Involved in Dr. Rahim's allegation about 2003 research poster issue
Dr. Peter Colloby	Lead Medical Examiner with the First Respondent
Professor Matthew Cooke	Consultant Physician.
Dr. Dar	Registrar.

Dr. Indaril Dasgupta	Employee of First Respondent. Dr. Rahim alleges Dr. Dasgupta did not work weekend shifts (allegation dating 2010-2014).
Sangeeta Dhabi	Dr. Rahim's former secretary. Dr. Rahim alleges that Dr. Shakher shouted at her in November 2009.
Dr. Philip Dyer	Consultant Diabetologist. Involved in Dr. Rahim's allegation regarding the on call rota in the summer of 2006.
Tracey Eltham	Bereavement Officer.
Dr. Neil Jenkins	Consultant Physician. Member of scoring panel for Clinical Excellence Awards in 2015.
Dr. Alan Jones	Consultant Physician. Involved in Dr. Rahim's allegation regarding the on call rota in the summer of 2006.
Dr. Ali Kamal	Consultant Diabetologist based at Heartlands Hospital
Dr. Karamat	Consultant Diabetologist, based at Solihull hospital.
Karen Kirby	Senior Diabetes Nurse at Solihull hospital
Freiza Mahmood	Former HR Business Partner
Ian McKivett	Dr. Shakher's BMA representative
Andrew McMenemy	Former Deputy Director of HR
Alison Money	Head of Operational HR

Dr. Kavish Mundil	Junior doctor. Dr. Rahim alleges he was interviewed by Dr. Shakher in October 2015.
Dr. Narayan	GP of a patient treated by Dr. Rahim and Dr. Shakher (this relates to the "iCare letter" allegation)
Dee Narga	Project Manager, Ambulatory Emergency Care
Dr. Adedeji Okubadejo	First Respondent's Revalidation Officer and Consultant in Anaesthesia and Pain Management and Trust's Caldicott Guardian
Marion Pavitt	Interim Operational Manager Conducted fact finding investigation into Dr. Rahim's concerns in 2015
Dr. Habib Rahman	Consultant, also applied for a Clinical Excellence Award in 2015 and was asked to step down from scoring panel
Dr. Umar Raja	Specialist Trainee
Helen Ratley	Dr. Rahim's BMA representative
Ray Reynolds	Former Head of Operational HR
Dr. David Rosser	First Respondent's Medical Director
Clive Ryder	Deputy Medical Director
Dr. Hardeep Singh	Junior doctor, Dr. Rahim alleges he was interviewed by Dr. Shakher in October 2015.
Angela Spencer	Clinic Manager, Diabetes centre at Heartlands Hospital

Leeanne Stokes	HR Business Consultant
Dr. Tehrani	Honorary Consultant Physician in Endocrinology & Diabetes. Clinical Scientist in Diabetic Medicine at University of Birmingham. Attended meeting in London in October 2013 with Dr. Rahim.
Mark Tipton	HR Business Partner Supported Dr. Rose with MHPS investigation
Sarah Tomlinson	HR Consultant
Philip Turner	Interim HR Manager. Supported Marion Pavitt with fact finding report conducted into Dr. Rahim's concerns in 2015.