



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr V Trivedi

v

**(1) Central and North West
London NHS Foundation
Trust
(2) Ms P Patel**

Heard at: London Central

On: 12 – 16 November 2018

Before: Employment Judge Hodgson
Ms C Ihnatowicz
Dr V Weerasinghe

Representation

For the Claimant: in person

For the Respondents: Ms C Murphy, counsel

JUDGMENT

The unanimous judgement of the tribunal is as follows:

(i) the claims against the second respondent, Ms Patel, were withdrawn and dismissed;

(ii) the remaining claims against the respondent trust of direct discrimination and harassment fail and are dismissed.

REASONS

Introduction

- 1.1 By a claim presented to the London Central Employment Tribunal on 16 March 2018 the claimant brought claims of direct discrimination, and harassment.

The Issues

- 2.1 The issues were identified, and a note was given to the parties on day two. The issues to be decided, as given to the parties, are set out below.¹

Direct discrimination - section 13 Equality Act 2010

- 2.2 Did the respondent treat the claimant less favourably than it treats or would treat others?
- 2.3 If so, was such treatment because of a protected characteristic?

Harassment - section 26 Equality Act 2010

- 2.4 Did the respondent engage in unwanted conduct which had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- 2.5 If so, was it related to a relevant protected characteristic?

The allegations of direct discrimination and harassment

- 2.6 The allegations of detriment/harassment relied on are as follows:
- 2.6.1 Allegation 1: on 23 June 2016² by Ms Purvi Patel telephoning the claimant, who had been at a pharmacy department, and stated "You should be back for 14:00 and your break is 45 minutes."
- 2.6.2 Allegation 2: on 18 October 2016 by Ms Purvi Patel in front of Ms Regina Law saying to the claimant (allegedly rudely), "Can you be back from lunch on time? You are late."
- 2.6.3 Allegation 3: on 3 November 2016 by Ms Purvi Patel at 13:23 stating the claimant was required to email her if he went to lunch later than 13:15. (It is not clear how this was communicated.)
- 2.6.4 Allegation 4: on 10 November 2016 at 13:15, by Ms Purvi Patel saying "That's why I do not like Indian fast. They eat lots of food. What is the

¹ We have amended some typographical errors where necessary.

² It was clarified during the hearing that the date should be 22 June 2016.

point of fasting.” Thereafter at 14:02, by Ms Purvi Patel saying to the claimant “Will talk to you later. Now we are only meant to talk work related things.”

- 2.6.5 Allegation 5: on 22 December 2016,³ by Ms Purvi Patel and the respondent’s management, serving an improvement note. The claimant relies on five specific allegations:
- 2.6.5.1 by the note being issued after the claimant had raised concerns about excessive work and harassment and he had alleged harassment and discrimination against Ms Purvi Patel;
 - 2.6.5.2 by the note referring to his time management;
 - 2.6.5.3 by requiring him to spread his annual leave over the year;
 - 2.6.5.4 by alleging he had conducted personal business (it being his case that it had not been raised before formally or informally); and
 - 2.6.5.5 by requiring the claimant to finish work at 17:10 (it being his case that no female staff member was required to finish at the same time).
- 2.6.6 Allegation 6: on 3 April 2017, by Ms Purvi Patel during a managerial supervision meeting, mentioning that the claimant had sent an email at 17:16 and reminding him he should leave the office at 17:10.
- 2.6.7 Allegation 7: on 4 April 2017, by Ms Purvi Patel distributing to every team member except the claimant a Ferrero Rocher chocolate from a box donated by a doctor.
- 2.6.8 Allegation 8: on 13 April 2017, by Ms Purvi Patel, during a health and safety assessment for the claimant’s special chair, stating, “I am Vishal’s line manager and I need to know what is going on.”
- 2.6.9 Allegation 9: on 24 April 2017, at 16:01, by Ms Purvi Patel sending an email to the claimant detailing entries made from electronic notes.
- 2.6.10 Allegation 10: on 28 April 2017, between 10:35 and 10:45, by Ms Purvi Patel calling the claimant and stating, “You did not give ward medications back to the nurses. Can you come to the ward straightaway? I need the keys.” Further on the same day at 15:55, a person (not identified) calling the claimant to find out where he was.
- 2.6.11 Allegation 11: on 2 May 2017 at 13:20, by Ms Purvi Patel saying “That’s why I do not like Indian men, I hate Indian men. Like to sit and demand.”
- 2.6.12 Allegation 12: on 9 May 2017, by Ms Purvi Patel accusing the claimant of leaving medication in a locker and stating, “Why did you leave medication in the locker and keys hanging in the locker door.” Further, on the same day, by Ms Purvi Patel saying, “The person who has problem should mind his business. I have not supplied excess stock or nonstock medication and not to intervene in my work.”

³ The amendment as allowed referred to these events occurring on 12 December 2016. The claimant’s subsequent document alleges the events occurred on 22 December 2016.

- 2.6.13 Allegation 13 on 10 May 2017 at 13:40, by Ms Purvi Patel stating abruptly in front of team members, “If you could do the training in the afternoon, thank you very much.” Further on the same day at 16:47, by Ms Purvi Patel stating, “I am concerned as you struggle to take all your annual leave by the end of the year, will you manage to take 29 + 5 extra days by March 2018?”
- 2.6.14 Allegation 14: on 18 May 2017 at 14:21, by Ms Purvi Patel calling the claimant and asking him to return to Park Royal and by speaking abruptly and in a derogatory manner stating, “I instructed you not to go.” Thereafter on his return ridiculing him by saying, “I told you not to go.”
- 2.6.15 Allegation 15: on 27 November 2017, by the Ms Niina Ezewuzie (senior manager representing CNWL at the grievance outcome meeting) alleging the claimant used trust property for his personal use.
- 2.6.16 Allegation 16: on 22 December 2017 at 13:45, by Ms Purvi Patel alleging the claimant had followed her outside the trust headquarters building at lunch.
- 2.7 A number of the allegations above have more than one aspect. However, the original numbering has been retained to assist the parties and provide ease of reference.
- 2.8 All the allegations are put as claims of direct discrimination and harassment. All allegations rely on the protected characteristic of sex. Allegations 4, 11, and the first part of 13 in addition rely on the protected characteristic of race. Allegation 4, in addition, relies on the protected characteristic of religion.

Evidence

- 3.1 We heard from the claimant, C1.
- 3.2 For the respondent we heard from: Ms Georgina Ell; Ms Purvi Patel; and Ms Niina Ezewuzie
- 3.3 We received a bundle and a chronology.
- 3.4 We received written submissions from the respondent.

Concessions/Applications

- 4.1 On day one of the hearing, we sought to identify the issues. The respondent was asked to provide its detailed response to the claimant’s schedule. The claimant’s schedule of issues was a mixture of allegation, assertion, and fact. We confirmed we would identify the specific

allegations of discrimination and harassment, and let the parties have a succinct list of issues on day two.

- 4.2 We requested that the parties provide their statements, and the updated schedule, as Word documents.
- 4.3 The claimant indicated there was an outstanding application for documents. We confirmed that he should identify any application. If there were no application, but he wished to make an application, he should do so in writing. We confirmed we would set a timetable for the hearing. The claimant was not ready to proceed on day one, and all agreed we would use the remaining part of the day to read the statements and documents, and we would proceed on day two.
- 4.4 On day two we gave the parties our list of issues. No objection was taken at any stage. The claimant did not proceed with any request for documentation. The respondent provided its detailed comments on the claimant's schedule of allegations. We received additional documents as and when produced.
- 4.5 On day two we set a timetable. The respondent would complete cross-examination of the claimant by 13:00. The claimant would have the remainder of the day, and until 13:00 the next day to cross-examine the respondent's witnesses. There would be submissions on the afternoon of day three. The remainder the time would be for the tribunal's decision. We agreed that remedy would be left to any further hearing.
- 4.6 The parties abided by the timetable except in one instance: the claimant sought more time to cross-examine Ms Patel. We sought to give guidance to the claimant during his cross-examination of Ms Patel, much of which lacked focus, was repetitious, or dealt with irrelevant matters. We were not satisfied it was appropriate to extend the agreed time and refused an extension for the reasons given on the day.

The Facts

Background

- 5.1 Since 2 November 2009, the claimant has worked for the respondent as a band 5 medicines optimisation pharmacy technician.
- 5.2 The claimant has worked at the Brent pharmacy at all material times, save for the period from 21 November 2016 until 31 March 2017, when he worked at St Charles'.
- 5.3 During much of the claimant's employment, his line manager was a grade 6 technician, Ms Purvi Patel. The majority of his complaints concern the alleged conduct of Ms Purvi Patel.

- 5.4 On 20 February 2014, the claimant was issued with an improvement notice concerning his timekeeping. There were problems in the working relationship from at least 2014. Ms Purvi Patel raised issues about the claimant's conduct and alleged that he would raise his voice inappropriately. She met with her manager concerning this on 1 April 2014. As a result, her manager agreed to meet with the claimant to discuss the issues.
- 5.5 On 30 April 2014, the claimant filed a grievance (R1/560). This was a general complaint concerning Ms Patel. He alleged he had been "subjected to a great deal of patronising behaviour through the last few years." He went on to say that Ms Patel made derogatory remarks concerning personal issues. He stated that she was "unapproachable" that she was "derogatory" and that she commented "about other staff members abilities, swearing, shouting, snapping, being abrupt and aggressive when pointed about her errors."
- 5.6 We do not need to give full details of how these matters proceeded. Ms Patel sent a full response on 25 June 2014 (R1/562). There was a formal grievance meeting on 24 July 2014. Both the claimant and Ms Patel attended. The claimant was given a choice about whether to pursue the matter formally, but it appears that no further action was taken.
- 5.7 Ms Patel's evidence was that the claimant scared her. She found him very difficult to manage. If she raised managerial issues with him, such as timekeeping, he responded negatively and shouted. As a result, she was reluctant to raise legitimate management concerns with him. In particular, she avoided one-to-one meetings. She would have another manager present when meeting with him. Her evidence was she did this because she found the claimant's behaviour intimidating and offensive.

The policies

- 5.8 The respondent has a disciplinary policy. It records that staff who behave in an unacceptable way will be subject to the trust's disciplinary policy (R1/45). There is a behavioural framework (R1/483A) which includes the need for compassion, and respect. It provides that mobile phones and other devices may not be used for calls or other communications during duty hours, unless there is exceptional requirement. They can be used on official breaks. Emphasis is also placed on staff following the requirements of the trust's dignity at work policy and avoiding unacceptable conduct. Cooperation is expected.
- 5.9 The disciplinary policy provides for both formal and informal action. Informal action involves the issuing of an improvement note (item 4.2). It provides for there to be a meeting when a discussion can take place and thereafter a record of the improvement required will be issued which remains active for a period.
- 5.10 The disciplinary policy records (at item 4) that it is part of the manager's duty to monitor the work of staff on a day-to-day basis and to draw to an

employee's attention any shortcomings and give advice and correction. It is the employee's duty to make necessary changes to performance and behaviour.

- 5.11 There is a trust annual leave policy, which was approved in December 2016. It is for the guidance of managers and individual employees. This policy is supplemented by the CNWL pharmacy service's guidance. This includes annual leave guidance. The relevant guidance provides that all requests to carry over annual leave must be in writing by the end of January. It is anticipated that majority (75%) of a person's annual leave is to be planned and booked by the end of December. The object is to provide, as far as is practicable, a consistent service. When leave is left to the end of the year, it becomes difficult to take it, as it can lead to service disruption. The claimant was aware of this guidance at all material times.

Relevant events

- 5.12 On 22 June 2016, the claimant was late back from lunch. Ms Patel telephoned him to check his whereabouts. She was concerned to check he was okay. He informed that he was dropping off HIV medication at the Central Middlesex Hospital. She confirmed that was fine. The claimant complains that she was shouted at. We consider that allegation further below.
- 5.13 On 18 October 2016, the claimant returned late from a lunch break. He accepts he was late. He accepts it was legitimate for his line manager to raise his lateness. He does not object to the words used. He objects to her tone. We will consider this allegation further when looking at allegation 2.
- 5.14 On 18 October 2016, Ms Georgina Ell (who was Ms Patel's manager) received complaints from Ms Patel that the claimant had shouted at her. She sought to resolve the matter informally with the claimant. This was not successful. She spoke to HR for guidance. She remained concerned that this was not the first complaint she had received about the claimant. There had been previous complaints by three members of the pharmacy team. She investigated the issues. She was informed that he used his mobile phone at impermissible times. She was aware there were concerns that he was using the trust's computer inappropriately and that he appeared to be conducting personal business. She met with the claimant on 12 December 2016 and she issued an improvement note (R1/97).
- 5.15 The matters raised in that improvement note are part of the claimant's complaint and we will look at that in further detail when considering the allegations.
- 5.16 From 21 November 2016 until 31 March 2017, the claimant worked at a different location, St Charles' pharmacy. Thereafter, the claimant chose to return to Brent, as the journey was more convenient and cheaper.

- 5.17 From the period 3 April 2017 to 22 December 2017, it is claimant's case that he was subject to behaviour which amount to discrimination or harassment. We considered the detail of the allegation when considering the allegations.
- 5.18 On or around 18 July 2017, the claimant lodged a formal complaint against Ms Patel these complaints included the following: being "blasted out" whilst working; being blamed for leaving medication in office locker; being given an impossible workload; not allowing him to put his point at meetings; overbearing and unplanned supervision meetings; and making specific derogatory remarks which were racist in nature.
- 5.19 This led to a formal investigation of Ms Patel under the disciplinary policy.
- 5.20 On 8 December 2017, Ms Niina Ezewuzie met with the claimant to discuss the outcome of his formal complaint. She found there was insufficient evidence to say that he had been given an excessive workload or that he was set up to fail or watched too closely for errors. There was insufficient evidence that he had been bullied or harassed. There was evidence to conclude that managers had tried to ensure consistency of team specific rules on working hours, the need for mobile phones to be kept in lockers, the requirement to take annual leave evenly over the year, and the arrangements around core working hours. There was insufficient evidence to show that Ms Patel had made any derogatory remarks.
- 5.21 On 22 December 2017, there was a mediation meeting between the claimant and Ms Patel. Ultimately, both acknowledged that the working relationship between them had not been good over a period of years. Both acknowledged the poor relationship negatively impacted their health. It was agreed that contact should be minimised and the claimant should avoid aggression.
- 5.22 Ms Patel found the mediation difficult and stressful. In the mediation she explained the stress had led to her having counselling. In need of a break, she went to have lunch on her own. Her evidence is as follows:

106 I went to Itsu for lunch and tucked myself in the corner where I thought that he would not be able to locate me. However, I was shocked when I saw him hovering around outside the restaurant. I could see him through the glass window. I recall that he stopped outside and was staring at me like he could do what he wanted and nothing could be done to him. He continued to watch me for five minutes. He then put his phone down and walked in and stood there and gave me a sarcastic grin.

107 I left Itsu, as quickly as possible, and called Denusha, my line manager at the time to explain what had happened. I told her that I felt intimidated by him. I was encouraged to speak about this in the mediation, which I did but he laughed and said I was paranoid. This made me feel even more uneasy.

108 I was very worried at the time and was not coping well generally. I raised my concerns with Vishal as part of the mediation, as I felt unsafe. This was not the first time that I had made to feel this way by him and I

wanted this to stop. Vishal was not willing to settle or resolve the situation during the mediation. He was very angry, defensive and I found the whole experience very traumatic.

- 5.23 Ms Purvi Patel accepts that she complained about the claimant's actions as he appeared to have followed her and acted in an intimidating way when he saw her.
- 5.24 The claimant accepts that he did go into the same café as Ms Purvi Patel. It is his case that it was accidental, and that he left as soon as he realised Ms Purvi Patel was there. His statement says the following about the incident:

33. Allegation 16

On 22.12.2017 at 13.45 hrs: Purvi made an allegation that Vishal Trivedi had followed her outside the Trust HQ building at lunch.

As usual Purvi made this horrible allegation. How can I follow her if she has left the premises 15 -20 minutes earlier than me? This behavior of Purvi was mentally disturbing, made me feel that she can ruin my life by such serious allegations. That kept me disturbed so much for so long time and fearing what's coming next from her side. I had been leaving in constant fear from Purvi's unpredictable behavior. Witness: Mark Reid (Mediator) Mediation date 22.12.17, page 345.

- 5.25 In his claim form, he says the following about the incident:

Ms Purvi Patel, mediator and me broke for lunch. Ms Patel left the room and premises before me and the mediator. I sat just outside the room in the same premises to have my pack lunch which I carried with me from home. After finishing my lunch, which was about 15 - 20 minutes since we broke for lunch, I went outside the building for a walk which is my daily lunchtime routine. On my walk, I went to superstore to browse and then to a Japanese café to check out for something interesting. It happened that Ms Patel was sitting in the same café. I left the café from the other door. When we reconvened Ms Patel made an allegation against me to the mediator that I followed her. She became very aggressive. I was shocked. I tried to explain, that how I can follow her when she had already left the premises 15 - 20 minutes prior to me.

- 5.26 The claimant obtained two ACAS conciliation certificates. The claim against Ms Patel (who was a second respondent), personally has been withdrawn and must be dismissed.
- 5.27 The first certificate concerned the respondent trust. Day A was 24 January 2018; day B was 20 February 2018.

The law

- 6.1 Direct discrimination is defined in section 13 of the Equality Act 2010.

Section 13 - Direct discrimination

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

- 6.2 **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 is authority for the proposition that the question of whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was. Accordingly:

employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was." (para 10)

- 6.3 **Anya v University of Oxford** CA 2001 IRLR 377 is authority for the proposition that we must consider whether the act complained of actually occurred (see Sedley LJ at paragraph 9). If the tribunal does not accept the there is proof on the balance of probabilities that the act complained of in fact occurred, the case will fail at that point.
- 6.4 Harassment is defined in section 26 of the Equality Act 2010.

Section 26 - Harassment

- (1) A person (A) harasses another (B) if--
- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of—
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

...

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

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

- (5) The relevant protected characteristics are--

age; disability; gender reassignment; race; religion or belief; sex; sexual orientation.

- 6.5 In Richmond **Pharmacology v Dhaliwal** [2009] IRLR 336 the EAT (Underhill P presiding) in the context of a race discrimination case, made it clear that the approach to be taken to harassment claims should be broadly the same. The EAT observed that 'harassment' is now defined in a way that focuses on three elements. First, there is the question of

unwanted conduct. Second, the tribunal should consider whether the conduct has the purpose or effect of either violating the claimant's dignity or creating an adverse environment for him or her. Third, was the conduct on the prohibited grounds?

6.6 In **Nazir and Aslam v Asim and Nottinghamshire Black Partnership UKEAT/0332/09/RN, [2010] EqLR 142**, the EAT emphasised the importance of the question of whether the conduct related to one of the prohibited grounds. The EAT in **Nazir** found that when a tribunal is considering whether facts have been proved from which a tribunal could conclude that harassment was on a prohibited ground, it was always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on that ground. That context may in fact point strongly towards or against a conclusion that it was related to any protected characteristic and should not be left for consideration only as part of the explanation at the second stage.

6.7 In **Dhaliwal** the EAT noted harassment does have its boundaries:

We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase. We accept that the facts here may have been close to the borderline, as the Tribunal indeed indicated by the size of its award.

6.8 Harassment may be unlawful if the conduct had either the purpose or the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

6.9 A claim based on 'purpose' requires an analysis of the alleged harasser's motive or intention. This may, in turn, require the Employment Tribunal to draw inferences as to what that true motive or intent actually was: the person against whom the accusation is made is unlikely to simply admit to an unlawful purpose. In such cases, the burden of proof may shift, as it does in other areas of discrimination law.

6.10 Where the claimant simply relies on the 'effect' of the conduct in question, the perpetrator's motive or intention even if entirely innocent does not in itself afford a defence. The test in this regard has both subjective and objective elements to it. The assessment requires the tribunal to consider the effect of the conduct from the complainant's point of view: the

subjective element. It must also ask, however, whether it was reasonable of the complainant to consider that conduct had that effect: the objective element. The fact that the claimant is peculiarly sensitive to the treatment does not necessarily mean that harassment will be shown to exist.

- 6.11 The requirement to take into account the complainant's perception in deciding whether what has taken place could reasonably be considered to have caused offence reflects guidance given by the EAT in **Driskel v Peninsula Business Services Ltd [2000] IRLR 151**, which concerned the approach to be taken by employment tribunals in determining whether alleged harassment constituted discrimination on grounds of sex. In **Driskel** the EAT held that although the ultimate judgment as to whether conduct amounts to unlawful harassment involves an objective assessment by the tribunal of all the facts, the claimant's subjective perception of the conduct in question must also be considered.

Comparators and the burden of proof

- 6.12 Section 23 refers to comparators in the case of direct discrimination.

Section 23 Equality Act 2010 - Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

- 6.13 Section 136 Equality Act 2010 refers to the reverse burden of proof.

Section 136 - Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to--

- (a) an employment tribunal;
- (b) ...

- 6.14 In considering the burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd [2003] IRLR 323** which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong [2005] IRLR 258**. We have particular regard to the amended guidance which is set out at the Appendix of **Igen**. We also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc [2007] IRLR 246**. The approach in **Igen** has been affirmed in **Hewage v Grampian Health Board 2012 UKSC 37**

Appendix

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

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

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

Conclusions

- 7.1 This is a claim which involves numerous allegations spread over a significant period of time. Before it can be determined whether an allegation amounts to direct discrimination, or harassment, it is necessary to determine whether the factual circumstances relied on as an act of discrimination or harassment happened. It is then possible to consider the thought processes of the alleged discriminator and to apply the reverse burden where appropriate.
- 7.2 The alleged events relied on as acts of discrimination and harassment must be established by evidence on the balance of probability: they are primary findings of fact, and they cannot be inferred.
- 7.3 It is important to have regard to the totality of the evidence when considering whether any specific act amounted to discrimination or harassment.
- 7.4 In our deliberations we have examined each of the allegations carefully. Where there is evidence that a particular factual circumstance relied on occurred, when considering whether it amounted to discrimination and harassment, we have had regard to the totality of the evidence. In particular, we have had regard to the relationship that the claimant had with his managers and we will summarise our findings at the end of our conclusions.
- 7.5 We now consider each of the allegations.

Allegation 1: on 23 June 2016 by Ms Purvi Patel telephoning the claimant, who had been at a pharmacy department, and stated "You should be back for 14:00 and your break is 45 minutes."

- 7.6 Whilst the original allegation referred to 23 June 2016, it is common ground that the correct date is 22 June 2016. It is accepted that Ms Patel telephoned the claimant. Part of that call was a request that he return. The claimant takes no issue with the call, or the request he return. His case is that she used an inappropriate tone. He complained about this in a subsequent email. Ms Patel denied using an inappropriate tone, but apologised for any offence that may have been caused.
- 7.7 The claimant has not established, on the balance of probabilities, that an inappropriate tone was used. It is clear that the claimant had ongoing issues with Ms Patel and did not readily accept any managerial intervention from her. In any event, she phoned because he was late. She was entitled to do so. Her reason for calling had nothing to do with his sex. There is no evidence on which we could find the purpose was to harass.⁴ The effect was not objectively viewed as harassment, even though we accept the claimant resented the phone call. His reaction was unreasonable and unnecessary and was conditioned, at least in part, by his negative reaction to Ms Patel's attempt to manage him.

Allegation 2: on 18 October 2016 by Ms Purvi Patel in front of Ms Regina Law saying to the claimant (allegedly rudely), "Can you be back from lunch on time? You are late."

- 7.8 the claimant accepts that he returned after 14:00. It remains unclear to the tribunal whether he accepts that he was late. We accept that the claimant understood that he could take a 45 minute lunch hour, but must be back at 14:00. It follows the latest time we could leave was 13:15. Taking his evidence as a whole, he accepts that he returned after 14:00. However, before us he has sought to argue that he had a right to take return after 14:00 if he started the break after 13:15. His basis for that assertion remains unclear. It follows that even before the tribunal the claimant has been unwilling to accept the legitimacy of the direction given by the respondent.
- 7.9 On 18 October 2016, he was late. It was appropriate for Ms Patel to raise this with him. The exact wording used is disputed, but nothing turns on it. The claimant accepts the wording used was legitimate and reasonable. He argues that Ms Patel should not have raised his lateness when Ms Law was present. We do not accept this. This was not a disciplinary matter. This did not require a meeting. This was a reminder that he should return to work on time. In any event, Ms Patel sought to avoid one-to-one meetings with the claimant because he acted aggressively towards her or shouted at her. She found the claimant intimidating and she was scared.
- 7.10 The claimant did not apologise. He did not accept that he had returned late. Instead, it is the claimant's evidence an argument ensued. He told us that he was calm and that it was Ms Patel who shouted. The nature of

⁴ For brevity, when we refer to "harass" or "harassment" we are using shorthand to refer to the totality of the definition being violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

the argument concerned his assertion that he had a right to return after 14:00. That was an unsustainable position for him to take. On the balance of probability, we reach the view that the argument was driven by the claimant's intransigence and his refusal to accept legitimate instruction. On the balance of probability, we have found that it was the claimant who raised his voice and was hostile to the legitimate management instruction.

- 7.11 Ms Law intervened to calm things down. There is no evidence that Ms Patel acted inappropriately, that she shouted at the claimant, or that she used an inappropriate tone. Had she shouted at him during the argument, as the claimant alleged before us, it is surprising that this did not form part of his allegation. On the balance of probability, the claimant's recollection of this incident is unreliable.
- 7.12 As to the allegation itself, the explanation is clear. He was asked to return on time because he was late. In no sense whatsoever is that because of his sex. Further, it was not harassment. It is not offensive or intimidating in any way. On the contrary, it is the claimant who became offensive.

Allegation 3: on 3 November 2016 by Ms Purvi Patel at 13:23 as stating the claimant was required to email her if he went to lunch later than 13:15. (It is not clear how this was communicated.)

- 7.13 The claimant has failed to give any proper evidence in support of this allegation. We cannot find that Ms Patel stated on 3 November 2016 at 13:23 that the claimant was required to email if he went to lunch later than 13:15. We did have evidence from Ms Georgina Ell that she did at one point say to the claimant that if he were late going for lunch, he should send her an email, or otherwise contact her, to confirm he was late and to confirm what time he would return. It is clear that she was offering some flexibility, despite the clear policy that lunch finished at 14:00 (for which there was legitimate operating reason). He never took advantage of that offer. It is possible that Ms Patel did make a similar reference. If she did, she was simply confirming what has been said by Ms Ell. It is difficult to see how the claimant can see this as harassment. All he was asked to do was to let management know if he could not return at 14:00. This is a concession that the respondent need not make and which was entirely for the benefit of the claimant. It was a way of treating him more favourably. In no sense whatsoever was because of or related to his sex. In no sense whatsoever was the purpose to harass him. In no sense whatsoever could it be said the effect was harassment.

Allegation 4: on 10 November 2016 at 13:15, by Ms Purvi Patel saying "That's why I do not like Indian fast. They eat lots of food. What is the point of fasting." Thereafter at 14:02, by Ms Purvi Patel saying to the claimant "Will talk to you later. Now we are only meant to talk work related things."

- 7.14 The claimant states of this occurred on 10 November 2016, whilst he was fasting. He alleges that the comments were pointed and were directed at him. Ms Patel recalls a conversation that she had in the summer of 2016

regarding fasting during Ramadan. It is not suggested by the claimant that any discussion about fasting would amount to discrimination on the grounds of sex, race, or religion.

- 7.15 We have to decide whether Ms Patel made the comments alleged on 10 November 2016. There is no direct witness evidence. She denies making the comments. The claimant was unable to give any background, or specify the circumstances in which the comments were made. No allegation was raised at the time. He raised a grievance in May 2017 which included references to race discrimination, but this allegation did not form part of that grievance. Had the words now relied on been used, on the balance of probability, there would have been some contemporaneous evidence. There is no evidence the claimant wrote them down. There is no evidence he raised with any other individual including any trade union representative. There is no evidence that he complained at the time. We find that he has failed to establish, on the balance of probability, that Ms Patel used the alleged words, or similar words, on 10 November 2016. As the circumstances relied on were not established, there is nothing for the respondent to explain. This allegation fails.

Allegation 5: on 22 December 2016, by Ms Purvi Patel and the respondent's management, serving an improvement note. The claimant relies on five specific allegations:

- (5.1) by the note being issued after the claimant had raised concerns about excessive work and harassment and he had alleged harassment and discrimination against Ms Purvi Patel;*
- (5.2) by the note referring to his time management;*
- (5.3) by requiring him to spread his annual leave over the year;*
- (5.4) by alleging he had conducted personal business (it being his case that had not been raised before formally or informally); and*
- (5.5) by requiring the claimant to finish work at 17:10 (it being his case the no female staff were required to finish at the same time).*

- 7.16 This concerns the issuing an improvement note, which is part of an informal disciplinary procedure. To the extent that this is brought against Ms Patel, the allegation must fail. Whilst information from Ms Patel and other managers was relied on by Ms Ell when compiling the improvement note, the issuing of the notes was in no sense whatsoever the responsibility of Ms Patel. The allegation against her must fail as she did not serve the note, or dictate its content.
- 7.17 Improvement note was issued by Ms Georgina Ell. We accept that at the time that the note was issued, the claimant had raised concerns about work and harassment. He had raised a grievance in 2014 and had raised complaints thereafter. However, the fact that he had raised issues does not prevent the respondent raising legitimate managerial concerns and issuing an improvement note. The improvement note is an informal part of the disciplinary procedure. It is designed to bring to an individual's attention shortcomings so that they can be addressed without the need to proceed to a formal disciplinary. The note did refer to the claimant's time management; there were issues with his time management. On day two

of the hearing the claimant specifically confirmed it was not wrong to raise this matter. The note did refer to the need to spread his annual leave over the year. We refer to the relevant guidance in our finding of fact. The reality is the claimant had only taken two weeks' leave and had not addressed when the remainder would be taken. This was clearly contrary to the policy. He knew the policy. It was appropriate that this should be raised. Leave needed to be spread over the year to minimise disruption to the service. The need is obvious, and the policy is logical.

- 7.18 It is clear from the evidence he gave to the tribunal that the claimant still does not accept the legitimacy of the guidance. He sought to rely on an overarching policy, which does not give detail. He was unable to, or is unwilling to, accept that policies may be interpreted by further guidance policies or that they are legitimate. He refused to accept the legitimacy of the guidance. The result is the claimant refused to accept legitimate managerial instruction. There can be no doubt that the respondent recognised the claimant's resistance to legitimate managerial instruction, and hence the inclusion of the reference, in the improvement note, to his spreading annual leave over the year. This had nothing to do with his sex. It was included because of the claimant's continued flouting of the respondent's legitimate instruction. The respondent giving legitimate and reasonable instruction does not have the purpose or effect of harassing.
- 7.19 Reference to conducting personal business was included in the improvement note because there was overwhelming evidence that he had. He had used his mobile phone at times when it was inappropriate, and he knew he should not. He had been observed using the company computer for private purposes. He had stayed behind late using the printer when it was unnecessary to do so for his work. He had been observed using a spreadsheet which had nothing to do with his work. To the extent the claimant suggests that the respondent had not previously raised these issues with him, that allegation is unsustainable and contrary to the evidence. The reference to not undertaking personal business during work time appeared in the improvement note because it had previously been raised with him and because there were continuing concerns. Those concerns were based on clear evidence of continuing abuse.
- 7.20 There was a general policy that the team should finish work at 17:10. We accept that there are occasions when other individuals, who were more senior to the claimant, needed to stay at work to complete tasks. That did not apply to the claimant. There was no reason why he should stay after 17:10. There was general concern about his welfare and his time management. The respondent wished to discourage the claimant working excessive hours. It also had concerns about lone working.
- 7.21 The respondent managers are in the best position to decide whether, in a pharmacy setting, it is appropriate for an individual to work alone. There was a clear concern that this should not be allowed. The claimant understood the policy. He was flouting it, and this is why it was raised. The fact that other more senior individuals may occasionally have to stay later is no evidence on which we could conclude that the treatment of the

claimant was because of sex. It is was not the purpose to harass. It cannot be said to have had the effect of harassing him. Requiring an individual not to work excessive hours when it is unnecessary does not, objectively, have the effect of harassment.

- 7.22 It follows we have concluded that the issuing of the improvement note was reasonable and legitimate. It dealt with matters where there was clear evidence the claimant was behaving inappropriately and was flouting the respondent's rules. It was a reasonable and proportionate response to his misconduct. It was not because of the claimant's sex. In no sense whatsoever was it harassment.

Allegation 6: on 3 April 2017, by Ms Purvi Patel during a managerial supervision meeting, mentioning that the claimant had sent an email at 17:16 and reminding him he should leave the office at 17:10.

- 7.23 It is clear that Ms Patel did refer to the email sent at 17:16 and reminded the claimant he should leave the office at 17:10. The claimant was aware of the requirement to leave the office at that time. We have explored the reasons for this above. The claimant was aware of the management instruction. Part of his improvement plan was to ensure that he did leave no later than 17:10. It remained a continuing concern for the respondent. The claimant continued to fail to comply with legitimate management instructions. There can be no criticism of Ms Patel for raising it. She raised it because there was clear evidence that he was not complying with the managerial instruction. That had nothing to do with his sex. It was not the purpose to harass him. This simple reminder could in no sense whatsoever have the effect of harassing him. It may be that the claimant objected to it, but that is simply evidence of his continuing unhappiness about being managed by Ms Patel.

Allegation 7: on 4 April 2017, by Ms Purvi Patel distributing to every team member except the claimant a Ferrero Rocher chocolate from a box donated by a doctor.

- 7.24 There is evidence in the respondent's internal investigation notes that Ms Patel accepted she brought in in a box of Ferrero Rocher chocolates. However, it was not Ms Patel who distributed them. They were distributed by Ms Law; this is the clear evidence the claimant during the internal investigations. His own log (R1/398) records that it was Ms Law who distributed them. He confirmed it was Ms Law during the disciplinary investigation (R1/269). It follows that this allegation must fail, Ms Patel did not distribute the chocolate. There is nothing for her to explain. It is possible Ms Law did not give him a chocolate. There is no evidence at all to suggest that this was caused by any action of Ms Patel. Ms Law's reasons do not fall to be considered, as there is no allegation against.

Allegation 8: on 13 April 2017, by Ms Purvi Patel, during a health and safety assessment for the claimant's special chair, stating, "I am Vishal's line manager and I need to know what is going on."

- 7.25 It is apparent that the claimant has ongoing difficulties that affect his back. On 13 April 2017, the respondent conducted an assessment of his workstation, such health and safety assessments are common. There is some evidence that Ms Patel had some discussion with the assessor. Her evidence was that she was concerned a footstool had been provided, but the claimant was not making proper use of it. She denies using the words alleged by the claimant. The claimant's complaint is not about the words as such, but about the fact that she became involved at all.
- 7.26 It is very difficult to understand the claimant's complaint. It is appropriate for a manager to be involved in the detail of the health and safety assessment. There is no evidence that Ms Patel did anything other than raise legitimate questions for the purpose of clarification. Her reason had nothing to do with the claimant's sex. She wished to ascertain the best use of the equipment available. Whilst the claimant may have resented that, it tells us nothing about the reasonableness of her question. There is no evidence on which we could conclude it was her purpose to harass the claimant. On the contrary, her purpose was to support the claimant. In no sense whatsoever could her action be said to have had the effect of harassing him.

Allegation 9: on 24 April 2017 at 16:01, by Ms Purvi Patel sending an email to the claimant detailing entries made from electronic notes.

- 7.27 Ms Patel did send the claimant an email detailing entries made (R1/133). This email referred to medicine reconciliations. She had checked the relevant electronic entries. Three had been undertaken in the afternoon and only one in the morning. The claimant was aware of the need to undertake reconciliations in the morning, as this was important for planning and for ordering drugs. He was being reminded of the need to organise his time.
- 7.28 In his evidence, the claimant accepted that this was a legitimate managerial intervention. There is no evidence on which we could conclude that this was anything other than a legitimate managerial direction. The fact the claimant resented it tells us something about his attitude to Ms Patel. The fact it was necessary tells us something about his continuing failure to manage his own time. The fact that it was necessary provides an explanation which in no sense whatsoever was because of sex. The fact that it was necessary demonstrated it was not the purpose to harass, and it could not be said to have the effect of harassing.

Allegation 10: on 28 April 2017 between 10:35 and 10:45, by Ms Purvi Patel calling the claimant and stating, "You did not give ward medications back to the nurses. Can you come to the ward straightaway? I need the keys." Further on the same day at 15:55, a person (not identified) calling the claimant to find out where he was.

- 7.29 There was an incident on 28 April 2017. In his evidence, the claimant accepted that it was appropriate to check with him whether he had the

keys and whether he could return. His evidence to us was it was Ms Patel's tone of voice to which he objected. We cannot accept, on the balance of probabilities, that her tone of voice was inappropriate. Even if she had shown irritation, there is no evidence on which we could find that the tone of voice employed was because of the claimant's sex. It did not have the purpose of harassing him. It did not have the effect objectively. We have considered whether it is possible that she showed some irritation at the time; that is a possibility. However, a transient and fleeting demonstration of frustration is not sufficient to demonstrate harassment. Even if we were wrong about that, there is no evidence whatsoever that it was related to his sex.

Allegation 11: on 2 May 2017 at 13:20, by Ms Purvi Patel saying "That's why I do not like Indian men, I hate Indian men. Like to sit and demand."

7.30 This allegation is said to have happened on 2 May 2017 at 13:20. At that time, it is the claimant's case that he was taking extensive handwritten notes (albeit we have none). He later typed out those handwritten notes (those notes have been disclosed). It is clear that this is a particularly overt allegation of race discrimination. On the balance of probability, had Ms Patel stated she hated Indian men, the claimant would have made a clear contemporaneous note of it. No such note exists. During a later internal investigation, Ms Law was interviewed. She gave no evidence in support of the claimant. There is insufficient evidence on which we could find that the comments were made by Ms Patel, and this allegation therefore fails.

Allegation 12: on 9 May 2017, by Ms Purvi Patel accusing the claimant of leaving medication in a locker and stating, "Why did you leave medication in the locker and keys hanging in the locker door." Further, on the same day, by Ms Purvi Patel saying, "The person who has problem should mind his business. I have not supplied excess stock or nonstock medication and not to intervene in my work."

7.31 It is common ground that Ms Patel did refer to keys being left in the locker on 9 May 2017. The claimant's contemporaneous note of it (R1/156) states, "PP mentioned about meds in locker and leaving keys in the lock in the office." The security of medications must be maintained in a pharmacy setting. Any potential issue with keys and leaving lockers open should be raised; it is difficult to see what offence could be caused. There is nothing in the claimant's contemporaneous notes to suggest that any comment made by Ms Patel caused offence. Her comment was innocuous. It is entirely appropriate that she should raise legitimate concerns about security. This had nothing to do with the claimant's sex. It did not have the purpose of harassing him. Objectively, it could not be said to have had that effect.

7.32 The second part of the allegation concerns words that she allegedly used. The context is not set out. It is not clear whether it was directed at the claimant. There is insufficient evidence to establish the words were ever used. There is no evidence whatsoever on which we could find that if the

words were used it was because of the claimant's sex, or that it had the purpose or effect of harassing the claimant.

Allegation 13 on 10 May 2017 at 13:40, by Ms Purvi Patel stating abruptly in front of team members, "If you could do the training in the afternoon, thank you very much." Further on the same day at 16:47, by Ms Purvi Patel stating, "I am concerned as you struggle to take all your annual leave by the end of the year, will you manage to take 29 + 5 extra days by March 2018?"

7.33 It is possible that Ms Patel referred to training in the afternoon. The claimant gives no detail. In his own contemporaneous note (R1/156), he simply refers to her mentioning training. There is no indication at all that he found her comments distressing. If we assume that there was a comment made about training, there is no evidence on which we could find it had anything to do with the claimant's sex. There is no evidence on which we could find it I have had the purpose or effect of harassing the claimant. This appears to be in innocuous comment.

7.34 The second part of the allegation refers to Ms Patel stating the claimant may struggle to take annual leave. She accepts there was a discussion. The claimant had asked to buy five days' extra leave. There were ongoing concerns about the claimant's failure to book leave, as illustrated by the improvement note. Ms Patel confirmed the claimant should put the request in writing and that she would forward it. The granting of the leave and the request to buy leave was not her responsibility. It is unclear why the claimant considers Ms Patel's action to be any form of detrimental act. We do not understand why the claimant believes this simple factual statement was in any sense offensive. There is no evidence on which we could conclude that it was because of the claimant's sex. There is no evidence on which we could find that it had the purpose or effect of harassing the claimant. Ms Patel's mentioning of a legitimate management concern was reasonable and appropriate.

Allegation 14: on 18 May 2017 at 14:21, by Ms Purvi Patel calling the claimant and asking him to return to Park Royal and by speaking abruptly and in a derogatory manner stating, "I instructed you not to go." Thereafter on his return ridiculing him by saying, "I told you not to go."

7.35 Ms Patel accepts that she phoned the claimant on 18 May 2017 and thereafter asked him to return. It is possible that there was some misunderstanding. It is clear that Ms Patel believed that the claimant had received instructions not to attend. It is possible the claimant was confused. It is also possible that he believed he had received permission from Ms Ell. Taken at its height, it is possible there was a misunderstanding. Given her understanding of the position, there was no reason why Ms Patel should not ask the claimant to return. She did not seek to discipline him. Even though she believed that he may have failed to follow legitimate instructions, she took no further action. The claimant has not established evidence from which we could conclude on the balance of probability that she used an inappropriate tone. The explanation for her action is clear, Ms Patel was giving a legitimate

managerial instruction based on her understanding of the situation. There is no evidence on which we could conclude that it was her purpose to harass or that her act had the effect of harassment.

Allegation 15: on 27 November 2017, by the Ms Niina Ezewuzie (senior manager representing CNWL at the grievance outcome meeting) alleging the claimant used trust property for his personal use.

7.36 Ms Niina Ezewuzie accepts that as part of the grievance and its outcome she referred to the allegation the claimant had used trust property for personal use. This included the use of the trust computers. The reference to these allegations was included because she had strong and credible evidence of the claimant's misuse of trust property. There is no evidence on which we could find that her reference to use of the trust's property was because of the claimant's sex. Her explanation is clear, and it is in no sense whatsoever was because of his sex. There is no evidence on which we could conclude that it had the purpose of harassing, or the effect of harassing the claimant.

Allegation 16: on 22 December 2017 at 13:45, by Ms Purvi Patel alleging the claimant had followed her outside the trust headquarters building at lunch.

7.37 The claimant complaint is about Ms Patel alleging he had followed her at lunchtime on 22 December 17. It follows that the alleged detrimental treatment is her allegation, which in some manner is said to be false. It is necessary for us to consider, therefore, why she made the allegation.

7.38 It is common ground that on that day there was mediation. Ms Patel was having lunch on her own in the Iitsu café, when the claimant came in. Their accounts vary in a number of respects. He alleges he only saw her when he was in the café; she alleges he saw her through the window and stared at her. He alleges that when he went into the café, he did not know she was there; she alleges that he did. He alleges that the moment he saw her, he left through "the other door;" she alleges that she left, dumping her food in the bin on the way out. He alleges he did not look at the claimant inappropriately; she alleged he gave her an inappropriate stare. Both accept that she reported the incident.

7.39 In his evidence, the claimant's focus has been on the reasonableness of her supposing she had been followed. He says that he was 20 minutes behind her leaving, and had no idea where she would be. The claimant's position is difficult to understand. Whether he knew where she was, or had followed her to the café, is not the point in issue. Her complaint was about his inappropriate behaviour to her when he saw her in the café. It is not surprising that she reached the conclusion that she been followed. However, it matters not whether she was followed, or whether he came upon her by chance. It is his subsequent behaviour which was the issue. It is clear that the claimant has some insight into this because, even on his own evidence, he recognised the inappropriateness of his being in the same café as Ms Patel on that day. Hence why, on his case, he left immediately.

- 7.40 If follows that he must have had some insight into the potential distress he could cause by being in the same café as her. In those circumstances, it should have been no surprise to him that she raised it with the mediator. It would have been easy for him to explain that he had not followed her, that he had come upon her by accident, and apologise for any inadvertent distress. Instead, he has sought to focus on an irrelevant detail about whether he followed her or not. He lost sight of Ms Patel's legitimate concern. Instead, he has sought to suggest that her reference to being followed was inappropriate.
- 7.41 Ms Patel could not know whether she had been followed. All that she could know was the claimant appeared in the café. Ultimately, that is the only common ground between them. The claimant should be able to recognise that it was not unreasonable for Ms Patel to speculate she had been followed.
- 7.42 We do not need to resolve on the balance of probability whether the claimant followed Ms Patel, whether he stared at her through the window, or whether he entered the café when he knew she was there. Her reason for raising the complaint was because she felt intimidated and scared by his presence. It had nothing to do with his sex. It was not her purpose to harass. It could not, objectively, have had that effect of harassing the claimant. Even if the claimant's behaviour was merely unfortunate and inadvertent, Ms Patel's reaction was entirely understandable.
- 7.43 It follows that all of the allegations have failed on the merits. In the circumstances we do not need to consider whether any of the claims are out of time, or whether there is course of conduct.
- 7.44 As we noted earlier, it is appropriate when reaching our conclusions to have regard to the entirety of the evidence. There are a number of key themes. The claimant has concerns about managerial policy, managerial instruction, and Ms Patel's behaviour. He alleges he has been treated inappropriately because of, or related to, the protected characteristics of sex, race, and religion. We have considered the totality of the evidence in detail. We have no doubt that a clear picture emerges. The reality is that despite the clearest instructions given to him, the claimant still continues to question the legitimacy of the respondent's policies. This is illustrated by his continuing objection to the requirement to comply with the guidance given on taking leave, and the requirement to return to work by 14:00. The claimant has continued to object, in the strongest possible terms to the most reasonable requests to comply with policy. We understand Ms Patel has now left, largely to remove herself from a situation she found stressful. She found that situation stressful because of the claimant's attitude towards her and his unreasonable reaction to the most reasonable and legitimate of instructions. We credit her evidence that the claimant shouted at her and that he was intimidating. The claimant behaved in a way which made management of him extremely difficult. On occasions, it is possible that Ms Patel showed a degree of frustration. That is entirely understandable. It is to her credit that she continued to manage him in a

reasonable and professional manner. There is no evidence that she treated him improperly or that any treatment was for any reason related to sex, his religion, or his race.

- 7.45 Ms Patel was asked during an investigation why she believed the claimant behaved as he did. She speculated he may have had cultural issues. In particular, she was concerned that the claimant, who is a Hindu of Indian ethnicity, may find it difficult to accept instruction from a female who was also Hindu of Indian ethnicity. This was an attempt to rationalise his unreasonable and inappropriate behaviour. In no sense whatsoever does that rationalisation, or speculation, provide any evidence on which we could find that any part of her treatment of him was because of sex, race, or religion.

Employment Judge Hodgson

Dated: 21 December 2018

Sent to the parties on:

2 January 2019

For the Tribunal Office