Case Number: 2500072/2018
2500071/2018

EMPLOYMENT TRIBUNALS

Claimant 1: **Dr E Njoku**
Claimant 2: **Dr S Uwhubetine**

Respondent 1: **Care Quality Commission**
Respondent2: **Mrs C Murray-Cook**

HELD AT: Sheffield **ON: 20, 21, 24, 25 and 26 June 2019**

BEFORE: Employment Judge Rostant
Mr D Pugh
Dr C Langman

REPRESENTATION:

Claimant: **Mr C Echendu, principal partner, Minority Advice**
Respondent: **Mr A Serr of counsel**

JUDGMENT having been sent to the parties on 28 June 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Procedural history prior to the substantive hearing.

1. In claim forms presented 15 January 2018, the claimants both brought complaints of race discrimination, victimisation and harassment against both respondents. The matters came before Employment Judge Little at a preliminary hearing on 18 March. At that hearing a jurisdictional issue was raised since the respondents had sought to argue that the Tribunal did not have jurisdiction to consider claims brought by practising doctors against the Care Quality Commission. At the hearing before Judge Little, it was agreed that the matter would have to be dealt with at a preliminary hearing.

2. On 11 July 2018, at a preliminary hearing before Judge Trayler, it was decided that the first respondent was a qualification body within the meaning of section 53 and section 54 of the Equality Act 2010 (EQA) and that the claims could therefore proceed. At that same preliminary hearing, Judge Trayler identified that the acts relied on as founding the various claims were summarised in paragraph 77 of the grounds of complaint and he identified that those complaints were complaints of direct discrimination, victimisation and harassment, where the protected characteristic was race. He also identified the fact that the claimants were relying on a comparison of the respondents' treatment of them with the respondents' treatment of other GP practices in the Doncaster Care Commissioning Group (CCG) and most particularly the practices at Fieldside Surgery, Stainforth (Dr Brown's practice) and Thorne Moor Surgery. Employment Judge Trayler ordered that the claimants complete a Scott schedule setting out the summary of each allegation with dates and the identity of the alleged discriminator. He also required that, for each allegation, the Equality Act provision relied on be set out, the paragraph in the ET1 where the complaint appeared be stated and the comparators and the protected acts, where relevant, be identified.

3. In compliance with that order, on 9 August 2018 the claimants produced a Scott schedule. It contains 14 allegations. Following that Scott schedule, the respondents made an application that certain of the claimants' allegations be the subject of a deposit order and that matter was dealt with at an open preliminary hearing on 29 November 2018 before Employment Judge Brain. Judge Brain, having listened to argument, ordered that the claimants each pay a deposit of £500 in respect of each of two different allegations. The first of those was an allegation in relation to the first inspection of the claimants' practice by the Care Quality Commission (CQC), the first respondent in this case. Dr Njoku and Dr Uwhubetine became the registered providers in the practice at some point in early 2013. Their predecessors were four partners, of whom Dr Njoku was one, the other three being white doctors. The allegation was that the inspection by the CQC in August 2013 was different and less favourable treatment, because of race, compared with the treatment by the CQC of the claimants' predecessors at the same practice, who had never been inspected.

4. Judge Brain's reasoning for making the deposit order in relation to the comparison point was that such a comparison could not form the basis of a claim of difference of treatment because of race since the first respondent had not acquired responsibility for oversight of GP practices until 1 April 2013 and that explained why the CQC had not inspected the practice prior to that date. In the event, the claimants chose not to pay the deposit in relation to that allegation and at a preliminary hearing on 4 February 2019 Employment Judge Maidment confirmed that any claim of direct discrimination founded on a comparison of the treatment of the claimants by the CQC with the treatment of the claimants' predecessors by the CQC prior to 2013 was struck out.

5. The second aspect of the claims which were subject of a deposit order was the contention that the second respondent was guilty of any of the allegations of race discrimination, harassment or victimisation levelled against her. The claimants did pay the deposit in relation to those claims. The reason for Judge

Brain's ordering of the deposit in relation to the second respondent are set out in paragraph 11 of his Judgment and we quote them in full.

"Further in my judgment there is a proper basis for doubting the likelihood of the claimants being able to establish the facts essential to their claims against the second respondent. She was not even in the relevant post to undertake inspections until January 2015. This therefore appears to rule out any of the claims made against her by the claimants up to the end of 2014. That there were no prior dealings must cast considerable doubt as to whether the second respondent (when embarking upon new employment with the first respondent) would engage in serious acts of discrimination and conspire with the first respondent and others so to do once she took up her substantive post".

Procedural issues once the substantive hearing started

6. At the outset of the substantive hearing, the Employment Tribunal sought to identify with Mr Echendu which protected acts he was relying on to found the claim of victimisation. Mr Echendu confirmed that he was relying on four matters. The first of those was a grievance letter of 29 May 2015. The next was the approach to ACAS for early conciliation and subsequent Employment Tribunal claim brought against NHS England and the Clinical Commissioning Group (CCG) in Doncaster, alleging discrimination because of race. The third was a letter from Mr Echendu to the second respondent dated 10 November 2017 alleging discrimination in the decision to carry out a further inspection of his clients' practice and the fourth was the Tribunal proceedings which gave rise to this case, presented to the Employment Tribunal on 15 January 2018. During the course of that discussion Mr Echendu abandoned any claim of victimisation based on a purported protected act on 29 May 2015. This left the approach to ACAS and the claim to the Tribunal in relation to the claims against NHS England those being dated 27 November 2017 and December 2017 respectively and the letter from Mr Echendu to Mrs Murray-Cook of 10 November 2017. None of the allegations in the Scott schedule post-date the presentation of the Tribunal proceedings in this case and that essentially limited the claims of victimisation to alleged detriments flowing from the protected acts the earliest of which was now established as being 10 November 2017. Mr Serr on behalf of the respondent conceded that the letter from Mr Echendu to the second respondent of November 2017 was indeed a protected act.

7. At the outset of the hearing, there was an application by the respondents to produce documents not contained in the bundle. This was the first of several applications made by both parties to introduce documents not originally contained in the bundle. Both parties sought to introduce such documents and permission was granted by the Tribunal on each occasion having first heard argument. In the case of the application by the respondents at the outset of the hearing, the relevant material was said to be evidence of inspections of other practices in 2013 in Doncaster. The evidence was in the form of the reports of those inspections available from the CQC's own website. After discussion. it was agreed that rather than burden the Tribunal and the parties with a considerable volume of paperwork, the claimants would be given an opportunity of reviewing the CQC's own website and conceding (or not) that there had indeed been inspections by the CQC of GP practices in Doncaster in 2013.

8. The relevance of this matter was that the claimants wished to complain about the first inspection in August of 2013 and had made a number of complaints

about that. One basis of complaint had been removed by the strike out Judgment referred to above. Another basis of complaint was that the claimants' practice was the *only* GPs practice in Doncaster inspected by the respondent in 2013, and that therefore the claimants had been treated differently to other practices in the town. The new material was adduced by the respondent in rebuttal. In the event, the claimants, having viewed the website, conceded that there had been other inspections and cross-examination on that matter was therefore properly advanced by Mr Serr on the basis that of that concession.

9. That concession however led, on the morning of the second day to an application by Mr Echendu that the Tribunal re-visit, by way of reconsideration, Judge Brain's deposit order in relation to the allegation of difference of treatment where the comparison was between the claimants' treatment by the respondents post- April 2013 and their white predecessors prior to April 2013. Mr Echendu's submission was that that Judge Brain had been misled by Mr Serr when Mr Serr had asserted that the first respondent's authority to inspect GP practices only started in April of 2013. Mr Echendu also asserted that Employment Judge Trayler had, in any event, already ruled on the matter in his earlier preliminary hearing and therefore Judge Brain was essentially dealing with a matter that was res judicata.

10. When this Tribunal pointed out that the provisions of Rule 72 of the Employment Tribunal Rules of Procedure 2013 prevented us Tribunal from reconsidering a decision made by a previous Tribunal, without express authority so to do from the President or the Regional Employment Judge, the application became one that the Tribunal should adjourn in order to contact the Regional Employment Judge and seek such authority. The Tribunal adjourned to consider that application and returned and rejected it with full reasons. Those reasons were, essentially, that in the Tribunal's view the overriding objective required that the Tribunal should consider avoiding delay and expense and dealing with the matters proportionately. The Tribunal's view was that this aspect of the case was a small part of the overall claim. Judge Brain's judgment did not prevent the claimants from complaining about the August 2013 visit and merely removed one basis for an allegation that there was difference of treatment. In comparison which previous treatment of the same practice. An adjournment would inevitably cause delay and expense, it not being immediately apparent that the Regional Employment Judge was readily available. Even if it was appropriate to adjourn to establish whether he was, there was no certainty that in the circumstances he would regard it as appropriate to give the relevant permission. The Tribunal also observed that this was an application that could have been made in the many months between Judge Brain's decision in November 2018 and the start of this hearing. If Mr Echendu believed that Judge Brain had been misled he ought to have applied for reconsideration within 14 days of the original deposit order. Nor was it apparent that Mr Echendu had sought to argue in the lead up to the preliminary hearing or at the hearing itself that EJ Trayler ad already ruled on the matter. Finally, if Mr Echendu believed Judge Brain's deposit order to have been flawed, his clients could have paid the deposit and pursued the matter before this Tribunal.

11. Following that ruling, Mr Echendu told the Tribunal that his clients had been making enquiries of the other practices purportedly inspected in 2013 as to whether or not they accepted that they had been inspected in 2013. However

the furthest that he had got was that some of the practices' immediate response was that they were not aware of the 2013 visit. The Tribunal observed that there were two possibilities about the reports shown to the claimants on the first day, which were the subject of the concession. Either the reports were what they claimed to be, that is to say genuine reports of genuine inspections placed on the CQCs website, or they were fabrications. The Tribunal went on to observe that if the claimants could produce evidence for the latter proposition then the application to introduce such evidence would be dealt with at the appropriate time. In the event, no such evidence was ever adduced and the Tribunal has proceeded on the basis that there were inspections by the first respondent of other GPs practices in Doncaster in 2013.

12. Finally, as a significant procedural matter, there was the question of the basis on which the claimants were advancing their overall case of direct discrimination against both the respondents. Throughout the course of his own evidence, Dr Njoku repeatedly responded to questions about the findings of the first respondent in its inspections of the claimants' practice by asserting that the claim was not about the *outcomes* of the inspections but rather about the *frequency and regularity* of those inspections. Indeed, when Mr Serr began cross-examining Dr Njoku on the details of the first inspection report in August 2013, Mr Echendu intervened to make the same point. Nevertheless, it became apparent that Mr Serr felt it necessary for Dr Njoku to deal with the details of the various findings in the first respondent's inspection reports because, in a number of instances, the respondents' case was that those findings explained the fact of the next visit. To put it simply, findings of inadequacy generated follow-up inspections and the number of inspections of the claimants' practice as compared to other practices in the area was, in part, explained by findings of inadequacy on more than one occasion during the routine inspections.

13. It was apparent that Dr Njoku had the belief that the first respondent's inspectors (who include the second respondent) were motivated by the claimants' race in making findings of inadequacy and it was therefore apparent that the claimants' case was really being advanced on two fronts, namely that where inspectors found the claimants' practice to be falling short of the relevant standards, that was a judgment based on race and that the overall frequency and regularity of the visit was also dictated by the claimants' race. This led to concerns on the part of the Tribunal and indeed on Mr Serr's part that the respondent had not approached the case on the basis that it would need to justify the detailed findings of the inspection teams. Mr Serr's observation was that it would be impossible for the Tribunal to unpick those findings now, even if all the inspectors were available to give evidence about them. This matter was addressed with Mr Echendu and his case was that since the respondent had sought to explain the regularity and frequency of the visits at least in part by the outcomes, he was entitled to rebut that defence by assaulting the probity of the reports themselves.

14. During the adjournment which followed, the Tribunal undertook a detailed analysis of the way in which the claims had been advanced in the claim form and the Scott schedule. It is apparent that although in the narrative of the claim form itself, a complaint is levelled against the probity of the 2013 report, that complaint is not repeated when the claims are summarised in paragraph 77, the part of the claim form which Judge Trayler viewed as the setting out of the

claimants' actual claims. Furthermore, the complaint in box 1 of the Scott schedule about the first inspection, reads in its entirety as "by the respondents' invasions in to the claimants' practice unannounced in August 2013, the first respondent had treated the claimants less favourable (sic) on ground of their race and/or harass (sic) them". That is, on any fair reading, a complaint about the *fact* of the inspection itself rather than its *outcome*. Whenever in the Scott schedule reference is made to the 2013 inspection it is always in connection with a complaint about the regularity and frequency of the inspections and, put simply, there is no complaint in the Scott schedule that could be fairly read as a complaint that the outcome of the 2013 visit was itself racially discriminatory.

15. There are, however, suggestions that there is a complaint of a racially discriminatory outcome in relation to the 2015 and 2016 reports. There is a complaint (in box 3) that the 2015 report was originally intended to result in a rating of "good" but had been altered by the first and second respondent so that the rating became one of "inadequate" and there is a very specific complaint in relation to the 2016 report, which was that the 2016 report failed, in contrast to an equivalent report for another GP practice, to mention the parking available at the claimant's practice. The comparator practice shared the same premises as the claimants' and its report did mention parking and the allegation was that there had been a deliberate omission of a reference to parking in the report on the claimants' practice as a way of subjecting the claimants to detriment by not reporting on amenity for patients that actually existed.

16. The concern about the way in which the case was being put and the ability of the respondent to respond to it loomed large during the course of the third day of the hearing when Ms Mitchell was giving evidence. Ms Mitchell's involvement really ended in 2014 and she was not the inspector for the first 2013 report. Strictly speaking therefore, she was not in a position to answer questions about the details as to why that inspection had found as it did. Nevertheless, the Tribunal decided that as a matter of pragmatism the detailed analysis of the pleadings which we have just set out above, if it were undertaken before Ms Mitchell could be cross-examined on the 2013 report, would inevitably prevent Ms Mitchell from completing her evidence on that day and would leave her sworn over. That was viewed by all as an undesirable prospect. The Tribunal also took the view that it was apparent that Ms Mitchell had overall charge of the inspection process in 2013, even if she was not one of the inspectors, and was therefore reasonably well fitted to answer such questions as she could, from her own knowledge about the inspection report itself. Cross-examination was therefore permitted about the details of the 2013 report. However, the Tribunal indicated that before cross-examination of the second respondent started it would carry out the analysis detailed above and give its own view as to what was appropriate and permissible for Mr Echendu to cross-examine on.

17. Having carried out that analysis the Tribunal's decision was announced to the parties. Essentially, the view of the Tribunal was that although it was understandable that there had been some confusion as to the precise way in which the claimants were putting their case, there was sufficient in the pleadings to show that the claimants had always challenged the probity of at least the 2015 and 2016 reports. Accordingly, it was appropriate for Ms Mitchell, who had been on the inspection teams for both reports, to be cross-examined on the findings of those reports and to have it put to her that the outcomes were

themselves dictated by a desire to discriminate against the claimants. We told Mr Echendu that we did not consider that there was any fetter on his cross-examination of the second respondent except for the normal requirements that cross-examination be relevant and on matters which fell within the knowledge of the witness. On that basis cross-examination proceeded and Mr Echendu did indeed put his various challenges to Mrs Murray-Cook.

The issues before the Tribunal

18. We will begin with a brief factual outline to assist comprehension. The claimants are medical general practitioners and are partners in a GP practice in Doncaster. Dr Njoku was a partner prior to 2013 and at some period before April 2013, the sole partner. At some point soon after April 2013, he was joined by Dr Uwhubetine. The first respondent has a statutory remit to inspect and report upon bodies delivering healthcare services. Prior to 2013, this was mainly care and nursing homes but in April 2013 all GPs practices were required to register with it. Between August 2013 and January 2018, the first respondent carried out six inspections of the claimants' practice. From early 2015, when she joined the first respondent, the second respondent took the lead for, amongst others, the claimants' practice and was involved in all inspections from January 2015 onwards. The inspection regime operated by the respondents in respect of the claimants is the subject of this claim.

19. The claimants' case relies on fourteen allegations here set out. N**B At this point I will set out the 14 allegations.**

20. All of the allegations are advanced as complaints of direct discrimination and in respect of the complaints of direct discrimination the claimants rely on a comparison between their treatment and the treatment by the respondents of other GP practices. In particular, these were Thorne Moor/Chestnut House (the same practice), a practice based in the same building as the claimants' practice; Field Road Surgery (Dr Brown's practice), Dansville, Hartfield Health Centre, West End Clinic and Church View. The complaints that date from and after 3 November 2017, are also advanced as complaints of victimisation (see the discussion about protected acts above) and some but not all of the direct discrimination claims are also advanced as complaints of harassment.

21. The respondent's case was that no discrimination has taken place. They did not accept that the claimants have suffered different treatment but asserted that if they have, any difference is not explained by the protected characteristic of race. The respondents denied that they had knowledge of the protected acts by way of an approach to ACAS or a Tribunal claim against NHS England and the CCG and therefore denied that any treatment said to be detrimental was based on the fact of those proceedings. The respondents accepted that there was a protected act in the form of Mr Echendu's letter to the second respondent of 10 November 2017 and accepted that they had knowledge of that, but denied that any detrimental treatment was motivated by that. The respondents denied that any treatment could amount to harassment or that any treatment that might amount to harassment was related to race.

22. It was apparent that the claimants wished also to assert that the respondent's conduct of its investigation process was improperly influenced or mandated by NHS England and the CCG. The Tribunal is aware that proceedings alleging race discrimination have been brought by the claimants against those

organisations. The precise way in which it is said that any collusion between those two bodies could amount to an act of discrimination because of race by the first and second respondent was not clear, at least at the outset of the proceedings but the Tribunal nevertheless permitted cross-examination on that basis on the assumption that the matter would be dealt with in closing submissions. At any rate, the respondents asserted that there was nothing racially discriminatory about their involvement with NHS England and about any connection between NHS England and the respondent and inspections of the claimants and instead assert that the first respondent's relationship with NHS England is the normal one of information sharing between bodies with related but distinct interests in the claimants' practice.

23. It was also being suggested by the claimants that Dr Brown, the GP who is the registered provider at Field House Surgery, and who is also a member of the CCG for Doncaster, had a personal interest in influencing the outcome of the respondents' reports into the claimants' practice The motivation for that was that if the reports were negative and resulted in a loss of patients by the claimants that would be to the to the financial benefit of, inter alia, the Field House practice, whose list increased in consequence. Again, the precise basis on which it is alleged that that motivation, even if it could be made out and even if it could be shown that it had affected the respondents' approach to inspection, could found a complaint that the claimants had suffered different detrimental treatment because of the protected characteristic of race was unclear. The Tribunal, however, out of a desire to avoid further delay, permitted cross-examination again on the assumption that closing submissions would disclose the basis on which such evidence was relevant

24. Finally, it would be appropriate to note that as early as Judge Trayler's case management hearing in August 2018, the respondents had flagged the potential issue of time limits. The claimants' claims are about a variety of inspections which begin in 2013 and the last act complained of is the carrying out of inspection on 15 January 2018 the date on which the claim to the Tribunal was presented. The claimants of course sought to establish that the acts complained of formed part of a continuing act of discrimination and that since the claim was presented to the Tribunal on 15 January and the last act is therefore clearly within time, the claimants were entitled to complain about all of the matters stretching back as far as 2013. Nevertheless, if the Tribunal were to find that later acts were not discriminatory the time limit provisions in S.123 of EQA might come into play.

The law

25. All provisions hereafter referred to are provisions of the Equality Act 2010, unless otherwise stated,

26. The provisions of sections 53 and 54 prohibit discrimination by a qualification body in the arrangements it makes for deciding upon whom to confer a relevant qualification and by the withdrawing of the qualification. S.53(3) prohibits harassment by a qualification body and S.53(4) makes victimisation by a qualification body unlawful.

27. Direct discrimination is defined in S.13, which provides that a person discriminates against another if, because of a protected characteristic, that person treats the other person less favourably than the person treats or would

treat others. S.27 defines victimisation as occurring when a person subjects another person to a detriment because that other person had done a protected act. A protected act is defined in S.27(2) as bringing proceedings under the Equality Act; giving evidence or information in connection with proceedings under this Act; doing any other thing for the purpose of or in connection with this Act; or making allegations whether express or not or another person has contravened the Act.

28. S.26 defines harassment (for the purposes of this case) as unwanted conduct related to a protected characteristic with the effect or purpose of creating the circumstances detailed in s.26(1)(b)(i) or (ii).

29. S.136 provides that in determining whether the Equality Act has been contravened, if there are facts from which the court could decide, in the absence of any other explanation, that a person contravened the provision concerned the court must hold that that contravention occurred. That does not apply however if the alleged discriminator shows that there was no contravention of the Act.

30. At EJ Trayler's hearing the respondent conceded and EJ Trayler found that all of the claims that the claimants seek to advance against the first respondent can be so advanced. S.110 makes employees of the qualification body liable for any discriminatory conduct carried out in circumstances when their employer would be vicariously liable for that conduct under provisions of S.109. The respondent conceded and EJ Trayler found that on the basis of that provision the claimants could bring their claims against the second respondent as an employee of the first respondent engaged in the carrying out of the inspections of their practice and others.

31. Evidence was completed at the end of the fourth day of the hearing and the parties made submissions at the outset of the fifth day both orally and supported by written submissions. The Tribunal had the benefit of reading those submissions and listening to the oral submissions.

The Tribunal's conclusions.

32. These claims fail.

33. We first make general comment on the cases as advanced by both parties. As already noted, there were areas of deficiency in the evidence and the Tribunal has had to do the best with what evidence it has received. Those areas of deficiency will be further commented on later. Overall, the claimants' case can be described as encompassing three broad areas of allegation. The first is that the respondents have set out, for reasons of racial bias, to carry out a scheme of inspection on the claimant's practice designed to destabilise (the claimants word) the practice and having the effect, if not the intention, of driving patients away from it and into the arms of other practices. The allegation is that that conduct was discriminatory on the grounds of race and in some cases harassment related to race. The allegation is not that the respondents and the various inspectors carrying out the inspections were influenced by unconscious racial bias but rather that they were consciously and deliberately giving expression to their biased approach to the claimants as black men by creating a scheme of inspection which was more frequent and more intrusive than that which comparator practices were subjected to. The next broad allegation is that the respondents were acting at the behest of and on the insistence of NHS

England and the Clinical Commissioning Group for Doncaster. The claimants' case as expressed fully in Mr Echendu's closing submission is that NHS England was itself racially motivated in its dealings with the claimants' practice and had itself subjected the claimants' practice to a variety of detriments. That treatment we understand to be the subject of separate Employment Tribunal proceedings between the claimants and NHS England. The allegation as far is relevant to the respondents in this case is that the CQC and Mrs Murray-Cook were aware of the NHS persecution of the claimants, were aware that that persecution was racially motivated and therefore, in agreeing to assist in that persecution and carrying out inspections and changing the outcomes of inspections at NHS England's behest, were acting in a racially discriminatory manner. Finally, the evidence dealt in part with the question of Dr Brown's involvement. As already noted, Dr Brown is a member of the CCG and it was alleged that Dr Brown had used his position to seek to influence the respondents to carry out inspections in a way calculated to drive patients from their list towards his list. That was the motivation which Mr Echendu said was not the main motivation on the part of the respondents although it was a partial motivation. In making that submission Mr Echendu acknowledged that that was a motivation which was not connected to race. For that reason, the Tribunal has not considered the evidence about that (albeit relatively sparse) in any depth but has focused on the evidence that might support the claimants' case of direct discrimination in relation to each of the inspections in issue.

34. As to the complaints of victimisation, they turn on the knowledge of the respondents of the protected acts as set out above and any evidence to suggest that the claimants were subjected to detriments because of having done those protected acts.

35. Finally, on the complaints of harassment the Tribunal will deal with our view as to whether or not those offences can be made out, even if the factual allegations before us were upheld, at the end of the Judgment.

The August 2013 inspections

36. The allegation about this inspection does not centre on the outcome of the inspection (although see paragraph 47). Both as expressed in section 77 of the claimants' claim and in box 1 of the Scott schedule, the complaint is about the fact of the inspection at all.

37. On examination, the complaint breaks down to three different sub-complaints. The first complaint is that the inspection was made without legal authority. The second complaint is about its unannounced nature. The third complaint is that the claimants were selected and singled out to be the first Doncaster surgery to be inspected. All three of those different detrimental treatments, say the claimants, are evidence of difference of treatment because of race.

38. The Tribunal deals with each of those points in turn. The first is the legal authority point. The claimants' case here is that the CQC had no legal authority to carry out inspections of GP practices until the development of a regulatory framework for those inspections which appeared in the 2014 Regulations. The respondents case is that the 2008 Act and the 2010 Regulations gave the respondent the authority to carry out those inspections. The evidence before us however, did not establish the matter one way or the other with any certainty despite the fact that on more than one occasion we asked that the parties be

able to take us to what they say were the regulatory provisions that appear to prove their point. The Tribunal's position is that the matter ought to have been capable of being dealt with on documents alone but we were never satisfied that we had seen the documents that would assist us or heard submissions that would clearly set out the position. What documents we did see however led us to the following conclusions.

39. In January 2013 the CQC and the NHS Commissioning Board reached a memorandum of understanding about future co-operation. That could only, in the view of the Tribunal, have been with a view to the CQC extending its inspection regime to general practice. That view is reinforced by the fact that on 1 April 2013 all the GPs practices that we were made aware of in this case registered for the first time with the CQC. At some point in 2013, the CQC communicated publicly a strategy that included strategy for the inspection of GPs practices. That envisaged inspection starting in April of 2014. As a matter of fact, the evidence before us shows that the claimants' practice and at least another six practices in Doncaster were all inspected in 2013. As far as we know the claimants' was the first of the practices to be inspected but they were inspected in August and we were made aware of at least one other inspected in September. Although the Tribunal was unable to form a firm conclusion on the documents as to whether or not those inspections were carried out without authority, we could draw inferences from other facts. The first of those is that despite the fact that the claimants' practice was on the receiving end of an inspection report that found parts of its service inadequate, the claimants chose not to challenge the outcome of that report. If the claimants believed or understood the respondent to have been acting outside of its legal authority, it is surprising that they did not take the opportunity of judicially reviewing the report on the grounds that it was carried ultra vires. Nor are we aware of any other challenge by any other surgery in Doncaster or elsewhere to the legality of the inspections in 2013. Furthermore, it seems inherently improbable that a public body such as the CQC would carry out activities which it knew to be outside of its statutory powers and then proceed to publish evidence of that ultra vires activity on a publicly available website. On balance, the Tribunal conclude that the CQC had the legal authority to inspect the claimants' and other practices in the course of 2013.

40. The next complaint about that first inspection is that it was unannounced. The claimants used the word "invaded" in the Scott schedule, by which the Tribunal understood then to be complaining about the fact that the inspectors turned up without any warning. The claimants complained that there is ample evidence of difference of treatment here as compared to their comparators.

The comparators

41. At this point it would be helpful to make observations about the comparators in general and our observations here stand good for all of the claims of direct discrimination where these comparators are relied on. The comparator practices are set out in the Scott schedule and they have already been set out in this Judgment. The Tribunal's difficulty about the evidence in relation to comparators is that it is sparse. The fault for that can be shared equally

between the claimants and the respondents. Normally, one would expect claimants to establish their selected comparators as appropriate comparators by adducing evidence about the nature of those comparators. By the same token, one would normally expect a respondent seeking to rebut the value of a particular comparator as the basis for proper comparison to adduce evidence to support its case. Neither party helped the Tribunal in this way. We know almost nothing about the practices to which the claimants compare themselves. We know that they are said to be all in the broad geographical locality occupied the claimants' practice. We know that one, Thorn Moor, actually shares a set of premises with the claimants' practice. We know that Thorn Moor has partners at least two of whom appear to come from a BAME background and we know that one, Dr Brown's practice at Field House, has at least a senior partner, and perhaps the only partner now, who is probably not from an ethnic minority. Beyond that, we know nothing at all about the make-up of the partners for the other comparator practices. The Tribunal has had to decide whether or not it can usefully compare the claimants' treatment to that of its comparators before deciding whether or not we have evidence of difference of treatment, let alone where there is evidence of difference of treatment because of race.

42. On balance, the Tribunal has concluded that the claimants have satisfied us that theirs is the only general practice in Doncaster which *exclusively* led by black British general practitioners and on that basis the claimants are entitled to rely on the lack of that ethnic make-up in other practices when forming a comparison. That is the claimants' assertion, albeit unsupported by evidence other than their witness statements, and we had nothing of any consequence in rebuttal. Since the respondent has known for a long time which practices were being relied upon as comparators, we are entitled to assume that the claimants' reliance upon them would have been challenged by evidence from the respondent had such evidence been available,

The inspection (cont)

43. That having been said we then asked ourselves whether what has been established by the fact of the unannounced nature of the August 2013 inspection is evidence of difference of treatment. Again, we have not, for whatever reason, seen evidence about the nature of the inspections of all of the comparator practices. However, of the two practices we do know about (other than the claimants') that were inspected at that time, we do know that both of them had an announced visit and we are therefore able to form the view that in this case we have evidence of difference of treatment.

44. The authorities are clear that when the Tribunal is considering a series of complaints of discrimination, a Tribunal must be astute to examine each complaint individually but then at the end step back to consider whether, viewed as a whole, the evidence points to discrimination. At this point the Tribunal need only make the following observations. Even where difference of treatment and difference of status is shown, the authorities (see **Madarassy v Nomura International plc** 2007 ICR 687) call for something more before the respondent can be required to give an explanation for the treatment. The approach of going straight to the "reason why" can be another way of dealing with the burden of proof point, particularly where hypothetical comparators are relied on. In this is a case however, where direct comparisons are being drawn with live

comparators the standard approach burden of proof provisions is the best basis for establishing whether or not the claims can be upheld.

45. Our view is that the claimants have advanced no evidence, beyond that of difference of treatment and difference of status, that would allow us to infer racial motivation in the unannounced nature of the inspection so that we would be required to look to the respondent for an explanation. The claimants appeared to approach the case on the basis that it was sufficient for them to show that they had been treated differently. What we do know is that the documentary evidence shows that at the time of the inspection in August 2013 there was a concern that the claimants' practice was undergoing a degree of instability. It is an unchallenged fact that during the course of 2012 three out of four of the existing partners had left and the practice had had to place heavy reliance on locums. We also know that around about the same time NHS England the CCG were in receipt of a number of complaints by patients about the practice and a complaint by at least one whistle blower. That seems to us to be a likely explanation, if one is needed, for the early and unannounced inspection, once it was decided that there would be inspections at all in Doncaster.

The outcome of the August 2013 inspection

46. As we have already said, there is no complaint expressed about the outcome of the 2013 report. However, in fairness to the claimants we have gone on to consider whether any such complaint could be made out. We did not wish to hamper the claimants by perhaps what might have been an oversight in the way in which their claim was advanced in the Scott schedule or at paragraph 77 of the claim form itself. We have therefore looked at the report itself and listened carefully to the cross-examination by Mr Echendu of Ms Mitchell, the witness who knew most about it from the respondents.

47. The evidence of the report shows that the inspectors reached their conclusions on the basis of an examination of the documentation and policies and practices of the practice and interviews with staff and patients. Those interviews, although quoted anonymously, are quoted extensively and are relied on as part of the evidence to support the inspectors' findings of a degree of inadequacy in the practice as a whole. Unless it be the case that those inspectors were deliberately lying about what they were told by patients and staff, those quoted interviews form ample basis on which to reach the findings that the inspectors did. That is true in particular, of the overall conclusion that the practice was suffering from the instability caused by the flux at its head, no doubt the result of the resignation or departure of three out of the four GP partners. There is ample evidence that that instability was having an effect on patients and staff and examples of that can be found throughout the report but in particular perhaps at page 9 and 15.

48. In cross-examination, Dr Njoku fairly accepted that some of the criticisms, albeit not all of them, were fair and reasonable and in particular that concerned the practice's approach to complaints handling. The only real basis for challenging the probity of the report and its outcome is to suggest that the inspectors were, for whatever reason deliberately choosing to misreport what they were told. That appeared to be Dr Njoku's position, although he could produce no evidence for it. The Tribunal thinks that that is inherently improbable and we are particularly influenced in that view by the fact that the claimants had the

opportunity to challenge the accuracy of the inspection report through the first respondent's own procedures but did not. If Dr Njoku and Dr Uwhubetine, having read that report, were aghast at what they had read their staff being reported saying, and had then gone to check with their staff to ask whether that had been said and had been told that in fact that was a total misreporting of their interviews with the inspectors, one would have expected the accuracy of the report to have been challenged immediately, particularly knowing that that report would ultimately feature on a publicly available website. The Tribunal's overall conclusion therefore is that there is no evidence to support a suggestion that the outcome of that report was influenced by anything other than the inspectors' desire to accurately reflect the evidence before them.

The November 2013 inspection

49. Although this inspection forms part of the sequence of inspections which the claimants complain is overly oppressive, in fact Dr Njoku had no criticism of it. That is understandable. A follow-up inspection, given the perceived inadequacies identified and the enforcement notices that flowed from that inspection, was bound to happen. In the event, that follow up inspection showed that, greatly to their credit, the claimants had grappled with the enforcement notices and had put matters right so that the practice could be given a clean bill of health. The only way in which it could be said that this inspection formed part of any discriminatory regime was to suggest that it was deliberately teed up by a discriminatory outcome for the proceeding inspection and the Tribunal has dealt with that as fully as it can.

The 2015 inspection

50. The complaint about this inspection starts with an allegation that, once again, the claimants found themselves first in a queue for inspection. The agreed evidence between the parties is that between the 2013 inspections and the 2015 inspections, the regulatory and practice framework had altered and a new round of inspections had begun. The evidence before the Tribunal, to be found at page 43A and 43B, supports the second respondent's evidence on this point. She told us that a decision was taken in the South and West Yorkshire area to carry out inspections of a number (but not all) of the Doncaster practices during the month of January. That decision flowed from a meeting at which NHS England were present. The claimants suggest the decision that they should be inspected early was mandated by the NHS England representatives and that the list for inspection was the product of NHS England leaning on the CQC to inspect certain practices and the claimants' in particular.

The involvement of NHS England

51. There is certainly evidence that the respondents and NHS England met regularly. That much was accepted openly by Mrs Murray-Cook. That there had been a meeting which had involved NHS England representatives following which the list at 43A to B was arrived at. Mrs Murray-Cook's case however was that that is a list drawn up by the CQC, having taken soundings and received intelligence from their NHS England colleagues and was certainly not a list produced at the behest or insistence of NHS England.

52. Apart from the fact of the meetings taking place, the claimants had absolutely no evidence to support their contention that the CQC was impermissibly influenced in the identification of the various practices to be inspected. In any

case, even if it had been, the Tribunal has heard no evidence at all that would allow us to conclude that NHS England was racially biased against the claimants, still less that the claimants' were aware of that bias and willing to give effect to it.

53. The claimants complain that, once again, they were first in the queue but in fact that list totals sixteen Doncaster practices for inspection. The total number of practices in Doncaster is only 43 and therefore were looking at a list that comprises some 38% of the total to be inspected in Doncaster. Nor were the claimants the first to be inspected on that list. In fact, they were the penultimate practice to be inspected on that list. That list also includes one of the claimants' comparator surgeries, that's to say Dr Brown's surgery. Nevertheless, and being as generous as we can be, it is the case that some of the claimants' comparator practices are not on that list. It therefore might be said that there is evidence of difference of treatment in relation to *those* comparators since the claimants were in the first tranche of practices in Doncaster to be inspected and that all of the other comparator practices except Dr Brown's came into some later tranche.

54. Once again the Tribunal has to consider both on the level of detail about this particular inspection and at a general level whether there is any evidence to suggest that any difference of treatment might be caused by the difference of race. The Tribunal finds that there is no evidence adduced by the claimants that would support the drawing of inferences requiring the respondent to provide an explanation. The various practices on the list at 43A and B vary in locality and history and since we have no detailed notes as to why those particular practices were selected we were left with the conclusion that a group of practices were selected for reasons which were never advanced to us. Mrs Murray-Cook made it clear that the decision to inspect the claimants' practice and the other practices on that list was not hers but was made higher up the chain of command in the CQC.

55. This means that if true, and it was not significantly challenged by the claimants, that any discriminatory conduct on the part of the respondent starts at the very top, making more improbable the suggestion that there was racial motivation. As It also would require the Tribunal to conclude that Dr Browns' practice, at least, had been selected for the first tranche of inspection as a smokescreen for that racially motivated desire to penalise the claimants for their race.

The outcome of the 2015 inspection

56. We turn now to the other allegation that relates only to the 2015 outcome and that was that the report was deliberately delayed whilst Mrs Murray-Cook allowed herself to be influenced by NHS England into altering a good outcome to an inadequate outcome.

57. The allegation here centres on what Mr Echendu put to Mrs Murray-Cook was her feedback to Dr Njoku after the end of the 2015 inspection. All parties agree that Mrs Murray-Cook was the lead inspector in January 2015 and there is equally agreement that Mrs Murray-Cook followed the practice of giving feedback immediately after the inspection. The difference between the parties lies in Mr Echendu's assertion that, in the course of giving feedback, Mrs Murray-Cook told Dr Njoku that the outcome of the inspection would be a finding of "good". That, in turn, is relied on by the claimants as evidence of racial

motivation and an improper and itself discriminator influence by NHS England, when, some months later, the final report was published and the practice was found to be "inadequate".

58. The evidence about what happened in that feedback meeting is sparse. There was certainly nothing in Dr Njoku's statement that deals with it, although there is an assertion that it was given contained in the claimants' claim form. When Mrs Murray-Cook was cross-examined on the point, she said that since the Scott schedule of 2018 was the first time that this complaint had been raised, she had not retained her notes of her meeting with Dr Njoku but that she thought it was inherently unlikely that she would say such a thing. That was for two reasons. First, she knew the likely outcome and secondly she would never commit herself so definitely in a feedback meeting. The Tribunal was therefore forced to choose whom we prefer on this point. Although we did not hear Dr Njoku cross-examined on this meeting, because it is not mentioned in his witness statement, we were prepared infer that had he been asked, Dr Njoku would have said that he understood Mrs Murray-Cook to be saying that the outcome would be good.

59. On balance, the Tribunal prefer Mrs Murray-Cook's version for the following reasons. The Tribunal has seen the report. The report's conclusions are fully supported by the evidence set out in the body of the report. Mrs Murray-Cook was one of the inspectors. Since Mrs Murray-Cook knew that the report was going to have an "inadequate" finding it is inherently implausible that she would have told Dr Njoku to the contrary. Any change of position might of course be explained by the claimants' case that Mrs Murray-Cook was influenced out of her initial decision to give a good finding, by NHS England. The Tribunal supposes that is possible although there is absolutely no evidence to support that contention other than the fact that Mrs Murray-Cook met with NHS England in-between the inspection and the report. Mrs Murray-Cook explained that such a meeting was entirely routine and that it was the CQC's practice to share with NHS England a broad feedback on inspections even before the report was published. In this context we refer to our earlier view on the lack of evidence about NHS England's motives. In any case what is alleged by the claimants' entails a wholesale rewriting of the report and its conclusions and the involvement of all three inspectors. Further, had Mrs Murray-Cook made such a statement to Dr Njoku, Dr Njoku was bound to be astonished by the outcome of the report when it was sent to him in draft and one would have expected Dr Njoku and Dr Uwhubetine to make the point to Mrs Murray-Cook that they had been misled by her in her feedback. In fact, we know that Dr Njoku did make a complaint about the contents of the report (see page 43C). In evidence, Dr Njoku confirmed that the Tribunal could properly infer that that letter contained the sum total of his complaints about the report. Those complaints are notable for (a) total absence of any assertion that Mrs Murray-Cook had told Dr Njoku that the outcome would be good and (b) the rather confined nature of the complaints about the report itself. They centre on the findings about staff training and support. It is true that the report does contain comments about staff training and support, but the findings of inadequacy in three out of the five factors and requirement to improve in the other two are based on a great deal more than concerns about staff training and support. The Tribunal therefore concluded that Dr Njoku was not led to believe that the report would be a good one and that his "evidence" (adduced by way of questions put on his behalf) is

not accepted. The entire basis for this allegation therefore falls away and any suggestion that the outcome was influenced by NHS England must go the same way.

The January 2016 inspection

60. The next inspection that the Tribunal has to deal with is the January 2016 inspection. This, like the November 2013 inspection, was a follow-up inspection from an "inadequate" finding in the preceding inspection. Like the November 2013 inspection, the fact of this inspection is entirely unremarkable. Indeed, the outcome of the June 2015 inspection was that the claimants' practice was put in special measures and a further inspection within six months was not only well within policy but entirely unsurprising. Once again, the fact of this inspection is complained of as contributing to the oppressive and over-regular regime of inspection. The Tribunal observes that that complaint loses a great deal of force when the context of the 2016 report is properly understood. If the claimants were now being treated differently from their comparators, who were not getting follow-up inspections, that is because their comparators were, when inspected, nor generating the need for follow-up inspections. At this point the comparator practices cease to be a basis for proper comparison since they now differed from the claimant's practice in the outcome of their reports. Furthermore, the outcome of the August 2015 report provides a straightforward and convincing non-discriminatory reason for the later inspections in 2016.

The August 2016 inspection

61. We now move to the second inspection in 2016. That is to say, the August inspection. The January 2016 inspection had found that the practice was good in all respects except one where improvement was required and that related to complaints handling. That outcome was not challenged by the practice. The real complaint about the August 2016 report centres on the fact that it does not mention the fact that the claimants' practice had car parking facilities. Here the claimants draw a comparison between their inspection in 2016 and the inspection of the Thorn Moor/Chestnut House practice in the same year. The claimants and the Thorn Moor practice share the same premises and the report into the Thorn Moor practice mentions the fact that that practice had the benefit of car parking facilities. It is a matter of record that the 2016 inspection report into the claimants' practice does not make mention of car parking. The same inspectors, or at least one of the same inspectors, Mrs Murray-Cook, were involved in both inspections. Mrs Murray-Cook acknowledged the difference between the reference to the facilities and the Tribunal accepts that there was evidence on the face of the reports a difference of treatment in relation to the identifying of or failure to identify car parking facilities. Once again, the Tribunal therefore asked itself whether there is any evidence to shift the burden of proof to the respondent to supply an explanation. The Tribunal has concluded that there is not. We observe that this is a trivial matter, particularly when set aside the much more serious concerns expressed in the 2015 report and, indeed, the requirement for an improvement contained in the 2016 report. Furthermore, the report on the claimants' practice does not say that they do not have car parking facilities. It simply fails to mention them. If, as is alleged, this was an attempt to shift patients away from the claimants' practice to the Thorn Moor practice it was bound to fail, since existing patients of both practices must have known

what the facilities were. There is no evidence that would shift the burden that any difference of treatment was motivated by race.

62. In cross-examination, Dr Njoku complained that the January 2016 inspection outcome did not justify a comprehensive follow-up. From this we inferred that his other complaint about the August 2016 inspection was that it was unnecessarily through and oppressive. However, the documentary evidence disposed of that complaint decisively. There was a follow-up inspection but it was a "focused" one, looking only at whether or not the claimants had improved their complaints handling. Having satisfied themselves on the basis of a limited inspection that that matter had been dealt with, the inspectors cleared the claimants' practice in its totality. The Tribunal is at a loss to see where the complaint about that visit can come. It too is one of the six inspections that the claimants complain about of course but we make the same observation as we have in relation to the other follow-up inspections in November 2013 and January 2016. That is to say that the inspection was made inevitable by the outcome of the proceeding inspection and the best explanation for its existence lies in the outcome of its predecessor inspection.

The January 2018 inspection

63. Finally, we turn to the January 2018 inspection. This was first mooted in correspondence between Mrs Murray-Cook and the claimant as early as 6 November 2018. Once again, there had been a change in the inspection regime and approach at a national level and a decision had been made that every GP practice in England and Wales would be inspected with a time gap of every three to five years. The claimants again complain that they found themselves at the head of the queue for inspection under this new system, the third time that they had found themselves in that position. That is clear evidence they say that they were being singled out because of their race. The documentary evidence makes it clear that the decision as to which practices in Doncaster should go to the front of the queue for inspection under the new processes was influenced by a variety of factors but that a decision was taken that practices that had been in special measures would be inspected amongst the first. Beyond that, it is to be observed that this inspection was slated for late 2017, almost three years after the last routine inspection in early 2015 and therefore, did not represent a significant shift from the respondent's general policy on regularity of inspections. The Tribunal's observation is that since decisions had to be made as to which practices would go first in any new round of inspections, and since inspections were decided on a locality by locality basis, it is hardly surprising that a decision was made that practices that had been in special measures at some point in their life whilst the CQC was the inspecting body would be inspected first. Indeed, we saw some evidence that another Doncaster practice that had been in special measures was also selected for early inspection in this new round. In the circumstances, any difference of treatment as between the claimants and their comparators can be explained by the history of the claimants' practice.

64. Nevertheless, the claimants point to two more matters which would point away from that explanation as being a plausible one. The first of those is the question of whether or not this inspection was carried out contrary to a general suspension of inspections ordered by the chief inspector at that period. This was one of the relatively few areas where there was a significant question as to

fact. Mr Echendu made an entirely unsupported assertion that the suspension had been widely announced, in early November 2017, on the television. There is no evidence of that in the Tribunal's bundle. In contrast, the Tribunal did have sight of the page taken from the Nursing Times (see page 428) which refers to a CQC statement published on 10 January announcing that suspension. The Tribunal therefore takes the view that on balance that suspension had not been announced in early November but was on 10 January. In the circumstances, the correspondence between Mrs Murray-Cook and the claimants about a possible inspection, which started on 6 November was clearly conducted well before any suspension.

65. The claimants second submission was that even if the suspension did not take place until 10 January, the inspection of 15 January must certainly have been made in the full knowledge of the fact that the chief inspector had suspended inspections. Mrs Murray-Cook was cross-examined by Mr Echendu on this point. She gave detailed evidence of a telephone conversation that she had had with Dr Njoku. She explained that she had rung Dr Njoku to ask whether he was content, despite the general suspension, for the CQC to visit. She explained that Dr Njoku had said that it was not a matter for him as to when the CQC visited but a matter for the CQC. Mrs Murray-Cook went on to say that she asked Dr Njoku whether his practice was experiencing extra pressure as a result of winter and Dr Njoku had replied by saying that the practice was always under significant pressure. Mrs Murray-Cook then asked whether he was content, in those circumstances, for the CQC to inspect and Dr Njoku had said that the door of his practice was always open to the CQC and that indeed he would roll out the red carpet. Mrs Murray-Cook went on to say that the use of the phrase "red carpet" is what had made that conversation memorable to her. Although Dr Echendu took issue with my observation during his closing submissions that that part of Mrs Murray Cook's evidence had been unchallenged, I have checked my notes and there was no challenge to the truth of Mrs Murray-Cook's evidence on that point. Even if there had been, it would not have been on the basis of any evidence advanced by Dr Njoku to suggest that he had not had any such conversation and that he had specifically told the CQC that he did not want them to inspect. The Tribunal found Mrs Murray-Cook's evidence on this point convincing and, in particular the reference to the red carpet has about it the ring of truth. The Tribunal therefore concluded that there was no evidence to suggest that Mrs Murray-Cook, or indeed her superiors, sanctioned an investigation which had otherwise been prohibited by the chief inspector and it is to be noted that that inspection resulted in an overall finding of "good" although it is the claimants' case that it ought to have been "excellent".

Other matters

66. We deal now with the evidence in relation to a matter where we are not entirely clear how it fitted into the case but nevertheless featured in a fairly heated cross-examination of Mrs Murray-Cook by Mr Echendu. It relates to Dr Brown's erstwhile partner in the Field House surgery Dr Bundy. Mrs Murray-Cook was cross-examined on the basis that when she and her inspectors, when inspecting Field House had failed to find what should have been apparent, which was that one of the GPs who were partners in that practice, a Dr Bundy, was an undischarged bankrupt or at least had bankruptcy proceedings against

him and that his certificate for practice had accordingly been suspended. It was Mrs Murray-Cook's evidence that all practice certificates were inspected as a matter of routine and that the inspectors found that one of the partners in the practice was not entitled to practice, that would have featured in their report. Mr Echendu insisted that that was evidence of Dr Brown's practice being favoured since either the inspectors had negligently failed to inspect such an obvious matter or they had inspected but had deliberately overlooked the existence of that evidence. When the Tribunal asked Mr Echendu what evidence there was to show that Dr Bundy's practice certificate was suspended at the time of the inspection we were taken to evidence to show that some while later, in 2017, that doctor had bankruptcy proceedings taken against him in court. The Tribunal's observation is the fact of those proceedings are evidence only of the fact of those proceedings and were certainly not evidence that at the time of the 2016 inspection by Mrs Murray-Cook and her colleagues, Dr Bundy's practice certificate had been suspended and that the inspectors had deliberately or negligently overlooked that. In any case, we would observe as we already have, that any evidence of the favouring of Dr Brown appears to form part of a complaint that Dr Brown was using his influence on the CQC for a financial rather than other motives. Not only is there no evidence of Dr Brown's practice being favoured, there is, more importantly for this case, no evidence and apparently no allegation that any such favouritism was based on motives of race.

67. We deal now with the basis of the case advanced by the claimants that, if not motivated by their own racial bias, the respondents were motivated by the NHS England's racial bias, which they knew about and were happy to give effect to. That is a case which requires the following steps. First that the Tribunal conclude that NHS England had a racial motivation, second that if it did the respondents knew of it and thirdly, that knowing of it, they agreed to give effect to it. With due respect to the claimants, that is a case which is even less plausible than their case against the respondents alleging that they themselves are motivated by their own racial bias. We have heard ample evidence of the fact that the claimants are in dispute with NHS England. We do not doubt that they believe that NHS England has treated them in a particular way because of their colour or ethnic origins. Their belief however, does not amount to evidence that could establish that racial motivation and the Tribunal has understandably not heard the evidence that would allow us to conclude ourselves that NHS England has acted in a racially biased way. When the case management of this case came before Employment Judge Little the suggestion that the two cases be combined for hearing was resisted by the claimants. Therefore the Tribunal was simply not in a position to hear evidence that might allow us to conclude that NHS England had treated the respondents in a racially discriminatory way. Nor was there any evidence to suggest that the respondents knew or were aware of a racially discriminatory policy by NHS England towards the claimants. Certain it is that the respondents knew of concerns that NHS England had about the practice and there is ample documentary evidence of that in the file. Unsurprisingly, none of that evidence makes it clear that those concerns were based on the claimants' race nor, with due respect to Mr Echendu, can any of that evidence lead to an inference that the respondents must have known that those concerns were really a mask for a racially discriminatory policy of oppression and persecution. Finally, there is

no evidence, as we have already pointed out, to suggest that the CQC or Mrs Murray-Cook, or both of them, were carrying out their statutory functions in a way that was mandated, dictated or otherwise impermissibly influenced by NHS England. Therefore, it follows that the Tribunal has no evidence for the existence of any of the three necessary steps to support that part of the claimants' case.

The victimisation claims

68. We deal now with the issue of victimisation. Some of the complaints in the Scott schedule are said to form the basis of complaints not just of direct race discrimination but of victimisation. In order for there to be victimisation it is trite to say that there must first be a protected act and trite to say that there must be evidence to support a finding that the protected act is the cause of the detrimental treatment. Mr Echendu very fairly accepted in his closing submissions that the Tribunal must be satisfied that the respondents had actual knowledge (or belief) of the protected acts in question before the Tribunal could conclude that any of the detrimental treatment happened because of the protected acts. Of the three protected acts in play here, two of those relate to litigation that the respondents were not party to. Mr Echendu insists that the Tribunal can properly infer that Mrs Murray-Cook and indeed her superiors must have known of the fact of that litigation because of the close relationship that they enjoyed with NHS England and the sharing of information. The Tribunal would observe that it is at least possible that that information was shared with the CQC but there was no evidence before us to support that and Mrs Murray-Cook denied any knowledge of the fact of that litigation. Absent any other evidence to suggest that she was misleading us, the Tribunal accepted that evidence and that deals with the protected acts centred on the NHS litigation as being causative of any detriment involving Mrs Murray-Cook or the first respondent for whom Mrs Murray-Cook was acting as lead inspector in relation to the claimants' practice.

69. That leaves us with the other protected act, which is Mr Echendu's letter of 10 November. Here there is no doubt that it is a protected act and that the respondents were fully aware of it. The question is whether or not there is any evidence that it caused the announcement of the inspection or the inspection itself. It certainly cannot have caused the selection of the claimants' practice for inspection, since that was evidently made well before that letter was sent. Indeed, the letter was sent in response to Mrs Murray-Cook identifying the claimants and communicating with them as likely early candidates for inspection. It therefore follows that the only detrimental act that could plausibly flow from the fact of that protected act is the fact that the inspection was carried out in January 2015. The Tribunal has already dealt with what we consider to be the likeliest explanation for the fact of that inspection, namely that the claimants' practice had been selected for inspection and that Dr Njoku had been prepared for the inspection to go ahead. The Tribunal therefore does not consider that there is any evidence that will shift the burden of proof to the respondent to prove the lack of connection between the protected act and the fact of the inspection.

The claims of harassment

70. There are a number of boxes in the Scott schedule where it is alleged that acts are either direct discrimination because of race or are harassment related to

race. That is not true for all of the boxes. Nevertheless, for the boxes where it is true, the harassment complaints must fail for the simple reason that none of the matters alleged against the respondents in those boxes have about them the characteristics that could support a finding of harassment *related to race*. For such a finding the Tribunal would have to be satisfied that the actions carried out by the respondent themselves related to race. That is to say that there was something inherent in the actions themselves that referred either directly or indirectly to the claimants' race. All the actions complained of in this case as amounting to harassment are administrative actions of an administrative body. They were carried out in a way which made no reference, even obliquely, to race or anything connected to race. In the claimants' case, their only connection to race was the motivation behind them. They were, therefore, not of the quality that could found a complaint of harassment. The fact of motivation supports a finding of direct discrimination not of harassment. Even if it were possible to found a complaint of harassment based on a motivation which was racially discriminatory, the Tribunal would find that the complaints fail since we are satisfied that the actions of the respondents were not motivated on the grounds of race.

The case overall

71. At this point it would be appropriate to deal with Mr Serr's submission as to the general implausibility of the suggestion that the respondents were guilty of a racially motivated assault on the claimants' practice. The Tribunal accepts that the fact that something is improbable does not mean that it might not happen. Nevertheless, the general improbability of a proposition is a matter that the Tribunal can take into account. Not only do we understand Mr Serr's submission when he draws to the Tribunal's attention the unlikeliness of a public body acquiring a responsibility for the inspection of GPs practice and immediately deciding to give reign to a generally understood and practised racial bias, we bear in mind that the overall trajectory of the claimants' practice in the inspection regime following the 2015 inspection was heading towards an outcome in which the claimants, in 2018, were found to be good in every respect. In this regard Mr Serr's observation that that does not sit well with a decision to destabilise the claimants' practice by reason of race is well made. If Dr Njoku's allegation that the inspectors (all of whom would have had to have been recruited to the racially biased nature of the conspiracy against the claimants) were more than capable of simply inventing evidence is true, it seems surprising that the inspectors did not, on every occasion, invent evidence designed to give effect to the generally understood conspiracy, based on race, to destabilise and perhaps drive out of practice the claimants altogether. That simply did not happen. The evidence, on the contrary, shows that the outcomes of inspections varied and that on occasions the claimants' practice was found to be inadequate but on other occasions, including the most recent occasion that was not the case.

72. The claimants' case, by contrast, suffered from an unfocussed approach with allegations often unsupported by anything more than a feeling of general injustice. The allegations about the involvement of Dr Brown, the CCG and NHS England added nothing at all to our understanding of what we were supposed to be deciding.

73. Our overall view, as already expressed, is that there was an understandable and logical sequence of events where each inspection can be explained either by the outcome of the previous inspection or by the general history of the claimants' practice after 2013 or by the policy of the respondent or a combination of all three. Although it is certainly the case that the claimants' practice has had more inspections than any other practice we heard about in this case, and that therefore there is evidence that they have been treated differently than, for example some of the other comparator practices, in the number of inspections, the explanation for that difference of treatment is obvious when one examines each of the inspections in turn and one considers the general policy of the respondents at the relevant times. Furthermore, there is no evidence, at an individual level, to support an inference that the individual decisions in relation to each of those inspections might be influenced by considerations of race. For those reasons the Tribunal concludes that these claims fail and must be dismissed.

Employment Judge Rostant

Date 12 August 2019