EMPLOYMENT TRIBUNALS

Claimant: Dr JB Ilangaratne

Respondent: Humber Teaching NHS Foundation Trust

Heard at: Hull
On: 7-10 May, 2 and (deliberations only) 3 September 2019

Before: Employment Judge Maidment
Members: Mr N Pearse
Mr GD Wareing

Representation
Claimant: In person
Respondent: Ms L Kaye, Counsel

RESERVED JUDGMENT

The Claimant's complaints of race discrimination fail and are dismissed.

REASONS

Issues

1. The Claimant's complaints in these proceedings are of direct race discrimination. Originally complaints of indirect discrimination and seeking damages for breach of contract had been raised, but these had since been dismissed upon the Claimant's withdrawal of them. The Claimant is Asian Sri Lankan in terms of ethnicity/national origin and relies in his complaint, in particular, on his colour and his being a BME doctor as the reason for less favourable treatment.

2. The Claimant's complaints arise out of the events at an internal lecture on 26 April 2017 and, in particular, the treatment he received from a Dr Wood. It is important to note, however, that there is no complaint before the Tribunal about the treatment he received from Dr Wood itself. As will be

explained, the Claimant complained internally that Dr Wood's behaviour towards him was racially motivated, but that is not a question for this Tribunal to determine. Instead, the complaints of less favourable treatment relate to the internal process which the Respondent adopted in response to the Claimant's complaints about Dr Wood.

3. The Claimant's complaints had been identified during the Tribunal's case management process, but the Tribunal spent some time at the outset clarifying with the Claimant the actual complaints he was asking the Tribunal to determine as (and if) distinct from a number of specific issues he raised in further particulars which he had provided. Having identified those complaints, the Tribunal spent the remainder of the first morning of the hearing privately reading the witness statements exchanged between the parties, but asked Claimant during this adjournment to give some thought to this formulation of his complaints and to ensure that they were definitive of the matters he was seeking the Tribunal to determine. On reconvening, he confirmed that they were.

4. Firstly, the Claimant complains that the Respondent failed to properly categorise his complaints about Dr Wood's inappropriate language and behaviour (a reference to his PowerPoint slides which included naked images) as bullying or misconduct. It had placed too high a threshold for meeting their definition.

5. Secondly, the Respondent did not afford the Claimant a proper forum to air his concerns about Dr Wood.

6. Thirdly, the Respondent had not addressed the Claimant's concerns in line with the Respondent's own policies.

7. Fourthly, the Respondent had failed to investigate the Claimant's complaint fairly, properly and within a reasonable timescale.

8. Fifthly, the Respondent had not provided sufficient reasons as to why Dr Wood's behaviour did not amount to bullying/misconduct of the Claimant.

9. The Claimant confirmed that the matters raised in paragraph 11(i)-(ix) of his further particulars and in paragraphs 2-10 and 13-15 of his response dated 19 March 2018 to the outcome of an investigation conducted by Ms Flack were not freestanding complaints of discrimination but background matters, some minor, but from which the Tribunal might draw an inference of less favourable treatment. He said that he was not asking the Tribunal to go through each of them. The Tribunal would emphasise nevertheless that in the course of its deliberations it has reviewed all those points made by the Claimant.

10. It appeared to the Tribunal that, in terms of relevant comparator, it had been clarified during the case management process that the Claimant was maintaining that a hypothetical white doctor complaining about a BME lecturer, who acted and spoke as Dr Wood had, would have been treated more favourably by the Respondent. The Tribunal queried whether the Claimant's complaint was in fact somewhat broader and not dependent upon a reversal of the colour of the lecturer. Was the Claimant also maintaining that a white doctor complaining about Dr Wood would have been treated more favourably? The Claimant confirmed that that this was a basis of his complaint.

Evidence

11. The Claimant raised that, of the Respondent's witnesses, one was a former and one a current Medical Director and he might feel intimidated by their presence in the Tribunal room, which could have a negative impact on his ability to explain himself and to cross-examine witnesses. The Tribunal was of the view that those witnesses ought not to be excluded from the hearing room, where the Tribunal did not consider that to be such a risk in all the circumstances, including the nature of the complaints pursued and where those witnesses who were being accused of unlawful discrimination ought to be able to understand what was being said against them and to give appropriate instructions. The Claimant was going to have to cross-examine these very witnesses himself in any event and did not raise that this would be problematical for him in any way.

12. As already referred to, having clarified the issues with the parties, the Tribunal took some time to privately read into the witness statements exchanged between them and relevant documentation. That documentation was contained in two separate folders and numbered in excess of 500 pages. A small amount of additional documentation was disclosed during the proceedings, but without any objection by either party as to its inclusion in evidence before the Tribunal.

13. When giving evidence, each witness was able to confirm their statements and, subject to any brief supplementary questions, then be open to be cross-examined. The Tribunal heard firstly from the Claimant himself. It then heard from Dr Dasari Michael, consultant psychiatrist and former Medical Director, (interposed during Dr Michael's evidence) from Dr John Byrne, Medical Director, Ms Lynn Parkinson, Chief Operating Officer, Ms Michele Moran, Chief Executive and Ms Alison Flack, Transformation Programme Director.

14. At the conclusion of evidence, the Tribunal was presented with written submissions by the Claimant and on behalf of the Respondent which were supplemented orally.

15. Having considered all the relevant evidence, the Tribunal makes the findings of fact as follows.

Facts

16. The Claimant is employed by the Respondent as a speciality doctor in psychiatry. He attended a training session as part of his Continuing Professional Development ("CPD") delivered by Dr Simon Wood of the Respondent on 26 April 2017. Dr Wood had held various positions with the Respondent but at that point in time was the Principal SOAD ("Second Opinion Appointed Doctor") of the Care Quality Commission ("CQC").

17. This lecture was one of a series of regular Wednesday morning training sessions primarily aimed at junior doctors, but open to doctors of all levels to attend to update their skills and knowledge and to help them acquire sufficient CPD hours for the purpose of their annual appraisals. The sessions took place at a lecture theatre at Castle Hill Hospital. Dr Wood's lecture was delivered from a lectern on a stage. Doctors could sit wherever they wished. Behind the last row of ordinary chairs, at the back of the lecture theatre, were 2 sofas. The lecture was attended by 40 – 50 people.

18. The Claimant's evidence is that before the lecture began Dr Wood was distributing blank A4 sheets of paper, but refused to give one to the Claimant. The lecture was late in starting due to technical issues which appeared to annoy Dr Wood. He then returned to his lecturn to begin his lecture. Before starting, he asked 4 doctors who were sitting on the rear sofas behind the chairs, including the Claimant, to either come forward or "*bugger off*". He repeated his request. These were confirmed by the Claimant as the words used at his interview with Ms Flack on 8 September 2017. The other 3 doctors moved forward, but the Claimant did not. Dr Wood asked the Claimant whether his request was not clear enough. The Claimant found his behaviour to be inappropriate and intimidating, the Claimant being particularly shocked that Dr Wood was behaving in this manner in front of an audience of colleagues.

19. The Claimant responded: *"I will let you know privately"* which, in the Claimant's view, de-escalated the situation and the lecture commenced and continued to its completion without further incident. The Claimant asked Dr Wood a question during the lecture which Dr Wood answered.

20. There was never any material dispute as to the words exchanged between the Claimant and Dr Wood save that the Claimant maintained that Dr Wood had said: *"Is that not clear enough"* when the Claimant did not move forward at the lecture. The Respondent did not consider that this comment was supported on the evidence before it.

21. It is noted at this stage that, at one point in the lecture, Dr Wood showed 2 slides which pictured naked people who had been photographed as part of

an art installation to be exhibited during Hull's year as National City of Culture. It later emerged that one slide included the words: "*Fuck the Rules*" (during Ms Flack's investigation) and another: *"Arse Horror*".

22. The Claimant sent an email to Gillian Hughes, Medical Education Manager, on 26 April raising concerns about Dr Wood's behaviour. In this, the Claimant described what had been said to him by Dr Wood at the lecture. He referred to his view of the repetition of the words *"bugger off"* and then inquiring if he had understood as being an "*intemperate outburst*", an act of bullying and harassment and a threat to deny him the opportunity to take part in CPD. He considered, he said, that Dr Wood had breached the GMC's Good Medical Practice, in particular in failing to respect a colleague. He said this caused him severe embarrassment and distress. The Claimant did not refer to Dr Wood's behaviour as discriminatory or to the ethnicity of the other doctors who had been seated at the back of the lecture. Ms Hughes acknowledged receipt around an hour later, at the same time sending this on to Dr Desari Michael, Medical Director (as she informed the Claimant she was doing). Any issues raised by a doctor about another doctor had to be forwarded to him, as Medical Director, to review and determine the next steps. Dr Michael is of Indian ethnicity.

23. Dr Michael knew both the Claimant and Dr Wood, but there is no evidence that he had a close relationship, whether personal or professional, with Dr Wood. Dr Michael had first met Dr Wood sometime between 1987 and 2000 when working as a junior doctor under his supervision. When asked to describe his relationship with Dr Wood at the time, he said that it was "*quite cordial*", which struck the Tribunal as hardly effusive. When Dr Michael returned to the Respondent around 2006, Dr Wood was still active in practice as a consultant psychiatrist and the Claimant asserts that it is more likely than not that Dr Michael would have met Dr Wood over the following years. The Tribunal can accept that that their paths are likely to have crossed from time to time but rejects the Claimant's assertion that Dr Michael appeared somewhat guarded when he explored with him in cross examination his connection with Dr Wood. It was suggested by the Claimant that whilst Dr Michael said that he did not regularly attend the Wednesday morning CPD lectures, he had attended on a day when Dr Wood had been giving a lecture on the Mental Health Act Code of Practice. Dr Michael may have introduced Dr Wood as the speaker, but the Tribunal does not accept that he was unusually complimentary about Dr Wood when doing so. There is no evidence that Dr Michael held Dr Wood in particular high esteem or exaggerated his achievements. Dr Michael appeared genuinely perplexed by the Claimant's cross examination of him in which the Claimant sought to portray a closeness of relationship with Dr Wood which he clearly did not recognise himself as having.

24. Dr Michael had not previously received any other complaints relating to Dr Wood, nor indeed seen any complaints or concerns relating to the Claimant. He was aware that Dr Wood was working on a "bank" contract basis

undertaking appraisals for a revalidation purposes and some work as an adviser on the Health Legislation Committee.

25. On reviewing the Claimant's complaint, he noted the language the Claimant said had been used towards him and thought it was clear from the Claimant's account that Dr Wood had been irritated by some technical difficulties with the computer in the lecture theatre. As already noted, the Claimant referred to Dr Wood having been guilty of an "*intemperate outburst*", "*bullying and harassment*" and "*a threat to deny the opportunity to take part in CPD*". The complaint did not state or allude to there being any motivation in Dr Wood's language related to the Claimant's race or nationality or that of the other 3 doctors who had been asked to move forward. All 4 were BME doctors, but Dr Michael was unaware of that at this point.

26. At the end of the Claimant's complaint he stated: *"In any event, if the trust is unable to deal with this matter independently and impartially then please let me know. In any event I will be taking independent advice about this issue and proceed as necessary."* Dr Michael did not understand why, at this early stage, the Claimant appeared (to him) to have doubts about how his complaint might be handled.

27. Dr Michael met with Julie Hall, Deputy Director of HR on 3 May 2017 to discuss how to progress the Claimant's complaints. He explained to her the nature of the allegations made by the Claimant. Ms Hall advised that there was no need from an HR perspective for Dr Wood to be suspended from completing the appraisals he was undertaking on behalf the Respondent. It was agreed between them that it would be a good idea to meet with Dr Wood in the first instance to find out his comments on the events at the training session. Ms Hall also advised Dr Michael that the Respondent should handle the complaint under a recently created policy known as the Framework for Personal Responsibility Policy ("FPRP"), indeed only signed off with the Trust Consultation and Negotiation Committee in January 2017.

28. The introduction to the FPRP explained that: *"This framework seeks to provide a route for moving away from a blame centred culture and to establish a supportive approach for changing attitudes, behaviour and practice".* Under the heading of *"Defining Personal Responsibility"* it is stated that: "*It is easy to overlook our personal responsibility for the way that we conduct ourselves and, the subsequent impact of our acts or omissions on service users or colleagues."* Personal responsibility is defined to include actively learning from mistakes or poorly managed situations and treating others with dignity and respect. Employees are told that they may use the framework to bring forward concerns or issues in confidence that they will be dealt with appropriately and without overreaction. It is stated that these might include an incident or practice an employee has committed about which they feel unhappy and acting in accordance with Professional Codes of Conduct or standards to highlight behaviours that require action or

improvement. The Tribunal considers that whilst the FPRP is focused on patient care, the terms of the policy go wider than that.

29. The Tribunal notes that the FPRP gave examples of when it would not apply which included where the matter fell within the parameters of the Disciplinary Procedure and/or the Performance Management Procedure.

30. The purpose of the FPRP was to seek to move away from a culture of blame and to allow matters to be dealt with without the use of formal disciplinary policies where appropriate to ensure that everyone understood their responsibilities and that their attitudes reflected those responsibilities. To Dr Michael, the Claimant's complaint appeared at that stage to be a simple matter of a lack of mutual respect which could appropriately be handled under the policy. Whilst he recognised that the complaint involved the use of seemingly inappropriate language towards a colleague, he did not see it as an obvious disciplinary matter. It did not appear to him to be a serious issue and he did not think it was being expressed as such by the Claimant.

31. Dr Michael and Ms Hall met with Dr Wood on 2 June 2017. He explained the nature of the session he had been undertaking on the day in question. The Tribunal concludes that this was not to address clinical issues but about getting people to look at things differently and getting a second opinion. The aim was to challenge behaviours and to change ways of thinking. In that sense, it might be described as provocative or at least aimed at provoking some self-reflection. He said that the lecture was 15 minutes late in starting due to technical issues. He described passing round a paper questionnaire to the attendees and recalled there being four people in the back row. He drew a diagram showing where they were located. He said that he would always ask people to move forward to engage with any of his lectures and that he had asked the four individuals to do so. He admitted to having said to an individual at the back (which was taken to be reference to the Claimant) that if he didn't want to be involved then he could "*bugger off*". Dr Wood offered to give a written or verbal apology to the person sitting at the back of the room as, he said, he had not intended to cause offence. Dr Michael's lack of detailed questioning of Dr Wood must visit in the context of Dr Ought providing an account which largely agreed with that which the Claimant had already provided in circumstances where he was immediately ready to offer an apology.

32. It seemed clear to Dr Michael that Dr Wood had accepted that he had acted inappropriately and was willing to apologise. As he accepted his error, he did not feel it necessary to take any further action. Dr Wood's recollection of events coincided with that of the Claimant, subject to some minor discrepancies which he thought to be of the type which would naturally arise in such situations.

33. The Claimant emailed Dr Michael on 6 June 2017 enquiring as to the progress of the investigation. The Claimant confirmed in subsequent correspondence that he had received an email from Julie Hall to say that the Respondent would be back in touch with him. Ms Hall had, in an email of 8 June, apologised for the delay which she stated was as a result of the availability of Dr Michael, Dr Wood and herself. She noted that Dr Wood was not employed by the Respondent on a full-time substantive contract and had not been available to meet with them before 2 June. The Claimant again sought a response on 19 June but was told that Ms Hall was out of the office. He further emailed Michele Moran, Chief Executive, Elizabeth Thomas, Director of Human Resources and Dr Michael on 26 June chasing a response and referring to an undue and unexplained delay. On 4 July he emailed Ms Moran saying that he believed he had been treated unfairly and unreasonably by Ms Hall and/or the HR Department. Therefore, he wished to file a grievance in this regard and asked that this be dealt with under the Respondent's Grievance Procedure. He was informed by Julie Hall later on 4 July that the outcome letter had been sent.

34. Indeed, Dr Michael and Julie Hall discussed the outcome letter which she then wrote for Dr Michael to approve. That was communicated in a letter dated 3 July confirming the discussions Dr Michael had had with Dr Wood and Dr Wood's account of events which included confirmation that he had used the words "*bugger off"* in the context of wishing attendees to participate and, if they did not wish to do so, then they could "*bugger off*". Dr Wood said that this was not intended to cause any upset or insult. The letter recorded Dr Wood's acceptance that his language was not appropriate. Dr Michael confirmed that he had addressed Dr Wood's language with him and that he would not expect this to happen again. The Tribunal does not consider that Dr Michael was seeking to mislead in referring correspondence to having formally addressed the issue with Dr Ward your that any conclusion can reach adverse to Dr Michael by Dr Woods reference in his wrists written response to the Claimant's allegations to having an informal discussion with Dr Michael. The formality or informality of a discussion is a matter of degree and perception. It is possible to have an informal discussion in the context of a formal process and for that discussion to be regarded as not truly informal in the ordinary meaning of the term. He explained that Dr Wood would wish to apologise to the Claimant in person or in writing. Dr Michael said that this had been immediately offered by him. Dr Michael asked for the Claimant's preference as to whether or not he wished to meet with Dr Wood and suggested that any meeting was facilitated by HR. He added that if there were any further difficulties the Claimant encountered attending lectures/training he should bring that to the attention of the Medical Directorate to ensure any adjustments were accommodated. He ended the letter with the comment: "*I am now concluding this matter*."

35. Mr Michael's (accurate) understanding was that the FPRP did not provide for a right of appeal.

36. Ms Thomas, Director of HR, wrote to the Claimant on 5 July at the request of Ms Moran. She confirmed that the outcome letter had been sent to the Claimant and reiterated that Dr Wood had agreed to apologise to him either in writing or in person. She concluded: *"The Trust does not believe that you have been treated unfairly or unreasonably and we trust that we have now resolved this matter for you."* The Claimant emailed Dr Michael on 7 July asking for a copy of the FPRP. Ms Hughes provided a copy to the Claimant by return. He also wrote to Ms Moran clarifying that he still wished to pursue his grievance regarding the delay in providing the outcome. Ms Thomas responded asking what outcome the Claimant was seeking and she said that there had been an apology for the delay and the Claimant now had his outcome. The Claimant responded that he still required an explanation for the time taken. Ms Thomas responded on 18 July stating that the reason was due to competing demands on Ms Hall's and Dr Michael's time. She went on: *"It is not in anyone's interest to pursue this matter further, as the reason for the delay and an apology has been given, therefore we consider this matter resolved."*

37. Dr Michael spoke to Dr Wood by telephone on 10 July to explain that a letter would be sent to him by Julie Hall following the investigation under the FPRP. No such letter has been provided within the Respondent's disclosure and it is unclear whether one was ever sent.

38. On 10 August, the Claimant provided his response to the outcome letter. A revised version of that response was sent to Dr Michael by the Claimant on 14 August.

39. The Claimant took issue with not being afforded the opportunity to expand on his original complaint of 26 April. In his response he indeed set out a more detailed range of complaints. These came as a surprise to Dr Michael. They included an allegation that the words used and actions of Dr Wood were specifically targeted at the Claimant. Furthermore, the four individuals at the back of the lecture hall were all from BME backgrounds. He alleged that Dr Wood had acted in breach of the GMC's Good Medical Practice in not treating colleagues fairly and with respect. He furthermore said that in the lecture Dr Wood had shown a side containing a close-up of fully naked people painted in blue and the Claimant considered that this showed racial, cultural and religious insensitivity. The Claimant suggested that Dr Wood's behaviour constituted gross misconduct. He questioned the use of the FPRP on the basis that it did not apply in the case of disciplinary issues. The Claimant also suggested that the Respondent's bullying and harassment policy would have been a more appropriate way of dealing with his concerns. The matter should have been dealt with under Maintaining High Professional Standards in the Modern NHS which was incorporated into the Respondent's policies through its disciplinary policy for medical staff.

40. On reviewing these comments, Dr Michael still considered that it had been appropriate to use the FPRP given the nature of the allegations which had been made at the time and as he saw them.

41. The Claimant also, within his response to Dr Michael's outcome, suggested that a referral be made to the Care Quality Commission ("CQC") and the GMC and an agreed apology be given by Dr Wood for the totality of his misconduct, communicated to all those who had attended the lecture.

42. As a consequence of the new concerns the Claimant raised, Dr Michael arranged to speak to both the GMC and the National Clinical Assessment Service ("NCAS") by telephone on 21 August. He explained to them the complaint which had been received as set out in the Claimant's letter of 14 August. The GMC advised him that the bullying and harassment policy would now be the appropriate policy to use and that he should consult with NCAS. Otherwise, the GMC confirmed that the issue was not of immediate concern to them, as Dr Michael noted in a diary entry, which also refers to the bullying and harassment policy and that he was to "*run [it] past NCAS*." The letter of complaint was not forwarded to the GMC and the Tribunal accepts that Dr Michael went through it over the telephone. There is no evidence to contradict that assertion and Dr Michael's evidence was that it was his practice to read through such complaints over the telephone in conversations with the GMC and NCAS.

43. Dr Michael then spoke to Bill Beaumont of NCAS, again explaining the nature of the complaint. He did not send them a copy of the Claimant's complaint but said that he had read it all out over the phone. This was a lengthy letter and the Tribunal is sceptical as to whether he read it out in its entirety as opposed to summarising its contents by referring to key passages. However, there is no evidential basis for concluding that this did not occur. Their advice was that the Respondent should proceed using its local policies and that the situation did not meet the threshold to trigger the use of MHPS. He was advised that the matter would be logged with NCAS, a manager should be appointed to investigate the issues with the support of human resources and that the outcome should be discussed with NCAS following the investigation. Dr Michael emailed Mr Beaumont effectively repeating that advice back to him. He referred to him agreeing that at the present time the allegation did not meet the threshold for MHPS. This is not contradicted by subsequent correspondence from Mr Beaumont as the Claimant suggests. The Claimant does not accept Mr Michael's evidence, but it is credible and the Claimant was not a witness to the advice taken.

44. Dr Michael emailed NCAS on 21 August following on from his telephone conversation. He also received a letter from NCAS confirming their advice.

45. Dr Michael wrote to the Claimant again on 22 August. He referred to the Claimant having now provided additional information not included in the

previous complaint. This included reference to Dr Wood targeting BME doctors and the Claimant's raising the inappropriateness of a slide showing a close-up shot of naked people. He said that he had organised for an investigation to commence which would be led by Alison Flack, STP Director, supported by Mr Mano Jamieson, Senior HR Business Partner. He said that the investigation would be in accordance with the Respondent's Bullying and Harassment Policy. He went on that it was not the intention to investigate the matter under Maintaining High Professional Standards. The findings from the investigation under the Bullying and Harassment Policy would determine how the Respondent proceeded, including the potential of any referral to the CQC. He said that he had taken advice from NCAS and the GMC, who were in agreement.

46. Mr Beaumont of NCAS emailed Dr Michael on 23 August. The Claimant asks the Tribunal to take note that he refers to Dr Michael explaining Dr Woods role, in particular that he was well known and respected in his field and also known at a regional level for his SOAD training work. Mr Beaumont makes no reference to the PowerPoint slides, but the Tribunal cannot straightforwardly infer, as invited to do so, that therefore Dr Michael must not have told Mr Beaumont about that aspect of the Claimant's concerns. Mr Beaumont does refer to the "*serious content*" of the complaint. The Claimant urged the Tribunal to conclude that Dr Michael was seeking to blame Mr Beaumont for omitting this detail and that he sought to an allege there to have been an unlikely oversight by an experienced adviser by saying that Mr Beaumont would have been dealing with hundreds of calls. Rather, the Tribunal considers that Dr Michael under cross examination was simply trying to explain why the reference was missed in circumstances where his evidence was clear that he recalled reading out the allegation about the inappropriate slides. The Tribunal draws no inference from Dr Michael failing to revert to Mr Beaumont to tell him of his omission. The Tribunal considers it more likely than not that Dr Michael never appreciated that this point of detail had not been referred to by Mr Beaumont. Again, the context was that Dr Michael did certainly not see the display of the slide with naked people painted in blue as part of a commissioned work of art to be in anything like in the same category as the Claimant maintained in terms of its offensive nature. The Tribunal considers it extremely unlikely that Mr Beaumont saw the allegation as being at an entirely different level of seriousness.

47. Mr Beaumont's letter is not contradictory of Dr Michael's evidence regarding the advice received from him. It is clear that the Bullying and Harassment Policy has been the one determined to be appropriate for the Respondent to use. At the foot of his letter, Mr Beaumont refers to relevant regulations/guidance which include MHPS, but it is implicit from the body of the letter that there is no recommendation that the matter, certainly at this stage, be dealt with under that procedure.

48. Dr Michael then proceeded to commission an investigation under the Bullying and Harassment Policy. He wrote to the Claimant explaining that the matter would be investigated by Ms Flack with HR Support. He told the Claimant that NCAS had advised on this approach.

49. Around August 2017, Dr Michael handed over as Medical Director to Dr John Byrne. He told Dr Byrne that an investigation was ongoing and who was handling it.

50. Ms Flack had undertaken NCAS case investigation training in the past and had experience in handling both medical and non-medical investigations and in chairing hearings relating to bullying and harassment, grievances and disciplinary issues. She knew of Dr Wood in a professional capacity, but had not worked directly with him before. She said she might have been at some of the same meetings he had attended.

51. She was aware of Dr Michael's initial investigation under the FPRP. She understood that the Claimant was dissatisfied with the level of investigation.

52. Ms Flack arranged to meet with the Claimant to ensure that she had all the relevant information from him on 8 September 2017. In the early stages of the meeting the Claimant queried whether Ms Flack had a conflict of interest. She explained that although she knew Dr Wood professionally, she hadn't met him for a long time. She thought this had satisfied the Claimant.

53. The Claimant went on to explain his complaint in detail. Ms Flack noted what she considered to be some inappropriateness in the Claimant referring to Dr Wood's behaviour as possibly being an early sign of mental health deterioration and that this might be a safeguarding issue without, she felt, any basis. She referred her concern about the Claimant's comments back to Dr Michael, but no action resulted. The Claimant gave some names of individuals he wished to be interviewed including Dr Singh, Dr Doug Ma, Dr Rena Roy, Dr I Igbokwa and Dr Hakiman.

54. The Claimant explained that he would like an agreed apology sent to those in attendance at the lecture. He suggested that there might have been a racial motivation in Dr Wood's actions. When asked why he thought that to be the case he said that: "*I can't be sure, I would like you to ask him if that was the reason he behaved the way he did*." Ms Flack felt that the Claimant could not explain the context of the slides he took offence to as he had not understood their context. Whilst he repeated his view that Dr Wood should be disciplined under MHPS and referred to the GMC, Ms Flack's initial view was that that was not appropriate, as supported by NCAS and the GMC.

55. Ms Flack had a telephone conversation with Dr Wood to explain the allegations now being made against him and to invite him to a meeting. The

Tribunal accepts Ms Flack's evidence that she would contact anyone in similar circumstances. Dr Wood would reasonably have expected the whole matter to be at an end, whereas a further investigation was proceeding and the allegations against him had changed. She felt he ought to be aware of that. On meeting Dr Wood, he confirmed to Ms Flack that he recalled four people at the back of the room and that he told them they would need to engage and should move forward. Whilst three of the individuals did move forward, the Claimant hadn't complied with his request. He said that the Claimant told him that he would talk with him at the end of the session to explain why he was there. He admitted that he had said: "I*f you don't want to be involved then you can always bugger off"* or something to that effect. She felt that he was seeking to portray a light-hearted use of an otherwise inappropriate term to cajole the Claimant into co-operating. Ultimately, Ms Flack agreed that Dr Wood had been making an attempt to be light-hearted. Dr Wood confirmed that he had previously been prepared to give an apology to the Claimant.

56. Dr Wood also prepared a written document setting out his position regarding the allegations as well as a drawing to show the layout of the room. He also provided copies of the slides which the Claimant regarded as offensive. Dr Wood explained that one of them (with naked people painted in blue) was an artwork by Spencer Tunick commissioned for the Hull City of Culture programme. He also gave some names of attendees at the lecture who might be interviewed, including Ms Joanne Bone.

57. Ms Flack subsequently spoke to Dr D Ma, Dr R Ward, Dr R Singh, Dr R Roy, Dr K Fofie, Ms J Bone and Dr S Srikanth. Mano Jamieson also met with Dr Igbokwe prior to him leaving the Respondent's employment. He reported to Ms Flack that Mr Igbokwe had not raised any concerns regarding the event. There is no evidence of any notes having been taken of that interview and no reference to that particular witness evidence is made in Ms Flack's outcome letter. In the subsequent process, as will be described, which amounted to a review of her investigation, Mr Igbokwe's evidence was referenced and the Tribunal rejects the suggestion that this was an invention on Ms Flack's part in circumstances where, while she would have wished to portray as full an investigation as possible, the Tribunal does not consider she would have felt so vulnerable so as to or, in any event, have wished to portray the scope of her investigation inaccurately. Her evidence was convincing in that regard. Ms Flack said that she was unable to interview Dr Hakiman as he had already left the Respondent's employment.

58. Ms Flack accepted that only the above-mentioned individuals who had attended the lecture were interviewed. She said that she had concentrated on interviewing those individuals named by the Claimant and Dr Wood. Her evaluation of what they said was that they had not detected or suspected a racial undertone to Dr Wood's comments. There were some who felt that the slides had been inappropriate and that the comments of Dr Wood

towards the Claimant had made them feel uncomfortable. However, she thought they were in the minority.

59. The Tribunal has been taken to the notes of the various interviews. Dr Ma described Dr Wood as flamboyant and "*out there*" describing that he was *"wanting us at front to entice into interactive session. Said move up or leave to people who didn't want to".* He recalled that the Claimant said that he had had a good reason and that Dr Wood "*didn't leave it*". He recalled the Claimant said that he would speak after the event. He described the situation as awkward to witness and when asked if Dr Wood was targeting the Claimant said: "*As Dr Wood wouldn't let go probably*". When asked if it could have had a bearing that the people at the back were BME doctors he responded: *"It didn't come across to me, but can see why someone at the back might have thought it."*

60. Joanne Bone described Dr Wood as wanting people to join in, move forwards and not looked disinterested. She noticed that some people moved forward. Dr Wood said that he had just asked people to move forward saying *"might as well not be here".* She said that he sounded jovial and relaxed to her. When asked if she thought individuals could have been targeted due to their ethnicity, she responded: "*Absolutely not*". When asked if the slides could have been inappropriate or caused offence, she said she didn't specifically remember them, but didn't find them offensive. She didn't recall any nude pictures.

61. Dr Roy when asked if people could have been targeted because they were from a BME background said: *"It's difficult hard to know how people perceive… an individual feels."* She didn't recall anything offensive in the presentation.

62. Dr Singh recalled Dr Wood saying: "*come to the front or bugger off*". He said that he was the first to move and went to the front. He recalled that the Claimant had said he had a personal reason for not going forward. When asked if he personally felt that Dr Wood had targeted people because of their BME background he said: *"No, SW is a Senior Dr and I've known him for 15 years*". When asked if he could understand why anyone else would feel that, he said it was difficult as there were no white people at the back.

63. Dr Ward had no particular recollection of the day. Dr Srikanth was asked if he would think it reasonable to ask people to move forward and responded: "*I would think so*". When asked if Dr Wood has been targeting the Claimant, he said: *"no wouldn't say so"*. He couldn't recall any inappropriate behaviour. He recalled nude pictures and thought that maybe some people might find them culturally offensive, but didn't think it could be a massive issue. When describing Dr Wood, he said that he could be quite strong and challenging, but not so as to cause concern, saying that he was constructive and balanced.

64. On 6 October 2017, the Claimant emailed Ms Flack to ask for a note of the meeting/interview she had conducted with him on 8 September. She replied that day and asked Mr Jamieson to send the notes to the Claimant and to confirm that she had managed to speak with a number of witnesses and anticipated being able to conduct the final interviews by early November.

65. The Claimant responded on 9 October to say that he thought it was inappropriate for Dr Wood to be his appraiser. Ms Flack took guidance from Dr Byrne as medical director to gain an understanding that Dr Wood would not undertake that role.

66. A meeting with the Claimant to feedback the results of the investigation was arranged for 1 December. However, on 14 November the Claimant emailed Ms Flack setting out a number of questions about the policy, to which she replied 22 November to confirm that they would meet first and that he would then be sent a formal outcome, that there would be a meeting with Dr Byrne and then a meeting would be held with Dr Wood to feed back the report to him. She confirmed that, at that point, the report hadn't been finished and it would be shared with the Claimant once Dr Byrne had seen it. The Claimant responded on 22 November thanking her for that email.

67. The Claimant made some amendments to the notes of his meeting and returned these to Ms Flack.

68. Ms Flack's report was then completed. Her conclusion was that there was no deliberate intent to target the Claimant by Dr Wood. However, the phrase "*bugger off*" was inappropriate. She recommended that a written apology be issued to the Claimant for the language used. None of the witnesses however had suggested a racial motivation in Dr Wood's comments. In fact, she considered that the Claimant in his own interview said that he couldn't be certain of any such motivation. None of the witnesses she concluded supported the allegation that the behaviour of Dr Wood was wilful or deliberate. She considered that the content of the presentation and some of the slides used were confusing to a number of attendees. The slides the Claimant complained of she considered not to be pornographic, but that they may have caused offence to some of the audience. Again, there was no evidence of any malicious intent or wish to offend from Dr Wood in presenting the slides. However, she concluded that he should review his presentation to ensure that any material which might cause offence was removed before it was used again.

69. Ms Flack did not recommend a referral to the GMC. The Tribunal accepts that it was her view that her conclusions, in terms of Dr Wood's conduct, were in no way sufficiently serious to warrant a referral and certainly she considered could not reasonably be said to have an affect on his fitness to practice.

70. She looked at 4 individual allegations. In terms of Dr Wood targeting Claimant, she defined targeting as a deliberate attempt to isolate an individual and suggestive of an untoward motivation. It was accepted that the Claimant had been unknown to Dr Wood. In fact, they had met at a previous appraisal of the Claimant, but it was never the Claimant's position that there was any significant history between them. Dr Wood was trying to achieve a legitimate outcome, however his approach should have been *"more regulated*". The distress the words used had caused the Claimant was acknowledged. It was also acknowledged that inappropriate behaviour which leads to public humiliation can be seen as bullying. However, Ms Flack's view was that the first intervention by Dr Wood towards the 4 doctors sat at the rear of the room was a reasonable request which was perhaps not delivered in the most appropriate language. The second interaction between Dr Wood and the Claimant did cause offence as it was solely directed at the Claimant. Nevertheless, the second interaction of Dr Wood with the Claimant constituted a repeat of the original request, was met with a reasonable explanation from the Claimant and Dr Wood did not then pursue it. The allegation was partially upheld in terms of requiring Dr Wood to give a written apology for the language that was used.

71. The second allegation related to the suggestion of a racial motivation. It was noted that Dr Wood had explicitly refuted any suggestion that that was the reason for him asking people to move forward. She noted that none of the witnesses interviewed believed that Dr Wood's behaviour was racially motivated. It was noted that the attendees comprised of other staff, beyond those 4 doctors, from BME backgrounds. That allegation was not upheld.

72. The third allegation, which was said to link to the first, was about Dr Wood's demeanour and aggressive behaviour, it being said by Claimant to be wilful or deliberate. Ms Flack recorded that none of the witnesses supported that allegation. Again, this allegation was not upheld.

73. The fourth allegation related to the PowerPoint slides and the close-up shot of naked people causing offence. It was also noted that the Claimant said that other slides contained offensive language, (Ms Flack had brought up the slide she had seen saying *"Fuck the Rules"*) but that the Claimant noted that Dr Wood was possibly trying to make a connection with the audience and inject some humour. Ms Flack was of the view that the photographs displayed were neither pornographic nor sexually suggestive. Their use was, however, "*potentially injudicious*" and could have caused offence. There was no evidence of malevolence on Dr Wood's behalf in this regard, but again the allegation was partly upheld in terms of the recommendation for Dr Wood to remove particular slides from the presentation.

74. Ms Flack concluded by setting out two learning points to be taken from her investigations. The first was that in the case of any future complaints, the complainant ought to be met with in the first instance to gather any further

information and this should be done before a decision was taken regarding the policy to be followed. The second was that a circular ought to be issued providing guidance on the content of presentations with reference to the use of humour, the sensitivity of the audience and being respectful of any cultural beliefs.

75. Ms Flack met with Dr Byrne to present the report to him. He agreed with the conclusions and that Ms Flack and Ms Jamieson would be best placed to provide feedback to the Claimant. As a result, they, but not Mr Byrne, met with the Claimant on 1 December. No notes were taken by them of the meeting as it was not felt necessary given that the contents of the written report were being fed back to the Claimant. The Claimant was told that the report would be with him the following week. However, there was a delay arising in part out of difficulties in arranging to meet with Dr Wood before its publication.

76. On 8 December the Claimant asked her for the report. Ms Flack was chased by the Claimant on 14 December and reverted the following day attaching a copy of the report and the appendices to it. At that point Ms Flack believed that the matter was closed and that any further meetings would take place between Dr Byrne and the Claimant.

77. Dr Byrne's personal view was that he struggled to understand how the issue had gone so far and that, given his view of the nature of the allegations, it appeared that the matter ought to have been capable of being concluded quite easily and by an informal process. Before the Tribunal, he said that he agreed with Ms Flack's findings. He thought that the slides used could be seen as inappropriate given that this was a large training session with a diverse range of delegates. Nonetheless, they were images which had been used in the wider public domain as part of the Hull City of Culture. He viewed Dr Wood's language as not being appropriate, but asking people to move forward in itself had not been inappropriate. It was his language which could and did cause offence to the Claimant.

78. He was comfortable with Dr Wood apologising to the Claimant and for the use of his slides to be reviewed by him. He considered that Dr Wood had reflected on and accepted his mistakes and there had been no racial motivation in his behaviour. He did not think that a formal sanction would have been an appropriate response to the findings.

79. Dr Byrne accepted that he could have met with the Claimant personally to feed the outcome back to him. However, due to family issues he was working from home for a significant proportion of November and then had some time off in December. The Tribunal does not conclude that Byrne sought to avoid responsibility for meeting with the Claimant. He did not see a need to once the report had been fed back to him by Ms Flack. Dr Byrne wrote to Dr Wood on 1 March 2018 referring to a meeting between them on

17 January and "*subsequent communication"* continuing that he was happy to confirm that, further to the investigation, the matter was now closed. He continued: "*We agree that you will be happy to take learning and reflection into your appraisal framework."* Whilst the Claimant pointed to Dr Byrne's lack of clarity as to the nature of any meeting or communication, the letter does corroborate a conclusion that there was a recognition on Dr Wood's part regarding the inappropriateness of his behaviour.

80. On 19 March 2018, Dr Byrne received an email from the Claimant which attached his response to the outcome. He was surprised at receiving this some three months after the outcome been delivered. He noted that the Claimant questioned specific conclusions which Ms Flack had reached and asked that the Respondent reviewed the outcome of the report.

81. The Claimant pointed out that Dr Wood had carried out the Claimant's appraisal in September 2016 and therefore he was known to Dr Wood. He stated that the third allegation had been re-crafted and no finding had been made regarding *"offending language"*. He questioned how that could not be found to have been wilful and deliberate. He felt the questions had not been approached from his own perspective as victim. He suggested that the concentration on there being no deliberate "*intention"* to target the Claimant was a misunderstanding of the policy definition of harassment and bullying which was not dependent on an intention to cause distress. He thought that the initial refusal of Dr Wood to give him bank A4 sheets had not been considered. He considered that there had been no finding regarding a threat to exclude him from CPD training. The severity of Dr Wood's actions had been minimised. The Claimant said that there had been no offer of any form of personal apology by Dr Wood. He queried, if the slides were neither pornographic nor sexually suggestive, how their use could have been injudicious and liable to cause offence.

82. Dr Byrne responded on 22 March 2018 saying that he would take advice from human resources. The Claimant reverted on 23 March, thanking Dr Byrne and noting an amendment to his letter.

83. Dr Byrne took advice from Ms Thomas and a response was sent to the Claimant on 5 April 2018 (albeit dated 22 March). In this document, he questioned the timing of the Claimant's letter and challenged the Claimant's assertion that Dr Wood had never offered to apologise to him and had not shown any insight. This was on the basis that Dr Byrne understood that when the matter been considered by Dr Michael, Dr Wood had offered to apologise at that stage. However, the Claimant had not responded about how he would wish to receive an apology.

84. His view was that given the Claimant's delay in responding to the outcome and the fact that the Respondent had already utilised two separate procedures to try and resolve this issue, it was not appropriate to reopen

the matter. This accorded with human resources advice he also received. He closed the letter saying that *"this investigation is closed".* The Claimant emailed him again on 6 April. In this communication he indicated that he had still not received an apology. Dr Byrne appreciated that, but considered it had been offered and that the Claimant had been asked to confirm whether he wish to receive a written or face-to-face apology. Dr Byrne replied the same day seeking to draw a line under the matter and confirmed that from his perspective and on human resources advice, the matter was closed. Dr Byrne, the Tribunal concludes did think that an appeal/further investigation would be, as the Claimant suggests he did, a waste of time. Again, that was, however, in the context of him believing that everything had been fully and satisfactorily resolved, certainly after Ms Flack's investigation.

85. On 23 April the Claimant wrote to Michele Moran, Chief Executive and others, including Dr Byrne, attaching a further letter questioning the rejection of his letter of 19 March and asking that his case be handled under the Respondent's Grievance Procedure.

86. On 24 April, Ms Moran asked Ms Flack, Mr Byrne and Ms Hall for their thoughts on the Claimant's request. In response, on 27 April Dr Byrne explained that the matter had been logged with NCAS and subsequently closed down. He remained satisfied with and confident in the investigation and its outcome. Ms Flack commented that individuals had 15 days in which to appeal a decision under the Bullying and Harassment policy.

87. On 4 May 2018 Ms Hall responded to the Claimant on Ms Moran's behalf. By this stage Ms Thomas had left the Respondent's employment as HR Director. In the letter, reference is made to the time taken for the Claimant to raise further concerns. Nevertheless, as Dr Byrne had not actually confirmed the appeal time limit to the Claimant in the outcome letter, the Respondent had decided that it should hear his concerns.

88. A review panel was formed consisting of Lynn Parkinson, Interim Chief Operating Officer and Dr Nick Cross, Deputy Medical Director for Primary Care, with Helen Lambert, Deputy Director of HR present and in support. There was delay in the panel meeting due to Dr Cross' availability but it did meet on 19 July to discuss the case with a pack of relevant papers relating to the Claimant's complaints before it. Ms Parkinson was clear before the Tribunal that she saw all of the presentation slides which were in issue. Effectively, they conducted, what Ms Parkinson termed as, a desktop review. Ms Lambert was then asked to prepare an outcome letter in accordance with the panel discussions which was sent to the Claimant by email on 7 August, but dated on 25 July 2018. Whilst Ms Parkinson was in difficulties explaining the delay in sending it, a delay served no purpose from the Respondent's point of view and there was no evidence that this was deliberate. The Tribunal draws no adverse inference regarding Ms Lambert of HR failing to retain copies of notes of the appeal panel's deliberations in

circumstances where the thoughts and conclusions derived from those deliberations were set out fully in the outcome letter. The panel considered there were no reasons within the Claimant's response to call into question or overturn the findings of Ms Flack's investigation report. Ms Parkinson was aware from Dr Wood's response to the Claimant's expanded allegations that he was, from that point, withdrawing any offer of apology, but was also aware that the previous offer had been made where the Claimant had an opportunity to confirm how he wish to receive an apology. The outcome supported the reversion to the position Dr Michael had reached asking the Claimant whether he would wish to meet with Dr Wood or receive an apology in writing. It was of course a recommendation following Ms Flack's investigation to ask Dr Wood to consider writing to the Claimant with a written apology for the language he had used.

89. Amongst the panel's findings was that the behaviour of Dr Wood did not constitute bullying or harassment, albeit there was a recognition of the upset caused to the Claimant by his behaviour. The Claimant's reference to Dr Wood handing out A4 sheets was said not to form part of the original investigation and therefore it was not possible for the panel to reach a conclusion on it. Whilst the allegation of Dr Wood's implicit threat to deny entitlement to attend CPD training had not been specifically recognised in the outcome report, the panel had concluded that the Claimant did in fact remain at the lecture despite the suggestion that if he did not move nearer to the front he should leave. The panel nevertheless considered that the language used by Dr Wood was not conducive to a professional work environment. The recommendations of the investigation panel were upheld.

90. On 10 August 2018 in the Claimant wrote to Ms Moran to express further concerns regarding how his case had been dealt with. She responded on 29 August stating that the process had been thorough, fair and impartial. The Claimant expressed a concern that the review panel had considered his request under the Respondent's grievance policy. Ms Moran was of the view that, regardless of whether the review was under that policy or the Bullying and Harassment Policy, the procedure would have remained the same as an appeal from a bullying and harassment complaint was also handled under the grievance policy appeals process.

91. On 14 August Ms Moran emailed Ms Hall, Ms Parkinson and Mr McGowan, new Director of Human Resources, to arrange a meeting to address the Claimant's further concerns. Following this discussion, Ms Moran replied to the Claimant on 29 August making the aforementioned points. She concluded that there had been no denial of the right of appeal under the bullying and harassment policy because such an appeal would have been conducted under the grievance policy appeal process. She informed the Claimant that there was no further right of appeal against the decision.

92. Nevertheless, the Claimant wrote further to Ms Moran on 12 September stating that there were procedural irregularities in the initial investigation and

setting out that he considered the 19 July review to be procedurally unfair. Ms Moran met with Dr Byrne on 26 September. Given that the Claimant had been told that there was no further right of appeal, it was considered that the outcome needed to be communicated by Dr Byrne reiterating the points already made by Ms Moran and confirming that there remained no right of appeal. She felt this was the appropriate method of communication as the Claimant's letter had mentioned her and she felt it would be inappropriate to respond directly. On 5 October Dr Byrne responded to the Claimant on Ms Moran's behalf.

93. The Claimant informed Ms Moran on 1 November 2018 that he had commenced early conciliation through ACAS.

94. The Tribunal would note at this stage that whilst the Claimant explored with the Respondent's witnesses, in his cross examination of them, the alternative steps they could and, in his view, should have taken in addressing his concerns, he was reluctant to and did not at first seek to explore their motivations for acting as they had. The Tribunal had to remind the Claimant that his claims were of race discrimination and that if he was going to maintain that any individual witness had acted as they had because of race, he should put that directly to them, so that they had an opportunity to respond and answer what was clearly, not least in an NHS context, an extremely serious allegation. Eventually, the Claimant put this to each of the witnesses other than Ms Parkinson, although she rather pre-empted his question and Ms Moran, the Claimant explaining that he was not suggesting that Ms Moran had a racial motivation but rather had effectively been *"duped"* by those who did.

95. The Tribunal also on a number of occasions asked the Claimant to explain and again put to the witnesses where appropriate the basis upon which he was suggesting a racial motivation. Again, he was times reluctant to do so and indeed expressed the view to the Tribunal that it was for the Tribunal to look for and determine that the Respondent's witnesses were influenced by race.

96. In the case of Dr Michael, the Claimant did spend some time in his question suggesting that Dr Michael knew and had a particular respect for Dr Wood. It was suggested that this caused him to wish to avoid any adverse finding against Dr Wood as was illustrated, for instance, by his alleged lack of full disclosure of the nature of the Claimant's allegations when speaking to, in particular, NCAS. Whilst it is a statement of the obvious that a BME Doctor is capable of racially discriminating against another BME Doctor on racial grounds, the Claimant appeared to appreciate that the allegation that Dr Michael, as an individual of colour and Asian ethnicity, had discriminated against him on the grounds of his race jarred somewhat. In apparent recognition of this, the Claimant sought to argue and put to Dr Michael that it was a possibility that Dr Michael had in effect transformed/supressed his BME identity and taken the place of a white senior medical professional

such that whilst he could not physically lose his BME identity he had been driven by a desire, conscious or unconscious, to seek to please and retain acceptance by a white hierarchy within the NHS. That had caused him to protect Dr Wood from a complaint by a BME Doctor, the Claimant. Dr Michael appeared genuinely puzzled by this suggestion and what he recognised as a distortion of a theoretical concept which derived from the study of psychology/psychiatry.

97. Whilst lacking in any specifics, the Claimant suggested that Dr Michael's association with white senior management, including Dr Wood, had enabled Dr Michael to obtain the position of Medical Director in the Respondent over a competitor, Dr Fofie. The Tribunal had before it no evidence whatsoever which could allow it to come to any conclusion or to make any findings regarding the circumstances of Dr Michael obtaining that position.

98. Dr Byrne in his evidence roundly rejected the suggestion that his treatment of the Claimant was influenced by considerations of race. He expressed disappointment that such a suggestion had been made which struck Tribunal as genuine, Dr Byrne explained his sensitivities to issues of discrimination having grown up at a particular time in Northern Ireland where that was a prominent issue. The Claimant suggested that Dr Byrne's upset at being accused of race discrimination was illustrative of an upset he would generally feel and felt in the case of Dr Wood facing such an allegation. There is no basis for that proposition in evidence. The Tribunal concludes that Dr Byrne was straightforwardly expressing his upset at being accused of race discrimination in his treatment of the Claimant in these subsequent Tribunal proceedings and the expression of those feelings does not suggest that he would therefore not take seriously a claim of race discrimination made against, for instance, someone in Dr Wood's situation. Whilst he appreciated the stressful nature of being investigated in response to an allegation of discrimination, which the Claimant suggests showed particular sympathy for Dr Wood, that was in the context of a matter which he had thought to have been closed being reopened, where the original allegation against Dr Wood had not been of race discrimination at all and where, Dr Byrne very clearly thought that this was a matter which ought to have been capable of being dealt with and settled very quickly.

99. The Claimant's suggestion to Ms Flack was that she applied a particular meaning to the term "*bullying and harassment"* to avoid making a finding against a senior white consultant. She said that that was absolutely not the case and she had conducted an independent and impartial investigation with no desire to avoid making a finding against Dr Wood. The Claimant also raised some statistical evidence showing within the NHS a greater proportion of BME than non-BME reporting that they felt bullied by other staff. The Claimant referred to statistics produced within the Respondent to illustrate a greater number of BME than non-BME staff raising issues of concern.

100. The Claimant did not put it directly to Ms Parkinson that her actions were influenced by considerations of race/colour. Nevertheless, Ms Parkinson recognised issues of inequality and the over-representation of BME employees in the application of conduct proceedings. She also referred to the development of graduate programs to widen access to management roles. She said that she had volunteered to mentor individuals with BME backgrounds and expressed herself to be passionate about equality of opportunities for all. She said that the recent staff surveys showed a generally positive attitude towards inclusion and that the Respondent was above the national averages in diversity indicators, although she accepted that there was always work they could do to improve. She said that she could categorically say that she was not motivated, in her decision making about the Claimant's concerns, by considerations of race. She said that she had not been aware of the Claimant's racial background, was unaware of his colour and that she had never previously met Dr Wood and did not know his colour. Her lack of recognition that the Claimant was or might be a BME Doctor lacks credibility, not least given his surname and the nature of the allegations he was pursuing. The Tribunal factors that in to the evaluation of her evidence. She said that she saw no evidence that anyone at an earlier stage in the complaints process had been influenced by the Claimant's race and, if she had, she would have challenged that. She said that she was well aware of the possibility of unconscious biases.

101. The Tribunal notes that the Respondent does not have any board members from a BME background and that Ms Moran, in her evidence, agreed with the Claimant that this was a matter of concern. She also acknowledged that bullying was a significant problem within the NHS.

Applicable law

102. The Claimant's complaints are of direct race discrimination. In the Equality Act 2010 direct discrimination is defined in Section 13(1) which provides: *"(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."*

103. "Race" is one of the protected characteristics listed in Section 4 and further defined in Section 9 of the 2010 Act so as to include colour, nationality, ethnic or national origins. Section 23 provides that on a comparison of cases for the purpose of Section 13 *"there must be no material difference between the circumstances relating to each case*". Section 39(2)(d) covers "*any other detriment*" as a potential act of unlawful discrimination.

104. The Act deals with the burden of proof at Section 136(2) as follows:-

"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes 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".

105. In **Igen v Wong [2005] ICR 935** guidance was given on the operation of the burden of proof provisions in the preceding discrimination legislation and in particular the guidance set out as follows, albeit, with the caveat that this is not a substitute for the statutory language:-

"(1) ….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 employer has committed an act of discrimination against the Claimant which is unlawful by virtue of Part 2……..

(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 ill intentioned, but based upon 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 section 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 ….. from an evasive or equivocal reply to a questionnaire …………

(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…….. 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 employer has treated the Claimant less favourably on the ground of sex, then the burden of proof moves to the employer.

(10) It is then for the employer 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 employer 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 employer 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.

106. The Tribunal also takes notice of the case of **Madarassy v Nomura International Plc [2007] ICR 867**. There it was recorded that Mr Allen of Counsel had put forward that the correct approach was that as Ms Madarassy had established two fundamental facts, namely, a difference in status (e.g. sex) and a difference in treatment, the Act required the Tribunal to draw an inference of unlawful discrimination. The burden effectively shifted to the Respondent to prove that it had not committed an act of discrimination which was unlawful. Mummery LJ stated:-

"I am unable to agree with Mr Allen's contention that the burden of proof shifts to Nomura simply on Ms Madarassy establishing the facts of a difference in status and a difference in treatment of her.

…….. The Court in Igen Ltd v Wong [2005] ICR 139 expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the Tribunal could conclude that the Respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "could conclude" that, on the balance of probabilities, the Respondent committed an unlawful act of discrimination. …

57 "Could….conclude" …. must mean "a reasonable Tribunal could properly conclude" from all evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the Respondent contesting the complaint. Subject only the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the Tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like …..; and available evidence of the reasons for the differential treatment

58. The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the Respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the Tribunal then moves to the second stage. The burden is on the Respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."

107. The Tribunal refers to the case of **Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337** for guidance as to how the Tribunal should apply what is effectively a two stage test. There it was recognised that in practice Tribunals in their decisions normally consider firstly whether the Claimant received less favourable treatment than the appropriate comparator and then secondly whether the less favourable treatment was on discriminatory grounds (termed as the "reason why" issue). Tribunals proceed to consider the reason why issue only if the less favourable treatment issue is resolved in the favour of the Claimant. The less favourable treatment issue therefore is treated as a threshold which the Claimant must cross before the Tribunal is required to decide why the

Claimant was afforded the treatment of which he/she is complaining. Lord Nichols went on to say:-

> *"No doubt there are cases where it is convenient and helpful to adopt this two step approach to what is essentially a single question; did the Claimant on the prescribed ground receive less favourable treatment than others? But, especially where the identify of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined."*
>
> Later, he said:-
>
> *"This analysis seems to me to point to the conclusion that 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. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former there will be usually no difficulty in deciding whether the treatment afforded to the Claimant on the proscribed, ground, was less favourable than was or would have been afforded to others."*

108. The Supreme Court in **Hewage v Grampian Health Board [2012] UKSC 37** made clear that it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

109. The Tribunal has also been referred to the cases of **Chief Constable of West Yorkshire v Khan [2001] ICR 1065**, **Denman v Commission for Racial Equality and Human Rights [2010] EWCA Civ 1279**, **Birmingham City Council v Millwood EqLR 910**, **Laing v Manchester City Council [2006] ICR 1519** and **Attridge Law LLP v Coleman [2010] ICR 242**.

110. Having applied the relevant legal principles to its factual findings, the Tribunal reaches the following conclusions.

Conclusions

111. The Claimant's first allegation is that the Respondent failed to properly categorise his complaints about Dr Wood's inappropriate language and behaviour as bullying or misconduct and that it placed too high a threshold to meet their definition.

112. The Tribunal's conclusion is that the Respondent, in particular through Dr Michael, Ms Flack and Ms Parkinson, did not categorise Dr

Wood's conduct in that way as they genuinely did not see, on their evaluation of the evidence, that Dr Wood's behaviour amounted to bullying or that it reached a threshold where it ought to be regarded as misconduct, certainly such as would then involve the initiation of any form of disciplinary proceedings against him. The Respondent's conclusion at all stages of the process was that Dr Wood had been guilty of inappropriate behaviour and the use of unprofessional language in the workplace. This was viewed as an isolated incident which had been acknowledged by Dr Wood who had at an early stage made an offer to apologise to the Claimant for the upset caused.

113. The Claimant would say that the initial treatment of the allegation under the FPRP was so obviously unreasonable and dismissive of the seriousness of his concerns that an adverse inference ought to be drawn, at that stage, as to Dr Michael's motivation. The Tribunal cannot agree. Without the allegation against Dr Wood of race discrimination (and that allegation was not made by the Claimant in his initial complaint), the substance of the Claimant's concerns viewed objectively were not of a matter of the utmost seriousness and the Tribunal can and does accept that it was considered by Dr Michael that the matter could be quickly resolved without a detailed investigation and without engaging the Respondent's more formal procedures. Dr Byrne clearly was of the same view and the Tribunal again can accept that he genuinely thought that this was not a matter which ought to take up a significant amount of the Respondent's time and resources and ought to have been capable of being dealt with quickly and cleanly, particularly given the lack of material dispute as to what had occurred and Dr Wood's initial willingness to offer an apology.

114. Of course, the Claimant subsequently did allege that Dr Wood's treatment of him was influenced by considerations of race. The Respondent then recognised that this allegation was one appropriately to be dealt with under the bullying and harassment procedure. The Claimant's position is that the definition of bullying was and must have been met in circumstances where there was adverse/unwanted treatment of him which, as a matter of fact, caused him upset and regardless of whether or not that had ever been Dr Wood's intention. The Claimant relies also on GMC definition of harassment or bullying as, in particular, not being reliant upon an intent to bully.

115. The Tribunal is clear from the evidence of in particular Ms Flack and Ms Parkinson that their failure to categorise Dr Wood's conduct as bullying or misconduct arose out of their own evaluation of the evidence and their consideration that even if there was inappropriate conduct which caused the Claimant upset, there was still required to be an evaluation as to whether or not that amounted to bullying and/or harassment. A threshold had to be reached and, in their minds, they did not consider it had been reached.

116. This was in circumstances where there had been no complaints from any other attendee at Dr Wood's lecture including from any of the other doctors, all of BME backgrounds, who had been requested to move forward. The Tribunal has referred in its factual findings to the witness statement evidence gathered upon which the Respondent based its evaluation of what had occurred and can understand how, based upon that, the Respondent did not conclude there to have been anything offensive intended by Dr Wood or aggressive in its nature. The Respondent genuinely evaluated the evidence as not disclosing any racial motivation on Dr Wood's part and the Claimant has pointed to nothing which would suggest that conclusion to be one which the Respondent was not entitled to reach. The Respondent was faced indeed with a complaint where there had been no initial suggestion by the Claimant of any racial motivation on Dr Woods behalf, where the Claimant himself said that he could not be sure that it was racially motivated and certainly he was not providing the Respondent with any evidential basis which would support such a conclusion beyond the other doctors who were requested to move forward being also of BME backgrounds.

117. The context of Dr Wood's comments was accepted by the Respondent as the encouragement of full participation in a hopefully thought provoking session. Whilst even Dr Wood accepted that the way in which he made his request was inappropriate, that does not call into question the Respondent's conclusion that there was a legitimate purpose behind the request. Dr Wood's manner had been described by a witness as "*jovial and relaxed",* albeit the Tribunal recognises by a witness suggested that the Respondent speak to by Dr Wood and where Dr Wood's patience had clearly been tested with technical issues prior to the commencement of his lecture. Perhaps the most critical witness of Dr Wood was Dr Ma who could understand why others might have been offended (although he hadn't been) and whilst he did not think the ethnicity of the doctors at the back called forward had any bearing on Dr Wood's behaviour, he could see why someone at the back might have thought that to be the case. Even then, he described Dr Wood as flamboyant and recognised that Dr Wood wanted to entice them to move to the front.

118. Witnesses were not offended by the slides or had no particular recollection of them. There was an appreciation, however, that others could have been and questions as to their appropriateness. The Respondent agreed regarding the inappropriateness and the need to revise the slides for the avoidance of any offence, but the Respondent genuinely did not consider the particular slide which showed nude figures to be of a pornographic nature or inherently offensive. It came to the genuine conclusion, understanding that it was the work of an established artist commissioned for the Hull City of Culture. The Claimant himself had made nothing of slides containing the statement: "*Fuck the Rules*" until later in the proceedings and reference to an inappropriate slide with the wording "*Arse Horror*" was at the Tribunal hearing itself. Again, the context of the slides was that they were part of a presentation aimed at challenging preconceptions. Dr Wood had indeed in his response to the Claimant's

further allegations explained that the image of naked figures was intended to demonstrate the importance of *"pattern recognition"* and the need to be clear as to why one person might stand out from a crowd. Even the Claimant in his interview with Ms Flack referred to Dr Wood trying to make a connection and add some humour in the image of naked blue people and the "*Fuck the Rules*" slide although he couldn't be sure what the point was.

119. There has been discussion of the meaning of *"targeted"* and the Respondent's suggested refusal to recognise that this is what had occurred in Dr Wood's treatment of the Claimant. Of course, the Claimant had been targeted in the sense that there was a point in the lecture where he was the only person at the back who had refused to move forward and that he was therefore the only person to whom the request to move forward was repeated. However, the Respondent genuinely concluded that Dr Wood had not targeted the Claimant in any other sense. The overall context, Ms Parkinson concluded (which mirrored Ms Flack's earlier conclusion) was that it was not sufficiently evident that Dr Wood deliberately bullied or particularly targeted the Claimant, that there had been a request of all four doctors at the back to move forward which in itself was not unreasonable, the language used was not reasonable but that still Dr Wood's behaviour did not constitute bullying of the Claimant. She separately considered whether it amounted to harassment reviewing the definitions, but again couldn't find, for her, sufficient evidence that Claimant had been targeted or that, if he had, that related to any protected characteristic including race/ethnicity. As regards the issue of misconduct, the use of slides was not entirely appropriate she thought, the choice of language was not appropriate and therefore she felt simply that, in terms of appropriate sanction, an apology by Dr Wood was still warranted. The decision not to treat this as a matter of misconduct which ought to be addressed under any further procedures was based upon how seriously the conduct was viewed and also as an acknowledgement that, whilst the behaviour had upset the Claimant and he felt embarrassed, there was no supportive evidence of bullying.

120. The Tribunal accepts that the Respondent's failure to categorise the treatment of the Claimant as bullying, harassment or misconduct was purely down to the evaluation of the Respondent's witnesses of the behaviour of Dr Wood which was a genuine evaluation (and certainly not outwith any band of reasonableness), unrelated to the Claimant's or Dr Wood's race.

121. Certainly, the Respondent genuinely concluded that Dr Wood's conduct was not serious enough to warrant a disciplinary charge of misconduct or a referral under MHPS. Whilst the Respondent has put forward that referrals might be appropriate in the case of allegations of dishonesty, inappropriate prescribing of medication, inadequate care and inappropriate delegation of duties, there is clearly scope for a wider category of misconduct to be dealt with as serious misconduct with reference to MHPS. Nevertheless, the Tribunal accepts that it was the

Respondent's genuine evaluation that Dr Wood's conduct did not meet the necessary threshold to be dealt with at that level. The Respondent's position is supported by the advice taken from NCAS and the GMC. Again, the Tribunal accepts that Dr Michael took this advice and that this was (after the Claimant had expanded on his allegations) to deal with the matter under bullying and harassment and that it was not a matter which fell to be dealt with according to MHPS. Dr Michael's decision-making to commission Ms Flack's investigation was in response to that advice and of course the Claimant has no basis for suggesting that there was a discriminatory motive behind that third party advice. The Respondent did find the language and aspects of Dr Wood's behaviour to be unprofessional and inappropriate and made its recommendations upon that basis and upon the basis that his conduct in their genuine view did not amount to anything further and certainly not bullying, harassment or misconduct which ought to be taken forward through any further procedure. Clearly with inappropriate or unprofessional conduct, there are varying degrees of seriousness and available sanctions from the giving of advice to the ending of a career. The Tribunal is clear that the Respondent evaluated Dr Wood's behaviour at the lower end of those extremes, but genuinely so.

122. Dr Byrne's recognition that Dr Wood's behaviour was a departure from Good Medical Practice does not signify that the matter ought to have been dealt with under the Respondent's general disciplinary procedure. That is always a question of degree. Not every departure from Good Medical Practice will warrant action at a particular level. That is despite policy references to all issues of misconduct being dealt with in that procedure. The Respondent clearly considered it had a discretion to treat some aspects of misconduct outside the disciplinary procedure. Certainly, the reason why the findings of inappropriate conduct against Dr Wood were not dealt with at a more significant level and through a disciplinary process was that they were not considered by the Respondent at various stages to be sufficiently serious to warrant that. That was a genuine conclusion untainted by considerations of race.

123. Whilst the Tribunal has been able to make the aforementioned positive findings as to the Respondent's genuine considerations, it would not have concluded that the Claimant had shown facts from which the Tribunal could reasonably conclude that the Respondent's decision-making was materially influenced by considerations of race. No actual comparator is relied upon where it can be shown that other employees who raised complaints as the Claimant had would have been treated differently. The Claimant relies on a hypothetical comparator but cannot point to any facts which might allow the Tribunal to infer any difference in treatment. The Claimant was perhaps one of the Respondent's first employees to have had a concern dealt with under the FPRP at first instance, but the Tribunal accepts the evidence of Dr Michael that he was following HR advice in circumstances where there was a desire to road test this policy and where there was a genuine view taken within HR, with which Dr Michael concurred, with that this was the sort of spat between professional colleagues which

might be quickly and informally resolved under such a policy which was intended to find quick resolutions which might highlight unprofessional behaviour in a less formal and potentially career affecting manner.

124. The Claimant's second allegation is that he was not given an appropriate forum to air his concerns about Dr Wood. The Tribunal considers that the Claimant's primary argument in this regard must relate to the use of the FPRP and the way in which this was interpreted and applied. The Tribunal has already dealt with this to some extent in the Claimant's previous allegation. The Tribunal has accepted Dr Michael's evidence that the reason why he adopted this process for dealing with the Claimant's initial concerns was that he received advice from HR to do so, he felt it was appropriate given his view as to the nature of the concerns raised and that he understood that the use of the FPRP did not close off the possibility, if appropriate, for the matter to be dealt with, for instance, under the alternative disciplinary policy.

125. It is significant that at the time Dr Michael decided on the use of this policy, the Claimant had not made an allegation against Dr Wood of race discrimination. Dr Michael genuinely considered that the policy was appropriate given its stated purpose being to enable people to learn from mistakes or poorly managed situations and the encouragement of treating others with dignity and respect.

126. The Claimant was nevertheless not given the opportunity to meet with Dr Michael to explain his concerns and how he viewed Dr Wood's treatment of him. Routinely, for instance, in the use of a formal grievance procedure, whilst an individual might provide a written grievance to initiate the process, there would be a meeting to clarify and further understand the person's complaints. That did not occur in this case. The Tribunal notes however that there is no mandatory requirement for that to happen. The Claimant did not seek a meeting or refer to the need for any meeting with him prior to the outcome, in circumstances where he was awaiting an outcome letter aware that he had not been interviewed. The Tribunal concludes that the reason a meeting did not happen in this case was that Dr Michael felt that he clearly understood the Claimant's complaints and that, in particular after he had interviewed Dr Wood, he did not consider there to be any material dispute as to what had occurred. The Tribunal view this as a conclusion he genuinely reached and was open to him. In that context and where Dr Wood had immediately made an offer to apologise to the Claimant, Dr Michael genuinely did not see any need to meet with the Claimant and thought indeed that the use of the FPRP had produced a 'quick win' in that Dr Wood had recognised his failings, would learn from them in terms of ensuring no repetition and that an apology from Dr Wood represented a proportionate response in circumstances where it clearly did not enter Dr Michael's considerations that this was a matter of the same seriousness as the Claimant considered it to be such as to justify the

initiation of formal misconduct proceedings against Dr Wood and indeed, as the Claimant would have it, a referral to the GMC.

127. There is absolutely no evidence whatsoever before the Tribunal which could allow it to reasonably conclude that Dr Michael's decision in this regard was in any respect motivated by Claimant's or Dr Wood's race. The Claimant's theory of Dr Michael effectively transforming/subrogating his own identity to become a cipher and agent of a predominantly white senior management team is a theory, but no more than that. There is no evidential basis upon which the Tribunal could reasonably conclude that Dr Michael was influenced in that way. There is no evidence of a particularly close relationship between Dr Michael and Dr Wood as the Claimant had suggested, let alone such as would allow the Tribunal to move to the next relevant stage of considering whether that relationship caused Dr Michael to protect Dr Wood out of any motivation related to race.

128. Aside from issues involving the FPRP, it cannot be said that the Claimant did not have an appropriate forum to air his complaints. He raised his original complaint in April 2017 but submitted an amended form of complaint after the conclusion of the FPRP process by letter dated 10 August 2017. This resulted in the Claimant meeting with Ms Flack as part of an investigation then under the Respondent's Bullying and Harassment Policy where he was able to fully explain and, where he thought appropriate, expand upon the nature of his concerns. He further aired his concerns in correspondence with Dr Byrne in March 2018 and with Ms Moran in April 2018. This ultimately led to a review of how the Claimant's concerns had been dealt with by the appeal panel set up under the grievance procedure appeal process chaired by Ms Parkinson. The Claimant aired his concerns further to Ms Moran in August and September 2018.

129. The Claimant may disagree with conclusions reached at each stage of the process, but it cannot be said that this was not a matter which was not fully considered and where the Claimant did not have numerous opportunities to argue his case and seek to persuade the Respondent as to the appropriate decision it ought to be making.

130. Nor has he again pointed to any facts from which the Tribunal could reasonably conclude that he had been less favourably treated because of race. Again, no actual comparator is relied upon. There is no evidence upon which the Tribunal could conclude that the Claimant would have been treated differently had he been white or that Dr Wood's race influenced the nature of the process adopted to address his concerns. The Respondent is right to point to the Claimant being allowed to pursue his appeal against Ms Flack's findings despite its late submission. Whilst the opportunity was allowed to the Claimant in circumstances where he had not been advised of the time limit, the Claimant had access to and was aware of the relevant policies and the Claimant delaying for a period of months before seeking to take the matter further was, viewed objectively, not justified.

131. The Claimant's third allegation is that the Respondent did not address his concerns in line with its own policies. The Tribunal's conclusions in this regard by now inevitably overlap with his first two complaints which also address issues of process.

132. Dr Michael determine that it was appropriate to deal with the matter at first instance under the FPRP for the reasons already explained. His failure to meet with the Claimant first, albeit not a mandatory part of that policy, has also been explained as well as Dr Michael concluding that process on the basis that he considered that Dr Wood had accepted his own inappropriate conduct and that his offer of an apology provided an appropriate resolution which he genuinely thought ought to and would satisfy the Claimant. The Claimant not being satisfied, it was entirely appropriate and in accordance with third party advice that the matter the looked out under the Respondent's Bullying and Harassment Policy. The Claimant himself in evidence did not suggest that the Respondent did not have that option open to it. Ms Flack conducted what the Tribunal considers to be a sufficiently in-depth investigation, meeting with witnesses who were in attendance at the time and who had been highlighted by the Claimant as people to whom she ought to speak. The Tribunal is not surprised that she did not widen her enquiry to interview every person who attended the lecture and no adverse inference could be drawn from that limitation in her investigation. The only witness, on the Tribunal's findings, who was identified by the Claimant but not interviewed, was a doctor who had left the Respondent's employment and that, the Tribunal concludes, was the only reason why Ms Flack or Mr Jamieson did not interview him.

133. Again, Ms Flack's findings were based on the evidence before her and a genuine evaluation of the nature of the inappropriate conduct of which Dr Wood, she concluded, was guilty. Again, the conclusion that the allegations did not amount to bullying and harassment or conduct which ought to be dealt with through a separate disciplinary process was genuine and already, as the Tribunal has found, untainted by considerations of race.

134. The Claimant is right to highlight that he was not informed of his right to an appeal but he is not suggesting that this was a deliberate omission let alone one tainted by considerations of race. Indeed, despite his very late appeal, as already referred to, this was allowed to go forward to a further process of consideration under the Respondent separate grievance appeals procedure. Indeed, there is no provision within the Bullying and Harassment Policy for an appeal, which the Respondent genuinely therefore considered ought to be dealt with as a grievance appeal and where in all the circumstances, the nature of the appeal would not have been different in any event.

135. Ms Parkinson chaired an appeal panel which considered all of the relevant evidence together with the Claimant's latest representations.

136. Again, the Claimant has pointed to no actual comparator, nor any evidence from which the Tribunal could reasonably conclude that the matter proceeded under the various policies it did and in the manner it did because of any considerations as to the Claimant's and/or Dr Wood's race.

137. The Claimant's fourth allegation is that the Respondent failed to investigate his complaint fairly, properly and within a reasonable timescale.

138. Again, the Tribunal has already addressed the reason why the various policies and processes were applied by the Respondent and the extent to which the Claimant was able to air his concerns within them. The Tribunal agrees with the submissions, however, on behalf of the Respondent that there was a proper, fair and full investigation of the Claimant's complaints through the application of the aforementioned three separate internal policies with the only potentially valid criticism being the lack of interview with the Claimant during the initial FPRP. The Tribunal has already, however, dealt with the reason for that omission.

139. Thereafter the Claimant was interviewed by Ms Flack. He was able to make (and have considered) his oral and written representations. Ms Flack interviewed the witnesses the Claimant had wished her to, except Dr Hakiman, as referred to above. She had before her the relevant documentation. She provided him with a reasoned decision. There was then a review of the process by Ms Parkinson's appeal panel and again a reasoned outcome provided to the Claimant.

140. In terms of timescale, Claimant's original complaint was raised on 26 April 2017. The investigation under the FPRP was completed and outcome delivered on 3 July 2017. There was an element of delay in the provision of the outcome but this has been explained to the Tribunal's satisfaction as referred to in its factual findings above and the Claimant has never suggested to Dr Michael or otherwise that and if so on what basis the delay related to considerations of race. The Tribunal notes that the Claimant received an apology for the initial delays from HR together with an explanation in terms of workload issues.

141. The Claimant provided an expanded form of complaint by letter of 10 August 2017. Ms Flack was appointed to investigate this on 22 August and met with the Claimant on 9 September 2017. She interviewed witnesses and fed back her outcome to the Claimant at a meeting on 1 December and then my email of 15 December.

142. It was the Claimant who delayed until 19 March 2018 in lodging an appeal against her conclusion. On the basis that it had been submitted out of time, which it had, this was initially rejected by Dr Byrne on 22 March. The Claimant raised a grievance against that decision on 22 April and it was

then determined that an appeal ought to proceed by Ms Moran on 4 May 2018. The appeal panel met on 19 July and provided an outcome dated 25 July 2018, albeit sent to the Claimant on 7 August 2018.

143. Save for an early delay in the provision of the FPRP outcome and a more significant delay due to the Claimant's this matter has, the Tribunal concludes, been progressed against a timescale which can certainly not be categorised as unreasonable and indeed in the context of an employer such as the Respondent more quickly than might ordinarily be expected.

144. Even if the Claimant could point to failures in terms of the need for a proper, reasonable or timely investigation, he has again pointed to no actual comparator nor any evidence at all from which the Tribunal could reasonably conclude that the way in which the Respondent handled his concerns was influenced by considerations of race. The Tribunal nevertheless accepts the Respondent's explanations in any event for the way in which it conducted its considerations of the Claimant's concerns and that its reasons are untainted by considerations of race.

145. The Claimant's fifth allegation alleges a failure to provide sufficient reasons for why Dr Wood's behaviour did not amount to bullying and/or misconduct.

146. The Claimant of course received certainly two detailed written outcome letters from Ms Flack and Ms Parkinson. The Claimant does not agree with their conclusions but it cannot be said that they did not seek to explain their decision making to him. The Claimant's complaint is that they did not sufficiently engage with the definitions of bullying, harassment and misconduct in the bullying and harassment procedure and under MHPS. It could be said that they could have gone further in their explanations, but there is no defect identified to the Tribunal or any hint of them seeking to avoid an issue which would raise suspicion or which might lead to the drawing of an adverse inference. Fundamentally, they were applying a threshold of seriousness before something could be said to amount to bullying, harassment or be dealt with under separate misconduct proceedings, they genuinely thought that this threshold had not been reached and they thought that they had provided a sufficient explanation to the Claimant.

147. There is no evidence before the Tribunal which could lead it to reasonably conclude that there was any aspect in any lack of provision of reasons which was related to considerations of the Claimant's or Dr Wood's race. There is no actual comparator and no evidence before the Tribunal which, for instance, would allow the Tribunal to conclude that a white complainant would have been treated differently to the Claimant. In any event, the Tribunal accepts Ms Flack and Miss Parkinson's evidence that

they provided outcomes which they considered addressed the Claimant's issues and the issues they were being asked to determine.

148. The Tribunal has considered the survey evidence and data provided by the Claimant but considers that to be of too general a nature to allow it to draw any inference regarding the treatment of the Claimant in these very specific and unique circumstances. The Tribunal does note that the Respondent in instituting such surveys recognised a need to ensure equality and to monitor performance in that respect. All of the Respondent's witnesses confirmed that they had undertaken equality training.

149. The Claimant has referred the Tribunal to the ACAS Code of Practice in relation to Disciplinary and Grievance Procedures and sought to identify areas where he considers the Respondent has unreasonably failed to meet those standards. These include references to Dr Michael's failure to give the opportunity to the Claimant to clarify his initial complaints under the FPRP, Dr Byrne's initial refusal to allow a review/appeal of Ms Flack's outcome and an allegation that the appeal was not impartial. The Tribunal has dealt with these points save the argument that Ms Hall of HR was part of the appeal panel or engaged in correspondence with them despite previously having been the subject of a complaint raised by the Claimant in respect of the delay in the FPRP outcome. The Tribunal does not consider her involvement at the review panel chaired by Ms Parkinson to be material or there be any linkage made regarding her involvement with a desire to frustrate the Claimant's complaints let alone to do so for reasons related to race.

150. The Tribunal has also been referred to and considered the EHRC Code of Practice for Employment as regards points made by the Claimant of alleged failures to meet the standards expected in terms of keeping written records of decisions, declining to use alternative dispute resolution procedures and, again, Dr Michael's failure to engage with the Claimant during the initial FPRP process.

151. The Claimant has also in submissions sought to argue that the FPRP is inherently discriminatory because of there being no requirement to interview a complainant or obtain further information, no requirement to obtain witness evidence and no right of appeal. The Claimant has failed to articulate how its application might result in direct discrimination because of race or indeed that the policy, as one of general application, disadvantages BME employees. This appeared to be an alternative way of arguing that it was unreasonable for the FPRP to have been used at all in the Claimant's case and that the Respondent ought to be in the position of having to show a non-discriminatory reason for its use. The Tribunal has already dealt with this question above.

152. The Claimant's case is essentially one of perceived unreasonable treatment and he has pointed to a great many perceived missteps taken by the Respondent's managers and how they dealt with his concerns, both in terms of the substance and the procedure adopted. Inevitably, the Tribunal will not have referred expressly in these reasons to each and every alleged failing, but it has taken care to ensure that it has considered all the points raised in the Claimant's pleaded case, his evidence before the Tribunal, documentation he has produced and his submissions. The Tribunal would note that in a process which became as detailed and complicated as unfortunately occurred in this case, there is the possibility of things being missed and mistakes being made. Sometimes, albeit certainly not always, those may be entirely innocent. However, for the Claimant's complaints to succeed the Tribunal has to be able to draw a linkage with considerations in the minds of the Respondent's managers, conscious or unconscious, of race/colour. The Tribunal is also aware that by a focus on a number of specific allegations it is possible to lose sight of the bigger and overall picture. The Tribunal has therefore taken care to stand back and look at the process as a whole to consider whether any inference of race discrimination could be drawn. It does not consider that it can. The Claimant views the Respondent's approach to his concerns as widely and fundamentally flawed, such that surely an adverse inference ought to be drawn given that it is inconceivable that the Respondent could have handled matter so badly without there being an undisclosed adverse motivation. The Tribunal does not agree with the Claimant's characterisation of Respondent's approach.

153. The Tribunal's fundamental conclusion is that the Respondent has explained to its entire satisfaction that its treatment of the Claimant in all respects, consequential on him raising concerns about Dr Wood's treatment of him, were in no way influenced by his or Dr Wood's race. This, however, is in the circumstances of the Claimant not having been able to shift the burden of proof so as to require the Respondent to provide such explanation.

154. All of the Claimant's complaints of race discrimination must fail and are hereby dismissed.

Employment Judge Maidment

Date 10 October 2019

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