EMPLOYMENT TRIBUNALS

Claimant: Mr P Appasamy

Respondent: Kent Community Health NHS Foundation Trust

Heard at: London South Croydon

On: 15-18 July and 6 September 2019 and in Chambers on 9-11 September 2019

Before: Employment Judge Tsamados
Mrs C Wickersham
Miss B Brown

Representation
Claimant: In person (15-18 July 2019)
Mr P Sinclair, Counsel (on 6 September 2019)
Respondent: Ms N Newbegin, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:

The Claimant was not subjected to unlawful discrimination. His complaints are unfounded and are dismissed.

REASONS

Background to the claim and issues

1. By a Claim Form received by the Employment Tribunal on 4 October 2017, following a period of ACAS Early Conciliation from 22 July to 5 September 2017, the Claimant, Mr Appasamy, brought claims of harassment on the grounds of race and sex, indirect religious discrimination and disability discrimination arising from his employment with the Respondent, the Kent Community Health NHS Foundation Trust, as an Assistant Practitioner from 23 January until 25 July 2017. At the time he brought his claim the Claimant was represented by the Rev Michael Adelasoye of One Stop Legal

Consultancy Services. In its response received on 28 November 2017 the Respondent denied the claims in their entirety.

2. A Preliminary Hearing on case management was originally set for 16 January 2018. This was postponed and an Order dated 9 January 2018 was sent to the parties on 11 January 2018. This required the Claimant to provide further information of his individual claims to the Respondent by 26 January 2018 and the Respondent was given leave to amend its Response within 14 days of receipt of that further information.

3. The Claimant's then representative provided a response to the Order in a document entitled Further and Better Particulars by email dated 26 January 2018. This document clearly did not comply with the terms of the Order, a matter which the Respondent's solicitors raised in an email to the Tribunal of even date.

4. A further Preliminary Hearing on case management was set for 19 June 2018.

5. By an email dated 9 May 2018, the Employment Tribunal wrote to the Claimant's then representative advising him that he had not sufficiently complied with the order of 9 January 2018 and that he was required by 13 June 2018 to send full particulars of his claims. The letter warned the Claimant that if no particulars were provided by that date or those provided did not clarify his claims and Unless Order would be issued.

6. The Claimant's then representative provided Further and Better Particulars by email dated 14 June 2018. This document was very much the same in content as the one provided on 26 January 2018. Again, it did not comply with the Order of 9 January 2018. Indeed, paragraph 5 of the document simply states, "please see attached", but no attachment was provided with the email.

7. By an email of 14 June 2018, the Respondent's solicitors raised the deficiencies in the Claimant's further reply to the Order and made an application for an Unless Order and further requested that the forthcoming Preliminary Hearing be postponed.

8. In an email dated 14 June 2018, the Claimant's then representative wrote to the Tribunal and to the Respondent's solicitors apologising for sending an incomplete email in response to the Order due to, "technical glitches with our computer system". The email indicated that it was anticipated that these problems would be resolved, and that the representative would be in a position to send the complete email and attachments later that day, failing which he would send hard copies in the post.

9. On the morning of 19 June 2018, the Claimant's then representative sent an email to the Employment Tribunal and to the Respondent's solicitors attaching Further and Better Particulars dated 13 June 2018, details in support of the claim and medical evidence relating to the Claimant's disability. The Further and Better Particulars and the details in support of the claim can be found in the Respondent's bundle at pages 48 to 56.

10. The Preliminary Hearing on case management was held by telephone on 19 June 2018 and was conducted by Employment Judge ("EJ") Harrington. At that hearing the issues were determined and case management Orders were set. These Orders required the Claimant to provide further information of the harassment on grounds of race which he complained of, the nature of his disability, with evidence in support if needs be, and for the Respondent to provide an amended Response if so advised. Also, a further telephone Preliminary Hearing on case management was set for 11 September 2018 at which the Tribunal would clarify the claims and defences, and to determine whether the Respondent disputed that the Claimant was disabled for the purposes of the disability discrimination claim. The record of the EJ Harrington hearing was sent to the parties on 5 July 2018. This can be found at pages 57 to 63 of the Respondent's bundle.

11. The Respondent provided amended particulars of its Response on 28 August 2018. This can be found at pages 64 to 68 of its bundle.

12. The further telephone Preliminary Hearing on case management was conducted by EJ Balogun on 11 September 2018, at which a full hearing date was set for 15 to 18 July 2019 at the Ashford hearing centre and case management Orders were made so as to prepare the case for that hearing. This included: the parties to agree the issues by 23 October 2018; disclosure of documents; preparation of bundles; and exchange of witness statements. In addition, EJ Balogun recorded that the Claimant had included within his further particulars of his allegations relating to harassment on further dates which had not been referred to within his Claim Form for which he had not sought the permission of the Tribunal. On that basis EJ Balogun disallowed those matters and ruled that they did not form part of the claims or issues to be determined. A copy of the record of this hearing was sent to the parties on 27 September 2018 and can be found at pages 69 to 72 of the Respondent's bundle.

13. A list of issues was agreed between the parties and is at pages 75- 79 of the Respondent's bundle. The Claimant provided a Schedule of Loss which is at page 79a of the bundle.

14. However, the Claimant did not comply with the Order to disclose documents and this would appear to have been caused by his then representative, Rev Adelasoye's, incapacity due to ill health. Ultimately, he withdrew as the Claimant's representative and notified the tribunal and the Respondent's solicitors in an email of 28 November 2018.

15. In an email dated 3 December 2018, the Respondent's solicitors sought an Unless Order in respect of the Claimant's failure to comply with the Order for disclosure of documents by 9 November 2018 as required.

16. The Claimant instructed solicitors, Kingsley Smith, to act on his behalf and they wrote informing the Tribunal of their interest by email letter dated 12 December 2018. That letter put forward revised dates in January 2019 for compliance with disclosure of documents and provision of the trial bundle. In a subsequent email, the Respondent's solicitors agreed to the suggested

dates and the Tribunal recorded the case management Order as having been varied by consent.

17. It would appear that shortly before the start of the full hearing, Kingsley Smith ceased to act for the Claimant. Indeed, the Claimant provided an updated Schedule of Loss directly to the Respondent's solicitors in an email dated 13 July 2019.

18. The full hearing proceeded before this Tribunal at West Croydon rather than Ashford from the 15 to 17 July 2019 at which the Claimant was unrepresented. The Claimant was somewhat agitated at the start of the hearing and I did make every attempt to explain to him the Tribunal procedure and what was expected of him.

19. The Tribunal was not able to continue the hearing on 18 July 2019 due to the Claimant's non-attendance due to ill-health. This is dealt with in the context of the Respondent's costs application which is dealt with below. Further dates were set for September 2019. The Claimant was represented by Mr Sinclair at the further date of 6 September 2019. The Tribunal then met privately in chambers from 9 to 11 September 2019 so as to reach this Judgment.

Documents

20. At the start of the hearing, the Respondent provided us with documents contained within three lever arch files running to 1321 pages (these are referred to as "R1", "R2" and "R3" as required), an opening note and witness statements for Mrs Friederike Stenning, Ms Fiona Arnold and Ms Emma Payne. The Claimant provided us with a copy of his witness statement and his updated Schedule of Loss. We heard evidence from the Claimant and the Respondent's witnesses by way of written and oral testimony.

21. During the course of the hearing further documents were provided by the Respondent which are set out as follows: "R4" screen shots of Ruth Simmons' diary, the Claimant's diary, the course co-ordinator's diary and his expenses claims and "R5" Breakdown of Rotas in Respect of Dates of Allegations.

22. At the resumed hearing on 6 September 2019, the Respondent provided a supplemental witness statement for Mrs Stenning.

Preliminary applications

23. At the start of the hearing a number of preliminary matters were raised. The Respondent objected to the Claimant's witness statement because it contained matters that went further than the agreed issues. The Respondent also wished to rely on two additional witness statements, one from a new witness and one from an existing witness in the form of a supplemental statement.

24. After hearing submissions from each party and considering the additional witness statements, we adjourned to read all of the statements, the documents referred to in those statements, those documents identified by the

Respondent and those set out in a reading list which we had asked the Claimant to provide.

25. On return we gave the following determination as to these preliminary matters.

New matters raised in the Claimant's witness statement

23.1 We could not see at this late stage that it was proportionate to restrict the Claimant's evidence. Many of the issues were raised in his grievance and there are witnesses that the Respondent is calling and are here and can deal with what appear to be the new matters. The only point which we felt could not be dealt with by the Respondent was the allegation at paragraph 15 of the Claimant's witness statement which do appear totally new;

23.2 However, this claim was extensively case managed and set out in particulars and further particulars at which stage the Claimant was represented. The claim is as set out in the agreed list of issues. These other matters can therefore only arise as background.

Additional witness – Rachel Ann Nicholls

23.3 Although provided late, it is of relevance, it is a short statement, the Claimant will have sufficient time before she gives evidence to read it and prepare any questions he might have. The statement deals with an additional email that has been discovered and is not inconsistent with what this witness had already said during the internal process. We therefore heard evidence from Mrs Nicholls.

Supplemental witness statement - Emma Payne

23.4 Again, although it has been provided late it is a short statement and the Claimant will have sufficient time before she gives evidence to read and prepare. It is relevant in as far as it explains why the witness is no longer working for the Respondent, without which we can see that adverse inferences could be drawn.

26. The Respondent then provided additional documents consisting of a three-page rota and the missing email referred to in Ms Nicholls' witness statement. These had been sent to the Claimant on the Friday before this hearing, but he objected to their admission at this late stage. After conferring, we decided to allow the documents to be produced in evidence and noted that they were the Respondent's documents and so it was hard to see how the Claimant could challenge the contents in any event. These documents are at R3 1316.

27. I then discussed the order of events, the process we would be following and the sequence within which the witnesses would be called around their availability. The Claimant gave evidence first although provision was made to interpose specific witnesses of the Respondent as required.

Findings

28. I set out below the findings of fact the tribunal considered relevant and necessary to determine the issues we are required to decide. I do not seek to set out each detail provided to the Tribunal, nor make findings on every matter in dispute between the parties. The Tribunal have, however, considered all the evidence provided to us and we have borne it all in mind.

29. The Claimant is originally from Mauritius and describes himself as of Asian appearance. He is Hindu and his first language is French. He speaks with an accent which he says is a French accent. He has Diabetes and Psoriatic Arthritis.

30. The Claimant has a Batchelor's Degree in Biological Sciences and a Master's Degree in Pharmaceutical Sciences. He has worked as a health care professional since 2005 in general nursing and mental health care. He qualified as a Band 2 Healthcare Assistant ("HCA") in 2001 and as a Band 3 HCA in 2016. He was nominated for the NHS Heroes Awards in 2015.

31. The Claimant was employed as a Band 4 Assistant Practitioner by the Respondent health authority, primarily based at Tonbridge Cottage Hospital, from 23 January 2017 until his resignation by letter dated 24 July 2017 (at R2 523). The Claimant was absent from work due to ill-health from 8 June 2017 onwards.

32. On 24 January 2017, there was an incident between the Claimant and a Resourcing Officer in which the Claimant telephoned him to enquire as to receipt of one of his references. The Resourcing Officer states that the Claimant spoke to him in an abrupt tone and was rude to him. This is of consequence because it is not dissimilar to the complaints made by the Claimant's colleagues during the course of his employment. Details of the incident are set out in a document in the form of an attendance note by the Resourcing Officer at R1 396 of the bundle.

33. The Claimant's contract of employment is at R1 377-388. Clause 4 sets out the period of notice to be given by either party. For Band 4 posts this is stated to be four weeks for the first four years of employment. Clause 5 sets out the Claimant's probationary period of six months subject to regular review and extension if satisfactory performance has not been achieved, in accordance with the Probationary Period Policy. This Policy is at R2 883-893. The length of probationary period is set out at R2 887 along with the review process. At R2 889 extension of probation is dealt with and refers to a maximum extension of 3 months. The Claimant's job description and person specification are at R1 271-281.

34. The Claimant's line manager was initially Mr Thameen Khan, an Agency Band 7 Physio. From early April 2017 onwards his line manager was Mrs Friederike Stenning, who had commenced employment with the Respondent on 6 March 2017 as Therapy Lead. Her line manager was Mrs Rachel Nicholls, but she was not based at Tonbridge Cottage Hospital. Her job title is Operational Manager for Community Hospital.

35. The Claimant worked on the Primrose & Summerhill Ward. Ms Emma Payne was employed at the time of the Claimant's employment also as a Band 4 Assistant Practitioner working on the same ward. Mrs Fiona Arnold was and still is employed as a Band 2 HCA and was working on the same ward as the Claimant.

36. The Claimant alleges that he notified the Respondent of his medical conditions in his application form for employment. We were not provided with a copy of this and the Respondent denied that he had so notified it. Whilst Mrs Stenning accepted that the Claimant told her that he was Diabetic in approximately April 2017, he never mentioned anything to her at any time as to any reasonable adjustments that he might require as a result of this condition. The Respondent's position is that it was unaware that the Claimant had Psoriatic Arthritis. Subject to this lack of knowledge, the Respondent accepts that the Claimant is a disabled person for the purpose of the Equality Act 2010.

37. The Claimant's general case is that initially all was well at work and he was enjoying his new role, but things started to go awry in early March 2017.

38. His position is that the trigger point for this involved an incident between him and Ms Payne. He alleges that Ms Payne wanted him to make a complaint about another member of staff and he refused on the basis that he could not see any grounds for doing so. Ms Payne accepted that there was an incident involving another member of staff who attended work with sickness and diarrhoea but refused to go home when requested. Ms Payne said to the Claimant that he should report it, but the Claimant would not do so. She accepted that she and the Claimant had got on well until that incident.

<u>Race and sex harassment</u>

39. The Claimant alleges that from this moment onwards Ms Payne tried to make his life a misery. He relies on a number of alleged incidents involving Ms Payne and Mrs Arnold on a number of different dates during March and April 2017 which he believes amount to harassment on grounds of race and sex.

40. On 10 March 2017, at a Medicines Management training course held off site, the Claimant alleges in his witness statement that Ms Payne suddenly asked him in front of other members of staff whether he was bisexual. Ms Payne alleges in her witness statement that the Claimant initiated the conversation in the car park when they were talking about their respective relationships. She asserts that he asked her whether she liked men or women. She further alleges that she responded that she liked men and asked him the same question, to which he replied he liked women. She further asserts that he seemed a little shocked that she had asked the same question back to him.

41. There are some documents in the bundle which the Claimant attached to his claim form ET1. One of these is described as Details of Sexual Harassment Chronology of Events (at R1 15 and 18-19). R1 18 appears to refer to the incident on 10 March 2017 albeit obliquely. There is a further version of this document at R1 408-412 which contains the first page of the document at R1 18 on the second page at R1 409. This page gives more detail of the alleged

incident, in particular, that initially the Claimant did not realise what Ms Payne had asked him until it was pointed out to him afterwards by, Ms Ruth Simmons, another Assistant Practitioner. In an interview with Ms Simmons held on 8 November 2017, as part of a subsequent grievance investigation undertaken by the Respondent (in response to the Claimant's later collective grievance), she states that the Claimant told her that Ms Payne had asked him if he was gay but he did not seemed bothered by it. She further states that she did not hear him ask Ms Payne about her sexuality (R2 657-658).

42. In oral evidence, the Claimant stated that the initial conversation between him and Ms Payne took place in the training room, but it continued in the car park afterwards, during which he asked Ms Payne to confirm what she had said and why (having not realised what she said at the time). He further alleges that in response she told him that it was not her that had said this, she was repeating something that Mr Khan had said to her. The Claimant responded that he would ask Mr Khan the next time he saw him. He further states that he did so although he did not tell us what Mr Khan said.

43. This seemed at odds with his written evidence that he was shocked and that he froze when Ms Payne asked him if he was bi-sexual during the training course.

44. In further questioning the Claimant said that his response was to what Ms Payne had said in the car park and not initially in the training room. He denied that there was any discussion about their respective relationships.

45. In the later investigatory interview as part of the subsequent collective grievance brought by the Claimant, Ms Simmons said that the Claimant told her that Ms Payne asked her if he was gay, but he did not seem bothered by it (at R2 657). In answer to the point that Ms Simmons had said that he did not seemed bothered by Ms Payne's question, the Claimant replied in evidence why would he have asked Ms Payne what she said if he was not bothered by it?

46. In oral evidence Ms Payne stated that there was no conversation about sexuality in the training room, it took place in the car park. She further stated that at the time Ms Simmons was approaching them, but she only came up to her part way through the conversation. In addition, she states that she did not tell the Claimant that she was repeating what Mr Khan had said to her.

47. Mrs Stenning in her witness statement sets out what the Claimant and Ms Payne said to her at the time about this incident. She states that the Claimant told her that Ms Payne had made a comment after a training session something along the lines of "you are bi, aren't you?", which upset him because it was said in front of other people. She further states that when she spoke to Ms Payne she told her that they were walking to their cars after the training course and Ms Payne asked the Claimant if he was gay, away from other people, and he responded that it was none of her business and that she could not keep a man (at that time she had split up with her partner).

48. In both her written and oral evidence Mrs Stenning stressed that she could not remember the exact words either party had used. Her evidence indicates

that it was Ms Payne that initiated the conversation. In a later investigatory interview held on 2 November 2017 (at R2 628-637) she gave the same account but adds "the way EP (Ms Payne) described this to me it seemed like banter".

49. Mrs Stenning's further written evidence is that she did go to speak to the Claimant after she had spoken to Ms Payne and told him that as far as she could determine there was a misunderstanding and a communications breakdown. She asked him to write down what had happened, but she did not follow the matter up further. She added that there was a team meeting at which internal team relationships and general relationships with staff on the adjacent ward were discussed and at which the Claimant did most of the talking, although in her oral evidence it was clear that the Claimant did not raise the issue of what had happened on 10 March 2017.

50. On balance of probability we find that this conversation took place in the car park with no direct witnesses as to what was said or who initiated the conversation. But given the internal inconsistencies between the Claimant's written and oral evidence and the document drafted nearer or at the time by him we prefer the evidence of Ms Payne as to what was said save for who initiated the conversation. We prefer Mrs Stenning's evidence as to who started the conversation which on both the accounts of the Claimant and Ms Payne was Ms Payne.

51. The next incident that the Claimant relies upon is alleged to have taken place on 17 March 2017. He states in his written evidence that Ms Payne asked him to make her a cup of coffee and then grabbed him, rubbed her breasts against his chest and told him that she "loved me (the Claimant) to bits" and that she "really liked me (the Claimant)". In his document at R1 409, the Claimant states that this incident happened in the staff room whilst they were waiting for John, the Course Co-ordinator, to arrive for a training course. In oral evidence the Claimant stated that he was attending a training course that day.

52. Ms Payne denies this and states in her written evidence that the Claimant could be a little "touchy feely", touching her on the shoulder and sometimes giving her and a female colleague, Ruth, a hug when he came on shift. She adds that the Claimant would sometimes grab her arm or the arms of other members of staff, she believes when he wanted to ask something. She was in clear distress when giving evidence as to this incident. She further stated in her witness statement that there were occasions when the Claimant had followed her to the car park or waited for her in the car park.

53. Mrs Stenning said in her witness statement that the Claimant had a habit of invading other people's personal space and that other members of staff had informed her that he had been acting inappropriately towards them. She further stated that she had been told that the Claimant had on one occasion sat in the car park waiting for some members of staff.

54. The Claimant denied that he behaved in this manner.

55. However, this disposition towards being rude and overly familiar with female members of staff was also something that was recounted by a number of his colleagues in interviews which form part of the investigation into his later collective grievance:

    55.1 Ms Simmons stated that the Claimant was "very touchy feely, and didn't seem to understand personal space, he was in your personal space" (R2 657). She further stated that she did not witness any staff being inappropriate towards the Claimant particularly with regard to his sexuality and that he was "overfriendly and overly tactile, his mannerisms were quite feminine" (R2 658);

    55.2 Mr Subin Baby stated that the Claimant was "very touchy with the ladies and calling them all the time" and "he was touchy with the ladies, and confident" (at R2 670 and 671);

    55.3 Mrs Arnold stated that the Claimant was "rude and touchy feely" and "if you said please don't touch me, he would say don't be silly" and that it was always women he did this to (R2 625);

    55.4 Ms Stephanie Rhodes stated "he is aggressive at times and invades other people's personal space" and one member of staff had said that he "cornered them in the storeroom, not letting them out until they answered his question. Another said he stroked their arm" (R2 635 and 636);

    55.5 Ms Simmons stated that the Claimant was "very touchy feely, and didn't seem to understand personal space, he was in your personal space" and "overly tactile" (R2 657 and 658);

56. In addition, the Respondent's position is that in fact there was no training on 17 March 2017, and it has provided documents within R4 in support of this. Whilst the trainer, John, was at the Therapy Unit on 17 March 2017 he was providing one to one training to a member of staff. The attendance records abstracted within R5 indicate that the Claimant was working a night shift which finished at 07:30 hours in the morning of 17 March 2017 (the records are at R2 550-551) and that Ms Payne was working the night shift commencing at 19:30 hours that evening (at R2 577).

57. Whilst it of course is not beyond the bounds of possibility that the Claimant is simply wrong about the date, a lot of time and effort was spent in determining and agreeing the list of issues and in particular when the alleged incidents occurred.

58. But in any event on the evidence before us we find that on balance of probability this incident did not happen as alleged by the Claimant and we accept the evidence as to his disposition towards female colleagues.

59. The next incident that the Claimant relies upon took place on 14 April 2017 in which he alleges that Ms Payne noticed that a red pen had leaked in the breast pocket of his tunic and said in front of another clinician whilst pointing to him and laughing "I thought your boobs were leaking". Ms Payne accepted

in evidence that there was an incident when the Claimant's pen had leaked but denied that she made the comment attributed to her. On balance of probability we narrowly find that this remark was made but in the absence of anything else, as we explain below, we find that it does not amount to harassment.

60. The Claimant next relies on a number of incidents which he states all took place on 23 April 2017 and involved Ms Payne and Mrs Arnold during the half hour handover period between shifts. These incidents are set out at paragraphs 1.1 (as to race) and 4.1.4 (as to sex) of the list of issues (at R1 80 and 84).

61. In his witness statement the Claimant states that the matters relied upon as harassment on the grounds of race took place between 14 and 23 April 2017. However, as we have already indicated, a great deal of time and effort was put into arriving at an agreed list of issues and at a time when the Claimant was legally represented. We therefore formed the view that these matters are alleged to have happened on that one day as has been agreed in the list of issues.

62. Dealing with those incidents which are alleged to amount to harassment on grounds of race. The Claimant alleges that Ms Payne and Mrs Arnold teased him and mimicked his accent in that they said the following: "it smells like curry in here" - Mrs Payne; the ward smelled like a curry house - Mrs Arnold; "are you a Muslim?" - both women; "what are you carrying in this man handbag apart from your curry?" - Ms Payne; "hope there is not a bomb in your bag!" - both women; "you are so funny and you are going to make us p**s in our pants, Panama Canal" - both women; "we are joking paranormal!" - both women; when the Claimant said "that's not funny!" both women repeated his phrases and words and mimicked his accent (by putting on a French accent); when the Claimant told them that he found their behaviour unacceptable, Ms Payne said "Parama is going to report us" and Mrs Arnold said "you mean paranormal!"

63. At paragraph 1.2 of the list of issues (R1 81) the Claimant alleges that he was stereotyped because of his Indian looks and different accent, that Ms Payne and Mrs Arnold assume that he was Muslim and that he came from the ISIS group and was an ISIS sympathiser. He states that although he is of Asian descent, he was brought up in the French culture and speaks French as his first language. He further states that he does not eat only curry, as Mauritius is a diverse multi-cultural country.

64. It would seem unlikely that all of these matters could have occurred within the space of half an hour on one day. However, in his witness statement and within the document at R1 412 the Claimant indicates that these matters happened over a period of time. Both Ms Payne and Mrs Arnold denied that these events took place and there are no witnesses to the incidents.

65. The only matter that was accepted was that Mrs Arnold mispronounced the Claimant's first name albeit inadvertently. She said in evidence that the Claimant was upset about this, that she apologised and had some coaching from Mrs Stenning as to the correct pronunciation. However, she admitted

that she still struggled to pronounce properly Claimant's first name. She explained that she had difficulties pronouncing certain names. We asked her to state how she mispronounced the Claimant's name and from what she said this amounted to adding additional syllables to his name. But both she and Ms Payne denied calling the Claimant those names that he alleges as set out in the list of issues. We do note that the Claimant's first name was incorrectly stated to be "Panama" within an email at R1 439 although prior to that his name is correctly stated in that email. Whilst this was not relied upon as an incident it does appear to be a simple misspelling or typographic error. We note that in her investigatory interview Ms Simmons is asked if there were any difficulties between the Claimant and Mrs Arnold at a point in time and answered "no nothing unusual, I remember FA (Mrs Arnold) struggling to pronounce the Claimant's name, it was not malicious, she just couldn't do it, but he didn't seem concerned."

66. On balance of probability we find that the alleged incidents of harassment on grounds of race did not take place.

67. The next incident is one of alleged harassment on grounds of sex which took place on 23 April 2017. It is set out at paragraph 4.1.4 of the list of issues. The Claimant alleges that Ms Payne called him a "wanker" and also told him to "piss off you wanker". Ms Payne denies this. Her evidence is that she was talking to her boyfriend on her mobile telephone and that these words were directed at/to him and not at/to the Claimant. She explained as much at the time, apologised for being rude (in front of him) and he told her not to worry and he did not mean to intrude.

68. In his oral evidence the Claimant stated that Ms Payne was pretending to speak to her boyfriend on her phone, but when he was further questioned about what had happened his evidence changed as to the sequence of events, whether he was facing Ms Payne when she was talking on the telephone and as to whether he or Ms Payne left the room first of all.

69. On balance of probability we accept that these words were not directed at the Claimant but to Ms Payne's boyfriend as she stated.

70. The Claimant also relies on an incident which he states occurred on 31 May 2017 in which Ms Payne asked him, in front of other staff, whether he had "got a girlfriend now". He relies on this as an act of harassment on grounds of sex.

71. In his document at R1 411 he states that Ms Payne was at the nurses' station and talking to other staff, Ms Simmons and "JJ". He further states that in response to Ms Payne's question he replied "what has it got to do with you", and she turned her back and went to the handover room. Ms Payne denies these allegations.

72. The Respondent's abstract of the attendance records at R5 indicates that there was an overlap between the clamant and Ms Payne of half an hour, Ms Simmons was on duty, but JJ was not rostered to work. We note that Ms Simmons was not asked specifically about this incident in the later grievance interview. However, she does state generally that she had not witnessed

any staff being inappropriate towards the Claimant particularly with regards to his sexuality and that it was more the other way around.

73. On balance of probability we narrowly find that this incident did not occur given the lack of independent witnesses and in particular that the cited witness JJ was not rostered on that day.

Religion

74. The Claimant said that he declared his religion in his application form for employment with the Respondent. However, the application form is at R1 256 and does not contain any reference to religion. This was pointed out to the Claimant during the hearing and, on reflection, he said in oral evidence that he declared his religion in an online monitoring form. Our understanding is that this part of an application form is not usually passed onto those dealing with the recruitment and selection process because it is purely for monitoring purposes. However, it does not appear to be in dispute that the Respondent was aware that the Claimant was Hindu.

75. The Claimant has brought a complaint of indirect discrimination on the grounds of religion. His evidence is that he is Hindu and was not able to practice his faith whilst working shifts on a Sunday because he was not given "protected time" on the rota to visit his Temple. He further states that he noticed that Christian staff were being given preference to visit their Church, but he provided no further details or evidence of this.

76. He alleges that the Respondent applied the provision, criterion or practice ("PCP") that employees were required to work according to its rota system. The Respondent admits that it applied such a PCP. His case is that the application of such a PCP put him at a particular disadvantage because he was unable to pray three times a day and was unable to go to his Temple on a Sunday. The respondent denies this but, in any event, contends that the application of its rota system was essential to ensure that service and patient needs are met.

77. In addition, he states that he was not given "protected time" to pray during the day. He alleges that Mrs Stenning told him that he could not have "protected time" as he was not a Muslim. He further states that he made a specific complaint to her on 20 May 2017 asking for a meeting about this issue, but nothing was done. At paragraph 2 of the list of issues at R1 81-82 the Claimant alleges that in a discussion with Mrs Stenning on 20 May 2017 he requested time off work to pray and for time to attend his Temple which she refused. He accepted in oral evidence that this was the first time he had requested time off from Mrs Stenning, although he did say that he had previously discussed it with Ms Nicholls at a health and well-being meeting and she refused. We would note that this does not sit well with paragraph 21 of his witness statement which indicates that he complained to Mrs Stenning on more than one occasion. He did not put this matter to Ms Nicholls in evidence.

78. The meeting on 20 May 2017 was the Claimant's probationary meeting (which we deal with in more detail below). Mrs Stenning denies that the

Claimant ever asked her for time off to go and pray and whilst he may have mentioned that he did go to the Temple on certain days, he did not ask her if he could go or have time off or that she should change the rota so that he could have Sundays off. The notes of the meeting on 20 May 2017 do not contain a reference to any discussion about time off (R1 469-470). The Claimant said that he received these notes at the time. He did not challenge their accuracy.

79. In oral evidence the Claimant stated that he was supposed to be working a long day on 14 April 2017 and requested the early off to attend a religious festival and this was granted.

80. In cross examination the Claimant stated that he practiced spirituality and meditation and could not always find the time to go to his Temple to do this. This was at odds with his pleaded case based on Hinduism and the need to pray and go to his Temple. Indeed, we are not sure that these are essential tenets of Hinduism as a religious or philosophical belief and the Claimant did not provide evidence to support it. We researched the relevant page of the Equal Treatment Handbook and provided copies to the parties, but this did not deal with the issue.

81. The attendance records provided by the Respondent show that there were only two occasions on which the Claimant was required to work Sunday mornings (at R1 549-556). The Respondent submitted and we accept that, of course, the Claimant could have requested the early off to attend his Temple. The Claimant said in oral evidence that in any event he could have attended his Temple on Fridays but that he preferred to go on Sundays when he could practice spirituality as well.

82. In cross examination it was put to the Claimant that his rostered hours included two half hour breaks which he could have timed in such a way that he could pray 3 times a day (for which he needed 5 minutes on each occasion). He accepted that he was entitled to such breaks but said that it was often too busy to take them.

83. Prior to the commencement of his employment with the Respondent, the Claimant sent an email to Ms Nicholls on 2 December 2016 (at R3 1321) asking for clarification as to whether his role required working “lond (sic) days and unsocial hours such as nights”. His email continued “Besides this I am very flexible can work long days, weekends and nights.” In response, Ms Nicholls stated that there was no requirement to work long days at present, but it would be discussed and that there was weekend working as well. The Claimant’s email is curious because the request for clarification and the expression of his ability to work long days, weekends and nights are mutually exclusive. He appears to be seeking confirmation that he would be required to work long days and unsocial hours and offering to do so. But in any event, this does not sit comfortably with his allegations of religious discrimination.

84. In her supplemental witness statement, Mrs Stenning explained staff entitlement to breaks. She explained and we accept that all staff were entitled to a 30 minute break during the short shift and a one hour break during a long shift (i.e. one lasting 12 hours). The break could be divided up however each

staff member wanted to take it. For example, on a short shift the break can be taken as one block of 30 minutes or three lots of 10 minutes. It would be agreed between the Band 4s and Band 2s at the start of the shift how and when each staff member was going to take their breaks on that shift.

85. Mrs Stenning further states that the Claimant never asked her for specific break times to accommodate his prayer time but if he had done so she would have granted it. She also states that it was not clear to her having heard the Claimant's evidence as to why he could not have taken his prayer time during his breaks.

86. In response to the Claimant's evidence that he did not get his breaks because the ward was too busy, Mrs Stenning states that she does not recall him raising this issue with her and had he done so she would have asked for further details and investigated the matter.

The Claimant's grievances

87. The Claimant alleges that he raised a grievance about the way he was being treated at work in a letter dated 7 April 2017 (at R1 430). This letter is addressed to Mrs Stenning and raises a grievance against Ms Payne on the grounds that she constantly sexually harassed him and touched him inappropriately on several occasions. The letter refers to an enclosed document setting out chronological events.

88. In his witness statement he states that he sent a letter to Mrs Stenning on 7 April 2017 setting out his concerns in relation to an incident that occurred on Goldsmid Ward on 18 March 2017. His witness statement at paragraph 23 sets this incident out. However, there is no reference to this incident in the letter at R1 430.

89. Mrs Stenning denies receiving such letters or enclosures and further that she did not see the letter at R1 430 until she was interviewed as part of the Respondent's later investigation of the Claimant's collective grievance.

90. We had difficulty identifying what documents were alleged to have been enclosed with the letter at R1 430. The Claimant alleged that the attachment was the document at R1 431-433. However, this refers to events post-dating 7 April 2017. The Claimant did not give a satisfactory answer when this was pointed out to him but later on in questioning, he stated that the enclosed documents were in fact those at R1 408-411. However, the same problem arose with the dates within those documents post-dating the letter of 7 April 2017 and again the Claimant was not able to give a satisfactory answer. The Respondent's position is that it definitely had the documents by September 2017 because they were sent to them by ACAS as part of the Early Conciliation process.

91. In cross examination the Claimant said that he was going on holiday and Mrs Stenning asked him to come to see her on 7 April 2017 regarding some concerns that she had about him. He intended to use this meeting to raise his own concerns as to other staff members. At that meeting he says he handed Mrs Stenning two "statements", one was the letter dated 7 April 2017

and the other was about the incident on Goldsmid Ward. However, in his witness statement he states that he "sent" these to Mrs Stenning or at least the document about Goldsmid Ward. When questioned about this, he initially said that his solicitor drafted his witness statement, but subsequently said that he had drafted it and it must be a typo, and finally that he did not know. When pressed as to where the 18 March 2017 Goldsmid Ward incident document/letter was, he said he had given it to his solicitor, but he could print out a copy and bring it to the Tribunal.

92. Following the adjourned hearing on 18 July 2019, we directed the Claimant to produce this and any other documents that were attached to the grievance letter in readiness for the resumed hearing on 6 September 2019. On that day the Claimant produced the documents which we have labelled "C1". One of these is a document headed 18 March 2017, but otherwise it is the same as the document at R1 408-409 as far as the sentence ending with the initials "FS". It then ends with the words "Document written by parama Appasamy (sic)".

93. Whilst Ms Newbegin, the Respondent's Counsel, in submissions stated that this was a cut and paste manufactured document, all we would say is that it does not assist the Claimant because it clearly does not relate to the incident on Goldsmid Ward but is about the incidents on 10 and 17 March 2017. It may well be that the Claimant simply added to the draft of the document over time and that explains the version at R1 408 onwards.

94. The Respondent's position is that the Claimant did not raise a grievance until his letter of 13 July 2017 (at R2 519-521). Whilst it is clear that the Respondent did have copies of the letter of 7 April 2017 and the documents at R1 408-417 and those at R1 431-433, this was not until after the grievance raised in the 13 July 2017 letter.

95. We find on balance of probability that the Claimant did not hand or send any documents relating to a grievance to Mrs Stenning in April 2017 and that she was unaware of the grievance letter dated 7 April 2017 until she was shown it at her grievance investigatory interview on 2 November 2017 (at R1 631-632).

96. The letter of 13 July 2017 raises what the Claimant labels "a collective grievance" against Mrs Stenning, Ms Nicholls, Mrs Arnold, Ms Payne and a number of other members of the Respondent's staff. Whilst the letter sets out heads of grievance it does not go into any detail. We note that this goes much further than the Claimant's pleaded case as set out in the list of issues. For this reason, we do not propose to make any findings on the matters outside the list of issues.

97. The documents in the bundle indicate that investigatory interviews were carried out from 27 October until 21 November 2017. The investigatory report is dated 19 December 2017 and is at R2 765 to 694. The grievance hearing notes dated 8 February 2018 are at R2 697-702. The Respondent's letter to the Claimant advising him of the outcome of the grievance hearing is dated 7 March 2018 and is at R2 705-710. It is not clear what documents from the Claimant that the investigation considered beyond his grievance

letter dated 7 April 2017 and a reference to "PA's notes" at R2 689-690. We assume that the investigation also considered the collective grievance letter dated 13 July 2017 as this was the starting point. The Claimant did not appeal against the outcome of the grievance.

98. We note the grievance investigation report's conclusions at R2 687-688 and outcome letter findings and specifically a reference to a "white female clique". There did not appear to be any evidential basis for this beyond reference to this issue at the grievance hearing arising from a comment made by Mr Baby during his interview. The matter was not taken any further.

99. We note that Mrs Arnold was interviewed on 2 November 2017 and was not asked about mimicking the Claimant's accent or mispronouncing his name. However, these matters were not referred to in the collective grievance letter although they are mentioned in the documents at R1 408-417. Whilst the Claim Form was received by the Tribunal on 4 October 2017 it was not sent to the Respondent until 4 November 2017. The allegation of mimicking the Claimant's accent is referred to in Box 8.2 of the Claim Form at R1 10 and within the document headed "ET1 Statement in Support of Claim" at R1 28-33, but not the mispronunciation of his name. However, the same documents as at R1 409 et seq are attached at R1 17-25. Thus by the time that Ms Arnold was interviewed it does seem that the Respondent had at least the documents provided to it by ACAS.

Disability

100. The Claimant alleges that he was prevented from taking breaks to eat, take his medication and apply ointments. This related to his impairments of Diabetes and Psoriatic Arthritis. The Respondent admits that the Claimant was a disabled person for the purposes of the Equality Act 2010 but denies actual or constructive knowledge of the disabilities and the substantial adverse effect.

101. Mr Sinclair, the Claimant's Counsel, who appeared on the last day of the hearing on 6 September 2019, did not cross examine any of the Respondent's witnesses on the issue of disability and did not raise it in his closing submissions.

102. The Claimant alleges that his impairments were disclosed as part of his recruitment process either in his application form or a pre-appointment health check by occupational health or both. Whilst this might have been the case there is no evidence that this was passed onto his managers.

103. The closest we could find to a document that might have passed on such information is the consideration of disability within an Employment Suitability Report dated 27 November 2016 at R1 281. This states that the Claimant might be covered by the relevant disability and equality legislation, there is no additional specific advice provided in respect of him and should any arise to refer to an occupational health adviser and no reasonable adjustments are required at this time.

104. However, the document does not indicate what impairments had been disclosed to give rise to this report, if any.

105. In oral evidence the Claimant stated that he had been told by occupational health to raise any specific adjustments that he required with his line manager.

106. The Claimant alleges that he mentioned his Diabetes and special requirements that he needed at a meeting with Mrs Stenning on 10 April and that he raised it again in meetings with her on 25 April, 20 May and 7 June 2017. The only notes of any meetings on these dates are those relating to the probationary meeting held on 20 May 2017 (at R1 469) and this issue is not mentioned. As we have found, the Claimant received a copy of these notes at the time. He did not seek to correct them if they were inaccurate or incomplete.

107. The Respondent accepts that the Claimant told Mrs Stenning that he was diabetic in April 2017 but did not mention anything about any specific adjustments he required and said that he was managing it well and always brought his own food. It was denied that he ever mentioned to the Respondent that he suffered from Psoriatic Arthritis.

108. The Claimant alleges that the Respondent applied a provision, criterion or practice ("PCP") namely requiring its employees/workers to work through the day without specific protected break times. The Respondent denied this.

109. We have already dealt with our findings as to the position regarding the length of and arrangements for breaks during shifts.

110. In her supplementary witness statement Mrs Stenning states that the Claimant never asked for any specific breaks due to his Diabetes and that if he had done so she would have granted it. Mrs Stenning also states that if the Claimant had requested the need for four 15 minute breaks during a 12 hour shift, she would have granted it as she had done for other members of staff who had made requests for medical reasons.

111. We have already dealt with our findings in respect of Mrs Stenning's evidence that the claimant did not raise the issue of not being able to take breaks because the ward was too busy.

112. Mrs Stenning further states that the layout of the Ward and the staff room was such that the Claimant could easily have left the Ward to go to the staff room to eat his food if he needed to do so because of his Diabetes. The staff room was located approximately 2 metres away from the nurses' station and could easily be accessed at any time whilst still being in earshot of colleagues and patients should the need arise. We accepted this evidence.

113. On balance of probability we accept that the Respondent was only made aware of the Claimant's Diabetes in April 2017, most likely at the meeting on 10 April 2017 at which the Claimant said that he was managing it well and he did not raise the need for any reasonable adjustments. He had sufficient breaks to allow him to eat and to take any medication (if this related to

Diabetes and not Psoriatic Arthritis) and it was open to him to raise the need for additional breaks at the start of every shift.

114. We therefore do not accept that the alleged PCP existed in respect of the Claimant's Diabetes or if there was, that it was applied to the Claimant.

115. There is no evidence to suggest that the Respondent was aware or ought to have been aware of the Psoriatic Arthritis. There is no contemporaneous medical evidence that refers to this condition.

Extension of the Claimant's probationary period

116. The Claimant's probationary period should have come to an end in June 2017. Mrs Stenning held a probationary extension meeting with the Claimant on 20 May 2017 following a number of complaints from members of staff about the Claimant's behaviour at work. Her letter inviting the Claimant to this meeting is at R1 464. Her notes as to the purpose of the meeting are at R1 477-478. The notes of the meeting are at R1 469.

117. The notes indicate that it was a review of the Claimant's progress and to discuss concerns with regards to his performance. As a result, Mrs Stenning informed the Claimant that she was extending his probationary period for three months to 19 October 2017 and setting some objectives for him to meet. The concerns were set out in two categories. The first of these was the Claimant's need to react appropriately to the needs of deteriorating patients. The Claimant raised his concern that he was not being supported by the Band 2 HCAs. Mrs Stenning referred the Claimant to a folder available on the ward which lists key tasks and responsibilities for both Band 4 Associate Practitioners and Band 2 HCAs. The second of the concerns was to do with Trust Values and related to concerns that had been raised as to the Claimant's behaviour. Mrs Stenning said that she would write up some objectives for the Claimant to meet over the coming months and send these out in writing. Mrs Stenning provided the Claimant with written objectives and an action plan and made a further meeting to talk through the latter on 7 June 2017. It does not appear that this meeting took place.

118. Mrs Stenning's letter of confirmation of the matters discussed at the probationary meeting is at R1 467-468. This is set out in more detail the objectives that the Claimant was required to meet and an action framework. The letter made clear that failure to make sufficient progress either during or by the end of his extended probationary period would lead to formal action under the Trust's probationary policy which could result in the termination of his employment.

119. We heard evidence as to a number of incidents in which various members of the Respondent's staff had cause to raise concerns as to the Claimant's conduct and/or performance at work. These are set out below although we do not propose to go into detail as to any of them:

    119.1 19 March 2017 Ms Roberts report of a staffing incident at R1 400-401 and 398;

119.2 4 April 2017 Ms Hayes' report of the commode incident at R1 403;

119.3 22 April 2017 Ms Payne's report of the "nasty" incident at R1 439;

119.4 23 April 2017 incident, outcome recorded in June 2017 at R2 483;

119.5 3 May 2017 Mr Baby's report of "rough and heavy-handed" incident at R1 441;

119.6 11 May 2017 Ms Ansell's report of the MRSA incident at R1 443;

119.7 17 May 2017 Ms Hayes' report of various incidents at R1 451;

119.8 17 May 2017 Ms Heron's report of various incidents at R1 455;

119.9 31 May 2017 Ms Molinge's report of the "sharps" incident at R1 447;

119.10 31 May 2017 Ms Hingston's report of the "shouting and forcing patient to take medication" incident at R1 449

120. The later incidents post-date the Claimant's resignation were either raised externally or during the interviews undertaken by the Respondent to investigate the Claimant's collective grievance.

Claimant's ill-health absence and resignation

121. From 8 June 2017 onwards, the Claimant was absent from work and provided a fitness for work certificate from his GP stating that the cause of his absence was due to "acute stress reaction". The certificate signed him off work for the period of 28 days. The certificate is at R1 479.

122. On 12 June 2017, Mrs Stenning wrote to the Claimant notifying him of his referral to the Respondent's Occupational Health Services and attaching a Stress Risk Assessment form. This letter is at our R2 480.

123. The Claimant presented a further fitness for work certificate from his GP for the period 30 June to 7 August 2017 stating that he was still suffering from "acute stress reaction". This certificate is at R2 510.

124. The Respondent's Occupational Health Consultation Report dated 3 July 2017 is at R2 515-516. This followed a face-to-face consultation with the Claimant on that day. The report indicated that the Claimant suffers from anxiety and depression symptoms and is not fit to attend work at this time but is able to attend meetings with his manager and HR/staff side in order to discuss his concerns and to seek resolution. The Occupational Health adviser urged the Claimant to complete the stress self-assessment tool, to contact staff side and HR and to seek further advice from the NMC and ACAS as to his grievance. The adviser considered that there should be a further review in 4-6 weeks.

125. By letter dated 6 July 2017, Mrs Stenning wrote to the Claimant to arrange a meeting to be held on 24 July 2017 to discuss his continued absence, to

consider the Occupational Health report and to explore what support and/or assistance the Respondent could offer to facilitate his return to work. This letter is at R2 517.

126. In order to complete the chronology, the Claimant lodged his collective grievance by letter dated 13 July 2017 (as we have dealt with above). This letter is at R2 519-521.

127. By a letter dated 24 July 2017 the Claimant resigned from his employment with the Respondent with immediate effect (at R1 523). His letter cites the reasons for his resignation as:

> "… following the many difficulties I have experienced during my employment without redress that has subsequently made me very ill culminating in my absence and inability to work. Besides this, many matters which have left me with no alternative but to resign my employment"."

128. In the Claimant's witness statement, he states that he felt "totally let down, unsupported and unfit" such that he resigned his position. He further states that the Respondent failed to deal adequately with his complaints and his reasonable needs and, later, treated him as merely a nuisance.

129. It would appear that Mrs Stenning responded to the letter of resignation on 26 July 2017 (at R2 524-525) and on 7 August 2017 (at R2 545-546). We say appear, because the index indicates that the first letter is a draft. We heard no evidence on this point. The first letter acknowledged the Claimant's resignation and set out his final entitlements to salary and holiday pay. The second letter revises those entitlements.

130. We would make the point that of course this is not an unfair dismissal claim and the Claimant has not cited his resignation or constructive dismissal as an act of discrimination. In any event he resigned shortly after raising his collective grievance and did not participate in the subsequent investigation process.

Submissions

131. We had written submissions from Ms Newbegin, which she amplified orally and oral submissions from Mr Sinclair, all of which we have taken into account.

Relevant law

132. Section 19 Equality Act 2010:

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

133. Section 20 Equality Act 2010:

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

(2) The duty comprises the following three requirements.

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

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

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

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

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

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

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—
(a) removing the physical feature in question,
(b) altering it, or
(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—
(a) a feature arising from the design or construction of a building,
(b) a feature of an approach to, exit from or access to a building,
(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or
(d) any other physical element or quality.

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

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

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

Part of this Act	*Applicable Schedule*
Part 3 (services and public functions)	*Schedule 2*
Part 4 (premises)	*Schedule 4*
Part 5 (work)	*Schedule 8*
Part 6 (education)	*Schedule 13*
Part 7 (associations)	*Schedule 15*
Each of the Parts mentioned above	*Schedule 21'*

134. Section 21 Equality Act 2010:

'1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by

virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.'

135. Section 26 of the Equality Act 2010:

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

(2) A also harasses B if—
(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—
(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b) the conduct has the purpose or effect referred to in subsection (1)(b), and
(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.'

Conclusions

Time issue

136. Section 123 governs time limits under The Equality Act 2010. It states as follows:

"(1) [Subject to sections 140A and 140B,] proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable…
…(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

137. A Tribunal may allow a claim outside the time limit if it is just and equitable to do so. This is a wider and therefore more commonly granted discretion than for unfair dismissal claims. This is a process of weighing up the reasons for and against extending time and setting out the rationale. Case law has suggested that a Tribunal ought to consider the checklist under section 33 of The Limitation Act 1980, suitably modified for tribunal cases. The factors to take into account (as modified) are these:

137.1 the length of, and reasons for, the worker's delay;
137.2 the extent to which the strength of the evidence of either party might be affected by the delay;
137.3 the employer's conduct after the cause of action arose, including his/her response to requests by the worker for information or documents to ascertain the relevant facts;

137.4 the extent to which the worker acted promptly and reasonably once s/he knew whether or not s/he had a legal case;

137.5 the steps taken by the worker to get expert advice and the nature of the advice s/he received. A mistake by the worker's legal adviser should not be held against the worker and appears to be a valid excuse.

138. The Tribunal should also consider whether the employer is 'prejudiced' by the lateness, ie whether the employer was already aware of the allegation and so not caught by surprise, and whether any harm is done to the employer or to the chances of a fair hearing by the element of lateness.

139. Where the delay is because the worker first tried to resolve the matter through use of an internal grievance procedure, this is just one factor for the ET to take into account (**Apelogun-Gabriels v Lambeth LBC and another** [2002] IRLR 116, CA).

140. If the delay was because the worker tried to pursue the matter in correspondence before rushing to an ET, this should also be considered (**Osaje v Camden LBC** (1997) EAT/317/96; November 1997 Legal Action 16).

141. Given the date of presentation of the Claim Form and the effect of the ACAS Early Conciliation process, the earliest date on which an incident would be in time was 23 April 2017.

142. As a result, the complaints of sex harassment which occurred prior to that date are out of time. Namely, the incident on 10 March 2017, the incident on 17 March 2017 and incident on 14 April 2017.

143. The following matters are in time: the race harassment incidents on 23 April 2017; the comment on 23 April 2017 and the comment on 31 May 2017. The indirect discrimination based on religion occurred in April and on 20 May 2017 and so appears to be in time. The complaint of failure to make reasonable adjustments seems to stem from the start of employment and a number of dates in April and May 2017. Of course, this is all subject to our findings as to when and whether these matters occurred.

144. With regard to the exercise of our discretion, we heard no evidence or submissions relating to this and we note that the Claimant was legally represented at the outset of these proceedings through two sets of advisers. We are therefore unable to exercise our discretion so as to extend time.

145. However, we have gone on to consider and make findings on all of the complaints in as far as they might stand as relevant to the complaints which are in time and which we have to determine.

Burden of proof

146. The burden of proving unlawful discrimination is set out in section 136 of the Equality Act 2010, which states:

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

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

147. What it boils down to is the following: where the Claimant proves facts from which the Employment Tribunal could conclude in the absence of an adequate explanation that the Respondent committed an unlawful act of discrimination, the Tribunal must uphold the complaint unless the Respondent proves s/he did not commit that act.

148. We have followed the guidance given as to the burden of proof by the Court of Appeal in **Igen Ltd and others v Wong; Chamberlin Solicitors and another v Emokpae; Brunel University v Webster** [2005] IRLR 258.

Harassment

149. Harassment is defined under section 40 of the Equality Act 2010. A person "A" harasses another "B", if "A" engages in unwanted conduct related to a protected characteristic, which has the purpose or effect of violating the dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. In deciding whether the unwanted conduct has such purpose or effect, the Tribunal must consider the perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

150. We took into account that where conduct complained of does not have that purpose, i.e. where it is unintentional in that sense, it is not necessarily unlawful just because the worker feels his dignity is violated etc. We also took into account, as required, the other circumstances of the case and whether it is reasonable for the conduct to have that effect as well as the perception of the worker bringing the complaint. The starting point is whether the worker did in fact feel that his dignity was violated or that there was an adverse environment as defined in the section and that it is only unlawful if it was reasonable for the worker to have that feeling or perception. But not forgetting that nevertheless the very fact that the worker genuinely had that feeling should be kept firmly in mind (**Richmond Pharmacology v Dhaliwal** [2009] ICR 724).

151. We were also guided by ECHR Employment Statutory Code of Practice at paragraph 7.18:

"In deciding whether conduct had that effect, each of the following must be taken into account:

a) The perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment.

b) The other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker's health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which the conduct takes place.

c) Whether it is reasonable for the conduct to have that effect; this is an objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended."

152. Dealing with the Claimant's allegations of race and sex harassment in turn:

10 March 2017 incident at the Medicines Management training course

153. As we indicated at paragraph 50 of our findings, we accept that this conversation took place in the car park with no direct witnesses and we prefer Ms Payne's account subject to Mrs Stenning's evidence that the conversation was initiated by Ms Payne.

154. However, our concern is as to whether the question "you are gay, aren't you?" or "are you gay?" whilst perhaps an inappropriate question can amount to harassment on grounds of sex. It is not to do with gender but sexual orientation. Indeed, even on the Claimant's case as to being asked if he was bi-sexual this is not connected with the protected characteristic of gender.

155. We also take into account that this is the first incident that the Claimant relies upon as amounting to discriminatory treatment and so beyond a falling out over his refusal to report a colleague there is no wider context at that point in which to construe the question as anything more than an innocent but inappropriate question in a car park with no witnesses which the Claimant for whatever reason was offended by.

156. Given the extensive process that the list of issues went through and at a time when the Claimant was represented, we do not feel able to accept that perhaps he meant to bring a complaint of harassment on grounds of sexual orientation rather than on grounds of sex.

157. As such we do not find the conduct complained of albeit unwanted is related to the protected characteristic of sex. In any event we were of the view it was not conduct that has the purpose or effect of violating the dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant when taking into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct have that effect.

158. This complaint therefore fails but in any event was brought out of time.

17 March 2017 incident in staffroom involving Ms Payne

159. As we have indicated in our findings at paragraph 58 above we do not accept that this incident happened and so we do not find that there was any harassment as alleged or at all.

160. This complaint therefore fails but in any event was brought out of time.

14 April 2017 incident involving leaking pen and Ms Payne

161. As we have indicated in our findings at paragraph 59 above, we accepted that the incident took place as alleged by the Claimant but in the absence of anything else we did not find it amounted to harassment. Whilst the comment was no doubt unwanted we did not believe in the wider circumstances that it was reasonable for the conduct to have the purpose or effect of violating the dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. In this regard we were again guided by the judgment of Underhill J at paragraph 15 of **Richmond Pharmacology v Dhaliwa**l [2009] ICR 724. In any event we were not of the view that in this context it was a remark related to the protected characteristic of sex.

162. We therefore conclude that there was no unlawful harassment. This complaint therefore fails but in any event was brought out of time.

23 April 2017 incidents of race harassment involving Ms Payne and Mrs Arnold during the half-hour handover period

163. As we have indicated in our above findings at paragraph 66, we do not accept that the alleged incidents of harassment connected to race took place. We therefore conclude that the Claimant was not subjected to unlawful harassment in this regard.

164. The complaint therefore fails.

23 April 2017 incident of sex harassment involving Ms Payne

165. As we have indicated in our above findings at paragraph 69, we do not accept that the alleged incident of harassment connected to sex took place. We therefore conclude that the Claimant was not subjected to unlawful harassment in this regard.

166. This complaint therefore fails.

31 May 2017 incident involving Ms Payne

167. As with indicated in our above findings at paragraph 73, we do not find that this incident took place and we therefore conclude that the Claimant was not subjected to a harassment in this regard.

168. This complaint therefore fails.

Indirect discrimination religion

169. The Claimant alleges indirect discrimination on the basis of his religion of Hinduism. This is set out at paragraph 2 of the agreed list of issues (at R1 81).

170. Indirect discrimination is defined in section 19 of the Equality Act 2010. In essence indirect discrimination occurs where there is apparently equal treatment of all workers, but the effect of certain requirements and practices imposed by the employer puts workers with a certain protected characteristic at a particular disadvantage. If the Claimant is able to show that indirect

discrimination has occurred, then a defence is available. If the employer can prove that requirements and practices imposed are justifiable then the treatment complained of will not be unlawful.

171. We refer to our findings at 74-86 above. We have to say that we found the Claimant's evidence very confusing. But doing the best we can we find that the Claimant did not specifically request time off for religious reasons apart from on 14 April 2017 which the Respondent accommodated. We cannot find that there was indirect discrimination as pleaded because the Claimant was not denied time off for religious reasons. Further, in any event he was not placed at any particular disadvantage because he could have used the breaks that he had to pray or practice spirituality and meditation (if indeed these form essential tenets of Hinduism). With regard to attending the Temple, the Claimant was only required to work two Sundays during his entire period of employment, he could have gone to the Temple on Friday morning or requested Sunday morning off as he did before.

172. We therefore find that the complaint of indirect discrimination fails.

Disability and failure to make reasonable adjustments

173. Under sections 20 and 21 of the Equality Act 2010, there is a duty upon employers to make reasonable adjustments. Failure to do so constitutes unlawful discrimination. Where an employer applies a provision, criterion or practice ("PCP") which puts a disabled person at a substantial disadvantage compared with people who are not disabled, the employer must take such steps as are reasonable to avoid the disadvantage. The purpose of the adjustment is to address the disadvantage.

174. The adjustment has to be reasonable. In considering whether an employer has met the duty to make reasonable adjustments, the Tribunal must apply an objective test. Although we should look closely at the employer's explanation, we must reach our own decision on what steps were reasonable and what was objectively justified. Relevant factors can include the extent to which the adjustment would prevent the disadvantage, the practicality of the employer making the adjustment, the employer's financial and other resources, and the cost and disruption entailed.

175. There is no duty to make reasonable adjustments if the employer does not know and cannot reasonably be expected to know that the worker has a disability and does not know or cannot reasonably be expected to know that the worker is likely to be placed at a substantial disadvantage as a result.

176. The Claimant's complaint in respect of the alleged failure to make reasonable adjustments is set out at paragraph 3 of the agreed list of issues (at R1 82-83). The Claimant relies on impairments of Diabetes and Psoriatic Arthritis. The Respondent accepts that the Claimant was a disabled person within section 6(1) and Schedule 1 of the Equality Act 2010 but denies actual or constructive knowledge at the relevant times.

177. As we have indicated in paragraphs 100 to 115 above we found that the Respondent was only made aware of the Claimant's Diabetes in April 2017,

most likely at the meeting at which the Claimant said he was managing it well and he did not raise the need for any reasonable adjustments. The Claimant had sufficient breaks to allow him to eat and to take any medication (if this related to Diabetes and not Psoriatic Arthritis) and it was open to him to raise the need for additional breaks at the start of every shift. We therefore find that the alleged PCP of requiring employees/workers to work through the day without specific and protected break times as set out at paragraph 3.2 of the agreed list of issues did not exist and was not applied by the Respondent as alleged.

178. We also found that the Respondent did not know or ought reasonably have been expected to know that at the relevant time that the Claimant had the impairment of Psoriatic Arthritis and was likely to be placed at a substantial disadvantage as set out in paragraph 3.3 of the agreed list of issues.

179. The complaint therefore fails and is dismissed.

180. In summary, we therefore dismiss all of the Claimant's complaints.

Respondent's costs application

181. At the end of the evidence and submissions, the Respondent made a costs application in respect of its additional legal costs incurred by the Claimant's failure to attend the hearing on the final day listed in July 2019.

Background

182. On 18 July 2019, the Claimant did not attend the hearing. He had sent an email to the Tribunal beforehand timed at 07:38 hours indicating that he was not coming to the hearing due to ill-health and was seeing his doctor later that day.

183. The Respondent then made an application that the Tribunal should either continue the hearing in his absence or that the claim should be dismissed pursuant to rule 47 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("the 2013 Regulations"). Ms Newbegin made submissions in support of that application.

184. Before reaching a decision on the application, I asked our clerk to contact the Claimant on his mobile phone to obtain more information and to explain to him that the Tribunal had the option of adjourning the hearing, continuing with it in his absence or dismissing his claim. Our clerk was unable to contact the Claimant. I notified the Respondent of the steps taken.

185. After deliberating, we advised the Respondent that we had decided to adjourn the hearing for the following reasons. The overriding objective under the 2013 Regulations is to ensure that there is a fair hearing and this means fair to both parties. We appreciate the prejudice caused to the Respondent by adjourning and understand the distress caused to the witnesses who were facing personal allegations. But it is not appropriate to continue with the hearing in the absence of a Claimant who equally expressed distress at being accused of making false allegations, who indicated he was unwell over the course of

the hearing but carried on attending nevertheless and as stated in his email that he is still unwell and attending his doctor later today. We have attempted to make further enquiries by telephone but to no avail.

186. Thereafter we agreed the further dates for the resumed hearing. I then directed the administration to write to the Claimant as follows:

> *"Following receipt of your email, our clerk attempted to contact you by mobile telephone on two different numbers but was unable to speak to you. One number was not available and on the other our clerk left a voicemail message asking you to call the Tribunal as soon as possible. We had received no response by 11 am when we resumed the hearing to determine how to proceed.*
>
> *We decided to adjourn today's hearing in the circumstances. We have set a further two days for the remaining evidence and submissions to be heard on Friday 6 and Monday 9 September 2019. The Tribunal will then meet in private on 10 and 11 September 2019 to reach a decision. A separate notice of hearing will be sent to you and to the Respondent.*
>
> *You must send us your sick note to the Tribunal as soon as possible. We need evidence of your ill-health and your inability to attend the hearing. The sick note should specifically state whether you were unfit to attend the Tribunal hearing on 18 July 2019 or not. We will send a copy of your sick note to the Respondent.*
>
> *We have granted the Respondent permission to produce a supplemental witness statement for Ms Stenning in place of asking her supplemental questions orally at the hearing. This will save time and you will have the advantage of having the statement in advance. We have directed that the supplemental witness statement be provided to you and to the Tribunal by 30 August 2019.*
>
> *The Respondent has indicated to us that it has found another version of your collective grievance dated 17 July 2017 and the covering email. We understand that the letter has been emailed to you but not the covering email, which was found afterwards. The Respondent may seek to rely on it in evidence.*
>
> *During the hearing on 17 July 2017, you indicated that you had certain documents relating to your grievance and as to the date of the training course which you say was held on 10 March 2017. These are documents which were not in the bundle and have not been provided to the Respondent. You need to send copies of these documents to the Respondent as soon as possible. If you want to admit them as evidence (ie get the Tribunal's permission for them to be taken into consideration as evidence) you need to make an application to the Tribunal which should include an explanation why you have not provided them until now."*

187. On 30 July 2019 the Claimant sent the first page of a seven page document headed All Medical History from his GP medical records. This covered the dates 14 January 2019 to 24 July 2019. At the start of the hearing on 6 September 2019, he produced a letter on his GP's Surgery notepaper signed by a locum General Practitioner and dated 18 July 2019. This was regarding the Claimant and stated:

> *"This is to inform you that this gentleman attended the surgery today as he felt unwell with dizziness and diarrhoea for the past few days. He is not able to attend court today."*

<u>The Respondent's costs application</u>

188. Ms Newbegin provided the Tribunal with a Schedule of Costs from which the Respondent was seeking costs in the sum of £2,200 representing her re-brief fee at item 46 of the Schedule plus VAT. I explained that she could not recover the VAT if we were minded to award costs. Ms Newbegin accepted this. She also sought her instructing solicitors' costs of attendance on that day at items 28 and 29 of the Schedule and at page 9 relating to the preparation of the supplemental witness statement for Mrs Stenning.

189. Under rule 76(1) of schedule 1 of the 2013 Regulations, an Employment Tribunal can order a party (called "the paying party") to make a payment in respect of costs incurred by the other party (called "the receiving party").

190. Under rule 74, costs can include the legal fees, disbursements and expenses incurred by or on behalf of the receiving party while legally represented.

191. Under rule 76(1)(a) and (b) of schedule 1 of the 2013 Regulations, the Employment Tribunal has a discretion to award costs and must consider whether to do so if among other things the paying party has acted unreasonably in either the bringing of the proceedings or the way in which the proceedings have been conducted or any claim had no reasonable prospect of success.

192. The Employment Tribunal should determine whether any of the categories in which it can award costs apply, then determine whether to use its discretion to award costs and if so in what amount (**Monaghan v Close Thornton Solicitors** UKEAT/3/01).

193. The Employment Tribunal may have regard to the paying party's ability to pay when considering whether to make a costs order and if so in determining in what amount (rule 84 of schedule 1 of the 2013 Regulations).

194. Under rule 78 of schedule 1 of the 2013 Regulations, the Employment Tribunal can award costs of up to £20,000 or refer the matter to the County Court for assessment.

195. The Respondent's application was made principally under rule 76(1)(c) of the 2013 Regulations in that a hearing had been postponed or adjourned on the application of a party made less than seven days before the date on which the relevant hearing begins.

196. We considered this and find that there was no application on the part of the Claimant to adjourn the hearing. We decided to adjourn it in response to the Respondent's application made as a result of the Claimant's non-attendance that day to continue with the hearing in his absence or to dismiss his claim. In any the hearing had already commenced and so rule 76(1) (c) is not applicable.

197. The Respondent also made its application under rule 76(2) which applies where a hearing has been postponed or adjourned on the application of a party. As we have identified above, there was no application on the part of the Claimant, it was our decision following the Respondent's own application. Again, the rule is not applicable.

198. Finally, the Respondent also made its application under rule 76(1)(a) of the Rules of Procedure which applies where a party has acted unreasonably, in this case by not attending the hearing.

199. Ms Newbegin asked us to view the Claimant's medical evidence as unsatisfactory and with suspicion because the letter from his GP's Surgery did not tie up with the medical history he has provided and so rendered the

letter of dubious provenance. She pointed to the letter having been signed by a different doctor to the one that the Claimant had seen and that the Claimant had asked for the letter on a number of occasions after 18 July 2019, which was the date of the letter, and according to the medical history it had not been provided.

200. Mr Sinclair stated that as he understood it the Claimant had been feeling unwell throughout the days of the hearing in July 2019 and he understood that if he could not attend he should let the Tribunal know in advance by email. He sent the medical history believing this to be what the Tribunal required. However, when Mr Sinclair was instructed he advised the Claimant that what he actually needed was a letter from his GP stating that he was unfit to attend the Tribunal on 18 July 2019. As a result he was provided with the letter which is before the Tribunal. There was nothing suspicious about the date of the letter which reflected the date on which the Claimant saw the doctor and was unable to attend, and it normal procedure for GPs.

201. I asked about the Claimant's means to pay a costs order if we were minded to make one. Mr Sinclair referred us to the Claimant's payslips within the trial bundles.

202. We reached the following findings.

203. The Claimant had indicated that he was unwell on a number of occasions during the course of the hearing due to diarrhoea. I had advised him at the end of the hearing on 16 July 2019 to let the Tribunal know if he was unable to attend the following day and to provide evidence in support of going to hospital or to see his GP as he had indicated he might do. As it was he was able to attend on 17 July although still unwell.

204. On the morning of 18 July 2019, the Claimant emailed the Respondent's solicitors cc the Employment Tribunal, at 07:39 hours indicating that he was unable to attend that day because he continued to feel unwell and would be going to his GP later to seek medical treatment. He said that once he had received a sick note he will forward it. The Tribunal attempted to telephone the Claimant to find out more information but was unable to contact him. The Respondent made an application for the hearing to continue in the Claimant's absence or the claim to be dismissed. The Tribunal decided to adjourn the proceedings for the reasons given above.

205. Notice of the re-listed dates of hearing and a letter were sent to the parties on 23 July 2019. The letter was addressed to the Claimant and advised him of the adjournment and the need to provide a sick note that must support his inability to attend on 18 July 2019.

206. The Claimant sent an email on 30 July 2019 enclosing a document setting out his medical history from 14 January to 24 July 2019. He sent a further email dated 31 July asking if the judge has accepted the "counter report" from the GP. This was not shown to the Tribunal until 6 September 2019. At the hearing the Claimant provided the letter from his GP dated 18 July 2019. We were provided with the original of the letter at the hearing.

207. We can see from the medical history that the Claimant attended "Dr AT Elmdene" on 18 July 2019. The entry sets out the symptoms that the Claimant presented with, his inability to attend a court hearing and the doctor's observations on examination of the Claimant. It also indicates that the Claimant requested a letter for court as unable to attend today. On 19 July 2019 he was seen in the general surgery clinic and requested a patient letter. On 24 July 2019 he attended the surgery and saw Dr Nauman and requested a report about his health for the court to be done by the following day. He was told by the doctor that he could not give him a report.

208. The letter was belatedly provided and is dated 18 July 2019, we were told in submissions because that is what doctors do because that was the date the Claimant attended the surgery. It was also signed on the face of it by another Doctor to the one that the Claimant saw on 18 July. However, we note that "Dr AT Elmdene" could actually mean that the Claimant saw a doctor at Elmdene, that being the name of the surgery. We say this because the medical history also contains references to "Dr A Locum" and "R Sys System Supervisor". These appear to be standard abbreviations used by the Surgery. On balance of probability, we have no reason to doubt the provenance of the letter or to infer any contradiction between the letter and the medical records.

209. In conclusion we do not find that it amounts to unreasonable behaviour for a person who indicated that they were unwell from day one of the hearing, continued to attend and to advise of his progress, to fail to attend on the final day of the hearing because of that ill-health. The Claimant was asked to provide medical evidence of his inability to attend and whilst what has been provided does not amount to a sick note it is nevertheless evidence of this.

210. The Respondent's application is therefore refused.

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Employment Judge Tsamados

Date 5 December 2019