EMPLOYMENT TRIBUNALS

Claimant: Mr V Mbuisa

Respondent: Cygnet Healthcare Limited

Heard at: Leeds **On:** 7 to 10, 14, 31 October and 1 November 2019

Before: Employment Judge JM Wade
Members: Mr R Webb
Mr K Lannaman

Representation:
Claimant: In person
Respondent: Miss Jennings (counsel)

Note: A summary of the written reasons provided below were provided orally in an extempore unanimous Judgment delivered on 1 November 2019, the written record of which was sent to the parties on 7 November 2019. A written request for written reasons was received from the claimant on 5 November 2019. The reasons below are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment given on 1 November 2019 are repeated below:

JUDGMENT

1 The claimant's complaint that the respondent failed to pay him the correct holiday pay on the termination of his employment (Regulation 14 WTR) succeeds and the respondent shall pay to him the sum claimed: £594.00.

2 The claimant's claims of breach of contract (wrongful constructive dismissal), unauthorised deductions from wages, protected disclosure detriment and dismissal, unfair dismissal (health and safety), race and disability discrimination are dismissed.

REASONS

1. Introduction and case management before this hearing

1.1. The claimant worked as a Health Care Support Worker ("HCSW") at the respondent's Bierley hospital from 1 February 2016. The hospital is a secure unit caring for adults detained under the Mental Health Act 1983. The claimant worked initially as a "bank" worker and then agreed to work under a "permanent" contract of employment from February 2017. He resigned on 30 August 2017.

1.2. His allegations included four incidents: on 27 February 2017 the claimant was attacked by a service user (1); on 4 March 2017 he assisted in an incident and was injured by a service user (2); in February or March a patient threatened him with physical harm (3); and on 20 May 2017 he was assisting a service user at the Bradford Royal Infirmary (BRI) and alleged he had sustained a back injury (4). Incidents (1) and (2) were not in dispute, recorded as they were on CCTV, viewed by the Hospital management at the time, and by the Tribunal as part of our reading; both the Tribunal and the Hospital expressed their commiserations for those incidents during the hearing. Incident (3) was recorded in the patient record; and Incident (4) was a matter of dispute both as to date and occurrence.

1.3. The claimant's claim, presented on 4 September 2017, was less than clear, in factual and legal territory which is complex. An Employment Judge rejected all claims outside the Tribunal's jurisdiction, specifying the following as accepted within that jurisdiction: health and safety unfair dismissal (the "Section 100 claim"), protected disclosure ("PID") unfair dismissal, PID detriment, breach of contract, discrimination, and unauthorised deductions from wages.

1.4. The claimant sought a reconsideration of the rejection of other complaints and joinder of the CQC (Care Quality Commission).

1.5. In its initial response to the claims, the respondent disputed a dismissal had occurred because, in error, it had missed the claimant's 30 August resignation letter, and was continuing to pay statutory sick pay to him and for other reasons set out below. When it became apparent a resignation had been received, the position was corrected.

1.6. On 26 October 2017, following a hearing of two and a half hours, before which the claimant had provided further particulars, and an agenda, Employment Judge Cox:

1.6.1. refused the claimant's application to restore (following rejection) certain aspects of his claim form;

1.6.2. refused joinder of the CQC;

1.6.3. dismissed on withdrawal claims of sexual orientation discrimination and sex discrimination;

1.6.4. Considered the allegations of PID detriment, PID dismissal and Health and Safety dismissal ("**the Section 100" claim**) and made deposit orders, concluding they had little reasonable prospects of success; and

1.6.5. Listed a two hour further public preliminary hearing to clarify the claims and consider whether any should be struck out.

1.7. On 4 December 2017 at a hearing which ran to three hours, Employment Judge Cox:

1.7.1. Dismissed on its withdrawal a claim pursuant to the Part Time Workers Regulations;

1.7.2. Clarified to the extent possible the Claimant's claims (by reference to his claim form and further particulars) in an Annex (attached below);

1.7.3. Ordered further particulars of his race and disability discrimination complaints; and

1.7.4. Ordered representations on her proposal to strike out the claimant's Section 100 claim for the reasons expressed in her previous deposit order.

1.8. On 22 January 2018 the claimant sent to the respondent's former advisers ten pages of medical notes concerning his alleged disability (relating to his back).

1.9. On 14 February 2018 in chambers, Employment Judge Cox considered the claimant's representations, struck out the Section 100 claim, ordered a refund of a deposit (£10) in that respect only, and ordered the complaints to be tried as set out in the Annex.

1.10. The respondent presented its amended response on 15 March 2018, and on 22 March 2018 Employment Judge Cox made final hearing Orders to ensure the case was prepared, taking into account the claimant acted as a litigant in person (for example, disclosure was sequential).

1.11. On 27 March 2018 the claimant made a detailed disclosure request to the respondent. On 21 April, having received the respondent's index of disclosure and paper copies around the same date, the claimant notified the respondent of further documents in his possession to be included in the hearing bundle.

1.12. The claimant sought strike out of the response for a failure to comply with disclosure orders and provide disclosure (including CCTV). That application was refused in May 2018 for reasons including that a fair hearing was still possible and that both parties had been in default.

1.13. On 28 May 2018 the respondent's solicitors sent two lever arch files of the hearing bundle to the claimant by post.

1.14. A six day time estimate had been given after consultation with the parties, for a hearing to start on 30 July 2018.

1.15. The claimant appealed the section 100 claim strike out to the Employment Appeal Tribunal and the ET hearing was postponed in June of 2018 on the application of the respondent. Postponement was not the claimant's wish. The parties were then on pause until the spring of this year.

1.16. The February 2018 case management order is annexed to this Judgment, containing, as it does, the matters which were due to be tried before the appeal (which added back one matter previously deposited and then struck out). The parties were on the point of exchanging witness statements in an already substantial case in 2018 when the case was delayed. Indeed, the claimant had provided a draft witness statement by that stage.

1.17. In April 2019 when the appeal outcome was known, the Regional Judge directed a hearing with a time estimate of six days, and made further orders for any additional disclosure and witness statement exchange. I then varied those orders on the respondent's application, because of the time necessary to consider the claimant's disclosure request concerning patient records, and other matters. There was no prejudice in that variation, as the hearing had been fixed for October 2019.

1.18. The respondent emailed copies of additional disclosure to the claimant (including CCTV of the first two incidents) on 5 July 2019 and asked him if he wished hard copies, on 29 July 2019. The respondent then provided copies of its twelve witness statements to the claimant, on 31 July, some of which remained those signed in June 2018, with a minority updated and signed in July of 2019 (the exception was Mr Ali, whose statement was not signed until 9 August 2019).

1.19. Miss Jennings provided an opening note in preparation for the hearing to assist the Tribunal and the claimant at lunch time on 4 October, the Friday before commencement on Monday 7 October. This note was clear as to the complaints to be determined and that the claimant relied upon his back pain only as his disability.

<u>Case management during this Hearing</u>

1.20. At the start of this hearing the claimant said he had not seen Miss Jennings' note. The Tribunal asked the claimant if he understood that the complaints to be determined were those identified in Employment Judge Cox's Annex and the EAT formulation of his Section 100 claim. He said he did understand that and I indicated that Miss Jennings' note listed those complaints also.

1.21. The Tribunal commented that his "Disability Impact Statement" sought to rely on a disability of "anxiety and depression" (the first four pages addressed such a disability), which was not the disability relied on in his particulars or in case management. The claimant said he relied on both back pain **and** depression as disabilities.

1.22. I indicated that given the amount of case management and the original particulars of claim, there were no complaints of disability discrimination asserting depression as disability, and did he wish to make an application to amend to add such complaints. He said that he did.

1.23. The Tribunal then heard from the respondent and applied the Selkent factors. The nature of the amendment: this was substantial and not minor; adding a compliant or complaints relying on mental impairment rather than physical impairment; the precise complaint was unclear: was it a claim of a failure to make reasonable adjustments for depression and anxiety, and if so how was that put, for example what substantial disadvantage did the claimant face, and when? The type and manner of amendment: it was an oral application, or if to be discerned from the disability impact statement, a written application, but made on the day of the hearing.

1.24. Further the disability impact statement was headed "In the Bristol Employment Tribunal", and appeared to have been drafted for a different purpose, referring to commenting on "the appropriate sentence for the offender".

1.25. What was the prejudice to the claimant in not having such a claim or complaints heard? As with all such applications there was potential prejudice, but the prejudice of not being permitted an unformulated and unclear claim was less than where a clear, arguable, discreet further claim or legal label is sought.

1.26. As to prejudice to the respondent and to the interests of justice generally, in light of the case management that had taken place in this case and the inevitable further delay that would arise for the parties, and the additional cost to the respondent, these far outweighed the prejudice to the claimant. That was all the more so when he clearly had a great number of complaints which required determination. The Tribunal refused the application.

1.27. The claimant had also provided his written opening submissions to the Tribunal clerk and a revised schedule of loss. Having read those submissions the Tribunal directed that this hearing would only address liability (because there was insufficient time to do more than that) and gave an indicative timetable for the hearing. The claimant had confirmed that he had prepared questions for the respondent's witnesses and estimated the time he felt he would need to ask those questions.

1.28. The Tribunal informed the parties that we would not consider the new schedule of loss unless and until a need to identify remedy issues arose. We did confirm to the claimant that a personal injury claim could not be brought as a stand-alone complaint in this Tribunal, but could arise as a remedy issue if the Equality Act or PID detriment complaints succeeded (noting that the claimant made reference to personal injury in a number of ways in his documents).

1.29. The claimant's written submission document also contained an application again to strike out the respondent's response on the basis of the respondent's failures in disclosure. He was asked if he wished to pursue that application. He did.

1.30. The Tribunal refused it because the respondent's delay in disclosure of CCTV could not be said to be unreasonable in all the circumstances; it was available to be seen by the Tribunal, and the claimant had had it for some months (but it became clear that he had not watched it); there was little prejudice and a fair hearing could still be possible. The Tribunal explained that preparation time orders could be sought as an alternative sanction, if there have been unreasonable conduct causing wasted preparation time if that were to become apparent. At the stage of the application, that was not apparent.

1.31. In relation to other documents requested by the claimant or sought to be included, the Tribunal indicated it may make further orders for disclosure/admission to the bundle during the course of the hearing, but would have to be persuaded of relevance and necessity. On this basis later in the hearing the Tribunal admitted copies of risk assessment documents for two service users, and further documents to ensure the proper collation and full notes for patient SW.

1.32. The Tribunal refused the claimant's application to admit an unsorted and uncopied (in the sense of spare copies for the use of the respondent and Tribunal) a very large bundle of medical records, opposed by the respondent on the grounds of proportionality and delay.

1.33. The Tribunal granted the claimant's renewed application for a much lesser volume the following day, to the extent we were satisfied that a few new pages were not already before us, were relevant, and the application was unopposed as to necessity or relevance.

1.34. At two points in the hearing the claimant indicated that he did not have the same pagination or documents as the respondent. Miss Jennings did all she could to sort out practical matters, to assist with identifying pagination.

1.35. The orders of Employment Judge Cox for five copies of the hearing bundle enabled the Tribunal to promptly make available to the claimant for reference a complete spare bundle, noting that the same had been previously sent to him in 2018, with the limited additions in 2019 to the end of the 2018 bundle.

1.36. The Tribunal was not able to sit on Friday 11 October. Partly in consequence, but also to prevent the case being part heard for any length of time, we directed two further days on 31 October and 1 November, to hear the last respondent witness Mr Hancock, and submissions. This decision was delivered on Friday 1 November 2019 after deliberations.

<u>The personal injury proceedings</u>

1.37. The claimant acted in person before the ET but instructed solicitors to commence personal injury claims. On 14 September 2017 they wrote to the respondent enclosing a "portal" notification claim form signed in respect of an incident alleged on 4 March 2017. The injury alleged was a "trapped nerve in back and pain in legs" alleged to have been sustained while the claimant was restraining

a patient. The form recorded that the claimant believed the details in the form to be true.

1.38. There was also a personal injury claim form in respect of an alleged injury on 20 May 2017 at around 2.30pm, which the respondent's former adviser had informed the Tribunal was filed on 14 October 2017. That claim form alleged: "The claimant is employed by yourselves as a health care support worker and on the date in question was providing care to a patient at the Bradford Royal Infirmary ["BRI"]and when he lifted and pulled the patient up the bed the Claimant felt a sharp pain in his back. The claimant had to continue lifting this patient and repositioning him throughout the day."

1.39. The Tribunal asked the claimant about those proceedings, noting no party had applied for a stay in the ET. The claimant indicated that the claims were not being pursued and the Tribunal took that assurance at face value. Albeit there was potential issue duplication (the claimant's constructive dismissal case advanced arguments that the respondent's conduct in its taking care of his health and safety was wanting), the Tribunal did not consider it in the interests of justice to stay of its own motion, when that was not the wish of the parties.

2. <u>The Evidence</u>

2.1. The Tribunal had papers comprising three lever arch files and around twelve hundred pages. As indicated above we ordered the admission of additional documents as appendices to the bundles on the basis that the additional documents were relevant and necessary for a fair hearing:

2.1.1. Medical records pages which the claimant had included in his EAT bundle;

2.1.2. The claimant's September 2017 communications with the CQC (he alleged a protected disclosure to the CQC);

2.1.3. The respondent's electronic version of manuscript incident forms, in rebuttal of the claimant's allegations that the manuscript forms were not made at the time;

2.1.4. Further additional medical records;

2.1.5. The respondent's risk assessments (pre and post incidents) for the two patients involved in incidents one and two;

2.1.6. The continuous patient record of the patient involved in alleged incident 4, organised into two sections (those notes taken at the BRI, and those notes maintained on the ward at the respondent's hospital).

2.2. The Tribunal assessed whether the claimant's evidence and assertions were reliable using all the tools available to us. He asserted patient notes and other documents had either been doctored to suit the respondent's case, or not fully disclosed. In particular during the investigation of alleged incident 4 (May 2017 whilst at the BRI), the claimant alleged he had recorded his alleged back injury in the patient record. In his oral evidence he clarified that he made the entries when

he returned to the ward at the respondent's hospital, being adamant this was on 19 May. In his September 2017 CQC complaint, he had alleged entries in the record both on 20 May at BRI, and 22 May at Bierley hospital.

2.3. The relevant patient notes were included in the bundle (and probably disclosed to the claimant) in a very unhelpful order. It emerged in the hearing that each day the respondent HCSWs took and maintained copious notes (every hour or two) and sometimes more frequently (every thirty minutes). These were observations of SW while he was at the BRI. In addition, every day, phone calls were made to the nurse in charge at Bierley to provide a "day summary" and "night summary" of SW's care and condition at BRI.

2.4. The confusion arising from the disordered notes was discussed during the hearing and the respondent then produced the two sets of notes, in a helpful order. Having considered the two sets (and checked that the pages were the same as the original set) and observed they were completed by multiple clinical staff members, we consider the claimant's belief that they have been doctored or are otherwise unreliable or incomplete as fanciful. The detail involved, the handwriting, the need for the notes to be sequential and frequent, the matching of what is said by HCSWs in the BRI notes with a summary later given and recorded in the Bierley notes, renders the prospect of tampering or omission highly unlikely. We also take into account that the respondent had disclosed other examples of the claimant recording information about himself in a patient record which was helpful to his case: he recorded the threats made by patient JC toward him in February and March 2017, and he recorded on 7 March his record of the incident on 27 February in the record of patient GC. Those notes were disclosed, as they appeared.

2.5. The Tribunal was fully satisfied, having reviewed the helpfully ordered SW notes, and undertaken the analysis above, that the SW notes over the period of alleged incident 4, could form the basis of accurate findings of fact and were far more likely to be reliable than the claimant's evidence, comprising, generally, patient observations. Those findings appear below.

2.6. The only indicator of strain on the claimant in caring for SW was a reference to frequency of bed changing. There was no reference at all to pain or back injury, albeit, we accept, it is possible he was experiencing pain or strain in silence. He was, however, adamant, that he had reported his injury and pain. He had not, and this significantly undermined his reliability across a number of matters. In addition, our findings concerning the medical evidence further undermined the confidence we had in findings based on his evidence alone.

2.7. The Tribunal undertook reading of the parties' witness statements and heard from the claimant over two days commencing before lunch on the first day and ending at the end of the second day. The Tribunal then heard from the respondent's witnesses:

Jestina Charinga: nurse in charge ("NIC") (formerly agency), BRI allegations
Paul Donaldson: hospital manager, Harrogate, disposed grievance
Emma Kavanagh: human resources
Laura McDonagh: operations manager (Ms Sidhu's manager)

Jenny McVinnie: hospital manager,
Jason Shale: nurse colleague reported Incident 1
Hannah Sidhu: ward manager, Bowling ward (incidents 1 and 2)
Andrew Hancock: ward manager, Shelley ward
Eve Phiri: NIC/clinical team leader, Shelley ward
Muzzfar Ali: night staff HSW on Shelley ward in May 2017
Sarah Allinson: personnel administrator

2.8. The Tribunal also had the signed statement of Mr B, from June 2018; he was a colleague of the claimant alleged to have failed to assist in incident 2; he did not attend the Tribunal, and the Tribunal considered other documentary evidence concerning his capacity at the time to assist, as well, of course of having the benefit of viewing the CCTV of incident 2.

2.9. All witnesses and the claimant were hindered by the passage of time, but the capture of most evidence in 2018 assisted. Generally, we found documentation likely to be more reliable than recollections; when there was no documentation to assist and there was relevant conflict we considered which account was more likely. Only one witness for the respondent, appearing nervous, gave any impression that his evidence might not be reliable on some matters. We discounted this in our assessment of him, nerves being unsurprising in relation to this hearing and the documentation being supportive of his statement generally.

2.10. The claimant was visibly upset when reviewing CCTV evidence of the first incident such that we considered it unnecessary for him to be taken through the second incident. It had emerged that he had not wanted to view the recordings at the time, nor since. That was understandable, but it was also the case that his recollection of the events was not the most reliable evidence before us, when inconsistent with the recordings (or contemporaneous documents).

2.11. On all other matters the claimant was persistent in his case and his beliefs about these events; he was hesitant only on a number of matters revealed by documents he had not perhaps anticipated being put – for example, references in medical notes, or a reference to the “Bristol Tribunal” in his disability statement.

3. <u>The outline facts found, many of which were undisputed (references to p. or pp. are to pages in the bundle);</u>

3.1. In May and June of 2015 the claimant registered his interest in working as member of the respondent’s “bank” of casual workers and signed terms to that effect. They included terms for payment of rolled up holiday pay (an allowance of 12.07% with an option to maintain a separate holiday fund) (p195).

3.2. On 15 October the respondent confirmed it had completed all pre-employment information and offered the claimant three induction and training shifts the following week, which were postponed (pp.188).

3.3. 27 November 2015 to 15 January 2016: the claimant visited South Africa (p 7 of 8 additional medical notes – Dalton surgery);

3.4. In February 2016 the claimant commenced his role as a member of bank staff.

3.5. On 23 November 2016 the claimant was offered a permanent role and provided with a permanent contract of employment to consider; there was then negotiation about pay rates which resulted in an increased salary and revised documentation.

3.6. On 16/17 December 2016: the parties signed the contract of employment with commencement on a date to be agreed (pp 238/232). It provided for a salary and 38.5 hours a week, and 5 weeks' holiday (or 192.5 hours) in addition to bank holidays. There were enhanced pay rates for nights and bank holidays. The contract provided as follows: "Payment for holidays will be calculated on the basis of your average rate per hour over the 12 week paid weeks immediately prior to the holiday. (For this purpose a "paid week" is a week in which some remuneration was paid to you by the Company). …The content of these clauses does not affect your statutory holiday entitlement under the Working Time Regulations 1998 (as amended). The holiday year was stated to be 1 April to 31 March but a communication to staff in September 2016 had indicated the year was to be revised to a calendar year.

3.7. On 23 January 2017: the claimant agreed a date to start as a permanent HSW on Bowling ward (one of the respondent's four hospital wards) on 7 February 2017;

3.8. On 7 February 2017 the claimant started work subject to the new agreement as a permanent member of staff (p.248). He had worked 3091 hours in the 2016/2017 tax year. In 2017 he worked typically every week in excess of 60 hours, until he became unfit to work from 25 May 2017.

3.9. On 12 February 2017: the claimant (on Shelley Ward doing overtime) recorded in the patient record that patient JC had threatened to physically assault him;

3.10. On 27 February 2017 Incident 1 took place. The claimant was subjected to an unprovoked assault by patient GC and there was full reporting save for the initial omission of "PMVA" being used by Mr Shale, the clinical manager. PMVA is "Prevention and Management of Violence and Aggression" or "restraint", in respect of which a separate form is required. There was a debrief with the claimant that day with a psychologist present; an assessment of GC's capacity for police interview; and a report to the police. GC was not subsequently prosecuted.

3.11. On 1 and 3 March 2017: the claimant was paid leave for the shifts he was due to work, approved by Ms Sidhu and authorised by Mrs McVinnie, in effect as paid recuperation time pursuant to the claimant's contract of employment which relevantly provided:" Payments for periods of absence due to sickness will be made in accordance with the current Statutory Sick Pay (SSP) Scheme where applicable. The qualifying days for Statutory Sick Pay purposes are your normal working days. Cygnet will provide the following additional benefit for employees

who have successfully completed their probation period: After successful completion of the probation period but less than 2 years' continuous service – 4 days' full pay in any 12 month period…Cygnet wishes to support its staff and works with a number of other organisations to provide a support package for those who have health related problems…..In addition, the Company retains absolute discretion in terms of providing additional Company sick pay where this is felt to be appropriate".

3.12. 4 March 2017: the claimant returned to work and was injured by a different patient CL (Incident 2); he returned to work without any absence as a result of that incident.

3.13. 7 March 2017: the claimant took part in a 30 day review (from the start of his permanent employment on the ward) discussing both assaults (pp.287-288) with Ms Sidhu. He confirmed he was happy to remain on Bowling ward and there was a full discussion of how he felt about the incidents. There was a further discussion of what other duties could be allocated when an HSW was undertaking security (locking up and keyholding) or other matters. Ms Sidhu told the claimant to raise any issue concerning the allocation of duties with the NIC. The claimant did not mention a back condition in this meeting.

3.14. 14 March 2017: the claimant presented a formal complaint document headed: "health and safety, discrimination, bullying, harassment and personal injury", following an altercation with staff that day (pp.289-299).

3.15. The claimant had been afforded paid leave that afternoon because of an altercation with colleagues. He had been allocated security duties and had been asked by colleague, SS, to respond to an alarm; the claimant had refused because he was on security duties, and SS allegedly shouted at him and he was reprimanded by NIC AJM. The claimant alleged he had his path to the door blocked by her when he sought to leave, (page 320 and 321). The claimant also made other historic allegations against those colleagues in his complaint.

3.16. 16 March 2017: the claimant met Ms Sidhu and Ms McDonagh and agreed to move from Bowling ward to Shelley ward temporarily (pp.300-301) (our detailed reasons for his finding appear below) while his complaints were investigated.

3.17. 21 March: the claimant was referred to occupational health ("OH") by Ms Sidhu in connection with Incidents 1 and 2, the claimant having raised personal injury in his complaint, namely, an old back injury being made worse. The claimant gave his permission for that referral. Ms Sidhu did not inform Mr Hancock, the manager of Shelly ward, of that referral.

3.18. 23 March 2017: the claimant reported to NIC "E" that patient JC on Shelley ward again threatened to assault him and appeared to be targeting" him; the claimant made an entry in JC's patient record. Patient JC engaged in similar behaviour with other staff and other patients.

3.19. 7 April 2017 the claimant reported backache in his upper back and shoulders to his GP and it was recorded that, “thinks related to the first incident”; a pre-existing back pain problem was noted (GP notes).

3.20. 13 April 2017: Mr Donaldson provided a grievance investigation report (pp.345-353) and grievance outcome (pp.354-357).

3.21. 25 April 2017: the claimant appealed the grievance outcome (pp.359A-C)

3.22. 5 May 2017; the claimant reported stress at work to his GP, and a grievance “alleging bullying/discrim” and he was prescribed an anti-depressant. He did not then complain of his back.

3.23. 8 May 2017: the claimant took part in an appeal hearing with Mrs McDonagh (pp.362-368). Around this time all staff on Shelley ward including the claimant were instructed to accompany SW to BRI once or twice a week, save for one colleague with sciatica who was exempt from the duty.

3.24. 11 May 2017: the claimant worked an overtime day shift at BRI accompanying SW for 11.5 hours. He reported no issues in the patient record in relation to his back. He did report difficulties with the complexities of personal care, and whether the degree of nursing skills required (involving catheters and so on) was feasible, or words to that effect, for HCSW staff. Meanwhile BRI staff contacted the respondent hospital to report the need for the respondent’s staff to assist more with SW’s care. The claimant later reported having changed SW’s bed three times that day due to continence issues. Ms Phiri was not told by the claimant that he was experiencing back pain and should not be allocated the duty.

3.25. On 12 May 2017 the claimant’s night shift colleagues on Shelley ward reported concerns in relation to the condition of SW, also concerning continence.

3.26. On Monday 15 May the claimant worked a day shift again at the BRI supporting SW and again did not report any concerns about his back, but made comprehensive notes in the patient record about SW’s condition and care.

3.27. On Friday 19 May the claimant reported arm pain by telephone to his GP; he had worked 11 hours’ overtime that day, but not at the BRI. Mr Ali and another colleague had carried out day time care for SW that day.

3.28. On 20 May 2017 the claimant attended the BRI to assist with the care of patient SW. The claimant was on the rota to work an 11 hour shift with a colleague CCB. There was no report of back pain or injury, or indeed any record in the patient note from the claimant that day. CCB undertook all the note taking. That was the consistent pattern seen in the notes: that one HSW would undertake to complete the notes; occasionally the second HSW would add something, or notetaking was divided up (morning or afternoon, for example). We accept that on this occasion, CCB undertook the notetaking. There was nothing untoward in that.

3.29. 20 May 2017: an appeal investigation report (pp.409-424) was produced by Mrs McVinnie.

3.30. Sunday 21 May 2017: the claimant was on annual leave.

3.31. On Monday 22 May 2017, the claimant worked 12.5 hours' voluntary overtime on Shelley ward without reporting any difficulties. The outcome of his appeal (not upheld) (pp.425-430) was also sent to him by Mrs McVinnie. In particular he did not report any injury that day in SW's patient notes.

3.32. On Tuesday 23 May 2017, the claimant attended an occupational health appointment in Leeds with his partner and an initial report was provided by Dr Ahmad that the claimant was fit for work (pp.431-432), without any restrictions or adjustments, that the two incidents (February and March) had aggravated pre-existing back pain, and the claimant may benefit from physiotherapy and counselling. He was next on the rota to work on 25 May.

3.33. On Thursday 24 May 2017, the claimant telephoned the respondent hospital and spoke to Ms Charinga to report he was unwell and would not be at work the next day, and attended Huddersfield Royal Infirmary accident and emergency department with back pain. He telephoned again on 25 May reporting back pain and that he would not at work that day.

3.34. On Friday 26 May 2017, the claimant visited his own GP with "backache" and a fit note was issued for two weeks describing him as unfit for work. He had reported "pain down legs and like walking on nails in feet". The claimant also telephoned the Bierley hospital to report he was unwell again and would be ill all week with back pain. Subsequent GP fit notes continued to certify the claimant as unfit for work with back ache and he did not return to work.

3.35. On 19 June the claimant reported to his GP that his backache was worsening but that nothing had been revealed by an x ray; his GP referred him to the musculoskeletal clinic. He was issued a fit note until 17 July 2017.

3.36. On 22 June 2017 Dr Ahmad wrote to Ms Sidhu recording that the claimant had asked for corrections to be made to the original report and further medical issues to be noted concerning his heart (for which he was prescribed beta blockers), two loose teeth, and back pain for which he was hoping for musculoskeletal investigation and physiotherapy via his GP. Dr Ahmad reported the claimant was likely to return to work because his symptoms had "a tendency to improve" and that he had advised liaison with the claimant's dentist concerning his teeth. The claimant did not ask Dr Ahmad to include details of an alleged injury or accident at the BRI assisting patient SW on 19 May in his updated report.

3.37. In June Ms Allinson was also liaising with the claimant in writing about his right to work.

3.38. On 17 July the claimant attended work and saw Mr Hancock to hand in a new fit note for eight weeks until early September. Mr Hancock explained he would receive statutory sick pay only due to the length of absence and the claimant told him his back condition was longstanding. Mr Hancock also said the claimant's probationary period may be extended.

3.39. 27 July 2017: the claimant telephoned Ms McVinnie to ask about his sick pay and complain he was the subject of a workplace injury on 19 May. Ms McVinnie asked him to complete statements and paperwork.

3.40. 28 July 2017: Ms McVinnie sought advice and completed a short accident report based on the claimant's telephone call concerning the alleged injury on 19 May.

3.41. 1 August 2017: Ms McVinnie received the claimant's complaint in writing (dated 17 July 2017), that he had sustained a back injury at work on 19 May 2017, was unhappy to be paid SSP only in respect of his ongoing absence (pp.443-449), and that he rejected her determination of his grievance appeal from 23 May. Ms McVinnie asked Ms McDonagh to investigate the 19 May injury reported by the claimant.

3.42. On 15 August 2017 Ms McDonagh met with the claimant to discuss her findings, The claimant took her through his account of events. (pp.469-471). She included these in her subsequent report, together with the evidence of other staff. Her conclusion was that there was no evidence of the claimant sustaining an injury on his last shift at the BRI (she did not consider that the date, 19 or 20 May, was material in her conclusion). She had interviewed seven members of staff in that investigation, had access to SW's patient notes and on 16 August Ms Charinga, then a nurse in charge supplied by an agency, provided a written statement.

3.43. On 29 August 2017 Ms McDonagh sent her decision to the claimant concerning his allegation of an injury at work on 19 May (pp.473-474), rejecting that complaint.

3.44. 30 August 2017: the claimant resigned with immediate effect in a letter sent by email under the subject heading, "wrongful dismissal", and saying:

"Dear [Ms McVinnie] I consider myself dismissed as a result of repudiatory breaches. I have suffered a detriment as a result of your Conduct, negligence, discrimination, injury to feeling, breach of contract and unlawful deductions.

You have impeded my recovery by making deductions to my SSP and been left unable to pay for my medication, access physiotherapy or access private treatment. You have failed to participate in my recovery, and basically made me redundant as result of my injuries I suffered during the course of carrying out my duties. I have been unfair treated and will be making a claim at Employment Tribunal Service for; [the claimant then listed 18 headings (for example, which were more or less faithfully replicated in a list in the claimant's claim form presented on 4 September 2017 and discussed in the case management stages of these proceedings].

3.45. That email was sent to Ms Allinson's email address and was overlooked by her in error.

3.46. On the evening of Friday 8, September a representative of the CQC emailed the claimant saying she was the inspector working with the Bierley hospital and had picked up his concerns; she asked him to provide further details and he did so in a lengthy email raising numerous matters dated 11 September. The claimant could not remember when in August he had contacted the CQC, nor did he produce the email doing so. He did produce the lengthy 11 September email. The CQC had inspected the hospital in May 2017 and had produced a report in July 2017. Ms McVinnie had drawn up an action plan to address the updating of risk assessments, and had challenged matters in relation to the modelling used by the CQC (and the hospital) for measurement of staffing cover.

3.47. Also on or around early September Mr Hancock telephoned the claimant to let him know his fit note had run out (p479); and Ms McDonough asked for a reference request to be done for the claimant "today", in response to a request that had been sent in August by an agency.

3.48. On 11 September the claimant then forwarded a replacement fit note for eight weeks, having seen his GP on 1 September. Mr Hancock forwarded that fit note to Ms McDonagh saying: "fyi he knows that he still has a job".

3.49. The notification of personal injury proceedings was received by the respondent's head office on 18 September from solicitors acting for the claimant (1.37 above), concerning the 4 March incident, saying (p 491)" the claimant is employed by yourself as a health support worker and on the day in question he was injured at work whilst trying to restrain a patient which should not have been on the "open ward". He was left to restrain the patient on his own and in doing so he suffered an injury." The injury was asserted to be "trapped nerve in back causing pain in both legs" and the recommended treatment was physiotherapy.

3.50. The notification recorded that the claimant was not still off work and had had four days' absence as a result of the incident.

3.51. On 26 September Ms McVinnie asked Mr Hancock the claimant's telephone number to "Corpore", a specialist company "to support him back to work". That company wrote to the claimant on 17 October, seeking he be in contact, following its attempts to contact him.

3.52. The claimant continued to be paid statutory sick pay by the respondent until November 2017. On 30 October 2017 his resignation came to light (pp.505-508), and Ms McVinnie wrote to him on two occasions, ultimately confirming the ending of his employment was accepted to be 30 August 2017. On 16 November 2017 a breakdown of his final pay calculated to this date was forwarded to him, including recovery of the statutory sick pay said to be paid in error.

4. Submissions

4.1. The parties prepared detailed written submissions in the interval between 14 and 31 October, the Tribunal having indicated that it would expect to give an extempore decision at the end of 1 November. Those written submissions were available to the Tribunal, to the claimant and Ms Jennings to review over a lunch

recess and we then heard from the claimant first, and then Ms Jennings, having discussed that with the parties in advance. The written submissions were very helpful in assisting the Tribunal to focus on the points which were important to them in the determination of the complaints and there was some short further points orally.

4.2. Ms Jennings adopted a straightforward allegation by allegation approach, adopting the allegations clarified during case management, set against the background of the first two incidents, for which many witnesses expressed their sympathy to the claimant. She avoided personal criticism, repeating Ms McVinnie's evidence and commiseration: "nobody comes to work to be assaulted". It will be apparent from our reasons below where her detailed submissions have borne fruit. We mean no discourtesy by not repeating them further here.

4.3. The claimant addressed each legal complaint, and then provided his analysis of each witness. He addressed the Section 100 (health and safety dismissal) first. Under his Equality Act heading, he did not mention race or sex discrimination but referred only to disability discrimination. He appeared to concede in his evidence that the alleged BRI injury, if it occurred, could only have occurred on 20 May, rather than 19 May, which he did not concede in his oral evidence. The respondent's witnesses had been more concerned with the substance of the allegation rather than the date, save only that the date assisted to identify relevant witnesses and documents.

4.4. As to race, in the following sections of his written submissions he said:

4.5. Of himself: "Respondent's witnesses agreed with most about 95% of the Claimant's accounts and only disputed 5% as they were trying to foil the claim because claimant was a black African". "Respondent conceded most the accounts claimant put forward was coloured by prejudice and disputed factual material even supported by documentary evidence." "The defence exposed deep rooted racial connotations and undertones."

4.6. Of Ms McVinnie: but one of many criticisms in a similar vein: "Ms McVinnie brought 11 witnesses to intimidate, humiliate, and made false claims which was an obstruction of justice, and interference with Employment Tribunals objective of administrator of justice".

4.7. After many paragraphs of lengthy personal criticism of the respondent witnesses he said this:

4.8. "Therefore this claim is not about money as such but to find closure, to heal, justice and move on to have voice and to be heard as it was clear Ms McVinnie was a bully and had done everything to foil and an attempt to bring a claim to the Tribunal and this is the first. My life has been destroyed, I lost 3 teeth and one chipped and the 4th about to fall off, back injury causes me sleepless night, difficult to find work and work and now dependant on medication for depression, heart arrhythmia, somethings that developed as a result of the treatment and discrimination by Respondent."

4.9. The Tribunal's task was to remain focussed on the complaints brought and determine those, applying the law to the facts we found, after an extensive examination of the documents and witnesses, weighing always that the claimant was a litigant in person. We pursued matters in the evidence on his behalf where appropriate in our duty to put the parties on an equal footing.

5. Determination of the claimant's complaints

5.1. For convenience, given the range of law relied upon by the claimant, it is included, briefly where appropriate, under each complaint below. We include the further factual findings necessary to determine the complaints, which do not appear in the chronological summary above. It is also convenient to deal with discrete complaints first.

5.2. Holiday pay: "Mr Mbuisa claims that he has not received the correct amount of accrued holiday pay due on termination of employment."

5.2.1. The claimant's case was initially recorded as follows during the case management hearings: "He accepts that the Respondent was entitled to recoup overpaid statutory sick pay from the holiday pay it paid him on termination, but he says that the calculation of the accrued sum was incorrect. He says that in around September/October 2016 the Respondent informed him that the holiday year would run from 1 January rather than 1 April. The Respondent's calculation appears to be based on a holiday year beginning on 1 April."

5.2.2. The relevant law is Regulation 14 of the Working Time Regulations 1998 and/or the contractual provisions of the claimant's contract as determined applying common law principles, if required.

5.2.3. On this matter we heard from the respondent's HR witness, Ms Kavanagh; her evidence in chief was at paragraphs 8 & 9 of her statement and is consistent with our findings: "the claimant commenced his permanent employment on 7 February 2017 and ended his employment on 30 August 2017 and therefore the pro rata entitlement for 2017 was 142.71 hours; the claimant took 33 hours of annual leave during this period, leaving a balance of 109.71 hours owed on termination, this was paid to the claimant." That is confirmed as a sum of £941.31 at the claimant's standard hourly rate of £8.58.

5.2.4. The respondent did not apply its contractual provisions to the effect that holiday pay would be calculated by reference to an average hourly rate (as recorded in our chronological findings). It did, however, adopt the calendar year, as was indicated would be the case in a briefing to staff in September 2016.

5.2.5. This may explain why the claimant did not include a sum for this aspect of his claim (the change in the holiday year) in the schedule of loss attached to his opening submissions in this case.

5.2.6. The claimant's witness statement is also silent concerning the holiday year changing. The June 2019 schedule of loss calculation asserts a holiday year of 1 January to 31 December, and gives the claimant full credit for a year's holiday

entitlement, whereas we know, from our findings of fact, that he was employed, even if his prior service as a bank worker is included, for 2/3rds only of 2017, from 1 January to 30 August. Even if we treat the June 2019 schedule as evidence, the change of holiday year point is misconceived, and was not pursued in the witness statement or schedule of loss attached to the claimant's opening submissions.

5.2.7. The claimant's clarification of his holiday pay case, in his opening submission was, in effect, this: he was owed holiday pay for variable hours (overtime) worked. He addressed this in his witness statement giving evidence about his average hours in the tax year 16/17. He said this: "the claimant is owed holiday pay as shown in the schedule of loss plus interest as the calculations were wrong and did not take into account the average hours worked a week".

5.2.8. His calculation of the second part of the claim produces a sum owing of £594. That is said to be the sum owing in respect of a shortage of holiday pay on termination: in short, the claimant worked many more hours entitling him to holiday payment, for which the respondent has failed to give him credit.

5.2.9. Miss Jennings very helpfully included the current state of the case law in this arena, which is the Court of Appeal decision in the case of Flowers, pending appeal to the Supreme Court.

5.2.10. The position, as we understand it, is that the employee/worker claimants in that case have succeeded both on the basis of their WTR rights **and** on the contractual "Agenda for Change" provisions, subject to appeal.

5.2.11. Pursuant to Regulation 14, and in respect of the European derived aspects of the minimum entitlement (four weeks' paid leave), the claimant is entitled to payment on the basis of an average taking into account sufficiently settled and regular voluntary overtime, which we have found has involved regular average hours in excess of fifty in the material period.

5.2.12. The claimant took less than a week's holiday (three shifts or 33 hours) in the relevant year. He was credited with £941.31. From his payslips we can see that he did undertake settled and regular overtime on a voluntary basis and earned, typically a gross average of approximately £450 to £470 per week. The payment made to him for holiday pay is therefore approximately a week, or slightly more, short, on our summary assessment. We do not think it is in the interests of justice to postpone our decision in this case because the principle is on appeal. We uphold the claimant's complaint and award him £594, as he has claimed, pursuant to Regulation 14. That is the sum claimed and we are satisfied that is it sufficiently close to the precise calculation that, given complexity of the other matters to address, the interests of justice demand we award that sum. That complaint succeeds.

5.3. Unauthorised deduction from wages – this claim was recorded as follows during case management:

5.3.1. Mr Mbuisa was paid statutory sick pay only during his sickness absence. He says that his sick pay payments on 25 June, 25 July and 25 August 2017 should

have been at the same rate as his normal wage because he had informed the Respondent that his absence was due to a work-related injury. He has not yet been able to identify the basis on which he says he had a contractual right to full pay in these circumstances.

5.3.2. We refer to our findings at 3.11 above. It cannot be said that company sick pay (that is full pay) was properly payable to the claimant on these dates applying his contractual terms. Mrs McVinnie's exercise of discretion cannot be said to be capricious or otherwise out with the provisions of his contract for the reasons set out below (this complaint is also alleged as PID and Equality Act detriment). This complaint must fail.

5.4. Protected Disclosure complaints

5.4.1. The claimant does not have two years' service and has to prove a dismissal (as opposed to a resignation) and an "automatic" reason for dismissal, in this case Section 103A (protected disclosure) is alleged as the principal reason, and following his successful appeal, Section 100 (health and safety). For his Equality Act complaint of dismissal, we have to find a discriminatory influence on any conduct in response to which he is found to have resigned. It is convenient to address these complaints in the order clarified in case management.

5.4.2. Section 47B(1) of the Employment Rights Act 1996 relevantly provides: "A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure." Section 103A relevantly provides that "An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason (or if more than one the principal reason) for the dismissal is that the employee made a protected disclosure.

5.4.3. We have to determine lengthy and involved factual matrices and reasons why. For these reasons it is expeditious to address the factual allegations of detriment (clarified firstly as "Protected disclosure detriments", adopting the order in the Annex below), and only determine whether any particular communication amounted to a disclosure if necessary.

5.4.4. This arose in circumstances where the respondent accepted we could find that **a** protected disclosure had been made in the claimant's grievance. For completeness we include below a note of where the disclosures were **not** established or where material differences in the factual landscape were found:

(i) In December 2016 he recorded in the continuous record of patient AM that he had been required to take AM into town even though AM was subject to a control order and no official permission had been given for him to leave the hospital. **There was no such record in AM's December notes for reasons described below. The claimant may well have made an entry in a patient record about an incident (Section 17) at some point between May and December 2016.**

(ii) In March 2017 he presented a grievance in which he alleged that an entry by Jason Shole in the continuous record of patient GC that no PMVA (prevention of

management of violence and aggression) had been used in the management of GC was deliberately inaccurate; and that he had been required to take AM into town without official permission even though AM was subject to a control order. **The respondent accepted that the grievance could amount to a protected disclosure because it contained allegations of race discrimination. There was an inaccuracy in the reporting regarding PMVA/patient GC in relation to incident 1 on 27 February but this was not deliberate; it was Mr Shole's good faith belief at the time based on his involvement, albeit in error.**

(iii) On 19 and 20 May 2017 he made two entries in the continuous record of patient SW that he had been forced to work at the Bradford Royal Infirmary providing personal care to patient SW and lifting him when his duties did not include providing personal care and he had informed the Respondent that he had a back injury. **The claimant made no such notes in SW's patient record.**

(iv) In July 2017 he wrote to Laura McDonagh, the Respondent's clinical manager, complaining about the fact that he had been required to carry out the duties in (iii). **We have made findings that there was a complaint by telephone on 27 July about an injury on 19 May at BRI, and a written complaint on 1 August; the respondent did not accept this communication was a protected disclosure.**

(v) In August 2017 he made a written complaint to the Care Quality Commission about the incidents raised in his grievance and about the alleged destruction of the record he made in (i) above. **The claimant has not established that his CQC complaint was made in August.** We have found it was made after his resignation in early September. We consider the CQC inspector would have been likely to respond with some urgency, and she did so on 8 September. It is likely any short written complaint was therefore sent in the seven days prior to that and before the claimant's resignation. He alleges no detriment towards him after 30 August 2017.

<u>The allegations of detriment</u>

5.4.5. <u>Because of disclosure (ii) the respondent asked the Police not to prosecute GC for an assault on Mr Mbuisa, that Mr Mbuisa had reported to the police in March 2017 (allegation 8(i))</u>

5.4.6. We accepted Miss Sidhu's evidence that she met with the police in relation to the 27 February incident. The incident reports record clearly that a report to the police was anticipated by the hospital and the incident report records that the clinician on duty certified patient GC as having capacity to be interviewed by the police. We find, on the basis of her evidence, that the relevant police officers took the decision not to take the matter further; they did not complete the paperwork required to have access to CCTV, nor take any further steps in that matter. Miss Sidhu did not know about any "restorative justice programme" on the part of the respondent group of hospitals. She could not have asked the Police to follow that. Mrs McVinnie was in the same position and we accept her oral evidence about it.

5.4.7. We cannot say why the West Yorkshire Police included in a letter sent to the claimant on 22 November 2017, the following: "The management then advised me that the hospital actually has a restorative justice policy in place for

staff/patients who are victims of assaults, which they would be willing to apply in this case." The letter went on to set out reasons why GC was not prosecuted in connection with that offence.

5.4.8. We accept the evidence of Miss Sidhu and Mrs McVinnie that they did not ask the Police not to prosecute. In fact, Miss Sidhu would very much have preferred that matter be pursued by the police but the respondent hospital cannot control prosecution (or not) decisions. Their evidence was consistent with the contemporaneous records: psychiatric assessment was made of capacity for police interview by the hospital doctor at the time, and a report to the police was mentioned on the form. That is not consistent with a request from the respondent not to prosecute. This complaint fails.

5.4.9. Because of disclosure (ii) Mrs McVinnie wrote to the claimant in May 2017 saying that there was no entry in AM's continuous record implying that Mr Mbuisa was lying (allegation 8(ii))

5.4.10. The further facts relevant to this allegation are these. There had been an incident where the claimant had been required by a Nurse in Charge ("PT") to accompany a patient on an external trip when the patient's paperwork did not permit it. Miss Sidhu, as ward manager, had raised the matter with the claimant, who said that he protested, but the Nurse in Charge had insisted. The claimant complained about this matter in his 14 March complaint, and it was investigated.

5.4.11. Mr Donaldson was unable to decide the complaint because the claimant could not, in April 2017, help him with a clear time frame. The claimant raised the matter again in his appeal with Mrs McVinnie, who agreed to look at the patient records as part of her investigation. Unfortunately, by this time, May 2017, PT had left the respondent. Mrs McVinnie recorded that the underlying allegation was December 2016 (at page 414). She had interviewed Miss Sidhu who could not recall the incident date, although she did recall having to raise performance issues with PT, but not this particular issue. In the hearing before the Tribunal, Miss Sidhu did remember the incident when the claimant asked her about, it and indeed she recalled it in her witness statement, but in reference to a differently named patient, perhaps, she said, because of shortened names or "nicknames" being used for patients and this being confused by the use of initials. We accept Ms Sidhu's evidence that it was through further discussion that her memory and the use of a particular shortening of the patient name allowed her to place the original incident, which was not, in this hearing, in dispute.

5.4.12. Mrs McVinnie's determination in her grievance outcome at page 414 was not, that there was no record in the patient record, nor did she suggest the claimant was lying. She was very clear as follows: "I have been unable to establish whether the claimant's assertion that he was asked by a RMN to take a service user out on leave without section 17 approval took place due to a lack of detail and the amount of time elapsed since this incidence. The RMN in question left Cygnet Healthcare in December 2016 and HS is unable to recall this incident."

5.4.13. As part of these proceedings the respondent has disclosed, albeit very late, given the application the claimant made, the notes for patient AM for

December 2016, because although Mr Donaldson had the complaint in his timeline as possibly January 2017, having read the claimant's 14 March complaint and spoken to him, Mrs McVinnie had established that the departure date of PT meant that the incident had to have been before that.

5.4.14. Miss Sidhu was the Ward Manager on Shelley ward (where AM or the relevant male patient was located) from around May 2016. The claimant was a bank worker allocated to that ward regularly. Miss Sidhu had cause to raise performance issues with nurse in charge, PT. The incident which both the claimant and Miss Sidhu recalled, could have been any time between May 2016 and December 2016. It does not appear in the December AM record, but it is accepted that it happened. There may well be references to it earlier on. Miss Sidhu, whose statement was prepared in 2018, and revised in 2019, gives evidence that she recalls the incident, but not in reference to "AM"; the patient names were often confused.

5.4.15. She did not give Mrs McVinnie the detail about that at the time, but we do not draw any adverse inference from that. She was called back for a second interview in relation to that matter, and could not recall one of many matters she had need to discuss with PT up to a year before. She has given it more thought as a result of the detail of the discussions in these proceedings, that is all.

5.4.16. The complaint does not succeed; the claimant's factual allegation has not been made out; there was no detriment in Mrs McVinnie's appeal determination. At no stage did she, or anyone else, suggest the claimant was even mistaken about the underlying event or the note-taking, let alone that he was lying, it was simply that Miss Sidhu did not recall it at the time and the complaint could not be resolved.

5.4.17. <u>Because of disclosure (ii) in April/May Eve Phiri assigned Mr Mbuisa to work at the Bradford Royal Infirmary (allegation 8(iii))</u>

5.4.18. After the claimant's move to Shelley Ward in March 2017 patient SW developed complex physical health problems which meant that he had to be cared for in the BRI. All the support workers apart from one with sciatica, were allocated to him twice a week and the claimant was on the rota to cover those duties.

5.4.19. This allegation is also part of the claimant's disability discrimination complaint.

5.4.20. The reason the claimant was on the rota to attend BRI with SW was because of the respondent's expectation, reasonably of all staff (unless on restricted duties for some reason), that they would do that work. The patient records of SW were absolutely clear that there was a wide variety of staff undertaking that work at the BRI of all ethnicities and characteristics. The fact of a previous grievance had no bearing on this operational issue whatsoever. This complaint fails.

5.4.21. Because of disclosure (ii) in May 2017 Mrs Charinga shouted at Mr Mbuisa and humiliated him in front of her other staff, complaining about his refusal to carry out personal care for patient SW (allegation 8(iv)

5.4.22. Mrs Charinga, the nurse in charge, received information about patient SW's state/care from the night staff team coming on to shift: two HCSWs considered the day staff team had not attended to SW's care appropriately. That was on Friday 12 May. On or around Monday morning (15 May), she did challenge the claimant in her office, with others present, saying that all the staff needed to do the care of SW properly, or words to that effect. The claimant was on the rota to attend at BRI that day. We accept her evidence that she did not shout. The reason Mrs Charinga raised matters that day was the report that she had been given, clearly minuted in the patient record by the night staff team. The fact of the claimant's March grievance had no influence whatsoever on her actions. This complaint fails.

5.4.23. Because of disclosures i) to iv) the respondent destroyed the entries that Mr Mbuisa made in the continuous records of AM and SW mentioned above (allegation 8(v)).

5.4.24. This is a very serious allegation which is unfounded. In relation to patient SW our findings appear at 2.3 to 2.5 above.

5.4.25. As to AM's patient record, the Tribunal could not establish the date between May and December in 2016 of an altercation between nurse PT and the claimant concerning the permission required to escort a patient on an outing (where the claimant was correct and PT was wrong). Nor could Miss Sidhu, but she clearly remembered the incident and she was clear that the claimant was correct about the issue and PT had a number of performance issues and later left the respondent. Her instruction to the claimant had been that he must do the right thing, or come to her, even if the nurse was telling him to do the wrong thing, or words to that effect.

5.4.26. The records for December for AM appear as you would expect them to be. There is nothing to suggest destruction of the claimant's entries and indeed their structure, as with the records of SW, make this highly unlikely. The obvious and likely explanation for there being no entry concerning this incident from the claimant is that the date was wrongly identified by him and he could not be more precise; there was also confusion about the patient's initials affecting Miss Sidhu's memory as follows: Miss Sidhu knew the patient by a differently commencing first name. An example would be "Rebecca Smith", identified by the claimant as "RS", known to Miss Sidhu as "Becky Smith" ("BS").

5.4.27. The claimant has not established that the respondent destroyed entries in the continuous record of AM or SW. This complaint fails.

5.4.28. Because of disclosures (ii) and (v) from 25 June 2017 the respondent decided not to pay Mr Mbuisa's sick pay even though he was contractually entitled to it (allegation 8(vi)).

5.4.29. The contractual position is that the respondent has a discretion to pay full pay, rather than SSP, and generally does so when it considers absences caused by injury sustained at work. Miss Sidhu and Mrs McVinnie did so in relation to the short March absence after the February incident. The respondent did not know at the time, either from the claimant's fit note, nor from his contact with colleagues, that he alleged an injury at work on 19 or 20 May was the cause of absence starting on 25 May. He did not complete an accident form, or otherwise report that injury, albeit he had communicated his absence was related to back pain by telephone.

5.4.30. When the respondent became aware that he alleged that injury, it investigated, immediately and concluded that there had been no such injury on the evidence before it.

5.4.31. The reason why Mrs McVinnie and Mr Hancock (who would have been the person recommending payment at the time) did not exercise discretion to pay full pay rather than SSP, was because on the first relevant payment date it did not know the accident or injury was alleged, and its subsequent investigation did not reveal an injury on 19 or 20 May. These are the reasons why: they have nothing to do with the claimant's grievance or a CQC report which post-dated sick pay decisions made. This complaint fails.

5.4.32. Because of disclosure (iv) in August 2017 Laura McDonagh wrote to Mr Mbuisa stating that there was no record of his entry in the continuous record of patient S[H]Wimplying that Mr Mbuisa was lying (allegation 8(vii)).

5.4.33. Mrs McDonagh wrote to the claimant to give him her decision on his allegation that he had sustained an injury at the BRI having met with him to discuss that matter on 15 August. She included in her decision that she had reviewed patient SW's patient record and could find no such entry. We repeat our previous findings which concur with Mrs McDonagh's. The reason why Mrs McDonagh wrote in those terms was because that was the position. This complaint fails.

5.4.34. In fairness to the claimant his suspicions of a conspiracy in relation to patient records and the destruction of his entries has been fuelled by the delay in disclosing them at an early stage, and the failure, in disclosure and exchanged evidence. That disclosure failed to be clear about what the records entailed and how they were organised, in a way that made it absolutely straightforward for him to see that they were full and complete.

5.4.35. In light of our assessment of frank and reliable evidence from Miss Sidhu, Mrs McVinnie, Mrs McDonagh and others, and the respondent's ability to correct the position very quickly when the witnesses were made aware of the difficulty, we are led to conclude this was a failure in communication and preparation between the respondent and its advisers in understanding the forensic significance of that material and its format, rather than any basis from which we could draw adverse inferences in support of a conspiracy.

5.4.36. Conclusion: the whistle blowing detriment complaints fail.

5.5. Unfair dismissal by reason of public interest disclosure: Mr Mbuisa alleges that he resigned in part because of the detriments set out in paragraph 8 (above), which were committed on the ground of his protected disclosures, and that the principal reason for his dismissal was therefore that he had made a protected disclosure.

5.5.1. It follows from our conclusions above, standing back and considering the claimant's dismissal case, that having failed to establish any adverse conduct towards him on grounds of having made alleged protected disclosures (whether or not his communications amounted to disclosures), even if he resigned in response to the conduct found above, we cannot find that the principal reason for dismissal was the making of protected disclosures and this complaint also fails.

5.6. Race discrimination allegations: Mr Mbuisa is a Black South African. He alleges that he has been treated less favourably in the ways set out below because of his race. He says that he believes he was treated in this way because he was black and because, as a result of his South African nationality and his limited right to work in the UK, the Respondent knew that he was vulnerable.

5.7. The relevant provisions are Section 13 and 39 of the Equality Act 2010. Again, we determine the factual chain of events concerning the claimant's allegations and the "reasons why" having heard from all the relevant witnesses.

5.7.1. On 20 March 2017 the claimant was moved to Shelley Ward to protect AJ and SS who are White and whom he had accused of bullying him (allegation 10.1).

5.7.1.1. The respondent hospital operated four wards: Shelley, (male, low secure); Denholm (psychiatric intensive care, female patients in crisis, who are to be assessed and stabilised, often with medication who may come from any part of the country); Bowling (female specialist ward for personality and eating disorders); Bronte (a further low secure female ward). In the period to 31 March 2017 there were the fewest incidents of risk on Shelley, the single male ward and the greatest number on Bowling ward.

5.7.1.2. That was the position in the Spring of 2017. The records of the claimant's hours and shifts as a bank worker, which we have reviewed in some detail from February 2016 to February 2017 are clear that he worked many hours a week, on his calculation, an average of 66 hours per week, always undertaking voluntary overtime. The claimant worked on all of the respondent's wards over that period.

5.7.1.3. The claimant worked the most shifts on Shelley and Bowling, and fewer shifts on Denholm and Bronte. The claimant's contracted hours were an average of 37.5 hour week, typically working three 11 or 12 hour shifts a week: it is clear he volunteered for a great deal of overtime.

5.7.1.4. Immediately after the two assaults (7 March 2017) the claimant confirmed he was content to remain on Bowling Ward. The claimant presented a complaint on 14 March having left work early, which included a complaint about his treatment by colleagues SS and AJM that day (see above). He then met with

Miss Sidhu and Mrs McDonagh on 16 March to informally discuss that complaint. The summary of his complaint on 14 March was:

5.7.1.5. "I felt scared, frightened and distressed that my stress and anxiety from other staff not patients. The recent attacks and treatment of staff on Tuesday 14 March clearly prove beyond any reasonable doubt that I was discriminated, harassed, bullied and that my health and safety was at risk due to the omissions and commissions of other staff members they continuously picked on refused to assist when I was attacked and misrepresented when making entry a clear sign that I was not being treated fairly".

5.7.1.6. Those were the events that were being discussed on 16 March informally. The notes record that the claimant was offered a move of Ward pending formal investigation, and other support measures were put in place including a referral to Occupational Health, because the claimant had mentioned his back pain and described that. He also confirmed in that meeting that he had been in touch with Employee Assistance for emotional support.

5.7.1.7. In response to the offer of a change of Ward, the claimant chose Shelley. That is our factual finding, although the claimant disputed that it had been his choice. The discussion and conclusions were recorded in notes and in a letter of 17 March. This is also consistent with the evidence of Mr Hancock: he was told the claimant had chosen a male Ward (and Shelley is the only male ward). Our finding also accepts the oral evidence of Miss Sidhu and Mrs McDonagh. The claimant's case on this particular point, was that he would not have chosen Shelley after the threats to him by patient JC on 12 February (which are documented) above. We find that the point he seeks to draw is not consistent at all with his choice to do overtime on Shelley on Wednesday 15th, Friday 17th, and Friday 24th February (after the threats to him from patient CH). In fact his choice of Shelley is entirely consistent with his choices in relation to overtime. He had previously been content to remain on Bowling after the patient assaults; he was offered a move of ward while his complaints were investigated; he chose Shelley.

5.7.1.8. Mrs McVinnie recorded what had happened in an email on 17 March to Mr Donaldson in arranging for him to investigate the grievance: "The staff member who has made the complaint (LM) has been moved to Shelley Ward as an interim measure, just to reduce the risk of further assault and remove him from his colleague who he feels aren't supportive". The staff member AJM was due to leave the respondent on 31 March.

5.7.1.9. We accept that the claimant chose Shelley in response to an offer of a move in the meeting recorded above. Mrs McVinnie was recording what had happened in summary. The claimant was not moved "to protect AJ and SS who are white". This complaint fails. The claimant has not established detriment nor that his treatment was influenced by race.

5.7.2. <u>In December 2016 he was forced to take patient AM into town even though AM was subject to a control order and no permission had been given (allegation 10.2).</u>

5.7.2.1. The claimant was required by PT to take a patient to town some time between May 2016 and December 2016. PT the nurse in charge was in error, because the patient did not have the required permissions. PT was also in error on a number of matters and was subject to performance management by Miss Sidhu.

5.7.2.2. The claimant's evidence as to the reason he was chosen to take the patient was because he was there, and his name was put on the board: it was a rostering choice by PT; he was one of a number of staff on shift that day. The incident was discussed with Miss Sidhu at the time (the following Monday) as something that should not have happened. PT's approach to people was apparent: when the claimant told her she was in error, she replied to him: "Are you the nurse in charge, I'm the nurse in charge, you just need to go", or words to that effect. She treated other colleagues in a similar way, which was unsatisfactory, and was subject to performance management. These are not facts from which we could conclude that race had anything to do with the reason why the claimant was rostered to take that patient on a particular trip.

5.7.3. <u>On 4th March 2017 when Mr Mbuisa was assaulted by patient CL JB refused to assist him. (Allegation 10.3)</u>

5.7.3.1. The Tribunal viewed the CCTV in relation to this incident (Mr Donaldson had also done this as part of the grievance investigation). We find as follows.

5.7.3.2. On 4th March a female patient was having some dialogue with female members of staff in the area outside the nurses' office; she sought to follow the staff members into that office; the nurse in charge, AJM, sought to close the door on the patient. The patient put her foot in the way and an alarm was sounded. The claimant, who was passing, responded to the alarm, there were de-escalation techniques used, two colleagues came running to the claimant's assistance, the claimant had taken the patient's arm, another colleague took her other side, and eventually a third colleague assisted and the patient was taken carefully to the floor. The male colleague who assisted on the other arm of the patient was kicked in that process, and the claimant suffered a scratched face and being spat at by the patient.

5.7.3.3. JB was a colleague who was passing the incident and can then be seen walking back and forth, while the three other staff members including the claimant resolved matters. JB did not depart the scene. He did not assist because he believed that he was unfit to take part in PMVA because of an injury that he had sustained. He also believed there were enough colleagues assisting. That was the evidence of his ward manager, with whom he had spoken after the incident. From the alarm sounding, we simply note that colleagues were on scene to assist within 9 seconds, the claimant being the first as he was passing. These are not facts from which we can conclude that the actions of JB had anything to do with the claimant's race. This complaint fails.

5.7.4. On 14th March 2017 AJ allocated him to take a patient to the Bradford Royal Infirmary even though he was already responsible for security duties that day (Allegation 10.4)

5.7.4.1. This description of the complaint falls into error; the claimant was allocated to BRI after March 2017 on Shelley Ward and AJM was not involved – she left the respondent on 31 March. She was involved in the incident below. This complaint is dismissed.

5.7.5. On 14th March SS ordered him to respond to a response alarm even though he was unable to do so because of being in charge of security. When he refused to respond SS verbally abused him and [AJM] shouted at him and tried to prevent him leaving the office (Allegation 10.5)

5.7.5.1. On 14 March 2017, the claimant was allocated security duties which meant he carried keys and a radio; an alarm sounded requiring staff to attend to provide assistance. SS directed him to respond, and then AJM the nurse in charge endorsed that firmly. The claimant refused to respond; he was allocated security duties. The week before he had clarified with Miss Sidhu that when on security he should not necessarily also be on patient observations. That is a slightly different point to 'when I am undertaking security duties should I respond to an alarm?', but nevertheless there had been discussion about the allocation of work. The claimant left work early after the incident. He presented his written complaint to management the same day.

5.7.5.2. Clearly the reason why colleagues on that day directed the claimant to respond to an alarm was because there was a need to respond to the alarm, and all staff are required to do so (as we observed on CCTV in respect of the 4 March incident: staff came running to assist within seconds of the alarm sounding). That was the case even when undertaking security duties.

5.7.5.3. A feeling of unfairness in the allocation of particular tasks was shared by other colleagues, who reported the same during the investigation of the claimant's grievance, including a colleague, Lorraine, who was white. The respondent has, we note, a very diverse workforce, and generally where there were more onerous tasks, these are shared irrespective of race or any other personal characteristic. The paradigm is the allocation of shifts at BRI for SW. These are not facts from which we can conclude that on 14 March SS and AJM were influenced by the claimant's race at all in directing him to attend the alarm, raising a voice, or blocking his way. AJM had blocked the way of a white patient when she attempted to enter the nursing office on 4 March by closing the door. This complaint fails.

5.7.6. [Mr Ali and S] falsely informed Jestina Charinga that Mr Mbuisa had refused to assist with patient SW and personal care while at BRI. Miss Charinga then repeated this in a team handover meeting (Allegation 10.6)

5.7.6.1. We repeat our findings above. This is a very similar allegation to that in respect of allegation 8(iv) (protected disclosure detriment). To those findings we add that SW had very extensive personal care needs while he was at the BRI. It

was very difficult to address those, at times, for the health support workers and indeed for the nursing staff at the BRI. It is entirely likely that there may have been short episodes, through no lack of care, that he was uncomfortable. All observations of his state needed to be accurately recorded and colleagues, working in teams of two, were right to document what they observed. On 11 May the claimant and colleague IK were caring for SW on the day shift and had discussed care techniques and difficulties with the nurse in charge at Bierley. That day the BRI staff also called the respondent to express the need for the respondent's staff to assist more with personal care.

5.7.6.2. The following morning at the conclusion of the night shift Mr Ali and his colleague properly and honestly reported their observations that SW was covered in faeces at the start of their shift. Properly Miss Charinga, who is also black African, took that up with the claimant and his colleague on the following Monday morning. There is nothing in those facts from which we could conclude that the initial reporting of the concerns, or discussing them in a team meeting, had anything to do with the claimant's race. We also bear in mind the diversity of the staff, and that Mr Ali's report, when he rang in to give the summary, did not name a colleague, but was about the day staff, one of whom was not black African but white. This complaint fails.

5.7.7. Mr Mbuisa was given menial and trivial tasks including being allocated to BRI more than other staff even though he was injured, being allocated to take two patients to football each week and being asked to remain on shift until an agency night cover could be found. (Allegation 10.7)

5.7.7.1. We repeat earlier findings. All Shelley staff had to undertake at least two shifts at BRI to care for patient SW for the duration of the patient's stay apart from one colleague medically restricted. The claimant knew that, all staff had to take turns, as he agreed in his evidence. The patient records are also conclusive. Personal care of SW was part of everybody's role; it was not menial or trivial, far from it. The claimant volunteered for overtime shifts at Shelley undertaking personal care for SW, and this continued after the March incidents, which he reported to Miss Sidhu had exacerbated an earlier back condition.

5.7.7.2. Being rostered to take patients to football was also part of the HCSW role for which the claimant was employed, as was staying late if a member of staff called in sick, which arose only on relatively rare occasions and affected whichever member of staff was awaiting a colleague to take over. The claimant has not established detriment, let alone less favourable treatment because of race in relation to the allocation of these duties. There are no facts from which we could conclude race discrimination in that respect. This complaint fails.

5.7.8. Sarah Allinson, Administrator delayed his employment start date, failed to process his named driver application on two occasions and deliberately blocked his promotion by not allowing him to enrol for a level 3 in Business Administration. (Allegation 10.8)

5.7.8.1. The claimant's successful application to be a bank worker was confirmed in June 2015 following an interview at a recruitment day in May 2015.

The first training date, and therefore start date, that was offered by Ms Allinson was October 2015. The claimant had to accept that his start date was delayed from October to the New Year in 2016 because he was away.

5.7.8.2. It is relevant and apparent from the claimant's medical records that during the material time (June 2015 to January 2016) the claimant had another full-time job as an HR administrator; he was not, therefore, in a position from 3 September at the latest to accept any training or other dates that were offered.

5.7.8.3. The training requirements for the HCSW role are stringent: staff have to be physically fit enough to undertake PMVA training and to be able to act on that training in their role on the wards.

5.7.8.4. The reasons for the apparent delay between June and October were the need for pre-employment checks and finding the next available date for training. We accept Ms Allinson's evidence about that. We also take into account the diverse nature of the respondent's workforce and the inherent unlikelihood of the claimant's case on this issue. We found Ms Allinson straightforward and compelling: she processed an application and joining process in the usual way, that is all.

5.7.8.5. As to the allegation about driving, Ms Allinson similarly processed the claimant's application to become a driver in August 2016 (that is to be able to drive patients on outings and the like. All that was required was the completion of a form. If there were no issues (that is the driver had a driving licence) they could undertake driving duties. The claimant filled in the form and submitted it. There was then no further process to tell staff that they could then take on those duties; it was up to the staff to tell the nurse in charge that they could be allocated driving duties. That process was the same for all. The claimant did not seek any driving duties. On March 7 2017 the respondent changed its process and asked all staff to complete a driving form afresh. The claimant did not complete the second form.

5.7.8.6. Ms Allinson did not stop the claimant becoming a named driver on the first occasion and on the second occasion all staff had to complete those forms. As far as she was aware the claimant had not done so. Ms Allinson did not "block" the claimant undertaking driving duties.

5.7.8.7. As to enrolling on a Business Administration course, this was a Ward Manager or management issue. There was at some point a presentation by a training provider, which the claimant attended, and at which staff were invited to sign up for courses relevant to them. The claimant was told that he could not sign up to the business-related course because management retained control on what was appropriate to fund, depending on the role. It was not Ms Allinson's decision as to who could or could undertake a particular course, that was entirely a management decision. Ms Allinson did not prevent him from doing so nor did she inhibit his promotion in any way, shape or form. She simply was unable to administer his joining a course which had not been approved as appropriate for the HCSW role. These are not facts from which we could conclude race played any part in Ms Allinson's actions. This complaint fails.

5.7.9. From February 2017 onwards, Laura McDonagh and Jennie McVinnie asked the Police to refer the assault on him by patient GC to its restorative justice process rather than investigate it with a view to a prosecution, whereas an assault on [A], an Asian British employee, by patient JC was the subject of a prosecution (Allegation 10.9)

5.7.9.1. This is a repeat of the first protected disclosure allegation but adding in support that an assault on [A], an Asian British employee by patient JC, was the subject of a prosecution.

5.7.9.2. We repeat our previous findings. We add that the claimant's former colleague [A] sustained immediate injuries involving stitches and weeks off work. He had been repeatedly punched in the face by JC, a known violent offender on Shelley ward. We make these findings not to minimise the assault by GC on the claimant, but to indicate that it is plain to the Tribunal that there are significant differences in the two matters which may explain their different course. It is not for us to understand the reasoning of the West Yorkshire prosecutors, but to make findings about the conduct and reasoning of the respondent. We have already found that the respondent put in place the measures for police involvement in the claimant's assault and did not recommend restorative justice on the basis of the evidence before us. Whether a prosecution results is not within the respondent's control. These are not facts from which we could conclude less favourable treatment. This complaint also fails.

5.7.10. When the claimant raised his grievance relating to inaccuracies in the patient records of GC Paul D who investigated the grievance accused Mr Mbuisa of dishonesty for not declaring his disability at interview and on his application form aiming to find reasons to dismiss him rather than investigate his grievance (Allegation 10.10)

5.7.10.1. This characterisation of what Mr Donaldson in fact did, in his dealings with the claimant concerning his grievance, could not be further from the truth.

5.7.10.2. Mr Donaldson, from the respondent's Harrogate Hospital, was asked to investigate the claimant's grievance within a twenty-day timescale. His work included producing a comprehensive timeline of allegations, documents and potential witnesses, watching CCTV of the February and March incidents, completing manuscript notes of an interview with the claimant which commenced at 11:30 on 31 March, interviewing others, reviewing documentation and completing a report.

5.7.10.3. During that interview with the claimant he took him through all of the allegations contained in his complaint and the timeline.

5.7.10.4. The claimant had complained of a lack of reporting of PMVA by Mr Shole in relation to the first incident in February. Mr Donaldson produced the various reports from those incidents and had them with him in the meeting on 31 March, to demonstrate that the claimant was mistaken that reports were not made. We concur with that finding, having been provided with contemporaneous electronic versions of the reports, also.

5.7.10.5. There were amendments to the reports recommended following the investigation for entirely sensible reasons (the claimant had been right that Mr Shole had failed to indicate that PMVA was used when he intervened to remove GC from her assault on the claimant). However, there is nothing in the handling of the grievance meeting that could indicate Mr Donaldson was influenced in his treatment of the claimant by his race.

5.7.10.6. During the meeting Mr Donaldson took the claimant through the chronology, including the start of the claimant's employment and joining process. He recorded in his timeline that on 1 May 2015, as part of applying for the bank role, the claimant had made reference to a previous injury, and had disclosed an asthma condition in February 2016 on starting that role. In fact, the claimant had also completed an occupational health form in May 2015 and been signed fit by occupational health (on behalf of the respondent) to work in June 2015, which is consistent with him disclosing a back injury.

5.7.10.7. Mr Donaldson made reference in his notes of the interview on 31 March 2017 to a discussion about disclosed conditions. He commented to the claimant that in September 2016, when converting to permanent, there was no record of a health condition disclosed in interview.

5.7.10.8. The claimant was very clear in his evidence before this Tribunal that there was no interview for the permanent position in September 2016 or even earlier on in 2016, where he might have repeated his declaration of a back condition, and that he was recommended to "go permanent" by his then Ward Manager. We accept that evidence, but the fact of Mr Donaldson being mistaken about whether or not the claimant had an interview in late 2016, does not alter our finding that there was no evidence whatsoever that Mr Donaldson did anything "to get the claimant sacked", as the claimant characterises his activity. He did not accuse him of dishonesty. He thoroughly investigated the claimant's grievance. The claimant has not established facts from which we could conclude detriment in Mr Donaldson's conduct of that meeting, let alone less favourable treatment influenced by race. This complaint fails.

5.7.11. From March to May 2017 Mr Mbuisa was forced to work with a bad back when other employees did not come to work because of flu and other illnesses. He was not allocated light duties when injured, while PH was allocated admin duties (Allegation 10.11).

5.7.11.1. The claimant was not forced to work. On 7 March he told Miss Sidhu that there were no issues that he wanted to raise at that stage, and he was content to remain at work at that time on Bowling Ward. Miss Sidhu referred him to occupational health in connection with the historic back condition they had discussed. On 14 March, because of the altercation with colleagues, he chose, when offered, a switch to Shelley ward. He could have sought a fit note from his GP at that point in relation to his back, or indeed at any point he could have requested light duties. He did not do so and in fact he worked many overtime shifts over those next weeks.

5.7.11.2. PH was a pregnant employee, subject to a pregnancy risk assessment, and moved to administration duties as a result. These are simply not facts from which we could conclude detriment, or decision making about duties influenced by race. This complaint fails.

5.7.12. On 21 July Laura McDonagh refused to pay the claimant sick pay at the rate of his normal wages because she said there was no evidence he had been injured at work (Allegation 10.12)

5.7.12.1. The precise chronology of this allegation is known to the parties (and appears above). The claimant telephoned Mrs McVinnie in mid-July, she took the claimant at his word and immediately recorded an injury and took all appropriate steps including asking for a witness statement from him about the allegation.

5.7.12.2. She then asked for a prompt investigation into whether there had been an accident or injury at work and that was undertaken by Mrs McDonagh. The latter concluded, having conducted interviews and reviewed all the relevant matters, that there was no evidence that there had been an injury at the BRI, on 19 or 20 May, having reviewed the claimant's complaint and met with him. She wrote to the claimant with her outcome on 29 August.

5.7.12.3. A decision had been taken previously by Mr Hancock as ward manager that the SSP rate would be applied (in accordance with the claimant's terms and conditions). Mr Hancock did not know that an injury on 19 and 20 May was being alleged as the reason for absence, and neither Mrs McDonagh nor Mrs McVinnie had matters in front of them to change that position, or that could lead Mrs McVinnie to exercise a discretion to pay full pay.

5.7.12.4. In dismissing that complaint, we also take into account that if one contrasts these events to the position in March, when there was a clear reporting of an incident which resulted in injury, and the respondent's response to that injury, and its care of the claimant at that time, there is simply no reason why, if there had been an injury reported at the BRI on 19 or 20 May, the approach would have been any different. The reason why sick pay was not paid at full salary was simply because the respondent did not believe the claimant had injured himself at the BRI. This complaint also fails.

5.7.12.5. It follows for the reasons above that all complaints of race discrimination are dismissed.

5.8. Disability Discrimination

5.8.1. The Employment Judge recorded during case management: "the claimant alleges that he is a disabled person (within the meaning of that term in the Equality Act 2010) as a result of an injury to his lumbar spine sustained in 2013. He says that he takes a variety of medications to provide him with pain relief and that he informed the Respondent about this medication when he was recruited. He says that the Respondent knew, or could reasonably have been expected to know, about his disability from: his application form, his recruitment interview, occupational health in 2015, 2016 and 2017; a health questionnaire; the incident

when the Claimant was assaulted in February 2017 and the debriefing after that; the Claimant's requests for time off to attend hospital, GP and physiotherapy appointments; and the Claimant's medical records."

5.8.2. Section 6 of the Equality Act defines disability as a protected characteristic and Schedule 1 supplements that definition. The respondent did not accept the claimant was a disabled person at the material times.

5.8.3. We bear in mind that the case management of this case started in October 2017 and continued between October 2017 and the Summer of 2018. The question for us is not whether the claimant was a disabled person when he started this case, or whether he is a disabled person now, the question for the Tribunal is: 'was the claimant a disabled person between March and May 2017 (or strictly speaking from 27 February 2017, the first of the assaults): this is the material period relevant to the complaints he raised which were clarified in case management.

5.8.4. The claimant wanted us to admit additional medical records in this case and we did admit some, for the reasons explained above.

5.8.5. The first matter that we examined is 'did the claimant have a physical impairment?' That is, an injury or impairment, a restriction on normal functioning of his lumber spine, at the material times, which he said he had sustained in April 2013.

5.8.6. The medical notes to which we have been referred were complex: the claimant was registered with a GP practice in Teesside in 2014 and possibly earlier, and then was registered with a new GP at "Dalton Surgery", Huddersfield on 2 February 2015. His medical notes, both those in the bundle originally and those added, were not structured in a way in which this Tribunal could make safe conclusions. We noted that although we only had extracts, the pagination of the notes from the Teesside practice ran to over one hundred pages and clearly concerned a number of different conditions and treatment, of which his back was only a small part.

5.8.7. The claimant's CV painted a different picture of apparent physical health: the claimant had had two jobs which had started after his asserted injury in 2013: one as a self-employed/owner driver with Max Couriers from April 2013 "to current", the other as a distribution assistant, part time from October 2014 "to current". Both entries indicate the physical activities of lifting and driving connected with those posts. The claimant's application to the respondent back in 2015 contained different and other jobs held. After the claimant registered with the Dalton GP, he registered a new onset of pain. On 3 September 2015, a first incident of low back pain was recorded as follows:

"ongoing since 2013 panels of stacked toughened glass fell onto him, knocked him to the ground landed on him went to A&E then a long time on crutches seen physio normal x-ray and on examination the claimant was exquisitely tender all round the lumber pelvic region"

5.8.8. The GP's comment then was: "will get MRI may need pain relief now has new job full time as an HR assistant for AAIK care work". That post does not appear on the claimant's CV. The referrals and notes continue. On 23 November 2015 the new GP records: "Scan essentially NAD (nothing abnormal detected) will refer to the Musculoskeletal going to South Africa on Friday, returns on 15 January. Orthopaedic referral". In seeking that referral, the GP gave further detail that: "has had MRI done which has shown some early degenerative facet joint changes but little else wrong".

5.8.9. The Tribunal can deploy its industrial knowledge including that gleaned from determining complaints of disability discrimination involving back pain and other musculoskeletal conditions. We frequently have in front of us MRI findings about degenerative discs, about osteoarthritis, and about other matters which cause musculoskeletal conditions or physical symptoms. This MRI was summarised by the claimant's GP as "NAD".

5.8.10. In May 2015 in answer to a question on the enrolment or application form about any employment history gaps, the claimant had written: 'Yes, injured 6 June 2013' and then an arrow 'went to university'. Injured at work off sick prior to university (page 173)."

5.8.11. That response is consistent (as to previous workplace injury) with the claimant's description to his GP in 2015, that he had had a significant injury in that year (2013), had been on crutches and the like, and he had done something else, studying, in order to take him forward. It is not necessarily consistent with the two jobs he describes in his CV as holding after the 2013 injury.

5.8.12. We have already determined that there was a delay in the claimant commencing his work with the respondent on the 'bank'. He made an allegation that the delay until February 2016 was a matter of race discrimination by one of the respondent's members of staff, Ms Allinson. We accepted her evidence that the delay from June to October was simply the process of pre-employment checks and the like. The claimant accepted that after that, he postponed starting because of a trip away. From the first week of September 2015 the claimant in fact had a full-time post as an HR assistant, which he did not mention as a reason he may not have started work for the respondent.

5.8.13. Furthermore, in February 2016 the claimant was required to undertake significant PMVA training to enable him to start his role on the bank with the respondent. The record of this training was found in comprehensive "PARQ" documents (page 708 and so on). The form said this:

"This PARQ (Physical Activity Risk Questionnaire) is designed to help risk assess each participant/student attending PMVA training, comprising either Personal Safety/ Breakaway or Teamwork courses delivered by providing confidential information on any areas you may feel will limit your ability to complete the training.

The completion of this PARQ is a sensible and necessary first step to take before attending a physical training course, the course will involve a warm-up routine with flexibility exercises to limit the risk of injuries for each practical session, participants

are required to demonstrate that they are able to meet the guidelines on flexibility as published in the PMVA biomechanical assessment form."

5.8.14. There are then a number of standard questions (we include the relevant questions only) and the claimant's replies in our findings:

5.8.15. "Do you take any medication", the claimant says "Yes".

5.8.16. "Do you have any pains in your chest?" Again, the claimant says "Yes".

5.8.17. "Do you have limited flexibility in any limb movement that may affect your ability to participate in this training course?" The claimant says "No".

5.8.18. "Is there a good physical reason mentioned here why you should not attend either PMVA breakaway or teamwork courses? and the claimant answers "No".

5.8.19. The claimant answered "No" to those questions on every day of the relevant course because the form is completed each day on the 2nd, 3rd, 4th & 5th of February 2016.

5.8.20. To give some examples of the types of things that are covered during the course: "Precautionary Hold, Principles of a wristlock incorporating variances of flexibility, Manoeuvring doorways, the anatomy of the arm, punch, kick, charge", and so on. This was a physical course completed in early February 2016.

5.8.21. According to his medical notes, on 26 February 2016 the claimant consulted his GP at Dalton Surgery, the history recorded was this: "Been off work since 31 January with back", which we conclude was "off work" from his job as an HR assistant.

5.8.22. This was in consultation with Dr Markland, the problem was low back pain; a document was issued as a result of that consultation; it was a Med3 which the Tribunal knows to be a 'fit note'. It was a new statement, 'not fit for work'. The duration of that statement was 1 February to 26 February 2016. That was at the same time that the claimant was representing to the respondent that there was no physical reason why he should not take part in PMVA training.

5.8.23. We return to the question before the Tribunal, was the claimant between March and May 2017 a disabled person within the meaning of the Act? Did he have a physical impairment? At that time, his MRI scan was NAD, as interpreted by his GP. The Teesside GP notes had recorded in 2014 that the claimant had had back pain without significant relief from co-codamol and naproxen.

5.8.24. The burden to establish physical impairment is the claimant's. The Tribunal can, in some circumstances, take evidence of medication and reporting of pain and diagnosis by General Practitioners and others at face value, without

the need for the interpretation by an expert in conducting a review of all the available medical evidence, and applying common sense.

5.8.25. In this case we do not consider that it is permissible for us to conclude impairment, for reasons which are obvious. The claimant's self-reporting is not reliable in light of the wholesale inconsistency between his report to his GP (perhaps in order to have a fit note to excuse him from his post as an HR assistant) and his fitness to take part in PMVA training on the forms which he completed.

5.8.26. We also observe that at the material times, that is March to May 2017, the claimant had been working on average over sixty hours per week doing work which required mobility: we have seen him walking, and engaging physically in cctv recordings. The only evidence in his disability impact statement of a physical impairment, and its impact on his ability to carry out day to day activities, is his statement, albeit not challenged by the respondent, that he had difficulty walking a hundred metres.

5.8.27. That statement, in his disability impact statement in 2019, is expressed in the present tense. It may be an accurate description of the position in 2019 (albeit by this hearing the claimant appeared to be without difficulty in walking), but we do not accept that it was an accurate description of the position in March to May 2017.

5.8.28. The claimant attended his meeting with Mrs McDonagh on walking sticks in August 2017, but before that, Dr Martland had recorded an entry in April 2017 of a first incident of "backache" connected with the incident on 27 February, recording that the claimant again told him he had a pre-existing back problem; Dr Martland advised the problem should settle with time, albeit he would obtain a "cxr" to rule out any bony injury.

5.8.29. The next consultation on 19 May by telephone was for arm pain. He was subsequently noted by the occupational health clinician to be fit without restrictions, and then later in June with symptoms likely to resolve.

5.8.30. For the reasons above the claimant has not proven that he had an impairment (back pain), which had a substantial adverse effect on his ability to carry out day to day activities, which had lasted for at least 12 months (at any time between 27 February 2017 and 25 May 2017 when the claimant telephoned to report absence from work). For these reasons the claimant has not proven an impairment with an effect which was likely, at any time from 27 February to 25 May 2017, to last for at least 12 months.

5.8.31. We add that even if we are wrong in our analysis of the medical evidence and the claimant's evidence seeking to establish disability, the respondent could not reasonably have known that the claimant had an impairment with a substantial adverse effect of the required duration or likelihood of duration and the complaints must be dismissed.

5.8.32. The respondent could not reasonably have known that the claimant could not walk a hundred metres or more, and could not reasonably have known

that the claimant was not fit for PMVA duties, because the claimant did not say so, on numerous occasions in the chronology when he had the opportunity to say so. Had the respondent known of an employee with a disabling back condition it would simply not have permitted that person to take part in the training, without further advice, nor to be put on duties requiring physical engagement. We make that finding because we have found the respondent took steps to stand others down from such duties when it was so aware.

5.8.33. For all these reasons claimant's disability discrimination complaints are dismissed.

5.9. Breach of Contract: "ordinary" constructive wrongful dismissal
Section 100 Unfair dismissal

5.9.1. The claimant has a complaint which is that the respondent breached his contract of employment and that he resigned in response to that breach; he claims damages for his notice pay. He relies on breaches of two implied terms: the obligation to maintain trust and confidence; and the obligation to take reasonable steps to maintain his health and safety. He relies on all the matters that we have dismissed, namely, whistleblowing detriment, direct race discrimination, disability discrimination, and the failure to pay full pay to him from June in respect of absence from 25 May 2017. We have dismissed those complaints. He also relies on the respondent's failure to take reasonable steps to avoid the assaults by GC and CL and the threatened assault by JC.

5.9.2. His first closing submission in this case addressed the ERA Section 100(d) claim on a different basis to that previously put: that the reason for his dismissal was "in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work".

5.9.3. At the time that the Section 100 complaint was clarified by the Employment Appeal Tribunal, following an oral hearing and included in the judgment, it was put in following way:

5.9.3.1. The Respondent allowed the circumstances to exist such that assaults could happen, the Claimant could be threatened with assault and was required to do lifting work when he was unfit to do so;

5.9.3.2. The Claimant was constructively dismissed by reason of these issues;

5.9.3.3. *And the Respondent allowed these circumstances to exist because the Claimant had raised health and safety issues (s100 concerns) by his grievance dated 14 March 2017*.

5.9.4. As to the assaults and the failure to provide him with a safe workplace, we make the following further findings.

5.9.4.1. The role of HCSW for this respondent, as with any employer operating these services, involved risk of physical harm, by nature of the patients admitted to the hospital. The respondent's approach to health and safety involved a number of matters (alarms, staff ratios, training, comprehensive reporting of incidents and so on), but at its heart was the assessment of that risk and the management of that risk. It could not, in reasonable circumstances of psychiatric care, prevent all assaults happening, whatever procedures and policies and actions were taken on the ground. That was apparent from the CCTV that we viewed.

5.9.4.2. The first assault in this case on 27 February is an example of that: an unprovoked, seemingly random attack by a patient on the claimant. The patient's last record of violence was towards a peer, some eight months previously and the risk of her engaging in violence, assessed on 21 January 2017, was "moderate". That remained the case in the risk assessment after the incident on 9 March 2017. CL, the patient involved in incident 2 on 4 March was assessed on 10 January 2017 as having a "high" risk of violence, and that remained the case when re-assessed on 17 April 2017. We cannot know if the CQC criticism of updating risk assessments related to these two patients, but it follows from their risk profile remaining as it was, that no additional measures would have been in place, even if they had been updated more quickly.

5.9.4.3. We have made findings above about the second incident. The first incident arose as follows. At around 2.35 pm, the patient ran towards the claimant, again near the nurses' office, saying the claimant must apologise (seemingly for closing the kitchen hatch earlier), grabbed him by the neck, pushed him, and pinned him to the wall. The ward doctor or another colleague on scene sounded the alarm very quickly (all staff have infrared alarms) and Mr Shale, the clinical manager responded, and with three members of staff present on scene a de-escalation (hold) technique was used (PMVA) to escort the patient away. That was a very shocking and frightening incident for the claimant. Mr Shale later recorded that verbal de-escalation only had been used with the patient because that was his belief and recollection of his own actions at the time, which all happened in split seconds. That was his honest recollection, we find.

5.9.4.4. Mr Shale completed at least two manuscript incident forms the same day; one for the claimant and the other for the patient. They were subsequently and promptly then converted to an electronic record. Both forms recorded outcomes; and that an incident of actual violence had occurred, and in the patient's form that it was to be reported and copied to the police. The ward doctor assessed the patient's capacity for police interview (the patient had capacity).

5.9.4.5. When the claimant complained on March 14 that he had checked the forms and was upset by the failure to record PMVA, Mr Shale was asked to revise and complete the relevant PMVA forms and he did so. That was an outcome of Mr Donaldson's investigation. On 27 February Mr Shale assessed the severity of the incident for the claimant (on a scale of 1 to 5, 1 being no harm, or negligible, and 5 being death, as "1").

5.9.4.6. The claimant was cared for by Miss Sidhu after the incident, including the debrief with a psychologist present. Mr Shale directed the claimant be sent home after the debrief because he believed the claimant was in shock and there was to be care, and a call from Miss Sidhu the following day. There were no obvious physical injuries reported by the claimant at the time.

5.9.4.7. This hearing concerned the three adverse patient incidents relied upon by the claimant. The respondent had risk assessed the patients (GC, CL and JC) and the risk assessments for GC and CL were admitted into evidence. They had all previously assaulted staff or patients or both; that was the case for many patients being cared for by the respondent. GC was moderate risk and CL high risk.

5.9.4.8. The purpose of the CQC's short notice announced inspection in May 2017 was to see whether its recommendations from 2016 had been implemented. Before August 2016 there had been three patient deaths; since that point to May or July 2017 there had been none.

5.9.4.9. The CQC findings in 2017 included that staff had not always updated risk assessments after a significant incident of harm, and that staff did not adhere to policies when using restrictive practices, having inspected 23 care records. Mrs McVinnie took action (see above) in response to those findings. As to staffing, the findings included that between 1 January 2017 and 31 March 2017 management reported that no shifts were unfilled, despite vacancies for permanent staff, but the CQC considered the staffing model did not measure acuity (need and complexity of patient) against staff on all shifts.

5.9.4.10. This is not a case where the claimant has established that in relation to the assaults or threats to him, they occurred because of a lack of care by the respondent, a failure to have previously updated risk assessments of the three patients involved, or a lack of staff. Nor has he established any other steps which could have prevented these incidents. Each incident, as far as the claimant was concerned, involved a different patient. It was apparent from the CCTV we observed that a good number of staff responded to the alarms or were present on the ward at the time.

5.9.4.11. As to JC, there was a repetition of threats to the claimant from JC (12 February and 23 March), which were reported by the claimant in the patient notes at the end of each shift. After the second threat, at the end of March, the claimant was allocated places on a number of courses including PMVA refresher training over three days.

5.9.5. Against these findings we conclude that the simple fact of the assaults and threats taking place in this environment, that is conduct by patients, cannot breach the implied term of trust and confidence. It was not conduct **by the respondent,** without reasonable and proper cause, calculated or likely to destroy or seriously damage trust and confidence. That is especially so when the respondent goes to the lengths it does to train its staff in the inherent risks involved, and the ways of engaging with service users and patients to seek to keep them and the staff safe. Viewing the CCTV anyone would have sympathy with the claimant, and the

Tribunal shares that, but the fact of the assaults and threats do not amount to any kind of a breach of implied term by the respondent.

5.9.6. As to the implied duty to take reasonable care for the health and safety of the claimant, maintaining a safe environment in any workplace involves the conduct of both employers and employees, that is a very common policy statement. The respondent's policy statement, signed by its Chairman and in our bundle, is very much of that kind.

5.9.7. It is all the more important in high risk environments, which this is, for employees to be absolutely straight with their employer in their efforts to reduce risk. In certifying himself as fit to engage in this role (and in particular engage in PMVA training in February 2016) while at the same time having his GP certify that he was not fit for work because of a back injury, was a breach by the claimant of his own duty to look after his own health. A lack of frankness is inherently unhelpful to the respondent in its task of managing risk.

5.9.8. The reasonable measures that the respondent did undertake are now well known now to this Tribunal: PMVA training, alarms, risk assessments, note taking, and appropriate staffing levels. No system is, however, perfect and the CQC made observations and criticisms, but they do not in their generality, assist the claimant given our detailed findings. Furthermore, prevention of harm requires everyone to respond in moments of crisis: and we have seen that clearly there was a very fast and supportive response to the incidents which befell the claimant.

5.9.9. The claimant chose Shelley, the ward on which JC was located, and that was after his first experience of threat from him; it was also, objectively, the lowest risk ward (on the basis of the CQC findings). He could at any time have sought to be allocated to work on Bronte or Denholm, where he had undertaken overtime frequently, following the second JC threat. There is no basis to find he would not have been granted a ward swap in these circumstances, had it been requested. Similarly, we have not found that the claimant said to any nurse in charge or the ward manager that he could not undertake shifts at the BRI because of back pain; had he done so, given that there was already a referral to occupational health, in all likelihood he would have been stood down from those duties.

5.9.10. Given that we have dismissed the complaints that underpin the ordinary wrongful dismissal complaint, allegations of race discrimination, disability discrimination, not paying sick pay, and whistleblowing detriment, as analysed pursuant to the relevant law, we also confirm that the facts we have found concerning those allegations did not, for all the reasons we have concluded, amount to conduct without reasonable and proper cause calculated or likely to destroy or seriously damage trust and confidence.

5.9.11. Finally, we have to address the claimant's section 100 case as set out by the EAT, or potentially as differently put by him in his closing argument for the sake of completeness.

5.9.12. The respondent took measures after the claimant complained about his two colleagues, to offer a move of ward and the claimant chose Shelley. We

have observed with some surprise in this hearing that the respondent did not communicate the March referral to Occupational Health to Mr Hancock, the claimant's new ward manager on Shelley (neither Ms Sidhu nor Mrs McDonagh did so). This omission, it seems to us, could be alleged to be without reasonable and proper cause, which could have been likely to damage trust and confidence (albeit not an allegation made by the claimant in terms but as part of a general duty of care). However, we also take into account that staff have a duty to be frank and clear with their managers and that they are entitled to confidentiality concerning such referrals, and for those reasons it is not conduct meeting the required threshold. If the claimant had been clear and frank and honest with Mr Hancock, or with Ms Phiri, or Ms Charinga, the nurses in charge on Shelley Ward, to the effect he was suffering back pain in silence (if that was the case), then like the colleague with sciatica, he would not have been deployed to the SW duties at the BRI.

5.9.13. The Respondent took reasonable steps to prevent the assaults on the claimant and to prevent him being required to undertake duties if unfit; it did not breach the implied terms of his contract of employment and his resignation was not, therefore, partly in response to breaches of his contract. There was no dismissal. The respondent did not undertake any adverse action towards him before his resignation at all; much less **because** he had raised health and safety concerns (that is concern about alleged injuries sustained in the incidents on 27 February and 4 March 2017).

5.9.14. Having failed to establish a dismissal, it is not necessary to address the claimant's case that he was dismissed because he absented himself in circumstances of danger. We remind ourselves that at no stage did the respondent seek to dismiss the claimant; to the contrary it retained him on payroll and sought to provide assistance to him after he had ended that employment. All complaints, save for that in relation to holiday pay are therefore dismissed.

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Employment Judge JM Wade
Date: 23 January 2020

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE

EMPLOYMENT TRIBUNALS

Claimant: Mr V Mbuisa

Respondent: Cygnet Healthcare Limited

ORDER

1. On analysis by the Employment Judge, the claim as contained in the claim form (including the Scott schedule annexed to it) and as clarified by the Claimant at the Preliminary Hearings on 26 October and 4 December 2017 and the Claimant's document of 29 January 2018 and reflecting the Judgment striking out the claim under Section 100 of the Employment Rights Act 1996, is as set out in the Annexe to this Order.

2. By 15 March 2018, the Respondent shall file an amended response to the claim, by reference to the Annexe, together with its estimate as to the number of days the claim will take to be heard. If the Respondent does not accept that a particular allegation in the Annexe is in fact part of the claim, it shall make that clear in its response.

3. By 15 March 2018, both parties shall confirm to the Tribunal any dates on which they or their witnesses would be unavailable to attend a Hearing in the period from June to September 2018.

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Employment Judge Cox
Date: 14 February 2018

ORDER SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE

ANNEXE

1. Mr Mbuisa brings claims of breach of contract by failure to give notice of dismissal; failure to pay accrued holiday pay due on termination of employment; unauthorised deduction from wages; detriment and unfair dismissal on the ground of /by reason of public interest disclosures under Sections 47B and 103A of the Employment Rights Act 1996 (the ERA); race discrimination; and disability discrimination. He has withdrawn claims of sex discrimination, sexual orientation discrimination and a claim under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, and these have all been dismissed. A claim under Section 100 ERA has been struck out.

2. The parties agree that Mr Mbuisa worked for the Respondent from 1 February 2016 to 30 August 2017, on which date he resigned. He initially worked as a member of bank staff, but was then given a permanent contract. He says his permanent contract began on 17 December 2016; the Respondent currently maintains that it began on 7 February 2017.

Breach of contract

3. Mr Mbuisa alleges that he was constructively dismissed. He says he resigned in response to the Respondent's breach of the implied terms requiring it to maintain mutual trust and confidence and take reasonable to protect his health and safety at work. The acts that he alleges breached these terms are detailed in paragraphs 6, 8, 10 and 12 below and the Respondent's failure to take reasonable steps to avoid the following:
    (i) an assault on him in February 2017 by patient GC;
    (ii) an assault on him on 4 March 2017 by patient CL; and
    (iii) a threat to assault him in March 2017 by patient JC.

4. Mr Mbuisa claims damages for breach of his contractual right to notice of termination of his contract of employment. He says he was entitled to four weeks' notice. The Respondent says that he was entitled to one week's notice only: he would have been entitled to four weeks' notice only if he had completed his six-month probationary period, which began when he was given a permanent contract but was suspended for any period when he was absent from work. Mr Mbuisa accepts that he was absent from work on sick leave from 22 May to 30 August 2017.

Holiday pay

5. Mr Mbuisa claims that he has not received the correct amount of accrued holiday pay due on termination of employment. He accepts that the Respondent was entitled to recoup overpaid statutory sick pay from the holiday pay it paid him on termination, but he says that the calculation of the accrued sum was incorrect. He says that in around September/October 2016 the Respondent informed him that the holiday year would run from 1 January rather than 1 April. The Respondent's calculation appears to be based on a holiday year beginning on 1 April.

Unauthorised deduction from wages

6. Mr Mbuisa was paid statutory sick pay only during his sickness absence. He says that his sick pay payments on 25 June, 25 July and 25 August 2017 should have been at the same rate as his normal wage because he had informed the Respondent that his absence was due to a work-related injury. He has not yet been able to identify the basis on which he says he had a contractual right to full pay in these circumstances.

Detriment on the ground of public interest disclosures

7. Mr Mbuisa alleges that he made the following protected disclosures, which are alleged to fall within Section 43(1)(b) or (d) and either Section 43C(1)(a) or, in relation to disclosure (v), Section 43F(1)(a) ERA :

    (i) In December 2016 he recorded in the continuous record of patient AM that he had been required to take AM into town even though AM was subject to a control order and no official permission had been given for him to leave the hospital.

    (ii) In March 2017 he presented a grievance in which he alleged that an entry by Jason Shole in the continuous record of patient GC that no PMVA (prevention of management of violence and aggression) had been used in the management of GC was deliberately inaccurate; and that he had been required to take AM into town without official permission even though AM was subject to a control order.

    (iii) On 19 and 20 May 2017 he made two entries in the continuous record of patient SW that he had been forced to work at the Bradford Royal Infirmary providing personal care to patient SW and lifting him when his duties did not include providing personal care and he had informed the Respondent that he had a back injury.

    (iv) In July 2017 he wrote to Laura McDonagh, the Respondent's clinical manager, complaining about the fact that he had been required to carry out the duties in (iii).

    (v) In August 2017 he made a written complaint to the Care Quality Commission about the incidents raised in his grievance and about the alleged destruction of the record he made in (i) above.

8. Mr Mbuisa says that he was subjected to the following detriments on the ground that he had made these disclosures:

    (i) Because of disclosure (ii), in April 2017, the Respondent asked the police not to prosecute GC for an assault on Mr Mbuisa that Mr Mbuisa had reported to the police in March 2017.
    (ii) Because of disclosure (ii), in May 2017 Mrs McVinnie, the hospital manager, wrote to Mr Mbuisa saying that there was no

record of Mr Mbuisa's entry in AM's continuous record, implying Mr Mbuisa was lying.

(iii) Because of disclosure (ii), in April/May 2017 Eve Phiri assigned Mr Mbuisa to work at the Bradford Royal Infirmary.

(iv) Because of disclosure (ii), in May 2017 Jess Chiringa shouted at Mr Mbuisa and humiliated him in front of other staff, complaining about his refusal to carry out personal care for patient SW.

(v) Because of disclosures (i) to (iv), on a date unknown, the Respondent destroyed the entries Mr Mbuisa had made in the continuous records of AM and SW mentioned in (i) and (iii) above.

(vi) Because of disclosures (ii) and (v), from 25 June 2017 the Respondent decided not to pay Mr Mbuisa sick pay at his normal pay rate even though he was contractually entitled to this.

(vii) Because of disclosure (iv), in August 2017 Laura McDonagh wrote to Mr Mbuisa stating that there was no record of his entry in the continuous record of patient SH, implying that Mr Mbuisa was lying.

Unfair dismissal by reason of public interest disclosure

9. Mr Mbuisa alleges that he resigned in part because of the detriments set out in paragraph 8, which were committed on the ground of his protected disclosures, and that the principal reason for his dismissal was therefore that he had made a protected disclosure.

Race discrimination

10. Mr Mbuisa is a Black South African. He alleges that he has been treated less favourably in the ways set out below because of his race. He says that he believes he was treated in this way because he was black and because, as a result of his South African nationality and his limited right to work in the UK, the Respondent knew that he was vulnerable.

10.1 On 20 March 2016 he was moved to Shelley ward to protect AJ and SS, who are white and whom he had accused of bullying him.

10.2 In December 2016 he was forced to take patient AM into town even though AM was subject to a control order and no permission had been given.

10.3 On 4 March 2017 when Mr Mbuisa was assaulted by patient CL, James Bertrand refused to assist him.

10.4 On 14 March 2017 Amy Jo allocated him to take a patient to Bradford Royal Infirmary (BRI) even though he was already responsible for security duties on that day.

10.5 On 14 March 2017 Shaerma S ordered him to respond to a response alarm even though he was unable to do so because of being in charge of security. When he refused to respond, Shaerma S verbally abused him and Amy Jo shouted at him and tried to prevent him leaving the office.

10.6 In May 2017 Muss Mustaffa and Sham Ali falsely informed Jestina Chiringa that Mr Mbuisa had refused to assist patient SW with personal care while at the BRI. Ms Chiringa then repeated this at a team handover meeting, shouting at him.

10.7 Mr Mbuisa was given menial and trivial tasks, including being allocated to BRI duties more than other staff, even though he was injured; being allocated to take 2 patients to football each week; and being asked to remain on shift until an agency night cover could be found.

10.8 Sarah Allinson, administrator, delayed his employment start date, failed to process his named driver application on two occasions in August and December 2016 and deliberately blocked his promotion by not allowing him to enrol for Level 3 in Business Administration.

10.9 From February 2017 onwards, Laura McDonagh and Jennie McVinnie asked the Police to refer the assault on him by patient GC to its restorative justice process rather than investigate it with a view to a prosecution, whereas an assault on Amran, an Asian British employee, by patient JC was the subject of a prosecution.

10.10 When he raised his grievance relating to the inaccuracies in the records of patient GC, Paul M, who investigated the grievance, accused Mr Mbuisa of dishonesty for not declaring his disability at interview and on his application form, aiming to find reasons to dismiss him rather than investigate his grievance.

10.11 From March to May 2017 Mr Mbuisa was forced to work with a bad back when other employees did not come in to work because of flu and other illnesses. Further, he was not allocated light duties when injured while PH was allocated administration duties.

10.12 On 21 July 2017 Laura McDonagh refused to pay the Claimant sick pay at the rate of his normal wages because she said there was no evidence he had been injured at work.

Disability discrimination

11. Mr Mbuisa alleges that he is a disabled person (within the meaning of that term in the Equality Act 2010) as a result of an injury to his lumbar spine sustained in April 2013. He says that he takes a variety of medications to provide him with pain relief and that he informed the Respondent about this medication when he was recruited. He says that

the Respondent knew, or could reasonably have been expected to know, about his disability from: his application form, his recruitment interview, occupational health in 2015, 2016 and 2017; a health questionnaire; the incident when the Claimant was assaulted in February 2017 and the debriefing after that; the Claimant's requests for time off to attend hospital, GP and physiotherapy appointments; and the Claimant's medical records.

12. Mr Mbuisa's allegations of disability discrimination are as follows:

12.1 The Respondent applied a rule that all staff should work at the BRI at least 2 shifts a week, even though this put him at a substantial disadvantage because of his back injury. This is an allegation of failure to make reasonable adjustments for Mr Mbuisa's disability.

12.2 Paul M, the grievance investigator, accused him of dishonesty in relation to what he disclosed about his disability on recruitment. This is an allegation of direct discrimination or discrimination because of something arising in consequence of disability.

12.3 The Respondent failed to take reasonable steps to protect him from assaults by patients, in relation to which he was particular vulnerable because of his back injury. This is an allegation of failure to make reasonable adjustments.

12.4 Mr Mbuisa was required to perform work at BRI involving manual handling of patients. This is an allegation of failure to make reasonable adjustments.

12.5 In July 2017 Laura McDonagh refused to pay Mr Mbuisa sick pay at the full rate, saying she found no evidence his absence was because of an injury at work, even though such evidence was available. This is an allegation of direct discrimination or discrimination because of something arising in consequence of disability.