EMPLOYMENT TRIBUNALS

Claimants: Mr O Ezekwem, Mr T Adegbayi, Ms D Last

Respondent: Fine Futures Ltd

Heard at: Birmingham

On: 2, 3, 4, 5, 6, 8, 19, 11, 13 November 2020

Before: Employment Judge Meichen, Ms I Fox, Mr D Faulconbridge

Appearances:
For Mr Adegbayi and Mr Ezekwem: Mr S Susak, counsel (Mr Adegbayi acted in person on day 1)
For Ms Last: in person
For the respondent: Miss C Elvin, litigation consultant

JUDGMENT ON LIABILITY

The unanimous judgment of the tribunal in respect of each claimant is as follows:

Mr Adegbayi

1) All of the claimant's claims fail and are dismissed.

Mr Ezekwem

2) The claimant's claim of ordinary unfair dismissal is dismissed following a withdrawal of that claim by the claimant.

3) All of the claimant's other claims fail and are dismissed.

Ms Last

4) The claimant's claim of sexual harassment succeeds to the following extent: Gary Stoddart's comments to the claimant on 16 March 2018 constituted sexual harassment.

5) The claimant's claim of harassment related to sex succeeds to the following extent: the failure to adequately investigate Ms Last's complaint about the

sexual harassment perpetrated by Mr Stoddart or provide her with an opportunity to appeal the findings constituted harassment related to sex.

6) The claimant's claim of victimisation succeeds to the following extent: the denial of training opportunities to the claimant on 24 and 25 May 2018 constituted victimisation.

7) The respondent is liable for the above acts.

8) The claimant's claim that she was subject to a detriment on the ground of making a protected disclosure by the denial of training opportunities to the claimant on 24 and 25 May 2018 is out of time, it was reasonably practicable for the claim to be brought in time and therefore the Tribunal does not have jurisdiction to consider the claim.

9) All of the claimant's other claims fail and are dismissed.

10) A case management order will be sent separately setting out required steps for preparing the remedy hearing in Ms Last's case, should such a hearing be required.

REASONS

Introduction

1. This hearing started on 2 November 2020 which was the first working day after the announcement of a further period of lockdown in response to the Coronavirus pandemic. The parties and representatives attended the tribunal in person on the first day however we discussed a number of practical difficulties with the hearing proceeding in person. These included the fact that some attendees were commuting from the Slough/Reading area and may have to use public transport and that other attendees were travelling from further afield and were intending to stay in hotels in Birmingham but it was unclear if their hotels would remain open. There were also understandable concerns about maintaining appropriate social distancing given the number of claimants, witnesses and other attendees. Although the tribunal administration had already taken appropriate measures to ensure safe distancing we were effectively at the very maximum number of people which the tribunal room could safely accommodate, and the arrival of more attendees or witnesses in person could have presented challenges.

2. In those circumstances we had a discussion about converting the hearing to CVP. Everyone was in agreement that this would be the best way forward and so that's what we did. It might be worth mentioning that on paper this case may not have looked the best candidate for a CVP hearing but in the event it worked quite smoothly. No concerns were raised during the hearing.

3. The claimants all gave evidence and were cross examined.

4. The respondent called 7 witnesses: Sara Turrell, Steve Blount, Alex Domingue, Melanie Camm, Sarah Jayne Court, Jon Welsby and Giselle Parkin. All of the respondent's witnesses gave evidence and were cross examined.

5. We heard submissions on the penultimate day of the hearing and by the time that was complete it was lunchtime. We therefore reserved our decision. We decided to determine the liability issues at this stage and determine any remedy issues at a later stage if we need to. This was because it turned out not to be realistic for us to attempt to determine liability and remedy in this amount of hearing time.

Preliminary issue

6. In the week before the hearing was due to start Mr Adegbayi and Ms Last each made an application to postpone. It was decided this would be dealt with at the start of the hearing.

7. For reasons which were not their fault the Tribunal members were delayed in arriving at the Tribunal and the Employment Judge felt the time could be used efficiently to determine the postponement applications as these were case management issues which did not require a full panel.

8. The Employment Judge proposed to the parties that he deal with the postponement applications alone and all parties readily agreed.

9. Earlier in the proceedings all three claimants had been represented by the same solicitors and the same counsel (Mr Susak who also appeared at this hearing). However Mr Adegbayi and Ms Last each explained that they had run into financial difficulties and could no longer afford representation. They did not feel confident representing themselves and sought a postponement to enable them to build up enough funds to re- instruct their legal team so that they could be represented at a future hearing.

10. Upon learning that this was the reason for the postponement applications the Employment Judge took some time to explain to the claimants that the Tribunal is well used to dealing with litigants in person and that consistent with the overriding objective the Tribunal in this case would ensure that the parties were all on an equal footing. The Employment Judge also frankly explained that if the case were to be postponed there would be a lengthy delay before a case of this length could be relisted.

11. Following the discussion Ms Last and Mr Adegbayi decided not to pursue their applications to postpone.

12. In the event Mr Adegbayi decided to re- instruct Mr Susak to represent him during the tribunal's reading time so by the time the hearing restarted on day 2 he was represented. Ms Last remained unrepresented but she did not raise any concerns about that during the course of the hearing and the panel's view was that she participated effectively in the proceedings.

Introduction to the issues

13. The parties had worked on agreeing a list of issues which was then amended during the hearing; mainly due to various arguments being abandoned by the claimants.

14. In respect of Ms Last's claim the respondent made significant concessions about her claim during the course of the hearing. These are recorded below.

15. By the end of the hearing there was a final list of issues which all parties agreed was a complete and comprehensive list of the issues which we were asked to determine. This was subject to two points in respect of Mr Adegbayi's claim where Miss Elvin complained, rightly in our view, that there had been last minute modifications to the way in which he put his case. We explain that in more detail below. Despite our concern over whether it was fair to allow the last minute changes to the issues in Mr Adegbayi's case in the end we felt that we could fairly reach conclusions on the issues as Mr Adegbayi sought to identify them.

16. The liability issues we had to determine in respect of each claimant were as follows.

The issues in respect of Mr Adegbayi

17. By a claim form dated 1st November 2018, Mr Adegbayi brought claims of direct race discrimination, detriment for making protected disclosures, harassment related to race, and victimisation. The respondent resisted all claims as per the Particulars of Response and continued to do so.

Detriment for making protected disclosures

18. Did the claimant make the following protected disclosures:

a. The Claimant's reports that Gary Stoddart administered incorrect medication to service users.

19. Did the respondent subject the claimant to any detriments, as set out below? Included within this issue are the questions of what happened as a matter of fact and whether what happened was a detriment to the claimant as a matter of law.

a. Failing to take the Claimant's reports against Gary Stoddart seriously and/or failing to investigate them.
b. Launching a malicious investigation against the Claimant.
c. Suspending the Claimant [for an unreasonable length of time][1].
d. [Reducing work allocated to the Claimant after 13 June 2018 and failing to allocate the Claimant work after July 2018][2].

[1] This was the first modification to the claimant's case which was made towards the end of the hearing. Up until that point the claimant's case was that he had been suspended "indefinitely".

[2] This was the second modification to the claimant's case which was made towards the end of the hearing. Up until that point the claimant's case had been that the respondent failed to allocate him any work at all after June 2018.

20. If so was this done on the ground that he made one or more protected disclosures?

Victimisation

21. Did the claimant do the following protected acts:

a. The Claimant's indication that he would act as a witness in Dina Last's sexual harassment claim against Gary Stoddart.
b. The Claimant's submission of the grievance dated 7th August 2018.

22. Did the respondent subject the claimant to the following detriments:

a. Launching a malicious investigation against the Claimant.
b. Suspending the Claimant [for an unreasonable length of time].
c. [Reducing work allocated to the Claimant after 13 June 2018 and failing to allocate the Claimant work after July 2018].

23. If so, was this because the claimant did a protected act and/or because the respondent believed the claimant had done, or might do, a protected act?

Direct race discrimination

24. Has the respondent subjected the claimant to the following treatment:

a. Failing to take the Claimant's reports against Gary Stoddart seriously and/or failing to investigate them.
b. Launching a malicious investigation against the Claimant.
c. Suspending the Claimant [for an unreasonable length of time].
d. [Reducing work allocated to the Claimant after 13 June 2018 and failing to allocate the Claimant work after July 2018].

25. Was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on hypothetical comparators.

26. If so, was this because of the claimant's race and/or because of the protected characteristic of race more generally?

Harassment related to race

23. Did the respondent engage in conduct as follows:

a. Failing to take the Claimant's reports against Gary Stoddart seriously and/or failing to investigate them.
b. Launching a malicious investigation against the Claimant.
c. Suspending the Claimant [for an unreasonable length of time].

d. [Reducing work allocated to the Claimant after 13 June 2018 and failing to allocate the Claimant work after July 2018].

24. If so was that conduct unwanted?

25. If so, did it relate to the protected characteristic of race?

26. Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

The issues in respect of Ms Last

27. By a claim form dated 28 October 2018, Ms Last brought claims of direct race and/or sex discrimination, detriment for making protected disclosures, harassment related to race and/or sex, and victimisation. The respondent resisted all claims as per the Particulars of Response but during the hearing Ms Elvin made some significant concessions on behalf of the respondent.

The respondent's concessions, and the application of s.212 Equality Act in Ms Last's case

28. The concessions made by the respondent during the hearing were as follows:

    28.1 That Gary Stoddart's comments to the claimant on 16 March 2018 constituted sexual harassment contrary to s.26 Equality Act 2010.

    28.2 That the failure to adequately investigate Ms Last's complaint about the above sexual harassment or provide her with an opportunity to appeal the findings constituted harassment related to sex contrary to s.26 Equality Act 2010.

29. There was no dispute that the respondent was liable for the above acts of harassment.

30. The respondent also indicated that it would concede Mr Stoddart's comments on 16 March were also direct sex discrimination contrary to s.13 Equality Act 2010. However we must apply the provisions of s. 212 Equality Act. Section 212(1) defines "detriment" so as specifically to exclude "conduct which amounts to harassment". This is subject to s. 212(5) but that has no relevance here as the Act does not disapply harassment in relation to the relevant protected characteristic (sex) in the work context. The effect is that the harassment and direct discrimination claims in respect of the same conduct are mutually exclusive: they cannot both succeed. The same can be said of the harassment and victimisation claims.

31. In our view Mr Stoddart's conduct on 16 March 2018, which we describe below, was a clear example of sexual harassment. We shall therefore conclude that the comments were sexual harassment only.

32. That technicality aside we were entirely satisfied that the respondent's concessions had been rightly made.

33. We should also record that the claimant did not withdraw her allegations that the failure to investigate adequately or provide her with a right of appeal were also direct discrimination[3]. In light of the respondent's concession and our view that it had been rightly made we shall conclude that those matters were harassment related to sex only.

34. There also remained a complaint that the matters which the respondent conceded were sexual or sex related harassment were also harassment related to race. We did not make any findings from which we could infer that the conduct was related to race and it appeared unnecessary to consider that complaint further in light of the concessions which we found were rightly made.

35. We have updated the list of issues in respect of Ms Last to take account of the above.

Detriment for making protected disclosures

36. Did the Claimant make one or more protected disclosures as follows:

    a. Complaint to Sara Turrell on 21 March 2018 that she was sexually harassed by Gary Stoddart on 16 March 2018 in the course of her employment;

    b. Complaint to Giselle Parkin that Ms Court had deleted entries in relation to RR being denied food by her;

    c. Grievance on 20 August 2018.

37. Did the respondent subject the claimant to any detriments, as set out below? Included within this issue are the questions of what happened as a matter of fact and whether what happened was a detriment to the claimant as a matter of law.

    a. Inviting Mr Stoddart to attend an investigatory meeting with the claimant despite the fact that he was the manager accused of the harassment being investigated;

    b. An alleged breach of confidentiality by notifying Sarah-Jayne Court about the harassment;

    c. The denial of training opportunities to the claimant by Sarah-Jayne Court on 24 and 25 May 2018;

    d. An allegation that the Mobizio entry was lost due to the claimant's error;

[3] This isn't a criticism as the effect of s. 212 was not discussed at the hearing.

e. Failing to investigate the claimant's reports against Mr Stoddart adequately;

f. Failing to provide the claimant with an opportunity to appeal the findings;

g. Failure to hear the claimant's grievance;

h. The "unreasonable and intimidating" email invite sent by Sara Turrell to the claimant on 16 October 2018;

i. Subjecting the claimant to disciplinary proceedings in October 2018;

j. Exposing the claimant to a generally hostile and intimidating work environment causing stress, depression and insomnia;

k. Failing to allocate the claimant any work since 14 October 2018.

38. If so was this done on the ground that she made one or more protected disclosures?

Victimisation

39. Did the claimant do a protected act, as follows:

a. The claimant's complaint to Sara Turrell on 21 March 2018 that she was sexually harassed by Gary Stoddart on 16 March 2018 in the course of her employment;

b. The claimant's grievance on 20 August 2018;

c. Starting an ET claim.

40. Did R subject C to any detriments as follows:

a. Inviting Mr Stoddart to attend an investigatory meeting with C despite the fact that he was the manager accused of the harassment being investigated;

b. An alleged breach of confidentiality by notifying Sarah-Jayne Court about the harassment;

c. The denial of training opportunities to the claimant by Sarah-Jayne Court on 24 and 25 May 2018;

d. An allegation that the Mobizio entry was lost due to the claimant's error;

e. Failing to investigate the claimant's reports against Mr Stoddart adequately;

f. Failing to provide the claimant with an opportunity to appeal the findings;

g. Failure to hear the claimant's grievance.

h. The "unreasonable and intimidating" email invite sent by Sara Turrell to the claimant on 16 October 2018;

i. Subjecting the claimant to disciplinary proceedings in October 2018;

j. Exposing the claimant to a generally hostile and intimidating work environment causing stress, depression and insomnia;

k. Failing to allocated the claimant any work since 14 October 2018.

41. If so, was this because the claimant had done a protected act and/or because the respondent believed the claimant had done, or might do a protected act?

Direct discrimination

42. Has the Respondent subjected C to the following treatment?

a. Inviting Mr Stoddart to attend an investigatory meeting with the claimant despite the fact that he was the manager accused of the harassment being investigated;

b. An alleged breach of confidentiality by notifying Sarah-Jayne Court about the harassment;

c. The denial of training opportunities to the claimant by Sarah-Jayne Court on 24 and 25 May 2018;

d. An allegation that the Mobizio entry was lost due to the claimant's error;

e. Failure to hear the claimant's grievance.

f. The "unreasonable and intimidating" email invite sent by Sara Turrell to the claimant on 16 October 2018;

g. Subjecting the claimant to disciplinary proceedings in October 2018;

h. Exposing the claimant to a generally hostile and intimidating work environment causing stress, depression and insomnia;

i. Failing to allocate the claimant any work since 14 October 2018.

43. Was the treatment less favourable treatment, i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on hypothetical comparators.

44. If so, was this because of the claimant's race or sex and/or because of the protected characteristic of race or sex more generally?

Harassment related to race

45. Did the respondent engage in the following conduct:

    a. Inviting Mr Stoddart to attend an investigatory meeting with the claimant despite the fact that he was the manager accused of the harassment being investigated;

    b. An alleged breach of confidentiality by notifying Sarah-Jayne Court about the harassment;

    c. The denial of training opportunities to the claimant by Sarah-Jayne Court on 24 and 25 May 2018;

    d. An allegation that the Mobizio entry was lost due to the claimant's error;

    e. Failure to hear the claimant's grievance.

    f. The "unreasonable and intimidating" email invite sent by Sara Turrell to the claimant on 16 October 2018;

    g. Subjecting the claimant to disciplinary proceedings in October 2018;

    h. Exposing the claimant to a generally hostile and intimidating work environment causing stress, depression and insomnia;

    i. Failing to allocated the claimant any work since 14 October 2018.

46. If so, was that conduct unwanted?

47. If so, did it relate to the protected characteristic of race?

48. Did the conduct have the purpose or (taking into account C's perception, other circumstances of the case, and whether it is reasonable for the conduct to have that effect), the effect of violating C's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for C?

Harassment related to sex

49. Did the respondent engage in the following conduct:

a. Inviting Mr Stoddart to attend an investigatory meeting with the claimant despite the fact that he was the manager accused of the harassment being investigated;

b. An alleged breach of confidentiality by notifying Sarah-Jayne Court about the harassment;

c. The denial of training opportunities to the claimant by Sarah-Jayne Court on 24 and 25 May 2018;

d. An allegation that the Mobizio entry was lost due to the claimant's error;

e. Failure to hear the claimant's grievance.

f. The "unreasonable and intimidating" email invite sent by Sara Turrell to the claimant on 16 October 2018;

g. Subjecting the claimant to disciplinary proceedings in October 2018;

h. Exposing the claimant to a generally hostile and intimidating work environment causing stress, depression and insomnia;

i. Failing to allocated the claimant any work since 14 October 2018.

50. If so, was that conduct unwanted?

51. If so, did it relate to the protected characteristic of sex?

52. Did the conduct have the purpose or (taking into account C's perception, other circumstances of the case, and whether it is reasonable for the conduct to have that effect), the effect of violating C's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for C?

The issues in respect of Mr Ezekwem

53. By a claim form dated 2 November 2018, Mr Ezekwem brought claims of direct race discrimination, detriment for making protected disclosures, harassment related to race, and victimisation. The respondent resisted all claims as per the Particulars of Response and continued to do so.

54. Mr Ezekwem had also brought a claim of ordinary unfair dismissal but he withdrew that through Mr Susak during the hearing who indicated that the claimant had no objection to it being dismissed on withdrawal. We shall therefore dismiss that claim.

Detriment for making protected disclosures

55. Did the Claimant make one or more protected disclosures as follows:

a. Informing Alex and writing a statement about Patricia assaulting RR. The claimant relied on s.43B(1)(a) ERA with the criminal offence being common assault under s.39 Criminal Justice Act 1988, and/or s.43B(1)(b) ERA regarding Patricia's legal obligation under her employment contract not to harm service users, and/or s.43B(1)(d) ERA that RR's health and safety was endangered;

b. The email to Ms Parkin in relation to the above which was in the public interest for the same reasons under the same sections;

c. Notifying Ms Parkin that Sarah-Jayne had deleted Mobizio entries in relation to RR being denied food by her. The claimant relied on s.43B(1)(b) ERA regarding Sarah-Jayne's legal obligation under her employment contract and RR's Patient Care Plan not to deny her food and./or s.43B(1)(d) ERA that RR's health and safety was endangered, and/or s.43B(1)(f) that the information set out above was likely to be deliberately concealed through the deletion; and

d. The Claimant's grievance of 25 August 2018 which repeated the above for the same reasons under the same sections.

56. Did the respondent subject the claimant to any detriments, as set out below? Included within this issue are the questions of what happened as a matter of fact and whether what happened was a detriment to the claimant as a matter of law.

a. An implication that the Claimant was lying about Patricia assaulting RR;

b. An allegation that the Mobizio entry was lost due to the Claimant's error and a caution to log out in the future;

c. Creating and perpetuating an impression that the Claimant's reports were not being taken seriously;

d. Creating and perpetuating a fear that the Claimant would be suspended;

e. Failing to hear the Claimant's grievance;

f. Failing to pay the Claimant's wages from the date of the grievance onwards;

g. The Claimant's dismissal without notice on 3 September 2018; and

h. Failing to allocate the Claimant any work since 3 September 2018.

57. If so was this done on the ground that he made one or more protected disclosures?

Automatic Unfair Dismissal s.103A ERA

58. Was the Claimant dismissed?

59. If so, was the reason, or if more than one, the principal reason for the dismissal the fact the Claimant had made protected disclosure(s) as listed above.

Breach of contract/Wrongful dismissal

60. If the Claimant was dismissed, what is he entitled to by way of notice pay?

Direct race discrimination

61. Has the Respondent subjected the claimant to the following treatment?

    a. An implication that the Claimant was lying about Patricia assaulting RR;

    b. An allegation that the Mobizio entry was lost due to the Claimant's error and a caution to log out in the future;

    c. Creating and perpetuating an impression that the Claimant's reports were not being taken seriously;

    d. Creating and perpetuating a fear that the Claimant would be suspended;

    e. Failing to hear the Claimant's grievance;

    f. Failing to pay the Claimant's wages from the date of the grievance onwards;

    g. The Claimant's dismissal without notice on 3 September 2018; and

    h. Failing to allocate the Claimant any work since 3 September 2018.

62. Was the treatment less favourable treatment, i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on hypothetical comparators.

63. If so, was this because of the claimant's race and/or because of the protected characteristic of race more generally?

Harassment

64. Did the respondent engage in the following conduct:

    a. An implication that the Claimant was lying about Patricia assaulting RR;

b. An allegation that the Mobizio entry was lost due to the Claimant's error and a caution to log out in the future;

c. Creating and perpetuating an impression that the Claimant's reports were not being taken seriously;

d. Creating and perpetuating a fear that the Claimant would be suspended;

e. Failing to hear the Claimant's grievance;

f. Failing to pay the Claimant's wages from the date of the grievance onwards;

g. The Claimant's dismissal without notice on 3 September 2018; and

h. Failing to allocate the Claimant any work since 3 September 2018.

65. If so, was that conduct unwanted?

66. If so, did it relate to the protected characteristic of race?

67. Did the conduct have the purpose or (taking into account C's perception, other circumstances of the case, and whether it is reasonable for the conduct to have that effect), the effect of violating C's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for C?

Victimisation

68. Did the claimant do a protected act, as follows:

a. Giving Mrs Last advice and support about her sexual harassment claim against Mr Stoddart;

b. The email to Ms Parkin about Patricia and the different treatment of Mr Adegbayi as a black man;

c. The Claimant's grievance on 25 August 2018 which repeated the above for the same reasons;

d. Starting an Employment Tribunal claim.

69. Did the respondent subject the claimant to any detriments as follows:

a. An implication that the Claimant was lying about Patricia assaulting RR;

b. An allegation that the Mobizio entry was lost due to the Claimant's error and a caution to log out in the future;

c. Creating and perpetuating an impression that the Claimant's reports were not being taken seriously;

d. Creating and perpetuating a fear that the Claimant would be suspended;

e. Failing to hear the Claimant's grievance;

f. Failing to pay the Claimant's wages from the date of the grievance onwards;

g. The Claimant's dismissal without notice on 3 September 2018; and

h. Failing to allocate the Claimant any work since 3 September 2018.

70. If so, was this because the claimant had done a protected act and/or because the respondent believed the claimant had done, or might do a protected act?

Breach of Contract

71. Did the Respondent fail to supply the Claimant his minimum contract hours from the date of his grievance?

A summary of the essential law to be applied

72. Firstly, we must bear in mind the burden of proof provisions of the Equality Act 2010 ("EA"). Section 136(2) Equality Act 2010 sets out the applicable provision as follows: "*if there are facts from which the court could decide in the absence of any other explanation that a person (A) contravened the provision concerned the court must hold that the contravention occurred".* Section 136(3) then states as follows: *"but subsection (2) does not apply if A shows that A did not contravene the provision".*

73. These provisions essentially provide for the employment tribunal to go through a two-stage process in respect of the evidence. The first stage requires the claimant prove facts from which the tribunal could conclude that the respondent has committed an unlawful act of discrimination.

74. The second stage, which only comes into effect if the claimant has proved those facts, requires the respondent to prove that he did not commit the unlawful act. That approach has been settled since the case of Igen Ltd v Wong [2005] IRLR 258 and has been reaffirmed recently in the case of Efobi v Royal Mail Group Limited [2019] IRLR 35.

75. It is also well established that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate the possibility of discrimination. They are not, without something more, sufficient material from which the tribunal could conclude that the respondent had committed an

unlawful act of discrimination. These principles are most clearly expressed in the case of Madarassy v Nomura International plc 2007 [IRLR] 246.

76. In addition to the above case law has shown that mere proof that an employer has behaved unreasonably or unfairly would not by itself trigger the transfer of the burden of proof, let alone prove discrimination (see in particular the case of Bahl v The Law Society and others [2004] IRLR 799).

77. The statutory burden of proof provisions summarised above have a role to play where there is room for doubt as to the facts necessary to establish discrimination. However, in a case where the tribunal is in a position to make positive findings on the evidence one way or another as to whether the claimant was discriminated against on the alleged protected ground, they have no relevance and need not be applied (Hewage v Grampian Health Board 2012 ICR 1054)

78. The direct discrimination claims fall under section 13 EA which provides that*: "a person (A) discriminates against another (B) if because of a protected characteristic A treats B less favourably than A treats or would treat others".*

79. Regarding the claims of harassment section 26 EA states as follows:

> (1*) A person (A) harasses another (B) if—*
>
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
>
> *(b) the conduct has the purpose or effect of—*
>
> *(i) violating B's dignity, or*
>
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B*
>
> *. . .*
>
> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
>
> *(a) the perception of B;*
>
> *(b) the other circumstances of the case;*
>
> *(c) whether it is reasonable for the conduct to have that effect.*

80. In GMB v Henderson [2017] IRLR 340, the Court of Appeal suggested that deciding whether the unwanted conduct "relates to" the protected characteristic will require a "consideration of the mental processes of the putative harasser".

81. The test as to whether conduct has the relevant effect is not subjective. Conduct is not to be treated, for instance, as violating a complainant's dignity

merely because she thinks it does. It must be conduct which could reasonably be considered as having that effect. However, the tribunal is obliged to take the complainant's perception into account in making that assessment.

82. Regarding the victimisation claims section 27 EA states as follows:

> (1*) A person (A) victimises another person (B) if A subjects B to a detriment because—*
>
> *(a) B does a protected act, or*
>
> *(b) A believes that B has done, or may do, a protected act.*
>
> *(2) Each of the following is a protected act—*
>
> *(a) bringing proceedings under this Act;*
>
> *(b) giving evidence or information in connection with proceedings under this Act;*
>
> *(c) doing any other thing for the purposes of or in connection with this Act;*
>
> *(d) making an allegation (whether or not express) that A or another person has contravened this Act*

83. If what is alleged would not be unlawful under the relevant legislation there is no protected act. The protected act must be more than simply causative of the treatment (in the "but for" sense). It must be a real reason.

84. The EHRC Employment Code contains a useful summary of treatment that may amount to a 'detriment': *'Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. This could include being rejected for promotion, denied an opportunity to represent the organisation at external events, excluded from opportunities to train, or overlooked in the allocation of discretionary bonuses or performance-related awards… A detriment might also include a threat made to the complainant which they take seriously and it is reasonable for them to take it seriously. There is no need to demonstrate physical or economic consequences. However, an unjustified sense of grievance alone would not be enough to establish detriment'* — paras 9.8 and 9.9. As this summary indicates, detriment does not necessarily entail financial loss, loss of an opportunity or a very specific form of disadvantage.

85. We must also bear in mind that where it is not entirely obvious that the claimant has suffered a detriment, the situation must be examined from the claimant's point of view. This point was confirmed in Chief Constable of West Yorkshire Police v Khan 2001 ICR 1065, where it was held that it was not appropriate *'to pursue the treatment and its consequences down to an end result in order to try and demonstrate that the complainant is, in the end, better off, or at least no worse off, than he would have been if he had not*

been treated differently. I think it suffices if the complainant can reasonably say that he would have preferred not to have been treated differently.' Accordingly, the treatment can still amount to a detriment even if there are no damaging consequences.

86. Further to the above, Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, clarified that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his or her disadvantage. The test is not satisfied merely by the claimant showing that he or she has suffered mental distress: it would have to be objectively reasonable in all the circumstances. The situation must be looked at from the claimant's point of view but his or her perception must be reasonable in the circumstances.

87. For the claimants' whistleblowing claims the relevant parts of sections 43A and 43B Employment Rights Act 1996 ("ERA") state:

> *43A Meaning of "protected disclosure"*
>
> *In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.*
>
> *43B Disclosures qualifying for protection*
>
> *(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –*
>
> *(a) that a criminal offence has been committed, is being committed or is likely to be committed,*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
>
> *(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,*
>
> *(d) that the health or safety of any individual has been, is being or is likely to be endangered,*
>
> *(e) that the environment has been, is being or is likely to be damaged, or*
>
> *(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.*

88. There was no dispute in this case that if it was a qualifying disclosure each of the claimants' disclosures were sent to the employer in accordance with s43C ERA.

89. The relevant parts of section 47B ERA state:

> *47B Protected disclosures*
>
> *(1) 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.*
>
> *(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—*
>
> *(a) by another worker of W's employer in the course of that other worker's employment, or*
>
> *(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.*
>
> *(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer. (1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.*
>
> *(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—*
>
> *(a) from doing that thing, or*
>
> *(b) from doing anything of that description.*
>
> *(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—*
>
> *(a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and*
>
> *(b) it is reasonable for the worker or agent to rely on the statement. But this does not prevent the employer from being liable by reason of subsection (1B). (2) … this section does not apply where—*
>
> *(a) the worker is an employee, and*
>
> *(b) the detriment in question amounts to dismissal (within the meaning of Part X).*
>
> *(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, "worker", "worker's contract", "employment" and "employer" have the extended meaning given by section 43K.*

90. The term 'detriment' is not defined in the ERA, but it clearly has a broad ambit. We refer to our explanation of the meaning of detriment in the similar context of victimisation.

91. Section 103A ERA states:

> *<u>103A Protected disclosure</u>*
>
> *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.*

92. Mr Ezekwem's claim for notice turns on whether he was dismissed by the respondent. The respondent denied that he had been dismissed as alleged; it did not present an alternative argument that the respondent was entitled to dismiss without notice.

93. Regarding Mr Ezekwem's breach of contract claim relating to minimum hours, it is for the claimant to demonstrate a contractual entitlement to hours which the respondent failed to provide.

<u>Our findings</u>

94. We shall firstly present our background findings of fact in relation to the respondent and each claimant.

The respondent

95. The respondent operates as a support service to vulnerable young people and adults based in and around Coventry. The claimants were all employed in caring roles as part of this service. Their roles involved looking after people who may have complex or challenging care needs. The respondent refers to the people it looks after as service users and we shall borrow that terminology in this judgment, rather than refer to anybody by name.

Mr Adegbayi

96. The claimant was employed in the capacity of senior support worker from 25 January 2017. He acted in that role until his resignation on 6 March 2018. The claimant then had a break from working for the respondent until he began working for them again on 4 April 2018. The claimant's role from that date was as a relief support worker and he was employed on a zero hour contract. The nature of that arrangement was that the claimant was not automatically scheduled into the work rota; instead he would cover shifts as and when needed and as and when he agreed to do so.

97. Prior to resigning the claimant had had issues with his manager Gary Stoddart. The claimant considered that Mr Stoddart behaved inappropriately at work in various different ways. A particular issue was that the claimant believed that Mr Stoddart would often administer either the wrong medicine or the correct medication but in an incorrect way. The claimant reported this to senior management and in particular his concerns were set out in an email which he sent to Gabriel Ojo on 18 February 2018. In that email the specific

complaints which the claimant made regarding medication related to Mr Stoddart administering paracetamol to service users.

98. On 16 March 2018 the claimant was a witness to the sexual harassment of Ms Last by Mr Stoddart. We explain that incident in more detail below. We accept the claimant's evidence to the effect that he was left shocked by that incident. We also accept the claimant's evidence that despite Ms Last having identified him as a witness to this incident nobody from the respondent ever asked him anything about it. In our view it was unsatisfactory for the respondent to have failed to interview Mr Adegbayi about this serious incident and we were not given any good explanation for that failure.

99. On 6 June 2018 the claimant was invited to an investigation meeting. That investigation meeting took place because of a complaint which had been received from the mother of a service user. The service user's mother reported that the service user had said that Mr Adegbayi had been having sex with a ghost in her presence and that he had removed his trousers. Apparently, the service user would use refer to a stranger as a "ghost".

100. The claimant attended the investigation meeting in respect of the concerns raised on 13 June and he denied any wrongdoing. It was suggested that the service user concerned had a history of making false allegations as well as experiencing hallucinations. Notwithstanding that however we consider that the fact that the service user's mother deemed it appropriate to make the complaint indicated this was a potentially serious matter and it merited a proper investigation by the respondent. As a result of this investigation being initiated the claimant was informed that he would not be allocated any more shifts at Paradise Farm which was the location where the service user in question was based.

101. On 7 August 2018 the claimant raised a grievance. In his grievance the claimant raised a number of complaints including: breach of contract, harassment, victimisation, whistleblowing and unauthorised deductions from wages.

102. The respondent arranged a grievance hearing to take place on 23 August 2018. The meeting was scheduled to take place at 2:00 PM. The claimant arrived with what he describes as his church friend. We understand that this was an individual who the claimants met through their church and was recommended by their pastor to assist them. The claimants were under the impression that this person was a lawyer but that turned out not to be true.

103. There was an issue with the grievance meeting in that there had been some kind of booking error which meant that the respondent had not arranged for a room to be available for the meeting to take place in. However the parties were able to find a space where they could hold the meeting. It seems that this space was in a hallway rather than a private room and

therefore it wasn't ideal. Notwithstanding that issue however the respondent cancelled the meeting on the ground that the claimant's companion was neither a work colleague nor a trade union representative. The claimant's friend from church would not accept at the meeting that he should not be present and the claimant did not want to proceed without him. In those circumstances the meeting did not take place.

104. The claimant was offered the opportunity to reschedule the grievance meeting and attend with an appropriate representative but the respondent did not hear back from the claimant following the grievance meeting with regard to rescheduling. We find that the claimant instead took the decision to stop communicating with the respondent.

105. On 10 October 2018 the respondent sent the claimant a letter saying that they had not received any explanation for his continued absence from work. The respondent indicated that unless they heard from the claimant by 19 October they would have to commence disciplinary action against him. The claimant responded to that with a further grievance. On 1 November 2018 the claimant submitted his claim to the tribunal.

Ms Last

106. Ms Last was employed by the respondent from 30 June 2016 and she worked latterly in the position of senior support worker.

107. On 16 March 2018 the claimant was in a kitchen together with her colleague Mr Adegbayi and her manager Mr Stoddart. The claimant was sat down at a table when Mr Stoddart started talking about the celebrity fashionista, Gok Wan. Mr Stoddart said something along the lines of *"Gok Wan is so lucky because he can touch women everywhere".* Ms Last replied to the effect that it was okay for Gok Wan to do that because he is gay.

108. At that point Mr Stoddart came and sat down next to the claimant and asked *"If I was gay tomorrow would you let me touch your boobs?".* The claimant says, and we accept, that she felt shocked and embarrassed by that comment and it left her feeling intimidated. The claimant also says, and we accept, that she found the comment to be deeply inappropriate, especially because the claimant knew that Mr Stoddart was married.

109. At the time the claimant did not know what to do and she says that she just giggled out of nervousness. We accept that this reaction came about because the claimant was shocked and did not know how to react.

110. The claimant then replied by saying something like: "*You're not gay though and you will not suddenly be gay tomorrow".* Mr Stoddart left the kitchen soon afterwards. Mr Adegbayi advised Ms Last to report what had happened to management and said that he would support her as a witness if required to do so.

111. The claimant reported the incident to Sara Turrell by email on 21 March. The claimant specifically mentioned that Mr Adegbayi had been present and that he could confirm her account. Ms Turrell replied the same day and said that what had taken place was unacceptable and that the claimant's email would be treated as a formal complaint and the company would investigate.

112. The claimant attended a meeting on the 26 March with Mr Ojo in which she gave her account of events. There was a handwritten note of that meeting and Mr Ojo also subsequently typed up a summary which he forwarded to Ms Turrell and also Jon Welsby.

113. It is important to note that in her meeting with Mr Ojo the claimant expanded upon her complaint concerning Mr Stoddart and she reported further incidents of harassment. As examples the claimant reported that Mr Stoddart had shown her a sexually explicit video on his laptop, had said that the claimant was a frustrated woman who needed a man in her life and that he had shared information and gossiped about her sex life.

114. The claimant reported to Mr Ojo that the situation was so serious that she had been caused sleepless nights and felt threatened by Mr Stoddart. All of those matters were contained in the typed summary of the meeting which Mr Ojo sent to Mr Welsby and Ms Turrell on 27 March 2018. It should have been obvious to the readers of this email that Ms Last was making very serious allegations of harassment.

115. However, we regret to say that the respondent's reaction to this serious complaint of sexual harassment was completely inadequate. Ms Turrell had a meeting with Mr Stoddart but that meeting was not recorded or minuted in any way. We were not therefore provided with any notes of the meeting and there is a lack of clarity over exactly what was said.

116. According to Ms Turrell, which we accept, Mr Stoddart strongly denied the allegation which had been made about events on 16 March. However she admitted that she did not even put the other matters which the claimant complained about in her meeting with Mr Ojo to Mr Stoddart. It seems then that these allegations were ignored. In light of Mr Stoddart's denial of the allegation concerning what had taken place on 16 March the obvious and necessary step for Ms Turrell to take would be to interview Mr Adegbayi since he had been named by the claimant as a witness to what had gone on. However Ms Turrell failed to do that and we did not receive any good explanation from her as to why not.

117. Ms Turrell told us that following her meeting with Mr Stoddart she asked him to provide his detailed account of what had taken place in writing. Mr Stoddart then emailed Ms Turrell on 2 April 2018. A copy of this email was available in the bundle. On reading the email it is immediately clear that Mr Stoddart had not done what Ms Turrell had asked. In fact not only did Mr

Stoddart fail to provide a detailed account of what had taken place on 16 March he failed to provide any account at all. Instead, Mr Stoddart requested that he be removed from working with Ms Last and he made a number of counter allegations against her. He described himself as "totally livid" as a result of the allegations which had been made against him but he did not attempt to explain what had actually taken place. Mr Stoddart also said that he regarded the allegation which had been made as a damaging defamation of his character and that he would be seeking advice with regard to that.

118. After having received that email Ms Turrell wrote to the claimant on 3 April 2018. She said that she had now investigated the claimant's complaint about Mr Stoddart and that the allegations had been strongly denied. Her email also said that she needed to inform the claimant that Mr Stoddart was seeking legal advice about defamation of character and false allegations. The email concluded by Ms Turrell saying that it was one person's word against another and she couldn't go any further on the matter. The claimant was not given any option to appeal against Ms Turrell's decision.

119. We found this to be a deeply unsatisfactory outcome to Ms Last's very serious complaint of sexual harassment. Ms Turrell had failed to conduct an adequate investigation and we received no adequate explanation as to why not. In particular Ms Turrell had failed to conduct a proper investigation interview with Mr Stoddart and failed to obtain his version of events on the matters which the claimant was complaining about.

120. Ms Turrell had also failed to interview the witness who had been named by Ms Last as someone who could speak to whether the original complaint was justified or not. It should be noted that the key part of the complaint (the events of 16 March) was patently not one person's word against another – Mr Adegbayi was an eye witness who Ms Last had identified.

121. In our view then Ms Turrell quite unreasonably decided that she could not go any further on the matter. Ms Turrell also compounded the threatening nature of Mr Stoddart's response by repeating his threat to take legal advice to the claimant. In our view this was a highly inappropriate way to treat a complainant in a case of sexual harassment, particularly in conjunction with the abject failure to investigate and make a finding on the allegations or offer any sort of appeal against the decision made by Ms Turrell.

122. In subsequent email correspondence on 3 April Ms Turrell asked Ms Last if she would be prepared to attend a meeting with herself and Mr Stoddart where the allegations would be discussed.

123. The claimant initially responded to say that she was "mostly" prepared to attend that meeting however she would be speaking to her solicitor. We should note at this stage that the solicitor who the claimant said she was speaking to may have been the church friend who the claimant wrongly

believed to be a solicitor. After taking some time to think about things the claimant indicated that she would not be available to attend such a meeting with Mr Stoddart. The claimant, quite reasonably in our view, pointed out that the meeting was not appropriate in view of her allegations of sexual harassment which had not been met with any appropriate response or actions.

124. On 5 April 2018 the claimant wrote to the respondent's director Steve Blount. The purpose of this email was plainly to escalate the claimant's complaint about sexual harassment because she was dissatisfied with the actions taken by Ms Turrell. The claimant said, correctly in our view, that nothing had really been done about her complaint. The claimant said that she would like to have some results from her complaint.

125. Mr Blount told us that in light of this email he had a conversation with Ms Turrell in which she reassured him that the matter was in hand. He did not take any steps to actually see what investigation had been done and he decided that no response at all from him was required to the claimant. The claimant therefore did not receive any answer at all to her very serious complaint that nothing had been done about her allegation of sexual harassment. We found Mr Blount's reaction to this email to be wholly inadequate.

126. On 24 May 2018 the claimant was due to go on a 2 day training course about strategies for crisis intervention and prevention. The claimant told us, and we accept, that this was a course which she wanted to attend in order to improve her skill set. However, on 22 May 2018 the claimant received a phone call from Sarah Jane Court telling her that her training was going to be cancelled because Mr Stoddart was also doing the training and there was an issue between them.

127. Mr Stoddart had telephoned Ms Court earlier and referred to issues between himself and the claimant. He said he didn't think it was appropriate that they were together in the same room.

128. Ms Court had a discussion about what to do with Ms Turrell. In view of Ms Court's discussions with both Mr Stoddart and Ms Turrell we conclude that it is more likely than not that she was aware that the claimant had made allegations of sexual harassment against Mr Stoddart, albeit she did not know the full detail of the allegations made.

129. Surprisingly in our view the decision was taken that it would be Ms Last who was asked to step off the training. In her statement Ms Court attempted to explain that by saying that Mr Stoddart's training needs were more significant than those of the claimant. In particular Ms Court said that the claimant had last attended training in July 2016 whereas Mr Stoddart had attended in May 2016. We did not regard that as a particularly significant difference.

130. Ms Court also said that the claimant had worked for a substantial amount of time with a particular client who presented challenges whereas Mr Stoddart had not. We did not accept that was a good reason either. Mr Stoddart was in a managerial position and therefore would have had substantial experience. We concluded therefore that neither of these reasons were the real reason why the claimant had been removed from the training.

131. It seemed important to us that Ms Last had been placed on the training in the first place and therefore it had been identified that there was a need for her to attend and she herself was keen to do this training. The reality in our view was that the claimant was removed from the training solely because she was a complainant in a serious case of sexual harassment (on which the respondent had failed to take any action or conduct an adequate investigation).

132. In her witness statement Ms Court in addition to denying that removing the claimant from the training was a detriment asserted that that was a step that had been taken in order to try and "protect" the claimant. There was similar evidence in Ms Turrell's statement. We saw that as a clear indication that the decision to remove the claimant was taken because of the complaint of sexual harassment which she had made. In particular Ms Court considered that because of her complaint Ms Last needed to be protected from Mr Stoddart by way of removing her from this training. We should note that the respondent reached that view without involving Ms Last. Ms Last had not suggested that she needed any form of protection or requested to be kept away from Mr Stoddart. It was also not a view which was reached on the basis of any findings of harassment as there had been a failure to make any findings on Ms Last's complaint one way or another.

133. In our judgement as the respondent had concluded that the claimant needed protection that should have made it clear that a proper investigation was needed, findings made and appropriate action taken against Mr Stoddart. What the respondent did instead was to effectively punish the claimant for having raised the complaint by way of removing her from this training.

134. In the event after the claimant was informed that she was going to be removed from the training Mr Stoddart later decided for reasons which have not been made clear to us that he was not going to attend the training anyway. Therefore Ms Last was able to attend the training course, but only because Mr Stoddart decided of his own volition not to.

135. At this juncture we think it is appropriate to record our surprise that Mr Stoddart was not called as a witness by the respondent in this case. We understand that Mr Stoddart remains an employee of the respondent and no explanation was given to us as to why he could not attend as a witness. Plainly he would have relevant evidence to give; in particular his version of events concerning the allegations of harassment which were made against

him. We felt that we could draw adverse inferences from the respondent's failure to call Mr Stoddart as a witness and in fact it was difficult to see how the complaints of harassment against him could have been defended without us having had any evidence from him. No doubt these matters were part of the reason why the respondent made the harassment concessions during the hearing.

136. A number of Ms Last's other complaints relate to entries which were made on the respondent's Mobizio system we understand is a digital system on which notes are recorded of time spent with service users and any relevant information is recorded so that it can be passed on to the next shift and used to inform care plans and things of that nature.

137. On 4 August 2018 the claimant had a shift with a particular service user. On that shift the service user told her about an incident with Sarah Jane Court in which the service user reported that she had wished to eat some pasta but Ms Court had told her no. The service user said that at the time this happened she had a fork in her hand and she raised that towards Ms Court.

138. The claimant recorded what she had been told by the service user on the Mobizio system. However the next day, 5 August, when she returned to do her shift the Mobizio entry from the previous day had gone. Ms Last suspected that Ms Court had deleted the record. The claimant reported her concerns directly to Ms Court and also sent an email to Giselle Parkin explaining what had happened. In her email she attached a photo she had taken of the relevant Mobizio entry. It is not at all clear why the claimant had taken a photograph of the Mobizio entry since presumably at the time she took the photograph she had no idea that the entry would later be deleted.

139. On 6 August 2018 Giselle Parkin responded to Ms Last. She explained that she had taken advice from Luke Smith who was another employee of the respondent who had particular experience of the Mobizio system and technical IT issues. Miss Parkin passed on Luke Smith's view that what had happened was that the claimant had failed to sign out of Mobizio which meant that not everything she had recorded had been synchronised and kept on the system. Miss Parkin also passed on Mr Smith's explanation that once a recording had been saved it was not possible for a manager such as Ms Court to log in and delete it.

140. The claimant was not satisfied with this response, mainly because she believed that she had signed out on the day in question. The claimant emailed Giselle Parkin to say that she was not satisfied and that she felt the organisation was protecting other staff. Despite the claimant's concerns we have concluded that it was not in fact possible for Ms Court to have deleted the entries due to the nature of the technology and that she did not do so. It seems to us that by far the most likely explanation for what happened is that the claimant simply forgot to logout with the result that her entry was not saved. In reaching these conclusions we took into account in particular the

written evidence from Luke Smith which we felt was cogent and we were not given any good reason to doubt. There was no reason for Mr Smith to have misrepresented anything.

141. Ms Last went off sick on 8 August 2018 and she was provided with a sick note for the period 14 August to 28 August 2018 and then a further sick note covering the period up until 2 September 2018.

142. The claimant submitted a grievance on 20 August 2018 in which she raised a number of concerns in considerable detail. The respondent invited the claimant to a grievance hearing to take place on 30 August. The claimant advised the respondent she could not attend that as she was still signed off sick. The claimant then returned to work on 4 September 2018 and was invited to a grievance hearing which took place on 12 September 2018. The claimant attended that meeting with a friend who was neither a colleague nor a trade union representative and the respondent objected to their presence on that basis. For that reason the meeting did not go ahead. The grievance meeting did not take place subsequently. It seemed to us that the most likely reason for that was that the claimant decided (as a result of advice which we describe below) to stop communicating with the respondent.

143. The claimant completed a number of shifts with the respondent in early September 2018. At the same time she was obviously considering bringing a tribunal claim and she started communicating with Acas. At that time the claimant was receiving advice and assistance from a member of her church (this was the person who had been recommended by the claimants' pastor). Ms Last was also under the impression that he was a lawyer but this turned out not to be true. The claimant explained in her statement that the advice she received from this person was to stop corresponding with the respondent and she followed that advice. We don't believe that was very good advice and we think it would have been better if the claimant had communicated with the respondent so that her grievance issues could have been discussed and there could have been more clarity about her working arrangements.

144. On 12 September 2018 the claimant requested annual leave for a period of approximately a month between 15 September and 14 October 2018. The claimant received a response to the effect that leave could not be authorised for such a long period and that at least one months notice was in any event required. The claimant then started looking for alternative employment and she started working in a new job from around 21 September 2018. The claimant then worked in that new job until around 21 December 2018.

145. The claimant did not return to work for the respondent. On 16 October 2018 the respondent invited the claimant to a disciplinary hearing for her persistent and unexplained absence since 10 September 2018 and her failure to respond to a request from the respondent to discuss her unauthorised absence.

146. The disciplinary hearing was scheduled to take place on 26 October 2018. The claimant did not attend the hearing. The claimant submitted her claim to the employment tribunal on 28 October 2018.

147. The claimant has been consistently working in various other caring roles for different organisations since she stopped working for the respondent.

148. There is a lack of clarity over how, when and indeed if the claimant's employment with the respondent may have terminated. We consider that the reasons for that are a mixture of poor communication on behalf of the respondent, poor organisation by the respondent, a failure to take ownership in the respondent of the situation and also decisions made by the claimant to not communicate with the respondent and to move on and work elsewhere without informing the respondent of her intentions.

149. We should record that we heard evidence from the respondent to the effect that various staff changes may explain why the employment situation of these claimants was allowed to drift. We accept that a high staff turnover may have made consistent communication more difficult and also that the care industry is not highly resourced generally and that too may have been a factor. Nevertheless we think the situation could and should have been better managed with more regular communication.

Mr Ezekwem

150. The claimant was employed by the respondent as a support worker from 15 September 2016.

151. On 19 June 2018 the claimant sent an email to Gabriel Ojo in which he reported that a colleague, Patricia Tague, had pushed a service user into a wall. The claimant reported that as a result of this the service user had fallen to the floor and cried. The claimant sent this email because he had been asked to provide a statement of what had happened when he initially raised his concern verbally (to Alex Domingue).

152. On 4 August 2018 the claimant was working the same shift as Ms Last. This was the shift in which the service user reported that Sarah Jane Court had denied her food. Mr Ezekwem recorded this on his Mobizio system in the same way as Ms Last. Similarly to Ms Last however when the claimant returned the next day for his shift on 5 August 2018 he could not find the record he had made on the system. Mr Ezekwem did not complain about this separately but he was named as part of Ms Last's complaint when she raised her concerns to the effect that Sarah Jane Court may have deleted the Mobizio entries.

153. Accordingly, Mr Ezekwem was copied into the email response from Gisele Parkin sent on 6 August 2018 which recorded that the Mobizio entries could not have been deleted by Ms Court and they must not have been

saved as the claimants forgot to sign out of the system. Similarly to Ms Last Mr Ezekwem also did not accept this explanation. He responded to Ms Parkin's email to say that he had logged out of his Mobizio system and therefore did not accept the explanation which had been offered.

154. Notwithstanding Mr Ezekwem's assertion that he believed he had properly logged out we refer to the finding we already made on this matter, which is that we consider is more likely than not that the explanation as to why the notes had not been saved on the Mobizio system was that the claimants had forgotten to sign out properly.

155. In making our findings on this point we took into account Ms Court's evidence, which we accepted, that it will frequently be appropriate to deny service users food and therefore she had nothing to hide and no reason to delete the Mobizio entries. As we have already recorded we also had no reason to doubt the technical evidence to the effect that it would not be possible for Ms Court to delete another user's entries on the Mobizio system.

156. In his email response to Ms Parkin on 7 August 2018 Mr Ezekwem went on to describe again the incident where he had reported that Patricia Tague had pushed the service user and that had caused her to fall. Mr Ezekwem described how the service user had subsequently reported that she had had a "fight" with Patricia Tague. The claimant contrasted what had happened in relation to that scenario (as far as he was aware no action had been taken against Patricia Tague) with the action that had been taken against Mr Adegbayi when he was suspended as a result of the allegation from the service user that he had been having sex with a ghost in front of her.

157. The claimant explained that as a result of these matters he did not feel safe working at the respondent *"because anything can happen to anybody and when you complain about it nothing will be done about it".* It seemed to us that in this email the claimant was indicating that he had lost trust in the respondent. This was confirmed by the claimant's subsequent email of 9 August in which he specifically said that he had lost trust in the management of the respondent.

158. The claimant was signed off sick on 7 August 2018 until 24 August 2018. The claimant did not return to work for the respondent

159. The claimant raised a grievance on 25 August 2018. This was another detailed complaint. The claimant made reference to discrimination and in particular race discrimination.

160. There is little agreement between the respondent and the claimant as to subsequent events concerning Mr Ezekwem. For now we shall summarise the claimant's case below and then making our findings on the disputed matters when we consider the issues in more detail.

161. The claimant alleges that he did not receive any invitation to a grievance meeting following the submission of his grievance. The claimant also says that he was on pre booked annual leave from 27 August until 2 September 2018 and that when he returned he did not receive his rota.

162. The claimant makes a particular allegation that on 3 September 2018 he received a telephone call from Jon Welsby in which Mr Welsby told him that his services were no longer needed. The claimant relies on this as the respondent dismissing him. The claimant says he requested a letter to confirm his dismissal but that no such letter was ever sent. The claimant says that since that time the respondent has not allocated him any work.

163. The claimant says that he did not receive any further correspondence from the respondent until after he lodged his tribunal claim, which was on 2 November 2018. The claimant says he then received a large number of letters from the respondent in one batch in January 2019.

164. We shall now set out our findings on the issues in relation to each claimant.

Our findings on the issues relating to Mr Adegbayi

Protected acts and protected disclosures

165. The respondent accepted that the claimant made reports that Gary Stoddart administered incorrect medication to service users in emails dated 18 February 2018 and 18 March 2018. It was accepted that these were protected disclosures. It seems to us this concession was rightly made; the disclosures tended to show that the health or safety of the service users has been, is being or is likely to be endangered. These were the only protected disclosures relied upon by the claimant for the purpose of his whistleblowing claim.

166. The first protected act relied upon by the claimant for the purpose of his victimisation claim is his indication that he would act as a witness in Ms Last's sexual harassment claim against Gary Stoddart. We do not accept that Mr Adegbayi ever gave an indication himself that he would act as a witness in Ms Last's sexual harassment claim. There is no mention of such an indication in his witness statement and no evidence of such an indication in the documents that we were taken to.

167. However Ms Last did refer to Mr Adegbayi in her email of 21 March 2018**,** noting that he had witnessed the harassment and that he would be able to confirm it. In our view this gives rise to a clear indication that Mr Adegbayi may do a protected act and that the respondent would have believed that upon reading the email. These circumstances therefore seemed to us to fall within s.27(1)(b) Equality Act 2010 (which we have already set out above).

168. It was accepted that the submission of Mr Adegbayi's grievance on 7 August 2018 amounts to a protected act. This concession was clearly rightly made.

Failure to take the claimant's reports against Gary Stoddart seriously/failure to investigate

169. The first allegation of detriment or direct discrimination or race related harassment relied upon by the claimant is that his reports into Gary Stoddart were not taken seriously nor investigated.

170. We accept the point made on behalf of the respondent that Mr Adegbayi would not be privy to internal investigations of this nature and he can therefore not know what was and what was not done at the time. It appeared to us that because of this Mr Adegbayi had made an assumption, some considerable time after the event, that his complaints had not been taken seriously. We accepted Mr Blount's evidence that the issues were investigated at local management level.

171. We think it is significant that at the time of his complaints Mr Adegbayi did not raise any issue with the investigation. In fact he thanked Mr Ojo for his support and acknowledged that Mr Stoddart had been spoken to. This seemed to be an indication that at the time Mr Adegbayi accepted that the matter had been adequately dealt with including that steps had been taken to address it with Mr Stoddart. Therefore we do not find that there was a failure to take the claimant's complaints seriously or to investigate them.

172. In those circumstances we could not find that the respondent's actions had the requisite purpose or effect to constitute harassment. We do not think there was any less favourable treatment either; the complaints would have been treated the same way if the claimant was a different race. We also do not find that Mr Adegbayi was subjected to any detriment. He was not put at any disadvantage and a reasonable worker would not take that view.

173. In closing submissions counsel for Mr Adegbayi suggested that a reason why Mr Adegbayi believes his reports were not taken seriously/investigated was that Mr Stoddart's behaviours did not change. In our view it does not necessarily follow that because Mr Stoddart's behaviour did not change that means the reports were not investigated or taken seriously.

174. Mr Adegbayi's claim was that a failure to investigate and/or take his reports seriously, was a detriment on the ground that he made a protected disclosure and/or it was direct race discrimination and/or it was harassment related to race. The claimant has simply not presented any evidence which could substantiate these claims. The claimant has not proved facts from which the tribunal could conclude that the respondent's alleged failures were because of race or were related to race. There was similarly no evidence which could suggest that the alleged failures were done on the grounds that the claimant has made a protected disclosure or done a protected act.

175. Although there had been a comparison in Mr Adegbayi's witness statement to "white colleagues", there was no explanation as to who they were or why their situations were comparable. Therefore the tribunal was not assisted by the identification of any meaningful comparators.

176. The reality was that there was no evidence to suggest that if an employee of a different race raised a complaint, that would be dealt with more favourably. We accepted the respondent's evidence that complaints of this sort are typically investigated by the local management team at the time (in this case Mr Ojo) and that might not necessarily involve a full formal investigation. We therefore concluded that the way Mr Adegbayi's complaint was dealt with was consistent with the respondent's internal processes and there had not in fact been any disregard for his complaint.

177. In those circumstances the claimant's claims in relation to an alleged failure to take his reports against Gary Stoddart seriously and/or a failure to investigate must fail.

June 2018 Investigation

178. Mr Adegbayi was subject to the investigation described above in June 2018. His complaint is that the respondent launched an investigation that was malicious and this constituted a detriment on the ground that he made a protected disclosure and/or that it was victimisation and/or that it was direct race discrimination and/or that it was harassment related to race.

179. It is clear that this investigation arose as a result of a complaint made by the mother of a service user**.** We accept that the respondent has a professional duty to investigate such matters as safeguarding issues were in play. The investigation involved meeting with the service user and producing a safeguarding report**.** This indicates that the complaint was taken seriously and we concluded that the reason why Mr Adegbayi was subject to an investigation was because a complaint had been received which the respondent took seriously. We did not find that the investigation was malicious and in reality we were not referred to any evidence which could support that allegation.

180. Again we found that the claimant had simply not presented any evidence which could substantiate his claims that the investigation was a detriment on the ground that he made a protected disclosure and/or it was direct race discrimination and/or it was harassment related to race and/or it was victimisation because he had done or may do a protected act. The claimant had not proved facts from which the tribunal could conclude that the respondent's alleged treatment of him was because of race or was related to race. There was similarly no evidence which could suggest that the investigation was done on the grounds that the claimant made a protected disclosure or because he had done a protected act or the respondent believed he may do a protected act.

181. We considered that the reason for the investigation was clear and obvious: it was the complaint received by the service user's mother which justified an investigation. We were satisfied that the investigation was

proportionate to the complaint raised and there was no evidence of malice towards Mr Adegabyi. In the circumstances we do not think a reasonable worker would consider that they were subject to a detriment merely by an investigation being launched in response to a serious concern raised by a service user's mother.

182. We took into account that the transcript of the investigation meeting shows Mr Welsby being supportive of Mr Adegbayi; he reminds him that the meeting is a formality and is not personal and he praises his professionality. This is not malicious behaviour.

183. We reject the suggestion that there was a conspiracy between the service user, her mother and the respondent, to fabricate the allegation against the claimant because he was black. This was an unsupported suggestion and far-fetched. Moreover, the meeting transcript records the claimant as agreeing the complaint could just as easily have been made against Jon Welsby, who is white**.**

184. In his closing submissions counsel for the claimant suggested that the investigation was malicious because the claimant was not informed of the outcome until 26 July (the report was made on 6 July) and the claimant was not provided with the notes of the investigation meeting held on 13 June. We think those points differ from the issue which it was agreed we had to determine – which referred to "launching a malicious investigation". In any event we do not think either point is indicative of malice as they are in reality complaints of procedural flaw which do not reach a level which could suggest maliciousness.

185. For those reasons the claimant's claims regarding the investigation in June 2018 must fail.

Suspension & failure to allocate work/reduction in allocation of work

186. Mr Adegbayi was not suspended indefinitely as he had originally claimed. The situation was that he was told he would not be able to work at Paradise Farm until the investigation concerning the service user who was based there had concluded. We accept the respondent's evidence that this was standard practice during a safeguarding investigation and in our view it is a reasonable and proportionate step when a service user has made a serious allegation against a worker. The reason why this decision was taken in this case was clearly in our view because of the complaint which had been made by the service user's mother and the need to undertake a safeguarding investigation before Mr Adegbayi could return to Paradise Farm.

187. The effect of the decision on Mr Adegbayi was that he could work at other services and he could also choose not to work at all; consistent with his role as a relief worker on a zero hours contract at that stage. In those circumstances we do not think there was in reality a suspension at all – rather a restriction on where the claimant could work. However, we accept that Mr Welsby did in fact use the word "suspension" when meeting with the claimant on 13 June and we think his concession that on reflection that was not the

best choice of words must be correct. This mistake may well have confused matters.

188. We also do not think there was any failure to allocate the claimant work. We note that in the relevant period the claimant was himself choosing not to work. We refer in particular to the claimant informing the respondent that he would not be attending a shift on 28 July 2018 to "protect himself". The reference to the claimant needing to protect himself suggests that this shift was at Paradise Farm which would suggest that by that stage the claimant was able to work there. We would therefore conclude that the restriction had not been unreasonably lengthy.

189. We also note that on 26 July 2018 the claimant was informed via text message that he was not suspended, that the outcome of the investigation was that the allegation had not been upheld and there would be no further action. He was therefore asked if he was available for work. In light of this we think that there was no failure to allocate the claimant work after July 2018 as the respondent had made it clear the claimant could be allocated work if he was available. This also reinforces our conclusion that the claimant was not suspended (or more accurately restricted from working at Paradise Farm) for an unreasonable amount of time.

190. The claimant sought to compare his situation with that of Patricia Tague who he alleged had not been suspended following a "fight" with a service user. However we understand that Patricia Tague is also black. Moreover what the claimant describes as a "fight" was actually a restraint of the service user which was required because of their particular care needs. We therefore do not consider this was an appropriate comparator.

191. The claimant also sought to compare his situation with Sarah Jane Court who was not suspended as a result of the allegation that she had denied food to a service user. We accept the respondent's evidence that there are many scenarios when it is appropriate to deny a service user food, such as it being an inappropriate time to eat. We therefore do not think this was an appropriate comparison either.

192. In contrast, the allegation made about Mr Adegbayi stood out because it was deemed serious enough that the service user's own mother raised it and because it was an unusual and worrying allegation – we refer in particular to the service user mother's reference to her daughter seeing Mr Adegbayi's "bum" and asking if the lady who he was hiding was his girlfriend. In our view this was a very serious concern which justified the action of removing Mr Adegbayi from Paradise Farm while it was investigated. We do not think a reasonable worker would view this as a detriment in light of the nature of the concerns raised.

193. We do accept that between 13 June (when the allegation was made) and 26 July (when he was informed that no action was to be taken) the claimant would not have been provided with as many opportunities to work as he was not able in that period to work at Paradise Farm. A reasonable worker may well consider they had been subject to a detriment in view of that.

However the reason why that was the case is clearly the complaint made by the service user's mother and the understandable and reasonable decision of the respondent to remove Mr Adegbayi from that location whist the complaint was investigated.

194. The suggestion that there had been a failure to offer any work after June 2018 was untrue. Mr Adegbayi worked shifts at other services.

195. The late attempt to change the issue, to that Mr Adegbayi's shifts were reduced from 13 June 2018 as opposed to not offered at all did not reflect well on Mr Adegbayi's credibility. The change plainly came about because Mr Adegbayi was presented with evidence which proved he had worked shifts after 13 June. In any event, we concluded that there were two non-discriminatory explanations for the reduction in shifts: shifts at Paradise Farm were not on offer due to the investigation and Mr Adegbayi was choosing not to accept shifts which as a relief worker he was entitled to do.

196. We accept that there may be valid criticism of the lack of contact/ correspondence that Mr Adegbayi received during the investigation and the communication with him thereafter was sporadic. This may also have affected the amount of work he was offered. However we have concluded that this was a result of poor organisation and a lack of ownership on the part of the respondent.

197. We also take into account that Mr Adegbayi was taking advice from the church friend who had been recommended by their pastor to assist the claimants. As we have already observed the claimants were under the impression that this person was a lawyer but that turned out not be true. No doubt this led to the claimants attaching weight to his advice. His advice was to stop corresponding with the respondent and Mr Adegbayi was, like the other claimants, influenced by that advice and he too stopped communicating properly with the respondent. This is a further factor which may in our view explain the reduction in the amount of work the claimant was doing.

198. It seems to us that a combination of these circumstances led to the situation where matters in relation to Mr Adegbayi were simply allowed to drift. The result is that there has been no clear ending of the relationship between the claimant and the respondent. We concluded that the respondent stopped offering the claimant work because there was no communication between the parties and the respondent did not know if and when the claimant was available for work. We consider that both parties bore responsibility for this breakdown in communication.

199. Mr Adegbayi's claim is that the suspension and reduction/failure to allocate work, were detriments on the ground that he made a protected disclosure and/or it was direct race discrimination and/or it was harassment related to race and/or it was victimisation because he had done or may do a protected act. Again we found that the claimant has simply not presented any evidence which could substantiate these claims. The claimant has not proved facts from which the tribunal could conclude that the respondent's behaviour was because of race or was related to race. There was similarly no evidence

which could suggest that the respondent had acted on the grounds that the claimant has made a protected disclosure or because he had done a protected act or the respondent believed he may do a protected act.

200. We concluded that the complaint made by the service user's mother was the clear reason for Mr Adegbayi's removal from Paradise Farm which had an effect on the amount of work he was offered. The removal was not done for an unreasonable length of time and Mr Adegbayi was able to work shifts at other locations if he wanted to.

201. For the above reasons Mr Adegbayi's claims in relation to suspension and reduction/failure to allocate work must fail.

Overall conclusions on Mr Adegbayi's claim

202. Our overall conclusion is that for the reasons set above all of Mr Adegbayi's claims must fail.

203. The common thread in our analysis was that there was no evidence to show a prima facie case of discrimination, other than the claimant's belief which was not sufficient to shift the burden of proof as it was not a matter from which we could infer discrimination.

204. There was instance of unreasonable behaviour, in particular our concerns over the poor communication from the respondent to the claimant, but this was an insufficient basis on which to infer discrimination.

205. We would also note that in relation to the claims of harassment had we concluded that the conduct was related to race we would not have found it had the purpose or effect of violating the Mr Adegbayi's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. This was not reflected in how the claimant reacted at the time (for example, his thanking Mr Ojo for his support following raising concerns about Gary Stoddart).

206. In relation to Mr Adegbayi's claims of victimisation and detriment on the ground of having made protected disclosures there was no evidence to support the contention that the respondent had acted because of the protected act/disclosures which the claimant had made. There was no evidence that the respondent reacted negatively to the protected acts/disclosure or that there was any animosity to the claimant as a result.

207. A common theme in Mr Adegbayi's claim was that his complaints were expressed to be either discrimination/harassment or a detriment for whistleblowing or, on other examples, an act of victimisation. This meant it was difficult to identify why the claimant asserted the particular action had been done. It was a scattergun approach and it did not assist the claimant because we were not taken to any particular evidence which would indicate that the acts complained of were harassment or victimisation or detriments for whistleblowing. In the end it appeared to us that the claimant had simply referred to a course of conduct with which he was dissatisfied and related that to his specific claims only in very generalised terms.

208. Finally, we should record that in relation to Mr Adegbayi's complaints in respect of the investigation into Mr Stoddart's alleged medication errors these complaints are out of time if viewed as individual acts as the earliest date for which an individual act is in time in Mr Adegbayi's claim is 22 June 2018. We would conclude that these complaints are not part of a course of conduct. They are unconnected to the complaints about the investigation that started in June 2018 and how Mr Adegbayi was treated after that.

209. We would not exercise our discretion to extend time in relation to the complaints in respect of the investigation into Mr Stoddart's alleged medication errors. Mr Adegbayi could have raised a complaint about this at the time. He was later able to contact ACAS and instruct a solicitor and it would have been open to him to do so at the time of this investigation too. We took into account that the claimant had sought advice through his church and was under the mistaken impression that the adviser appointed by the pastor was a lawyer. We felt the claimant could not really be blamed for that, but we understand that the claimant only went to his church around the time of the later issues. It did not appear that the claimant had sought any advice around the time he raised his concerns about incorrect medication being administered in February and March 2018.

210. However, the key factor would be that we considered that the respondent has faced prejudice in defending this claim as Mr Ojo has subsequently left the respondent and is no longer on good terms with them. This meant the respondent was unable to call Mr Ojo as a witness and therefore the cogency of the evidence has been adversely affected by Mr Adegbayi's unreasonable delay. In the circumstances we were of the view that the balance of prejudice lay in favour of refusing to exercise our discretion to extend time. This would be a significant factor in refusing to extend time.

Our findings on the issues relating to Ms Last

Protected acts and protected disclosures

211. The respondent accepts that the following amounted to protected disclosures made by Ms Last:

a. The complaint on 21.03.2018 that the claimant was sexually harassed by Mr Stoddart on 16.03.2018.

b. The complaint to Giselle Parkin that Ms Court had deleted entries in relation to the service user being denied food by her.

c. The grievance of 20 August 2018.

212. The respondent also accepted that following amounted to protected acts for the purpose of the claimant's victimisation claim:

a. The complaint on 21 March 2018 that the claimant was sexually harassed by Mr Stoddart on 16 March 2018.

b. The grievance of 20 August 2018.

c. The claimant's ET claim.

213. We consider these concessions were rightly made.

Harassment concessions

214. It has been conceded that Gary Stoddart's comments to the claimant on 16 March 2018 were made as alleged by the claimant and were sexual harassment.

215. It has also been conceded that the failure to investigate adequately and a failure to provide an opportunity to appeal in respect of Ms Last's complaint about the sexual harassment was harassment related to sex. The effect of this concession is that the respondent accepts there was a failure to investigate adequately and offer an appeal, that these failures had the purpose or effect necessary to constitute harassment and that they were related to sex.

216. We consider that these concessions were undoubtedly rightly made. In light of their concessions the respondent did not attempt to put forward any non-discriminatory explanation for the above matters. We shall therefore set out our reasoning as to why we consider the concessions were rightly made fairly briefly.

217. In respect of the comment made by Mr Stoddart on 16 March we accept that the comment was as the claimant describes sexually motivated and it was plainly unwanted. It was also degrading and offensive and created an intimidating and hostile environment for the claimant. It therefore had the requisite effect to constitute harassment under the Equality Act. The suggestion that the claimant's manager could touch her boobs is not a trivial or minor matter. It was reasonable for the conduct to have had the requisite effect to constitute harassment.

218. We find that the failure to investigate/offer any opportunity to appeal in response to the claimant's complaint about the sexual harassment perpetrated by Mr Stoddart was so conspicuous as to create a hostile and humiliating environment for the claimant. A failure to investigate a serious complaint of sexual harassment is not a trivial or minor matter. We were entirely satisfied it had the necessary effect to constitute harassment and that it was reasonable for it to have done so.

219. It was significant that the respondent was responsible for the actions of Mr Stoddart and it was their responsibility to conduct a proper investigation and address Mr Stoddart's behaviour. Although we acknowledge that the actions of Mr Stoddart on 16 March had already created a hostile environment for the claimant it was our view that the abject failure to investigate/offer an appeal made matters very much worse (and so falls within the meaning of "creating": Conteh v Parking Partners Ltd [2011] ICR 341). We are in any event satisfied that these serious failures in themselves created a hostile environment for the claimant.

220. The conduct was plainly unwanted as the claimant wanted there to be a proper investigation. The effect upon the claimant is demonstrated by, among other matters, the claimant's attempt to escalate her complaint to Steve Blount.

221. As we explained above Mr Blount did not respond at all to the claimant's escalation of her complaint and we found that highly unsatisfactory. This reinforced the conclusion that there was a clear failure to investigate, which was so serious as to constitute harassment related to sex.

222. The relevant conduct was because of the claimant's complaint of sexual harassment, which is related to sex. Examining the mental process of Ms Turrell, who was primarily responsible for the failure to investigate, we were satisfied that she was influenced mainly by the nature of the complaint. Ms Turrell was also influenced by Mr Stoddart's rather threatening response to the complaint. That response was itself caused by the nature of the complaint – i.e. it came about because Mr Stoddart had been accused of serious sexual harassment. It seemed to us that those factors led Ms Turrell to conclude that the matter was, in effect, too difficult or risky to investigate properly or take any further by way of offering an appeal against her decision. Her failures in those respects were intrinsically related to the subject matter of the claimant's complaint as it was that which led to her reaching the view that the matter was too difficult to investigate and should not be taken any further. In our view then the failure to investigate/offer any opportunity to appeal in relation to the claimant's serious complaint of sexual harassment was conduct which is inherently related to sex.

223. We do not think it is necessary for us to do so but, if it was, section 136 of the Equality Act would shift the burden to the respondent. It seems to us that the facts we found – especially Ms Turrell's decision not to take what was on any view a very serious complaint of sexual harassment any further - could satisfy us that unlawful discrimination in the form of harassment had taken place, including that the unwanted conduct in question related to sex. In light of their concession the respondent has done nothing to prove that in no sense whatsoever was this unwanted conduct related to sex and, generally, discriminatory.

224. For the reasons we have already explained we do not find that these matters were also direct discrimination. We did not make any finding from which we could infer that the harassing behaviour was also related to race. We did not make any finding from which we could conclude that the respondent's failures to investigate were on the ground that the claimant had made protected disclosures. We therefore focus on the remaining allegations made by Ms Last.

Proposed meeting between the claimant, Mr Stoddart and Ms Turrell

225. Ms Last complains that the invitation to the meeting was a detriment on the ground that she made a protected disclosure and/or it was an act of

victimisation and/or it was direct discrimination because of race and/or sex and/or it was harassment related to race and/or sex.

226. We had misgivings over whether it was appropriate for Ms Turrell to have asked if the claimant was willing to attend the meeting with Mr Stoddart. We should note however that Ms Turrell clarified with the claimant at the time that the meeting would be an informal meeting to establish the thoughts of both parties and that a third party mediator would be present. It appears therefore that the proposed meeting could properly be described as a mediation meeting (rather than an investigatory meeting as it was referred to in the agreed list of issues). The respondent fairly pointed out that such a meeting was anticipated in the respondent's harassment policy "in certain cases". We doubt whether it was suitable in this particular case but on balance it seems to us that we cannot say that Ms Turrell was wrong to explore it as a possibility in light of the fact that it was anticipated in the procedure.

227. Our decision making on this matter has also been influenced by our analysis of how the meeting was proposed by Ms Turrell, how the claimant reacted and how Ms Turrell reacted when the claimant in the end declined the meeting. The evidence shows that to begin with the Ms Turrell only asked if the claimant would be prepared to attend a meeting. She did not attempt to require the claimant to attend or even persuade her to do so. Ms Last's initial response was guarded but her indication that she was "mostly" prepared to go seems to indicate that she had no major concerns. When Ms Turrell explained some more about the nature of the meeting and the mediator Ms Last thanked her for her response and her concern and said she appreciated it. When Ms Last declined the meeting Ms Turrel said she understood that mediation was not for all and she fully accepted the claimant's decision not to do it. The claimant was not requested or encouraged to change her mind.

228. In that context we concluded that the invitation to the meeting was not a detriment.

229. We made no findings from which we could infer that the meeting was proposed because of or related to race or sex. In light of the procedure we concluded that had the complainant been male or a different race to the claimant, and the alleged harasser female or a different race to Mr Stoddart, then the same meeting would have been offered. Ms Turrell was essentially motivated by the scope for offering mediation within the procedure.

230. We found that the invitation was not "unwanted conduct" for the purpose of a harassment claim. This finding was made as a result of the context of the invitation as we have recorded above, especially the claimant's indication that she would mostly prepared to do it. We also concluded that the conduct did not have the requisite purpose or effect to constitute harassment in view of our contextual findings summarised above.

231. This means that the claimant's claims relating to the proposed meeting between herself, Ms Turrel and Mr Stoddart must fail.

Denial of training/ breach of confidentiality

232. We have found that Ms Court was aware through speaking to both Mr Stoddart and Ms Turrell that the claimant had made a complaint of sexual harassment against Mr Stoddart on 21 March. Albeit we found that she did not know the full detail of that complaint she was aware of the nature of it.

233. We do not think this constitutes a breach of confidentiality. It was relevant information for Ms Court to know as she was involved in organising the training which both Ms Last and Mr Stoddart were due to attend and she was not aware of the details of the claimant's complaint. We do not think this was a detriment as a reasonable employee would accept that relevant managers should have been made aware of the complaint so that appropriate measures could be taken. There is no disadvantage in the bare fact that a relevant manager was made aware of the existence and nature of the complaint. This was not a case of Ms Last's complaint being gossiped about or inappropriately shared.

234. Ms Last complains that the alleged breach of confidentiality was a detriment on the ground that she made a protected disclosure and/or it was an act of victimisation and/or it was direct discrimination because of race and/or sex and/or it was harassment related to race and/or sex.

235. We made no findings from which we could infer that the alleged breach of confidentiality was because of or related to race or sex. Had the complainant been male or a different race to the claimant, and the alleged harasser female or a different race to Mr Stoddart, then Ms Court would have been made aware of the same relevant information. The motivation in bringing the complaint to Ms Court's attention was to make her aware of relevant information.

236. We found that the alleged breach of confidentiality was not "unwanted conduct" for the purpose of the harassment claims. This finding was made as we concluded that the claimant would have expected relevant managers to be aware of her complaint so that they could take appropriate action and she herself had raised her complaint with at least two managers. We also considered that the conduct did not have the requisite purpose or effect to constitute harassment for the same reasons.

237. We found that removing the claimant from the training scheduled for 24 and 25 May 2018 and only reinstating her once Mr Stoddart decided not to attend was a detriment. This was training which the claimant plainly required as she was scheduled to attend. We accepted her evidence to the effect that she wished to attend it and that she was upset about being removed from it. A reasonable worker would conclude that they had been subjected to a detriment. We are of the view that the removal of an employee from training which they are due to attend, need to attend and wish to attend is a significant matter. It was objectively reasonable for the claimant to be upset and consider she had been put at a disadvantage by the respondent's decision to remove her from the training. This was not an unjustified sense of grievance.

238. We took into account that the claimant did in the end attend the training. However this was only after she had been informed that she was to be removed from it and only done because Mr Stoddart had decided of his own volition not to attend. For those reasons our conclusion that the claimant had been subject to a detriment did not change. The claimant being later permitted to attend the training but only because Mr Stoddart chose not to does not in our view make this incident insignificant. If anything the fact that the claimant was only permitted to attend because her harasser chose not to serves to emphasise the disadvantage which the claimant was being placed at.

239. We concluded that the detriment was done because of the claimant's protected act of complaining of sexual harassment by Mr Stoddart on 21 March. The only cogent reason for removing the claimant from the training was that she had made a complaint of sexual harassment and consequently Ms Court felt the need to protect her by way of removing her from the training. This was despite the fact that the respondent had not done anything to adequately investigate or take action on the claimant's complaint, or even to establish with the claimant if she felt she needed protecting or to be kept away from Mr Stoddart. It was not legitimate or appropriate in those circumstances for the respondent to conclude that the claimant needed protection and remove her from the training.

240. Plainly in our view if the respondent viewed the claimant as requiring protection from Mr Stoddart this should have resulted in action being taken against Mr Stoddart rather than the claimant effectively being punished for raising her complaint.

241. The perception that the claimant needed protecting by way of removing her from the training arose solely because of the claimant's complaint of sexual harassment against Mr Stoddart. This was the protected act which the claimant had done on 21 March and which we found Ms Court was informed about. The claimant was removed from the training because she had raised this complaint. We were satisfied this was the real reason for the removal.

242. Again, we do not think it is necessary for us to do so but, if it was, section 136 of the Equality Act would shift the burden to the respondent. It seems to us that the facts we found – especially Ms Court's decision to remove the claimant from training once she found out about her complaint of sexual harassment - could satisfy us that unlawful discrimination in the form of victimisation had taken place. The respondent has not proved that in no sense whatsoever was the removal an act of victimisation. We refer to our findings above to the effect that the alternative reasons put forward by the respondent (levels of experience and training needs) were not cogent and we did not accept that they were the real reason why the claimant was removed.

243. We concluded therefore that the decision to remove the claimant from the training was a classic example of victimisation within the meaning of s. 27 Equality Act 2010.

244. It may follow that it should also be a detriment on the ground of having made a protected disclosure as the protected disclosure is the same as the protected act. However, as we explain below, the complaint is out of time and we think it was reasonably practicable for the complaint to have been brought in time so we shall not uphold that claim. The complaint cannot succeed as a claim of direct discrimination or harassment by application of s. 212 Equality Act as we set out above. We should note however that we did not in any event make any findings from which we could infer that the conduct was because of or related to race.

Mobizio

245. Ms Last claims that the allegation that the Mobizio entry was lost due to her error (in not logging out) coupled with a caution to log out in future is a detriment on the ground that she made a protected disclosure and/or it was an act of victimisation and/or it was direct discrimination because of race and/or sex and/or it was harassment related to race and/or sex.

246. We found that that the clear and obvious reason why Ms Parkin made the allegation and gave the caution was because of what she was informed by Luke Smith. We were referred to documentary evidence from Luke Smith stating that it was not possible for Ms Court to delete shift notes and therefore the claimant must have forgotten to log out. In fact he said that nobody could delete the notes, including himself who had the top level of access. There was no real reason to doubt that evidence; the claimant simply had a suspicion it was not true.

247. We do not think that a reasonable employee would consider that suggesting that they had forgotten to log out and cautioning them to log out in the future was a detriment in the circumstances as we have found them to be. The claimant was not being disciplined; she was simply being advised how the situation must have arisen and how to avoid it happening again in the future. In any event the reason for Ms Parkin doing that was because of the information she received that notes could only be lost due to a failure to log out.

248. Our findings of fact have been that Ms Court did not delete the Mobizio entry and that it is more likely than not that the claimant did accidentally forget to log out and that is why her notes were not saved. Ms Court did not deny refusing the service user food. Plainly there will be times when managing service users who cannot properly look after themselves to deny them food. For example they may want to eat at an inappropriate time or eat inappropriate things. This supported our finding that Ms Court did not delete the notes; there was simply no need for her to do so

249. It is perfectly feasible that the claimant forgot to log out but believed that she had, and we think a reasonable employee would have accepted that was a possibility. We accept the respondent's evidence that it is possible that the claimant accidentally clicked off the app before it automatically saved or the tablet itself turned off after a few minutes of inactivity without syncing. There is therefore no implication that the claimant was seriously at fault.

250. There was some documentary evidence which supported the suggestion that the claimant had forgotten to log out. In particular an entry shows that there was no "actual time" logging out for the claimant on 4 August 2018, compared with the entry for 5 August 2018**.** Furthermore, no shift notes are saved whatsoever on 4 August 2018; not just the entry regarding abuse that the claimant refers to.

251. We also took into account that there was the inexplicable decision by Ms Last to take a photograph of her shift notes. Whilst we do not find, as the respondent suggested, that the claimant must have written the notes, taken the photo, and then deleted them in order to make the allegation against Ms Court the next day this issue caused us to doubt the claimant's version of events.

252. In those circumstances we concluded that the claimant was not subject to a detriment by Ms Parkin suggesting that the entry was lost due to the claimant not logging out. Ms Parkin's actions did not have the requisite purpose or effect to constitute harassment and she would have acted in the same way towards an employee of a different sex or race. Ms Parkin had only informed Ms Last of the information she had at the time, after enquiring to the best of her ability on the matter. She did not make the allegation because of any protected act or disclosure; it was simply based on the technical information she had received from Luke Smith. We were satisfied that the information provided by Luke Smith was accurate. We made no findings from which we could infer that the allegation/caution was because of or related to race or sex.

253. For those reasons all of the claimant's claims relating to the Mobizio entry must fail.

Grievance

254. Ms Last claims that the failure to hear her grievance was a detriment on the ground that she made a protected disclosure and/or it was an act of victimisation and/or it was direct discrimination because of race and/or sex and/or it was harassment related to race and/or sex

255. Ms Last attended the grievance meeting on 12 September 2018 with a friend. This was not in accordance with the respondent's policies on the appropriate accompanying person to such meetings. The claimant was informed the meeting could proceed without her friend or it could be rescheduled. Ms Last elected for the meeting to be rescheduled. Melanie Camm emailed the claimant on 13 September 2018 asking for dates when the meeting could be rescheduled. Ms Last acknowledged that email but she did not respond to provide dates for a rescheduling. Subsequently communication between the claimant and the respondent broke down in the way we have described above. We concluded that the main reason why communication broke down between the respondent and Ms Last was because of Ms Last's decision, on advice, to sop communicating with the respondent and her decision to go and work elsewhere without telling the

respondent. Those are the reasons why the claimant's grievance was not heard.

256. There was no evidence that the failure to hear the grievance may be connected to race, sex or Ms Last's protected acts/disclosures. We consider that the relatively prompt scheduling of the initial grievance meeting shows that the respondent was willing to hear the grievance and the only reasons why they didn't in the end hear it were the claimant's decision not to proceed without a companion, her failure to reschedule and the communication breakdown. In that context the failure was not a detriment which the respondent subjected the claimant to; the reason why it was not heard was effectively Ms Last's own conduct. The respondent's actions did not have the requisite purpose or effect to constitute harassment and they would have acted in the same way towards an employee of a different sex or race

257. In light of those findings all of Ms Last's claims relating to the failure to hear her grievance must fail.

Email of 16 October 2018

258. Ms Last claims that the email was a detriment on the ground that she made a protected disclosure and/or it was an act of victimisation and/or it was direct discrimination because of race and/or sex and/or it was harassment related to race and/or sex

259. The claimant's allegation is that the email, which was sent by Ms Turrell, was unreasonable and intimidating. We do not agree. The email was an invite to a disciplinary on the ground that the claimant had had unexplained absence since 10 September. The claimant was provided with relevant evidence and warned that she may be given a warning in accordance with the disciplinary procedure. She was given the right of accompaniment by a colleague or trade union representative. We do not see anything intimidating or unreasonable in the email. There was no detriment in the way alleged by the claimant as we do not find the email was unreasonable or intimidating.

260. In our view the invitation to a disciplinary hearing was justified in light of the claimant's unexplained absence from work. Her leave request had not been granted and yet the claimant had not attended work. The claimant had also not responded to correspondence from the respondent asking for the reasons for her absence and warning her that disciplinary action may have to be taken.

261. We note that persistent absenteeism is an example of misconduct in the respondent's policies and the sick notes provided by the claimant did not cover the whole period of absence. The reality is that the claimant simply did not communicate with the respondent about the reasons for her absence, including the fact she had obtained new employment.

262. Those were the reasons why the email of 16 October was sent. In light of those factors it was an understandable and proportionate response to the situation.

263. The 16 October 2018 email was wholly unconnected to Ms Last's sex, her race or her protected acts/disclosures. The respondent's actions did not have the requisite purpose or effect to constitute harassment and they would have acted in the same way towards an employee of a different sex or race. The reason the disciplinary procedure was instigated was solely on the basis of her absence, which the claimant effectively accepts was unexplained. We refer to our earlier findings to the effect that the claimant had decided to stop communicating with the respondent.

264. In light of the above findings all of Ms Last's claims relating to the 16 October 2018 email must fail.

Allocation of work

265. The claimant alleges that not being offered work after 14 October 2018 was a detriment on the ground that she made a protected disclosure and/or it was an act of victimisation and/or it was direct discrimination because of race and/or sex and/or it was harassment related to race and/or sex.

266. The respondent accepted that Ms Last was not allocated any work after 14 October 2018. On its own a reasonable worker may consider this was a detriment. However the respondent submitted, and we entirely accept, that this was due to the claimant's ongoing absence and the claimant's failure to communicate with them and explain the reasons for that. In that context we do not think there was in fact a detriment.

267. We accept that the respondent would not allocate Ms Last shifts within their service without certainty that she was available and that in the relevant period the respondent was not aware that the claimant was available. Given her ongoing absence and lack of contact with the respondent, they did not know what the claimant's intentions towards work were. In fact in the relevant period the claimant had obtained another job and started work elsewhere but she failed to inform the respondent of that.

268. Those were the reasons why the claimant was not allocated work after 14 October 210. There was no evidence that it was connected to Ms Last's sex, race or any of her protected acts or disclosures (if there was a detriment). It was entirely a consequence of the claimant's unexplained period of absence and lack of communication with the respondent. The respondent's actions did not have the requisite purpose or effect to constitute harassment and they would have acted in the same way towards an employee of a different sex or race.

269. Accordingly all of the claimant claims in relation to a failure to allocate work must fail.

Exposing the claimant to a hostile environment, causing stress, depression and insomnia

270. We understand this allegation to describe how the claimant felt as a result of her other allegations. It is not therefore a standalone allegation. The effect of the respondent's actions on the claimant may be relevant as a

remedy issue which we indicated we would deal with separately. Since there may now be a remedy hearing at which the parties will be entitled to make representations we do not think it is appropriate to make any findings on these matters at this point.

Overall conclusions on Ms Last's claim

271. In addition to the harassment which was conceded by the respondent we have concluded that the claimant was also victimised by the denial of her training on 24 and 25 May 2018. All of the claimant's other claims fail.

272. The earliest date for which an individual act is in time in Ms Last's claim is 8 June 2018.

273. The respondent indicated it did not object to time being extended for the purposes of limitation on a just and equitable basis for the concessions it has made (relating to events in March 2018). We consider it must be just and equitable for us to extend time in light of the respondent not opposing the extension. The respondent's position reflected the reality that they were not put to any prejudice by the delay in bringing the claim. In contrast there would be substantial prejudice to the claimant if she was denied a judgment in her favour on matters where the respondent conceded that she had been subjected to unlawful harassment.

274. The claimant also requires an extension of time for the successful victimisation claim over the training in May 2018 as there is no continuing act bringing this complaint in time.

275. We grant an extension of time on a just and equitable basis. The respondent did not put forward any reason why it would not be just and equitable to extend time and in particular they did not seek to argue in respect of Ms Last's claim that they were at a disadvantage due to any delay in bringing the claim. The respondent did not give us any reason why they would accept it would be just and equitable to extend time for us to adjudicate on events in March 2018 but not May 2018. In the circumstances of this case we could not think of any basis which could justify a just and equitable extension for the earlier acts but not the later one.

276. We remind ourselves that the just and equitable test is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. We should take into account any relevant factor; the tribunal has a wide discretion. However, there is no presumption that the Tribunal should exercise that discretion in favour of the claimant. It is the exception rather than the rule - see Robertson v Bexley Community Centre 2003 IRLR 434. There is no requirement that a tribunal must be satisfied that there is good reason for a delay in bringing proceedings - see Abertawe Bro Morgannwa University Local Health Board v Morgan [2018] IRLR 1050 CA.

277. The relevant factors which may (not must) be taken into account are set out in British Coal Corporation v Keeble [1997] IRLR 336 derived from section 33(3) of the Limitation Act 1980. Those factors are: the length of and reasons for the delay; the extent to which the cogency of the evidence is

likely to be affected by it; the extent to which the respondent had cooperated with requests for information; the promptness with which a claimant acted once aware of facts giving rise to the cause of action; and steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

278. We took into account that the claimant had received advice from her church friend who she wrongly believed to be a solicitor and that advice did not appear to be very good. If the claimant had taken professional advice sooner then she might have brought the claim sooner. We found that was the most likely reason for the delay. However we could see that the claimant had trusted the advice of her church and could not really be blamed for that in circumstances where she was under the impression that the adviser appointed by her pastor was a lawyer. We therefore did not feel that the steps taken by the claimant to obtain professional advice was a decisive factor. Similarly we did not find that the claimant had unreasonably delayed or deliberately waited until the last minute so the reason for the delay did not weigh against the grant of an extension either.

279. It seemed to us that the most relevant factors were that the delay was relatively short (the complaint in respect of the training was approximately 2 weeks out of time) and that there was no indication that the cogency of the evidence had been affected. The respondent was able to call both Ms Court and Ms Turrell who were the relevant decision makers and they were able to put forward their explanation for what had taken place without any apparent difficulty of recollection. In contrast, the claimant faced significant prejudice if we refused to extend time as we found that her claim was well founded but she would be denied a judgment in her favour. The balance of prejudice therefore lay in favour of extending time. For all those reasons we exercised our discretion to extend time on a just and equitable basis.

280. We did not find it was not reasonably practicable for the claimant to have lodged her claim in time. Despite the concerns over the standard of advice the claimant had been receiving she did not go as far as to suggest she had been misinformed over time limits and we found that she could still have conducted her own research or acted more promptly to instruct a solicitor herself. We therefore did not have jurisdiction to adjudicate on the claimant's claim of detriment on the ground of having made a protected disclosure arising out of the May training.

Our findings on the issues relating to Mr Ezekwem

Protected acts and protected disclosures

281. The respondent accepts that the following amounted to protected disclosures made by Mr Ezekwem:

a. Informing Alex and writing a statement about Patricia assaulting the service user.

b. The email to Ms Parkin in relation to the above.

c. The claimant's grievance of 25 August 2018.

282. We consider these concessions were rightly made.

283. The claimant alleged that there was a further protected disclosure by notifying Ms Parkin that Ms Court had deleted Mobizio entries in relation to the service user being denied food by her. However, as we explained above Mr Ezekwem did not notify Ms Parkin about the Mobizio entries allegedly being deleted – it was Ms Last. Ms Last mentioned Mr Ezekwem in her disclosure but it was not Mr Ezekwem who made this protected disclosure. Ms Last did not copy Mr Ezekwem into her email or say that he wished to raise the issue himself.

284. We note that in a later email (9 August 2018) Mr Ezekwem said that the note had been deleted intentionally because of the allegation relating to the service user being denied food. It was not entirely clear if this was what Mr Ezekwem wanted to rely on as Ms Parkin had already been notified of the allegation by Ms Last at this stage but we concluded that this was a protected disclosure in light of the concession made by the respondent in Ms Last's claim (which we found was rightly made).

285. The respondent accepts that the following amounted to protected acts by Mr Ezekwem:

a. The claimant's grievance on 25 August 2018.

b. The claimant's Tribunal claim.

286. We consider these concessions were rightly made.

287. Mr Ezekwem also alleged that he did the following protected acts:

a. Giving Ms Last advice and support about her sexual harassment claim against Mr Stoddart.

b. The email [of 7 August 2018] to Ms Parkin about Patricia Tague and the different treatment of Mr Adegbayi as a black man.

288. In his witness statement Mr Ezekwem said that Ms Last told him about the sexual harassment by Mr Stoddart and he was shocked and advised her to report it. He said Ms Last later told him that management were backing Mr Stoddart and not taking action. That was it. It seems therefore that the only advice or support Mr Ezekwem offered Ms Last was to report the incident which by the time she spoke to him she had already done. Mr Ezekwem does not suggest that he ever raised anything with the respondent about the sexual harassment suffered by Ms Last.

289. There is no evidence that Mr Ezekwem or Ms Last ever informed the respondent about any advice or support Mr Ezekwem may have offered Ms Last. Mr Ezekwem was not present when the sexual harassment occurred and is not referenced in Ms Last's email complaint. There was therefore no reason for the respondent to believe that Mr Ezekwem had done or may do a protected act.

290. For the above reasons we concluded that Mr Ezekwem did not do a protected act in relation to Ms Last's sexual harassment claim and the respondent did not believe he had done or may do a protected act in relation to the same matter.

291. It is difficult to make sense of Mr Ezekwem's allegation in respect of his email to Ms Parkin of 7 August 2018. The allegation is to the effect that the protected act was a suggestion that Mr Adegabyi was being treated differently to Ms Tague because of his colour. However as was accepted during the hearing both Mr Adegabyi and Ms Tague are black. Moreover, the email makes no comparison on the grounds of race - there is no reference to the race of either employee (or indeed any other protected characteristic).

292. There is a reference in the email to there being no equal opportunity at the respondent and in his witness statement the claimant claimed that what he meant by that was that *"white colleagues were being treated more favourably than black ones".* We do not accept that was what the claimant meant and nor do we accept that a reader of the email would have thought that's what he meant. Firstly, that is not what the email says and the claimant could easily have said that if it was what he felt. Secondly, if that was what the claimant was alleging then a comparison between Mr Adegbayi and Ms Tague would make no sense because, as we have said, both of those people are black.

293. In fact we think the meaning of the claimant's complaint is clear when one reads the email in full. The claimant alleges that a service user could complain and *"it will be used against anyone. I don't think anyone is safe the way things are going on".* The thrust of the claimant's complaint is that he does not feel safe because, as he puts it: *"anything can happen to anybody and when you complain about it nothing will be done about it".* Although this is a clear complaint of the respondent treating staff poorly and failing to support them it does not in our view amount to an allegation of a contravention of the Equality Act because the claimant's essential point is that this could happen to anybody (i.e. rather than certain people being treated differently).

294. For those reasons we concluded that the claimant did not do a protected act in relation to his email to Ms Parkin about Patricia Tague and the different treatment of Mr Adegbayi as a black man and the respondent did not believe he had done or may do a protected act in relation to the same matter.

Automatic unfair dismissal and wrongful dismissal

295. The claimant withdrew his claim for ordinary unfair dismissal on the basis that he did not have the requisite length of service.

296. The claimant's case is that he was dismissed by Jon Welsby by phone on 3 September 2018 because he had made protected disclosures. The allegation is flatly denied by the respondent; they say that no such phone call ever occurred and there was therefore no dismissal.

297. There is a lack of evidence supporting this assertion. There is no P45. There is no dismissal letter. There is no correspondence showing that Mr Ezekwem chased these documents (we found this particularly odd considering that Mr Ezekwem says he asked for a dismissal letter in the phone call itself).

298. There were no phone records produced by Mr Ezekwem to show the phone call he says he received. There was no correspondence to the claimant prior to 3 September indicating he may be dismissed. There is no evidence as to what reason the respondent would have put forward to dismiss the claimant at this time.

299. There was no challenge by Mr Ezekwem to this alleged dismissal, apparently his case is that he simply accepted it despite believing he had been dismissed unfairly because of making a protected disclosure. We find it very strange that Mr Ezekwem would not challenge his dismissal especially since he had complained about numerous other matters by this stage and raised a detailed grievance.

300. Mr Welsby explained in his evidence he would not have the authority to dismiss and any dismissal meeting would take place with two members of staff. We accepted that evidence.

301. There was evidence in the bundle of substantial attempts by the respondent to communicate with the claimant after 3 September 2018 in regard to ongoing absence**.** This contradicts the assertion that the claimant had been dismissed by the respondent on 3 September 2018.

302. For the above reasons we have concluded that the claimant was not dismissed as alleged on 3 September 2018 and therefore the claims of automatically unfair and wrongful dismissal must fail.

303. It seemed to us more likely than not that the claimant had lost trust in the respondent for the reasons he outlined in his email of 7 August 2018. He had therefore decided that he was not going to return to work but failed to communicate that to the respondent. We did not accept that the claimant did not receive any correspondence from the respondent until January 2019 – the correspondence in the bundle included emails before then which did not get any response from the claimant.

Implication of lying and not being taken seriously

304. The claimant's case is that there was an implication that he was lying in relation to the concern he raised about Patricia Tague assaulting the service user, and that his report was not taken seriously.

305. We find that Mr Ezekwem's report was taken seriously. It was considered as part of a safeguarding investigation and report dated 6 July 2018. This was a a formal step in itself. As we have already recorded Mr Ezekwem was asked to provide a statement and there is a reference to Ms Tague being interviewed.

306. It appears that the finding from the safeguarding investigation was that Ms Tague raise her hands to the service user with open palms and that the service user then lowered herself to the floor. This was part of an incident where the service user was being physically aggressive and hitting Ms Tague (we accept the respondent's evidence that it was not unusual for this service user to be physically aggressive). This was not as Mr Ezekwem had reported, as he had said that Ms Tague pushed the service user causing her to fall to the floor. However we did not think this amounts to a finding that Mr Ezekwem lied.

307. There is no suggestion of that in the report and no action was ever taken against Mr Ezekwem on the basis that he had lied. This was plainly a fast moving and difficult incident and Mr Ezekwem could well have raised a concern in good faith based on his interpretation of what he saw. We find that is more likely than not what happened. However, the respondent was entitled to consider all the evidence, including knowledge of how the service user acts generally and Ms Tague's account, before coming to a conclusion. As the conclusion was that Ms Tague had not assaulted the service user but had reacted appropriately to the service user's physical aggression there was no basis for any further action. In light of all the evidence we find that the respondent's conclusion was more likely than not what took place.

308. Mr Ezekwem did not see the safeguarding report at the time, so the basis on which he believed there was an implication that he was lying is unclear. We accept that once he had provided his statement the respondent's process is that the investigation is confidential. There is no clear evidence that anyone ever accused Mr Ezekwem of lying. The references in his email of 7 August to lies seem to relate to an alleged propensity of the service user to lie. We would expect that if Mr Ezekwem was believed to have lied about a

colleague assaulting a service use that would be a clear cause for disciplinary action, but no action was ever initiated on this basis.

309. For those reasons we think this allegation fails essentially on the facts – i.e. we have not found the facts alleged by the claimant to support his claim. We do not consider in the context that we have set out that the claimant was subjected to any detriment. Moreover, there was no evidence that the respondent had subjected the claimant to any detriment because he had made protected disclosures or done protected acts. We did not find any evidence from which we could conclude that the claimant's treatment was because of or related to race. The respondent would have acted in the same way towards an employee of a different race. We did not find that the treatment had the necessary purpose or effect to constitute harassment.

Fear of suspension

310. The claimant's case is that the respondent created and perpetuated a fear that he would be suspended. We do not find that this happened. The claimant did not give any clear evidence in his witness statement as to how the respondent did this. There was in fact no evidence that the claimant had ever been threatened with suspension or that suspension had even been raised as a possibility with him. The claimant was not under any sort of investigation which could lead to a suspension. The claimant's counsel pointed us in his closing submissions to the email from Ms Parkin but there was no mention of suspension in that.

311. For those reasons we think this allegation fails on the facts (i.e. we have not found the facts alleged by the claimant to make out the claim). We consider there is no evidence that the claimant was subjected to any detriment in the manner alleged. There was no evidence that the respondent had subjected the claimant to any detriment because he had made protected disclosures or done protected acts. We did not find any evidence from which we could conclude that the claimant's treatment was because of or related to race. The respondent would have acted in the same way towards an employee of a different race. We did not find any treatment which could have had the necessary purpose or effect to constitute harassment.

Mobizio

312. The substance of the claimant's complaint in relation to the Mobizio entries being lost mirrors that of Ms Last. We refer to the findings we have made in relation to Ms Last's claim which apply equally here. In summary:

a. Ms Parkin informed the claimant that he had not logged out properly because that is the information she had from Luke Smith (the individual at the respondent with knowledge of the Mobizio system). There is no reason to doubt that evidence. Ms Parkin cautioned the claimant to log our properly in the future as a result of the information she had received.

b. We accept that Ms Court was not able to delete records on the Mobizio system and we accept her evidence that she did not do so.

c. It appears from the documentary evidence that there is no evidence of an "actual time" logging out for Mr Ezekwem on 4 August and no shift notes whatsoever are saved for that day. These factors tend to support the suggestion that Mr Ezekwem in fact forgot to log out correctly.

d. We therefore conclude that it is more likely than not that Mr Ezekwem forgot to log out and that is the reason why his Mobizio notes were not saved.

313. We reiterate our finding that in reality there was no detriment in the above circumstances. Moreover there was no evidence that the respondent had subjected the claimant to any detriment because he had made protected disclosures or done protected acts. We did not find any evidence from which we could conclude that the claimant's treatment was because of or related to race. The respondent would have acted in the same way towards an employee of a different race. We did not find any treatment which could have had the necessary purpose or effect to constitute harassment.

314. Our conclusions have been informed essentially by our findings of fact. As we explained in relation to Ms Last's claim we found that Ms Parkin gave the claimant the information she had at the time, after enquiring to the best of her ability on the matter. It is clear to us that Ms Parkin did not accuse Mr Ezekwem of not logging out or not syncing because he had complained about Ms Tague; in fact Ms Parkin was not copied into the original email when that was raised on 19 June and Mr Ezekwem only raised it with Ms Parkin after she had provided her outcome to the Mobizio entry issue**.** There was no evidence that Ms Parkin was in any sense motivated by race as she simply told the claimant what information she had having spoken to the person who was best able to assist with the issue.

315. In light of the above all of the claimant's claims relating to the Mobizio entries being lost must fail.

Grievance

316. Mr Ezekwem's allegation is that the respondent failed to hear his grievance.

317. We do not accept that there was a failure on the part of the respondent to hear the grievance. The respondent wrote to the claimant on 28 September inviting him to a grievance meeting to take place on 8 October 2018**.** The claimant failed to attend that meeting and failed to respond to the invitation.

318. The claimant alleged that he did not receive this letter and that in fact he did not receive any letters from the respondent until he received a batch of

them in January 2019. We do not accept that evidence. We had some concerns about Mr Ezekwem's credibility, particularly in view of the fact that we found that he was not dismissed by phone as he had alleged.

319. There was no evidence of any "bounce-back" or notifications of non-delivery after the respondent had sent the invite. There was contemporaneous evidence that two managers waited for the claimant on the day of the hearing - which we consider they would be unlikely to do if the invite was not sent.

320. Moreover, the claimant was sent other emails around this time and he failed to respond to them either. We note that the claimant was taking advice from the same church friend who had advised Ms Last not to communicate with the respondent and that Mr Ezekwem had already made it clear he had lost trust in the respondent by this stage. We think it is likely the claimant was focused on his employment tribunal claim, and liaising with ACAS (early conciliation began on 16 September 2018) and had disengaged from communicating with the respondent. The lack of communication from the claimant included him not explaining to the respondent why he was absent from work.

321. For those reasons we concluded that it was more likely than not that the grievance invitation was sent to the claimant, but he chose not to reply and he chose not to attend the meeting as part of a course of non-communication with the respondent which he chose to adopt. That was the reason why the grievance was not heard; it was not because of any failure on the part of the respondent.

322. In those circumstances the claimant's claims relating to this allegation must fail: it has failed on the facts (i.e. we have not found the facts alleged by the claimant to make out the claim). We do not consider in the factual context that we have set out that the claimant was subjected to any detriment by the respondent. There was in any event no evidence that the respondent had subjected the claimant to any detriment because he had made protected disclosures or done protected acts. We did not find any evidence from which we could conclude that the claimant's treatment was because of or related to race. The respondent would have acted in the same way towards an employee of a different race. We did not find that the treatment had the necessary purpose or effect to constitute harassment.

Dismissal

323. The claimant claimed that his alleged dismissal on 3 September 2018 was also a detriment on the ground he made protected disclosures and/or it was direct race discrimination and/or it was harassment related to race and/or it was victimisation.

324. As we have found that there was in fact no dismissal these claims must fail.

Failing to allocate work

325. As we understood the claimant's case his primary argument was that he was dismissed by the respondent on 3 September 2018. Presumably if that were true he would not have expected to have been allocated any work after 3 September. Nevertheless the claimant brought what we understand to be alternative claims which alleged that the failure to allocate him work after 3 September 2018 was also a detriment on the ground he made protected disclosures and/or it was direct race discrimination and/or it was harassment related to race and/or it was victimisation.

326. We have concluded that the claimant was in fact absent from work at this time and he failed to communicate with the respondent about the reasons why. We accept the point made on behalf of the respondent that they could not sensibly put the claimant on the rota until they had understood the reasons for his absence.

327. We have taken into account that this allegation arises in a context where Mr Ezekwem's relationship with the respondent is unclear. There was certainly some period of unexplained absence (for example 25 and 26 August 2018, where it appears the claimant was placed on the rota but did not work). However the record keeping of the respondent as to whether the claimant was on annual leave or not at other times is unclear. We would also reiterate our findings to the effect that in respect of all of these claimants the communication with them could have been better and we think it is unfortunate that the question of their employment status was allowed to drift rather than being brought to a conclusion. Notwithstanding those concerns however we are satisfied that the respondent did make efforts to communicate with Mr Ezekwem but these were stymied by the claimant's failure to respond.

328. We therefore concluded that the claimant was not allocated work because he had stopped communicating with the respondent and failed to explain why he was absent from work. There was no evidence that the respondent had subjected the claimant to any detriment because he had made protected disclosures or done protected acts. We did not find any evidence from which we could conclude that the claimant's treatment was because of or related to race. The respondent would have acted in the same way towards an employee of a different race. We did not find any treatment which could have had the necessary purpose or effect to constitute harassment.

Breach of contract

329. Mr Ezekwem brought a breach of contract claim on the basis that the respondent failed to supply his minimum contracted hours from the date of his grievance. Mr Ezekwem did not allege he was owed pay for shifts he had worked; it was common ground that he had not in fact worked for the respondent in the relevant period.

330. Mr Ezekwem's contractual terms regarding remuneration were that he was paid an hourly rate for the time that he worked. Mr Ezekwem's contract refers to "normal" hours of work (initially 20 then 37 per week) rather than "minimum" hours. His contract also states "your hours many change depending on our client's needs". This makes it doubtful that the claimant in fact had contractually guaranteed minimum hours.

331. In any event as our result of our findings above we have concluded that in the relevant period Mr Ezekwem was not making himself available for work. The evidence demonstrates in our view that the claimant had disengaged and was failing to communicate with the respondent despite various attempts to contact him. There is also the matter of the claimant failing to work when he was put on the rota. There is no evidence in the relevant period of the claimant clearly saying to the respondent that he was available for work.

332. In those circumstances we concluded that the claimant was not offering his services to the respondent and he was in fact demonstrating that he was not available for work. In those circumstances there can be no obligation on the respondent to provide the claimant with work or to pay him.

333. Miles v Wakefield Metropolitan District Council 1987 ICR 368 is authority for this proposition which we think is plainly correct: an employee's right to remuneration depends on his or her doing or being willing to do the work that he or she is employed to do. Similarly, in SG & R Valuation Service Co LLC v Boudrais [2008] EWHC 1340 it was held that even where an employment contract conferred a right to work that right would be foregone if the employee demonstrated in a serious way that he was not ready or willing to work. Mr Ezekwem's unexplained absence and failure to communicate with the respondent in our view demonstrated quite unequivocally that he was not ready and willing to work.

334. For those reasons Mr Ezekwem's breach of contract claim must also fail.

Overall conclusions on Mr Ezekwem's claim

335. Our overall conclusion is that for the reasons set above all of Mr Ezekwem's claims must fail.

336. We reiterate the points which we have already made relating to the scattergun approach adopted by Mr Adegbayi and these apply equally to Mr Ezekwem's claim. This approach had again meant it was difficult to identify why the claimant asserted the particular action had been done. We again concluded that the claimant had simply referred to a course of conduct with which he was dissatisfied and related that to his specific claims only in very generalised terms. In consequence we found:

(i) There was no evidence to show a prima facie case of discrimination, other than the claimant's belief which was not sufficient to shift the burden of proof as it was not a matter from which we could infer discrimination.

(ii) There were instance of unreasonable behaviour, in particular our concerns over the poor communication from the respondent to the claimant but this was insufficient to found an inference of discrimination.

(iii) There was no evidence to support the contention that the respondent had acted because of the protected acts or disclosures which the claimant had made. There was no evidence that the respondent reacted negatively to the protected acts/disclosures or that there was any animosity to the claimant as a result.

Next steps

337. All of Mr Adegbayi and Mr Ezekwem's claims have failed. Ms Last's claim has succeeded in part. This means there may need to be a remedy hearing to decide the compensation which Ms Last may be entitled to. We express our hope that that may not be necessary. The parties should at least be talking to one another to see if matters can be agreed. If that proves to be impossible then we have made a separate case management order to prepare Ms Last's case for a remedy hearing.

Employment Judge Meichen

10 February 2021