EMPLOYMENT TRIBUNALS

Claimant:	**Mr. E Marunda**
Respondents:	**Nottinghamshire Healthcare NHS Foundation Trust (R1)** **Harriet Carter (R2)** **Diana Brennan (R3)**
Heard at:	**Via Cloud Video Platform**
On:	**9th, 10th, 11th, 16th, 17th, 18th, 19th and 20th November 2020** **24th November 2020 (in Chambers)**
Before:	**Employment Judge Heap**
Members:	**Mr. J Hill** **Mr. J Akhtar**

Representation

Claimant:	**Mr. M Chukwuemeka – Legal & Business Consultant and SRA Registered Foreign Lawyer**
Respondent:	**Mr. J Feeny - Counsel**

COVID-19 Statement

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was V – fully remote via CVP. A face to face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

1. The complaint of automatically unfair dismissal under Section 103A Employment Rights Act 1996 fails and is dismissed.

2. The complaints of detriment contrary to Section 47B Employment Rights Act 1996 fail and are dismissed.

3. The complaints of direct discrimination relying on the protected characteristic of race all fail and are dismissed.

4. The complaints of victimisation all fail and are dismissed.

REASONS

BACKGROUND & THE ISSUES

1. This is a claim brought by Mr. Emmerald Marunda (hereinafter referred to as "The Claimant") against his now former employer, Nottinghamshire Healthcare NHS Foundation Trust (hereinafter referred to as "The First Respondent" or "The Respondent Trust") presented by way of a Claim Form received by the Employment Tribunal on 25th February 2018. At that time the claim was one of automatically unfair dismissal contrary to Sections 103A and 104 Employment Rights Act 1996; detriment contrary to Section 47B of that Act; of direct discrimination relying on the protected characteristic of race and victimisation. The complaint under Section 104 Employment Rights Act 1996 was later withdrawn by the Claimant at a Preliminary hearing before Employment Judge Blackwell and as such is no longer a live issue before us. All remaining complaints are resisted by the Respondent.

2. The claim has been the subject of a number of Preliminary hearings designed to clarify the claims and the issues. The first of those took place on 19th June 2018 before this Employment Judge who made Orders for further information about the complaints made to be provided by way of the preparation of Scott Schedules. Those were completed by, as we understand it, the Claimant's then solicitors and appear in the hearing bundle at pages 76 to 136.

3. There was then a further Preliminary hearing for case management before Employment Judge Hutchinson on 24th August 2018. He listed an open Preliminary hearing which took place before Employment Judge Blackwell on 12th and 13th November 2020 with the purpose of considering whether to allow the Claimant to amend his Claim Form and whether any part of the claim should be struck out under Rule 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("The Regulations") or made subject to a Deposit Order under Rule 39 of the Regulations.

4. With the exception of one minor amendment relating to correction of a date, the Claimant's application to amend the claim was refused and he was made subject to Deposit Orders in respect of the complaints of whistleblowing detriment, automatically unfair dismissal and victimisation. The Claimant paid all three Deposit Orders in full and on time. No Deposit Order was made in respect of the complaints of direct discrimination.

5. At some point following that Preliminary hearing the Claimant parted ways with his solicitors. Other than what appears to be a brief spell when he was seeking advice from Counsel via what appears to be the Direct Access Scheme, the Claimant has been a litigant in person until the relatively recent instruction of Mr. Chukwuemeka who has represented him at this hearing.

THE CLAIMANT'S POSITION

6. The Claimant contends that during the course of his employment with the Respondent he made a number of protected disclosures in the terms recorded in the attached list of issues.

7. He contends that as a result of having made those protected disclosures, he was subjected to detriment by the Respondent or its employees. He further contends that as a result of the conduct of the Respondent, which he says was a fundamental breach of contract, that he had no alternative but to resign from his employment and that accordingly he was constructively dismissed. He contends that the reason or principal reason for that dismissal was because he had made those same protected disclosures.

8. Further and/or in the alternative, the Claimant also contends that during his employment he was subjected to direct discrimination on the protected characteristic of race. He contends that he was treated less favourably than other white members of staff were or would have been treated and that the reason for that difference in treatment is his race.

9. Finally, he says that he did a number of protected acts within the meaning of Section 27 Equality Act 2010 and that in consequence of those he was subjected to detriment by the Respondent and therefore was victimised.

THE RESPONDENT'S POSITION

10. The Respondent contends entirely to the contrary.

11. It is not accepted by the Respondent that the Claimant had made protected disclosures, but it is said that if he had then he was not subjected to detriment nor was any treatment of which he complains materially influenced by the disclosures upon which he relies.

12. Further, insofar as the matter of constructive dismissal is concerned, the Respondent's position was that there was no fundamental breach of contract, that the Claimant had by his actions in all events affirmed any breaches that were alleged and that in fact his resignation came not because of those matters but because he was aware that he was facing disciplinary action for working elsewhere against the Respondent's Sickness Absence Management Policy.

13. Insofar as the Claimant's complaints of race discrimination were concerned, the Respondent's position is that race was not a factor in any of the treatment of which the Claimant ultimately complains or otherwise that those matters did not occur or did not occur as he contends that they did.

14. With regard to certain of the detriment and discrimination complaints, the Respondent also contended that the Employment Tribunal had no jurisdiction to entertain them as the Claimant had presented a number of them outside the appropriate statutory time limit provided for by Section 48 Employment Rights Act 1996 and Section 123 Equality Act 2010.

THE HEARING

15. The claim was originally listed for 8 days of hearing time which took place between 9th and 20th November 2020 (with the exception of 12th and 13th November 2020 when the Tribunal did not sit as those were training days for the regions non-legal members). Whilst evidence and submissions were able to be concluded within that time, there was insufficient time for deliberations and so a further day of Tribunal time was added on 24th November 2020. With the

exception of 24th November when the Tribunal met in person at the Nottingham hearing centre, the claim was a fully remote hearing which enabled it to proceed in spite of the Covid-19 pandemic. We are satisfied that despite some technical issues arising during the course of the hearing, those were overcome and did not affect either the evidence or the fairness of the hearing.

16. At the time that the hearing commenced the Claimant had an extant application to amend his claim to include what was said to be an act of post termination victimisation relating to the Respondent having reported him to the Nursing & Midwifery Council after his employment had ended. We refused that application with reasons given orally at the time. Neither party has requested that those reasons form part of this Judgment and therefore we need say no more about them.

17. There was also dispute between the parties on the content of the list of issues which had been prepared in draft by the Respondent and amended by Mr. Chukwuemeka. Where agreement could not be reached as to the content – which largely concerned the inclusion of matters refused as amendment applications by Employment Judge Blackwell at the Preliminary hearing on 12th and 13th November 2019 – we dealt with those matters and again gave our reasons orally on those matters at the time. Again, no one has requested that those reasons be embodied within this Judgment. A copy of the final list of issues is now appended as a schedule to this Reserved Judgment.

18. The Judge sincerely apologises to the parties for the delay in promulgating this Judgment which has been caused, in part at least, as a result of difficulties working remotely on this and other cases during the pandemic without access to typing facilities and also IT difficulties which saw a considerable part of the initial draft Judgment lost and not be able to be recovered. Around two days work was lost as a result. That loss has not affected the decision as the Judge retained a clear note of the evidence and of deliberations with the members and both members have had sight of the Judgment in draft form and agreed with the content.

WITNESSES

19. During the course of the hearing, we heard evidence from the Claimant on his own behalf. In addition to his evidence, we also heard from the Claimant's partner, Ms. Leah Sadoka.

20. We also heard from a number of individuals on behalf of the Respondent. Those individuals were as follows:

- David Fisher – Deputy Matron of the Peaks and the Line Manager of the ward managers on the Peaks;
- Mark Sandall – the Claimant's first Line Manager within the Quantock ward and then Ward Manager;
- Harriett Carter - the Claimant's Line Manager when she took over as Ward Manager of Quantock ward;
- Bethany Lodge – a staff nurse and former colleague of the Claimant whilst they were on Quantock ward;
- Victoria Fox-Wild – a Team Leader of the Claimant whilst he was on Quantock ward;

- Diana Brennon – the General Manager overseeing various directorates, including the Peaks;
- Kerry Burton – the Modern Matron of Quantock's ward in the latter stages of the Claimant's employment; and
- Annette Magore – Modern Matron of Women's Services who undertook an investigation into complaints raised by the Claimant.

21. The Claimant was in fact recalled to give further evidence as a result of matters which had come to light since he had initially given his evidence. Ms. Carter was also recalled twice to deal with additional matters and Ms. Fox-Wild was also recalled, albeit only once.

22. The reason for recalling all witnesses came from an issue relating to disclosure of documentation that we had requested the parties to provide during the course of the hearing.

23. In this regard, during Mr. Chukwuemeka's cross examination it became clear that a significant issue in the Claimant's case was that it was alleged that the Respondent had falsified documentation after proceedings were issued. Similarly, there was a long standing issue as to whether the Respondent had received certain letters from the Claimant at the time that he claimed that he had sent them or whether they had been manufactured for the purposes of these proceedings.

24. We discussed with the parties that it appeared to us to be difficult for us to resolve those matters on the basis of witness evidence alone and so of our own volition we requested the meta data for the contentious documents in question. The Respondent provided all meta data, save as for in relation to one document which could not be found. The Claimant did not produce the meta data and Mr. Chukwuemeka told us that the reason for that was because the Claimant no longer had the computer on which he had typed the letters in question, having disposed of that when he moved house.

25. The letters in question had been sent to Annette Magore by email on 30th October 2017 and she took steps to obtain them to see if that assisted with the issue of the meta data. However, having seen those emails the documents were sent by the Claimant by PDF attachments and so that did not assist us and we were therefore unable to obtain meta data to assist with the creation dates of the letters.

26. We make our observations in relation to matters of credibility in respect of each of the witnesses from whom we have heard below and invariably the issue of manufactured or backdated documents has informed our views in that regard.

27. In addition to the witness evidence that we have heard, we have also paid careful reference to the documentation to which we have been taken during the course of the proceedings and also to the written and oral submissions made by Mr. Chukwuemeka on behalf of the Claimant and Mr. Feeny on behalf of the Respondent.

CREDIBILITY

28. One issue that has invariably informed our findings of fact in respect of the complaints before us is the matter of credibility. Therefore, we say a word about that matter now.

29. We begin with our assessment of the Claimant. Ultimately, we found him to be an entirely unsatisfactory witness. In many areas of his evidence we found him to be evasive and found that he frequently failed to answer the questions asked of him, choosing instead to answer something completely different despite having been told at the outset of his evidence that he needed to focus on the questions asked.

30. Moreover, we found the Claimant's evidence about the issue of the disposal of his computer to be entirely unsatisfactory and we did not consider him to be credible on the point. Particularly, his evidence began that he had disposed of the computer when he had moved house in August 2019.

31. When Mr. Feeny pointed out to the Claimant that the meta data in question had been requested by the Respondent much earlier than that (see page 92 of the hearing bundle) the Claimant changed his evidence to the effect that the laptop had broken much earlier than August 2019 – at some unspecified point in 2017 - but for some unfathomable reason he had retained it because he lived in a big house at the time and there was space to store it in a room with other broken equipment such as a printer. The Claimant's evidence was also that he had never seen the Respondent's request, although we consider it unlikely to say the least that he did not read the Reply to the Scott Schedules where that request was contained. He was of course legally represented at that time.

32. Moreover, when asked by the Tribunal as to when the computer had ceased working the Claimant replied that he did not know. That again changed after his evidence that he had used the computer to write letters in late 2017. He then apparently recalled that it had in fact been broken in December of that year.

33. His evidence about the laptop was entirely inconsistent, unconvincing and lacking in credibility. Particularly, we still could not fathom however big a house was that the Claimant would store broken equipment that he knew had, in his words, "served its time" for some years rather than disposing of it. All those matters, including the method by which they were said to have been sent, led us to conclude that the Claimant had manufactured the letters in question after the date that he claimed to have sent them and that is a matter that has considerably undermined his credibility.

34. We did not have any issue with the evidence of Ms. Sadoka and considered her to be a credible and candid witness. For example, she did not seek to suggest that she had experienced any difficulties when working for the Respondent despite the Claimant's contention that the Respondent was institutionally racist. However, Ms. Sadoka was ultimately not able to give evidence as to the disputed facts. She had not personally witnessed anything and the focus of her evidence was on the impact of events on the Claimant. Whilst she gave evidence about a telephone call that she had received from the Claimant when he told her that he had been the recipient of a racist incident, she did not personally witness anything and was entirely reliant on what the Claimant told her. There were also

differences in their accounts as to whether the Claimant had reported that incident as he told Ms. Sadoka that he had.

35. We turn then to the evidence given on behalf of the Respondents. We were not impressed with the evidence of either Mark Sandall or Harriet Carter. Their evidence was self serving with an attempt to justify failings on their part as to access to systems for the Claimant which were not ultimately justifiable. They instead sought to shift the blame almost entirely onto the Claimant which was not to their credit. We find that likely to have been the case in order to seek to cover up their own failings.

36. Moreover, with regard to Ms. Carter we were not satisfied with her explanations regarding the dates of supervisions that she contended that she had had with the Claimant. Her evidence changed after we requested the meta data for those particular supervision notes and we considered her explanations about the timings and delays in formalising those notes matters to be poor and lacking in credibility. We were satisfied that in at least one instance she had created a note of a supervision session after the event (albeit not after this claim was issued as the Claimant contended) and the date on which that was created happened to precisely coincide with the date that she entered into an email exchange about the Claimant and issues that he had raised about the ward. We did not accept that she might have accessed the notes to prepare her email because that would not account for why they were said to have been modified on 7th August 2017.

37. We were also not impressed with the evidence of Ms. Fox-Wild. Her evidence when she was recalled to deal with the date on which she had created a formal note of a supervision with the Claimant was entirely unsatisfactory. Her evidence was that she had only completed notes of a supervision, which she said had taken place on 29th January 2017, on 15th May 2017. She could offer no reasonable explanation for that significant delay and we are aware of course that note taking is a very important issue for a nurse. We did not accept her evidence that she had put the notes of the meeting with the Claimant away until that time and had only happened upon them on 15th May 2017.

38. Her evidence was also inconsistent. When asked why she had not just put the handwritten notes that she said that he had made on the Claimant's file, her evidence changed from her having written the notes on supervision templates to an assertion that she had also used spare pages and that those may have had other confidential information relating to other staff or patients on them. It was clear to us that she only prepared the notes at the time that she did because she was prompted to do so by the Claimant's complaints to another team leader, Katy Twigg, on 15th May 2017. The date was far too coincidental. The preparation of the notes in the terms that they were written was accordingly a back covering exercise on her part. We did not accept that they were accurate but instead they were designed to paint a more positive picture about support offered to the Claimant than was the reality.

39. We did not consider there to be any issue in respect of David Fisher's evidence and we accepted the account that he gave us in the course of these proceedings. He was forthcoming in his answers during cross examination and, in contrast to the Claimant, he was prepared to make concessions where appropriate.

40. Similarly, we considered Ms. Brennan to be a credible witness and had no reason to doubt the account that she gave to us. There were some areas where she could not recall certain matters but given the fact that she was being asked about events of over three years previously, we do not find that to be unusual. She sought to answer the questions posed in cross examination candidly and fully despite some confusion over, in some cases, what she was actually being asked. Given the nature of some of Mr. Chukwuemeka's cross examination, we do not consider that to be an issue.

41. We also considered Kerry Burton to be a credible witness. She was not asked many questions in cross examination by Mr. Chukwuemeka in all events and we have no reason to doubt the answers that she gave.

42. We considered Annette Magore to have sought to give us an honest account but it was clear that she had difficulties with her recollections. However, given the passage of time that is not necessarily unusual. She made concessions where appropriate and accepted times when she had been mistaken. She also took steps to try to verify parts of her evidence where she was uncertain about matters, such as by checking back through her emails.

43. Finally, we turn to the evidence of Bethany Lodge. She also had considerable difficulties in her recollection but again that is not surprising given the passage of time. Indeed, she had difficulties recollecting the year that she qualified as a nurse so it is of no surprise to us that she had a lack of recall of other events that had no particular significance to her at the time. She was also not interviewed by Annette Magore about allegations that the Claimant made about her towards the end of his employment with the Respondent and so did not have any knowledge of those matters until the course of these proceedings some considerable time later.

THE LAW

44. Before turning to our findings of fact, we remind ourselves of the law which we are required to apply to those facts as we have found them to be.

Complaints pursuant to Section 47B and Section 103A Employment Rights Act 1996 – Protected Disclosures

45. In any claim based upon "whistleblowing" (whether for detriment or dismissal) a Claimant is required to show that firstly they have made a "protected disclosure".

46. That in turn brings us to the definition of a protected disclosure, which is contained in Section 43A Employment Rights Act 1996 and which provides as follows:

"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."

47. Section 43B provides as follows:

> *"In this part, a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure is 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 and 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 one of the preceding paragraphs has been, or is likely to be deliberately concealed.*
>
> *For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is of the United Kingdom or of any other country or territory.*
>
> *A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.*
>
> *A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice."*

48. An essential requirement of a disclosure which qualifies for protection under Sections 47B and 103A (in respect of which the relevant provisions are set out below) is that there is a disclosure of information. A disclosure is more than merely a communication, and information is more than simply making an allegation or a statement of position. The worker making the disclosure must actually convey facts, even if those facts are already known to the recipient (See **Cavendish Munro Professional Risks Management Ltd v Geluld [2010] IRLR 38 (EAT)**) rather than merely an allegation or, indeed, an expression of their own opinion or state of mind (See **Goode v Marks & Spencer Plc UKEAT/0442/09**).

49. A disclosure need not be embodied in one communication and it is possible, depending upon the content and nature of those communications, for more than one communication to cumulatively amount to a qualifying disclosure, even though each individual communication is not such a disclosure on its own (**Norbrook Laboratories (GB) Ltd v Shaw UKEAT/0150/13**.)

50. It is not necessary for a worker to prove that the facts or allegations disclosed are true. Provided that the worker subjectively believes that the relevant failure has occurred or is likely to occur and their belief is objectively reasonable, it matters not if that belief subsequently turns out to be incorrect (See **Babula v Waltham Forest College [2007] IRLR 346 (CA)**.

51. A worker must establish that in making their disclosure they had a reasonable belief that the disclosure showed or tended to show that one or more of the relevant failures had occurred, was occurring or was likely to occur. That reasonable belief relates to the belief of the individual making the disclosure in the accuracy of the information about which he is making it. The question is not one of the reasonable employee/worker and what they would have believed, but of the reasonableness of what the worker himself believed.

52. However, there needs to be more than mere suspicion or unsubstantiated rumours and there needs to be something tangible to which a worker/employee can point to show that their belief was reasonable.

53. The questions for a Tribunal in considering the question of whether a Protected Disclosure has been made are therefore firstly, whether the Claimant disclosed "information"; secondly, if so, did he believe that that information was in the public interest and tended to show one of the relevant failings contained in Section 43B Employment Rights Act 1996, and, if so, was that belief reasonable.

Complaints of detriment under Section 47B Employment Rights Act 1996

54. If a worker can demonstrate that they have made a protected disclosure, then in order to succeed in a complaint under Section 47B Employment Rights Act 1996, they must also demonstrate that they have suffered "detriment". In this regard, Section 47B(1) Employment Rights Act 1996 provides as follows:

"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."

55. A worker must therefore prove that they have made a protected disclosure and, further, that there has been detrimental treatment. The term "detriment" is not defined within the Employment Rights Act 1996 but guidance can be taken from discrimination authorities and, particularly, from **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285.** In this regard, for action or inaction to be considered a detriment, a Tribunal must consider if a reasonable worker would or might take the view that they have been disadvantaged in the circumstances in which they had to work. However, an "unjustified sense of grievance" is not enough to amount to a detriment.

56. If the worker satisfies the Tribunal that he has both made a protected disclosure and suffered detriment, the employer then has the burden of proving the reason for the treatment pursuant to the provisions of Section 48(2) Employment Rights Act 1996. If the employer fails to prove an admissible reason for the treatment, a Tribunal must conclude that it is because of the protected disclosure.

57. In a case of a detriment, a Tribunal must be satisfied that the detriment was *"on the ground that the worker has made a protected disclosure"* and there must be found to be a causative link between the protected disclosure and the reason for the treatment. The test to be considered is if whether "*the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment*" of the Claimant (see **NHS Manchester v Fecitt & Others [2012] IRLR 64**).

Automatically unfair dismissal – Section 103A Employment Rights Act 1996

58. Section 103A ERA 1996 provides that one category of "automatically unfair" dismissal is where the reason or principal reason for the dismissal is that the employee has made a protected disclosure. Section 103A provides as follows:

"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."

59. A Tribunal therefore needs to be satisfied that a Claimant bringing a successful claim under Section 103A ERA 1996 has firstly been dismissed (including constructively dismissed) and, secondly, that the reason or principal reason for that dismissal is the fact that he or she has made a protected disclosure.

60. As to a dismissal, a dismissal for these purposes includes a situation where an employee terminates the employment contract in circumstances where they are entitled to do so on account of the employer's conduct – namely a constructive dismissal situation.

61. Tribunals take guidance in relation to issues of constructive dismissal from the leading case of **Western Excavating – v – Sharp [1978] IRLR 27 CA**:-

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; or, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

62. Implied into every contract is a term that an employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee. Breach of that implied term, if established, will almost always inevitably be repudiatory by its very nature.

63. The question of whether or not there has been a repudiatory breach of the duty of trust and confidence is to be judged by an objective assessment of the employer's conduct. The employer's subjective intentions or motives are irrelevant. The actual effect of the employer's conduct on an employee are only relevant in so far as it may assist the Employment Tribunal to decide whether it was conduct likely to produce the relevant effect.

64. If there is a fundamental breach of contract, an employee must, however, resign in response to it. That requirement includes there being no unconnected reasons for the resignation, such as the employee having left to take up another position elsewhere or any other such reason if that is unrelated to the breach relied upon. However, if the repudiatory breach was part of the cause of the resignation, then that suffices. There is no requirement of sole causation or predominant effect (see **Nottinghamshire County Council v Meikle [2004] IRLR 703**).

65. It is possible for an employee to waive (or acquiesce to) an employer's breach of contract by their actions. In those circumstances, an employee will affirm the contract and will be unable to rely upon any breach which may have been perpetrated by the employer in seeking to argue that they have been constructively dismissed.

Discrimination relying on the protected characteristic of race

66. The Claimant's discrimination complaints all fall to be determined under the Equality Act 2010 ("EqA 2010) and, particularly, with reference to Sections 13, 27 and 39.

67. Section 39 EqA 2010 provides for protection from discrimination in the work arena and the relevant parts provide as follows:

(1) An employer (A) must not discriminate against a person (B)—

(a)in the arrangements A makes for deciding to whom to offer employment;

(b)as to the terms on which A offers B employment;

(c)by not offering B employment.

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a)as to B's terms of employment;

(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c)by dismissing B;

(d)by subjecting B to any other detriment.

(3) An employer (A) must not victimise a person (B)—

(a)in the arrangements A makes for deciding to whom to offer employment;

(b)as to the terms on which A offers B employment;

(c)by not offering B employment.

(4) An employer (A) must not victimise an employee of A's (B)—

(a)as to B's terms of employment;

(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c)by dismissing B;

(d)by subjecting B to any other detriment.

68. Section 13 EqA 2010 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".

69. It is for a Claimant in a complaint of direct discrimination to prove the facts from which the Employment Tribunal could conclude, in the absence of an adequate non-discriminatory explanation from the employer, that the employer committed an unlawful act of discrimination (see **Wong v Igen Ltd [2005] ICR 931**).

70. If the Claimant proves such facts, the burden of proof will shift to the employer to show that there is a non-discriminatory explanation for the treatment complained of. If such facts are not proven, the burden of proof will not shift.

71. In deciding whether an employer has treated a person less favourably, a comparison will in the vast majority of cases be made with how they have treated or would treat other persons without the same protected characteristic in the same or similar circumstances. Such a comparator may be an actual comparator whose circumstances must not be materially different from that of the Claimant (with the exception of the protected characteristic relied upon) or a hypothetical comparator.

72. Guidance as to the shifting burden of proof can be taken from that provided by Mummery LJ in **Madarassy v Nomura International Plc [2007] IRLR 246**:

"'Could conclude' ….. must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of …… discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage …. the tribunal would need to consider all the evidence relevant to the discrimination

complaint; for example evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like….. and available evidence of the reasons for the differential treatment.

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

73. However, there must be something from which an inference could be drawn that the treatment complained of relates to the protected characteristic relied on. The fact that a person has that protected characteristic is not enough nor is a mere difference in treatment. Similarly, unreasonable treatment is not enough to establish that there has been discrimination (see **Bahl v The Law Society [2004] IRLR 799**).

74. The protected characteristic need only be a cause of the less favourable treatment but need not be the only or even the main cause. A Tribunal when considering the cause of any less favourable treatment will be required to consider that question having regard not only to cases where the grounds of the treatment are inherently obvious but also those where there is a discriminatory motivation (whether conscious or unconscious) at play (see **Amnesty International v Ahmed [2009] ICR 1450.**)

75. Section 27 EqA 2010 provides that:

(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.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

76. It will not be sufficient for a Claimant to simply use words such as "discrimination" for that to amount to a protected act within the meaning of Section 27 EqA 2010. The complaint must be of conduct which interferes with a characteristic protected by the EqA. There need not be explicit reference to the protected characteristic itself but there must be something sufficient about the complaint to show that it is a complaint to which at least potentially the EqA 2010 applies (see **Durrani v London Borough of Ealing UKEAT/0454/2012**).

77. In dealing with a complaint of victimisation under Section 27 EqA 2010, Tribunal will need to consider whether:

(a) The alleged victimisation arose in any of the prohibited circumstances covered by Section 39(3) and/or Section 39(4) EqA 2010 (which are set out above);

(b) If so, was the Claimant subjected to a detriment; and

(c) If so, was the Claimant subjected to that detriment because he or she had done a protected act.

78. In respect of the question of whether an individual has been subjected to a detriment, the Tribunal will need to consider the guidance provided by the EHRC Code (as referred to further below) and the question of whether the treatment complained of might be reasonably considered by the Claimant concerned to have changed their position for the worse or have put them at a disadvantage. An unjustified sense of grievance alone would not be sufficient to establish that an individual has been subjected to detriment (paragraphs 9.8 and 9.9 of the EHRC Code).

79. If detriment is established, then in order for a complaint to succeed, that detriment must also have been "because of" the protected act relied upon. The question for the Tribunal will be what motivated the employer to subject the employee to any detriment found. That motivation need not be explicit, nor even conscious, and subconscious motivation will be sufficient to satisfy the "because of" test.

80. A complainant need not show that any detriment established was meted out solely by reason of the protected act relied upon. It will be sufficient if the protected act has a "significant influence" on the employer's decision making (**Nagarajan v London Regional Transport 1999 ICR 877**). If in relation to any particular decision, the protected act is not a material influence of factor – and thus is only a trivial influence - it will not satisfy the "significant influence" test (**Villalba v Merrill Lynch & Co Inc & Ors 2007 ICR 469**).

81. In any claim of victimisation, the Tribunal must be satisfied that the persons whom the complainant contends discriminated against him or her contrary to Section 27 EqA 2010 knew that he or she had performed a protected act (**Nagarajan v London Regional Transport [1999] ICR 877**). As per **South London Healthcare NHS Trust v Al-Rubeyi (2010) UKEAT/0269/09** and **Deer v Walford & Anor EAT 0283/10**, there will be no victimisation made out where

there was no knowledge by the alleged discriminators that the complaint relied upon as a protected act was a complaint of discrimination.

The EHRC Code

82. When considering complaints of discrimination, a Tribunal is required to pay reference to the Equality & Human Rights Commission Code of Practice on Employment (2011) ("The Code") to the extent that any part of it appears relevant to the questions arising in the proceedings before them.

FINDINGS OF FACT

83. We ask the parties to note that we have only made findings of fact where those are required for the proper determination of the issues in this claim. We have inevitably therefore not made findings on each and every area where the parties are in dispute with each other where that is not necessary for the proper determination of the complaints before us. The relevant findings of fact that we have therefore made against that background are set out below. References to pages in the hearing bundle are to those in the bundles before us and which were before the Tribunal and the witnesses.

The First Respondent and the commencement of the Claimant's employment

84. The First Respondent is an NHS Foundation Trust operating a number of hospitals in the Nottinghamshire area. One of those is Rampton which is a high security hospital providing psychiatric services to its patients. Many of the wards at Rampton have challenging patients and ones who either have or would be incarcerated in prison but for their mental health conditions.

85. The Claimant is a staff nurse. He is registered with the Nursing & Midwifery Council ("NMC") and is required to abide by the NMC Code of Conduct. The Claimant qualified as a nurse in October 2016. Prior to that he had undertaken four years of study at York University. He had to undertake extensive travel to attend his course and he and his family are rightly proud of his achievement when he qualified. Prior to his qualification, the Claimant had undertaken a placement at a different unit at Rampton, namely Blake ward.

86. After that, he had accepted employment to commence as a Staff Nurse in October 2016 upon his qualification. After qualification, the Claimant had to await his NMC pin to allow him to practice as a nurse. He in fact started working at Rampton before he received his pin and during that time he was working as a Health Care Assistant. That was on 3rd October 2016 and after he received his NMC pin he joined the Peaks unit as a Staff Nurse commencing on 12th October 2016. The Peaks unit has between five and seven wards and the Claimant was assigned to Quantock ward although in practice he could and was, if the need arose, be deployed to any of the other wards on the Peaks.

87. Quantock ward deals with patients with personality disorders who had all, prior to transfer to Rampton, been serving custodial sentences in category B prisons. We accept that the work in the ward is challenging.

88. The Claimant describes his race as black African and he is from Zimbabwe. At the time that he began working on Quantock ward he was the only black member of the team although one other black staff nurse, Dumi Mbulawa, later joined the ward.

89. At the time, the Deputy Matron for the Peaks was David Fisher. Each ward of the Peaks was assigned a Ward Manager who Mr. Fisher would in turn line manage. The Ward Manager on Quantock ward at the time of the commencement of the Claimant's employment was Mark Sandall and then later Harriet Carter. Mr. Fisher worked under the Modern Matron who at the material time was Martina Griffiths and then, with effect from 2nd October 2017, Kerry Burton.

Care Quality Commission ("CQC")

90. There was an inspection of Rampton by the CQC between 6th and 10th March 2017. The Claimant relies on certain extracts of that report in support of the claim. In this regard, the report highlighted that whilst the staff that the CQC spoke to were aware of the Respondent's Whistleblowing Policy, they talked about a blame culture and felt that their career or job would be negatively affected if they raised an issue or blew the whistle (see pages 400, 407 and 436 of the hearing bundle).

91. However, there is no indication as to which ward or unit the individuals who were spoken to worked on and so we cannot make assumptions that this was a widespread issue or something that occurred on Quantock ward.

Lease car

92. Prior to the commencement of his employment on Quantock ward the Claimant made an application for a lease car. We have had some difficulty in obtaining the correct documentation in respect of that scheme, but we accept the evidence of Diana Brennan that the application was made under a scheme that was at that time available to lease a car via a salary sacrifice scheme but that she did not read the scheme documentation at the time of the Claimant's application.

93. Obtaining a car was important to the Claimant because he was having difficulties with his own vehicle at that time. However, that was not a matter known to Ms. Brennan. She had had no previous dealings with the Claimant and had no information about him other than his name and that he had been offered employment with the Respondent.

94. Mr. Fisher submitted the Claimant's application as his line manager but we accept his evidence and that of Ms. Brennan that she was responsible for making the decision about that matter and that Mr. Fisher played no part in that. Ms. Brennan decided that she would reject the application.

95. We are satisfied that she did so because she was concerned that an employee should have been in employment with the Respondent for a reasonable period of time before agreeing an application. That was on the basis that she had recently discovered that the Respondent Trust was responsible for costs in respect of those who defaulted on their agreements or caused damage to the vehicle. In this regard, Ms. Brennan had discovered from Human Resources ("HR") that the Respondent Trust had become responsible for the costs of recovery and damage

to a vehicle on the lease scheme which had been abandoned by a disgruntled former employee who had been dismissed. The cost to the Respondent Trust had been some £10,000.00. We agree with the assessment of Mr. Chukwuemeka that it is extraordinary that the Respondent was liable for those costs, but we accept that that was precisely why Ms. Brennan was shocked when she discovered the position from HR and she thereafter took a cautious approach regarding approving lease cars under that scheme.

96. Whilst the evidence given by Ms. Brennan as to the length of time that the individual in question had been employed by the Respondent differed from her witness statement, we accept that that was simply a mistake and the experience and cost that had resulted from that incident was the reason why she rejected the application. She gave unhesitating and very detailed evidence about that particular incident. We accept that the difference in her evidence was simply a mistake and there was no attempt to mislead us.

97. The fact that Ms. Brennan's reasoning related to the Claimant being new to the service was reflected in the explanation that she gave to Fleetcare who operated the lease scheme to be fed back to the Claimant at the time. That feedback was as follows:

"The reason is this member of staff is very new to the service and I feel we should wait for a few months before we commit to anything like this.

Happy for them to try again in the future".

98. The Claimant did in fact submit a further application for a lease car under the same scheme three months later. That application was accepted by Ms. Brennan given that by that time the "few months" that she had referred to in her feedback had passed. We would observe that Ms. Brennan was not required to give reasons for her decision, that was merely an option (see page 304 of the hearing bundle). No doubt if there was anything untoward with regard to her decision then she would not have elected to do so and also would have refused the Claimant's further application. However, her feedback was entirely consistent with her evidence before us.

99. When the Claimant commenced employment on Quantock his partner, Ms. Sadoka, was pregnant. His initial supervision session on 26th October 2016 had to be terminated because she had gone into labour (see page 307 of the hearing bundle). Thereafter he took paternity leave and extended that by taking a period of annual leave so that he would return to work on 25th November 2016 (see page 308 of the hearing bundle). In the early weeks of his employment the Claimant was therefore absent from work for a not insignificant period.

100. At the same time as requesting that period of leave, on 17th November 2016, the Claimant requested two days of annual leave on 21st and 22nd January 2017 so that he could attend his University degree ceremony. He made his request to Mark Sandall. Mr. Sandall did not process the Claimant's leave at that time and he chased the matter up on 16th December 2016 (see page 310 of the hearing bundle).

101. The Claimant wrote to Mr. Sandall again on 7th January 2017 when he discovered that he had been put on the rota to work (see page 359 of the hearing bundle). That had followed on from a conversation that he had had with Mr. Sandall when he had been told that he would need to swap shifts if he needed that time off. Two days later Mr. Sandall sent an email indicating that he had forgotten to put the Claimant on leave and asking if the rota could be changed so that the Claimant could take leave. That was supported by Mr. Fisher who, despite a push back from the shift organisers who also suggested a shift swap, made it abundantly clear that the Claimant should be permitted to take his leave (see page 362 of the hearing bundle). There was a change to the rota as a result and the Claimant was able to attend his graduation as originally planned. He was advised of the position by Martina Griffiths the same day.

102. As part of the process of becoming a staff nurse there was to be a period of preceptorship. The idea of preceptorship was as a transition phase once a nurse newly qualifies and assists them to become competent in their practice. It is an important part in development (see page 316 of the hearing bundle). Upon joining the ward a newly qualified nurse should be allocated a preceptor and a preceptorship package of paperwork for completion. New starters should also be allocated access to the Respondent's IT systems and have a clinical supervisor. In respect of the latter, the nurses themselves chose their own clinical supervisor. The Claimant chose Gayle Bennett with whom he had worked previously during his time on Blake ward. We accept that that was not an ideal choice because Ms. Bennett was very busy with her own practice and did not work on Quantock ward. Access to her was therefore relatively limited.

103. There was a delay in the Claimant being allocated a preceptor and being issued with the appropriate paperwork. He had to approach his initial preceptor, Mark Marples, himself.

104. The Claimant's access to the Respondent's email and IT systems, including CESA and RIO which was needed to view patient records, was also delayed. The Claimant was not connected to email until 14th December 2016 and Rio until 29th December 2016. Whilst the Respondent has been somewhat quick to blame the delay with IT access on the Claimant – indicating for example that this might be because he used more than one name – that is not borne out on the evidence and we cannot see that Mr. Sandall took any steps before December 2016 to ask the IT department to set the Claimant up on the system.

105. Until the Claimant completed his preceptorship, he was not able to undertake night shifts which he wanted to do for childcare reasons. Whilst it was clear that there were difficulties with inaction on the part of the Respondent in getting the Claimant's preceptorship issues resolved, there were also occasions where the Claimant's paperwork was not available because he had taken it home with him and therefore it could not be accessed for review (see pages 380 and 381 of the hearing bundle).

106. The Claimant's preceptorship paperwork appears in the bundle at pages 315 to 332. Many of the dates for preceptorship review are set as being done in the early stages of the Claimant's employment. However, those are signed by individuals from whom we have not heard and we cannot verify those dates as being accurate for a number of reasons. Particularly, one entry is dated 3rd

October 2016 which is a date when the Claimant was not working as a nurse but as a Healthcare Assistant.

107. At a similar time to the Claimant joining Quantock ward another newly qualified staff nurse, Matthew Thomas, also joined. Mr. Thomas is white. He did not experience the same difficulties with regard to his preceptorship paperwork or being allocated a preceptor although he did have his own access to CESA delayed and by 13th January 2017 he still did not have access (see page 350 of the hearing bundle). Mr. Thomas did complete his preceptorship before the Claimant (although not in a period of two months as the Claimant contends) but we accept that the time taken to complete preceptorship varies from practitioner to practitioner and the Claimant completed his within an average period of time.

108. As touched upon above, the Claimant initially had Mark Marples as a preceptor mentor. Mr. Marples had also mentored Matthew Thomas. The Claimant's preceptor later changed to Debra Anderson due to Mr. Marples absence from the ward on days in Autumn 2017. Mr. Marples could not then mentor the Claimant because they were not working the same shifts and it does not appear that much progress was made with that particular mentor.

109. Thereafter, Ms. Anderson commenced a period of long term sickness absence after which one of the team leaders, Walter Magill, mentored the Claimant and confirmed that his paperwork was in order. The Claimant was eventually signed off by Harriet Carter on 30th June 2017 (see page 332 of the hearing bundle) and thereafter he was able to work nights. Indeed, he was thereafter allocated a bank of night shifts by Ms. Carter to fit in with his childcare requirements over the school holidays.

110. There was a delay in Ms. Carter signing the relevant paperwork to confirm that preceptorship was complete and Mr. Magill confirming that he had met the relevant standards. That delay was between 21st May 2017 and 30th June 2017, but we accept that the Claimant was treated as competent from that earlier date.

Letter to Mr. Fisher

111. On 3rd January 2017 the Claimant wrote a letter to David Fisher, the Deputy Matron of the Peaks wards. As the letter is relied upon by the Claimant as being a protected disclosure, it is worth setting out the relevant content in full.

"I am writing to you directly with the intentions of seeking urgent help because I have not been getting any joy from Mark Sandall. I am now very frustrated and exploring other options to be moved off from Quantock ward. Unfortunately, these frustrations are not from patients as I have settled well with them but from management.

Just to give you a brief history, I commenced work on the 3/10/16 after completing my Elective Placement on Blake ward in 08/16. Blake ward clerk advised me that they would have been able to set me up if I was not allocated to Quantock ward. Since commencing on 3/10/16, I have been struggling to get connected to email, Rio and all the necessary Shared drives that enables me to carry out my professional ethical duties effectively.

*Following constant nagging, I have since then been connected to Email on the **14/12/16**. Since the 3/10/16, I have been constantly ringing IT to ascertain why this is the case. IT informs that my manager has not sent the Request documents. I have now been connected onto Rio after almost forcing Mark to speak with IT on the 29/12/16 and I was connected onto Rio on the same day. It was uncomfortable for me to feel as if I have put pressure on him to sort these things for me.*

I am still not connected to the following:-

1. ***Necessary Shared Drives***
2. ***CESA documents***
3. ***I am only connected to Quantock ward for RIO, though I am moved to other wards in Peaks Unit on daily basis.***
4. ***Information Gathered from Liaising with other colleagues indicates that I need to be connected to all the above for the Peaks Unit so as to enable access to patients historical information and their reports etc.***
5. ***Not yet commenced Preceptorship:-*** *it is already over 3 months since I commenced work. My understanding for Preceptorship is for it to provide a supportive environment to newly qualified staff so as to develop confidence as an independent professional and to refine skills, values and behaviours. My fellow colleague Mat Thomas who commenced work 3 weeks earlier than me has been signed off 2 weeks ago.*
6. ***Graduation Day*** *– Since commencing my Elective placement in 08/16, I have sent several emails to Mark with Annual Leave requests etc. This includes my Graduation Ceremony on the 21/1/17 & 22/1/17. I have sent 6 emails with no response. I have been Rostered to work on the 21/1/17. This means I cannot attend my graduation ceremony after 4 years of hard work and travelling to University of York everyday clocking 480 miles per week. This is very frustrating not only for me but for my family who have supported me throughout the academic years. I have since spoken to Mark about this face to face on Monday 27/12/16 and he confirms I will have to look for a swap! Is this what I have to go through to attend my Graduation ceremony? As you know Dave, I will have to arrange for graduation well in advance for gown etc. I am now in limbo. I do not think I have to go through this Dave.*

7. *Lease Car – I am struggling to get to work on a daily basis and cannot afford a new car at present. I know you advised me that I need to liaise with Diane Brennan. An update on this is:- My initial Application to Diane Brennan was declined and the reasons given were ***New to the job and needed at last 3 months. I have since placed a fresh application and have not received any email replies. How this will go I do not have hope.*

I did not anticipate to be this frustrated to consider a move from Quantock ward especially after settling with challenging patients. It is very sad but I cannot continue this way. I hope you will find a way to resolve this in a manner which will not make my situation even worse for me*."*

112. On 16th January 2017 Mr. Fisher asked to meet with the Claimant to review his induction and preceptorship documentation in view of the email. Whilst the Claimant initially denied in his evidence that that meeting took place, it is plain from the email below that it did and it is likely that he denied that it did so as to support his contention that no action was taken.

113. The Claimant was asked about Mr. Fisher's account of the meeting as set out at paragraph 8 and 9 of his witness statement. The Claimant initially said that he could not recall anything at all but then changed his evidence to say that he had definitely told Mr. Fisher that he wanted to move from Quantock ward. We prefer the evidence of Mr. Fisher that he asked the Claimant if he wanted to move wards and the Claimant said that he did not.

114. It is fair to say that Mr. Fisher was not impressed with how the Claimant's progress was going. He therefore wrote a strident email to Mark Sandall, Walter Magill, Victoria Fox-Wild and Katy Twigg (who were all Team Leaders on Quantock ward) in the following terms:

> *"I asked to see Emerald* (sic) *today to review his induction and preceptorship documentation and it would be fair to say it is a disgrace. There has been absolutely nothing done with his preceptorship, and he doesn't have one signature that I could see for his ward induction. I asked if he took his paperwork to managerial supervision only to be told he hasn't had any. I was even more bemused when he said over the past few weeks he has been much happier on the ward and feels he is being accepted. I then went on to question him on some other areas that I feel he should have some knowledge about after being a Staff Nurse for over 4 months into a 6 month preceptorship. His knowledge on LAPA's, IR's, Medication ordering, CESA training, TRIMS, Controlled drugs, was let's say not good, but if he hasn't been given the time what do you expect. Any arguments you may have about why these have not been done are irrelevant as he doesn't have anything in writing where concerns have been raised. I have told him I will be checking his progress in a months' time, if things have not improved in this period I will be looking at this differently rather than my current approach. When I asked him about his PAD he couldn't even tell me what it was. It would be fair to say I expect more than this, if this is how new staff are treated no wonder we are losing so many. To say I am disappointed is a bit of an understatement. Please do not try and justify why this persons needs have been ignored".*

115. Only Walter Magill replied to that email. He indicated that he was embarrassed about the matter and that he would make it a priority to spend more time with the Claimant. He indicated that he had not worked a shift with him and had worked more shifts with Matthew Thomas who he had been supporting whilst his own preceptor (Mr. Marples) was away. He also indicated that he had shown the Claimant around and gone through security issues, controlled drugs and ward routines and that he had spoken to the other nursing staff about supporting the Claimant. After Ms. Anderson went on long term sick leave Mr. Magill did indeed spend quite a bit of time with the Claimant completing his preceptorship documentation and signing him off as competent.

116. We did not accept the evidence of Victoria Fox-Wild that she was not concerned about the email from Mr. Fisher. It appears to us that anyone would be rightly concerned about receipt of such criticisms and we accept that the Claimant was told afterwards not to escalate matters to Mr. Fisher. However, it was part of the Respondent's policies that issues should be raised at line management stage in the first instance and the Claimant had not done so before emailing Mr. Fisher. That became a source of frustration with the Claimant telling people on Quantock ward that all was fine only to then escalate the same issues as complaints to higher management.

117. We take the view that the criticisms levelled by Mr. Fisher and the Claimant's actions in giving the impression that all was well before escalating matters soured the relationship between the Claimant and others on the ward. That became even more acute when the "medication error" situation arose in June 2017 and we shall come to that further below.

118. One of the reasons that the Claimant wanted to pass preceptorship was that he wanted to work nights and was unable to do so until preceptorship was complete. That was on the basis that there were less members of staff on duty on nights and so they had to be fully competent. The Claimant wanted to work nights because it suited his childcare arrangements, particularly after his partner, Ms. Sadoka, also began working at Rampton. It is notable that as soon as the Claimant passed his preceptorship, Ms Carter arranged for him to work 6 weeks of nightshifts to accommodate his childcare arrangements over the school holidays. She knew that he wanted to work nightshifts and it is not in keeping with a suggestion that she actively discriminated against him for her to have allocated him the shifts that she knew that he wanted.

Relevant Management Supervisions

119. On 4th March 2017 the Claimant attended a management supervision with Ms. Fox-Wild. The Claimant signed the record of the management supervision which made it clear that he was confirming that it was a true record. Despite that he refuted in his evidence before us that it was accurate. We cannot see that he would have signed it if it was not.

120. The record set out that the Claimant was settling into his role and that he felt happier on the ward and in the team. It further recorded that the Claimant's initial concerns had been resolved and that he was engaged in the preceptorship process. In terms of professional conduct, it recorded that the Claimant had no concerns. The Claimant's evidence about this document on the second day of the hearing was unsatisfactory and we accept that that is what he told Ms. Fox-Wild at the supervision in question. This gives credence to the Respondent's position that frustrations were caused by the Claimant expressing to others on the ward that all was well, only to blow hot and cold and subsequently escalate matters to more senior management.

121. The Claimant made similar comments that he was getting on well with the team and feeling a part of that team at a preceptorship meeting on 1st April 2017 (see page 438A of the hearing bundle). That record was also signed by the Claimant.

122. Despite not having raised any issue or complaint at the supervision or preceptorship sessions, on 12th May 2017 the Claimant emailed Mr. Fisher about when he would complete his preceptorship and medication protocols. He did not raise those matters with his line manager or team leaders as he should have done. In this regard, it is plain that any concerns during the course of employment should, in the first instance, be reported to an employee's Line Manager (see page 145 of the hearing bundle).

123. The actions of the Claimant in this regard contradicted the evidence that he gave on the second day of the hearing that he was not escalating matters to Mr. Fisher because he had been told not to do so.

124. Mr. Fisher emailed the Claimant back on the same day to enquire how matters were going in respect of his preceptorship. He made it plain that if matters were not progressing then the Claimant should let him have the relevant paperwork to, as he termed it, cast an independent eye on things. He answered the Claimant's medication query and ended his email by saying this:

> *"Hope this is okay for you, if you have any queries about this email then please get in touch. As previously discussed I want you to feel like a valued member of staff, like I would expect all staff to feel."*

125. It is clear from that and previous interactions and interventions that Mr. Fisher was seeking to support the Claimant and valued him as an employee. Again, that is not in keeping with the significant number of allegations of discrimination that the Claimant levels against Mr. Fisher in the course of these proceedings.

126. The Claimant replied to Mr. Fisher to say that he had had two supervisions with Ms. Fox-Wild and Ms. Carter and there had been no unmet objectives expressed or areas that needed further improvement.

127. On 15th May 2017, the same day as he sent the email to Mr. Fisher in reply, the Claimant had a managerial supervision with Katy Twigg who was at the material time a team leader on Quantock ward (see page 447 and 448 of the hearing bundle). The Claimant's evidence on day two of the hearing was that during that supervision he had raised with Ms. Twigg a complaint that Victoria Fox-Wild had been racist towards him and had discriminated against him. None of that appears in the supervision record and we do not accept that it was ever said. If that was at the forefront of the Claimant's mind, then it appears unusual that when mentioning Ms. Fox-Wild in his email of the same date to Mr. Fisher it would not have occurred to him to report to Mr. Fisher what had happened and to say before now that Ms. Twigg had not accurately recorded the supervision session.

128. It is worthy of note that whilst the Claimant alleges that both Ms. Fox-Wild and Ms. Lodge had been racist towards him, his witness statement provided no real detail about that at all and Mr. Chukwuemeka similarly put no real substance of the alleged incidents to either of them in cross examination. Indeed, he did not raise it at all with Ms. Lodge until we prompted him to do so.

129. The Claimant did make reference in the supervision to Ms. Fox-Wild bullying him but gave no specific detail about that and was not willing to talk about it in depth. If Ms. Twigg included such matters, there was no reason that she would not have also included references to discrimination if the Claimant had genuinely informed her about that.

130. We do not accept the Claimant's evidence that any racist comments were ever directed to him from either Ms. Lodge or Ms. Fox-Wild and that has been invented by the Claimant in order to seek to bolster his claim. We also do not accept that he said anything of that sort to Ms. Twigg in the management supervision.

131. The hearing bundle also contains a management supervision with Ms. Carter on 29th May 2017. There are a set of near identical notes from a further supervision which were originally dated 29th June 2017. Those set of notes were signed by the Claimant but it appears to us that they relate to the same supervision meeting.

132. The Claimant's evidence was that he raised at supervision with Ms. Carter that he still had no access to CESR, PNS and that he had been discriminated against but that is not recorded in the notes. One set of the notes was signed and they were of course almost identical. The final signature page could have applied to either set of notes. Neither referenced any issue of discrimination and we do not accept that the Claimant made any comment about it. Again, he would not have signed the notes if he had.

133. During a supervision session on 29th May 2017 the Claimant raised that he had had some interpersonal issues with certain staff but that he felt that these had been resolved. This no doubt related to the issue about Ms. Lodge failing to cease a session with a patient at mealtime and the fact that he felt that Ms. Fox-Wild had shown him up and disrespected him in front of patients. Ms. Carter reported what the Claimant had said to Mr. Fisher and Ms. Griffiths the same day by email (see page 453 of the hearing bundle) and that the Claimant had reported that he felt that he was receiving adequate support from staff on the ward, team leaders and management.

<u>Mealtime incident</u>

134. The issue with Ms. Lodge concerned an incident which had occurred shortly before the patients' mealtime was due to begin. Ms. Lodge has no recollection of this particular issue but then she had little recollection of many matters, including the year that she qualified as a nurse. We are satisfied that this was due to the passage of time and the fact that the issues raised at the time were normal every day incidents and not matters that would stand out as being particularly memorable.

135. Ms. Carter was able to give more detailed evidence about this matter as the Claimant had raised it with her and she had looked into it at the time. Ms. Lodge had been dealing with a distressed patient who had recently self-harmed and she had not wanted to terminate her session with him before she had resolved the issue. However, the Claimant wanted her to terminate the session immediately to begin meal service. Ms. Lodge had not agreed to do that and the Claimant was far from happy about it.

136. We are satisfied that the Claimant and Mr. Chukwuemeka have sought to give more weight to this incident and the complaint about it than was actually the position in reality. Mr. Chukwuemeka's cross examination suggested that there was a risk to staff and patients because the staff who were present needed to count out the cutlery and a patient could have secreted an item to use as a weapon. In reality, it is clear from the evidence, including that of the Claimant, that the cutlery had not been handed out and so there was no risk of that. The only issue was that mealtime would be slightly delayed but that had to be balanced against dealing with the needs of a distressed patient.

137. The real issue was that Ms. Lodge did not terminate the session as the Claimant had insisted that she should and he took that as a permanent slight as he did with other issues such as the medication error, despite Ms. Carter's apology, and being asked to complete an incident report form. We come to those matters later.

138. The Claimant's position that mealtimes were "protected" and thus that Ms. Lodge was doing something wrong was borne from a misunderstanding. All that that meant was that there would not usually be visits from doctors on their rounds and visitors were not allowed on the ward during mealtimes. It did not mean that Ms. Lodge had to terminate a session with a distressed patient who had just self-harmed simply to avoid a delay to the commencement of mealtime.

139. The bundle contains a further supervision record dated 6th July 2017. The Claimant denies that that meeting took place. The meeting record is not signed. We prefer the evidence of the Claimant on that point and we deal with the reasons why under our findings on the "medication error" issue below.

Incident report form

140. On 20th June 2017 the Claimant completed and submitted an incident report form concerning a patient who had smashed his radio. We accept that that was not an unusual occurrence and was nothing out of the ordinary at Rampton.

141. The Claimant contends that he did not witness the incident and that he was forced by Ms. Fox-Wild and Ms. Lodge to complete the report form. We do not accept that evidence. We are satisfied that if the Claimant did not witness the incident that it was not unusual for other staff to create an incident report form for a standard matter such as a patient destroying their own property. We accept that there was nothing out of the ordinary about that and we do not accept that the Claimant was bullied or forced to write the report. If he had been, given his tendency to write long letters or raise things with Mr. Fisher, we are satisfied that he would have made a prompt complaint about the matter.

142. Moreover, when Ms. Carter emailed the Claimant to say that he had provided insufficient detail he made no reference to not having witnessed the incident or being pressured to complete the report form. He simply thanked her for pointing it out and that he would make sure that the entry was amended.

Medication error

143. On or around 20th June 2017 an incident report form was completed by the pharmacy team and sent to Martina Griffiths regarding a medication error which had occurred a few days earlier. She forwarded that to Mr. Fisher, Ms. Brennan and Ms. Carter and asked the latter to let her know who had been responsible and what action she had taken under the Conduct Policy.

144. There was some degree of confusion in Ms. Carter's evidence about exactly what had happened with regard to the medication error and what date that had happened on. We had initially understood the position to be that medication had not been administered at all (which was what the letter to the Claimant and others suggested) but it would seem that medication was administered over the course of two days but none of the records had been signed to confirm that that was the case and that that had arisen because there was a second medication card that had been overlooked. Oddly, before getting the accounts of all concerned Ms. Carter spoke only to one member of staff who told her that the medication had been administered and simply not signed for and she accepted that without question.

145. Ms. Carter replied to Ms. Griffiths to say that the individuals involved were the Claimant, Victoria Fox-Wild, Bethany Lodge and Matthew Thomas. She indicated that the matter would be addressed in managerial supervision under the minor conduct policy; that they would be asked to read and sign the medications management policy and an email would be sent to all staff on the ward to remind them of procedure and standards of administration that were required. She enquired of Ms. Griffiths if each of them needed a formal letter to which she replied in the affirmative and indicated that a template letter devised by Mr. Fisher would be sent to her to use. She also made reference to more than one medication error in a 12 month period needing to be dealt with under the Conduct Policy.

146. The evidence of Harriet Carter as to what would occur in the event of a second medication error was, at best, confused. The letter and the evidence of Diana Brennan was that if a member of staff had been involved in a second medication error then more formal action would be taken. However, the evidence of Ms. Carter was that a second medication error would be dealt with by reference to additional medication supervision. That evidence in fact accorded with documentation which was disclosed after that evidence was given that showed that Bethany Lodge had made a second medication error and was dealt with without formal action being taken under the Conduct Policy.

147. Medication errors were not always dealt with by formal means and there were occasions when documentation had not been signed where this was dealt with by an email reminder to rectify the matter. That included for the Claimant (see page 349, 350, 705 and 706 of the hearing bundle). However, it is likely that what action was taken would depend on the severity of the incident, but we accept that the position with the formal letters for this particular incident was directed from Martina Griffiths.

148. The Claimant's evidence was that Ms. Carter had deliberately implicated him in the medication error when she knew that he had not been on duty and that she did so because of a letter that he had sent (which he relies on as being a protected disclosure) on 1st July 2017.

149. Whilst we have issues with some aspects of the evidence that Ms. Carter gave we accept her account that she genuinely believed that the Claimant was on duty on the shift in question. She had checked the Ghant sheets (which are effectively rota's) for the relevant dates which showed the Claimant as being on duty. However, there had been a last minute shift change and the Claimant had in fact been deployed off Quantock onto another ward. She did not complete more extensive checks of other tools to locate who had been on duty but that would not be particularly unusual given that the Ghant sheets would be expected to set out who was on duty.

150. Moreover, the Claimant's contention that the motivation of Ms. Carter to be untruthful about his involvement being his letter of 1st July 2017 simply makes no sense. Firstly, as we shall come to later we are satisfied that the Claimant never sent that letter and secondly, Ms. Carter cannot possibly have known about it on 22nd June 2017 when she told Ms. Griffiths about his involvement (or more accurately her belief that he was involved).

151. In accordance with the instructions given to her by Ms. Griffiths, Ms. Carter prepared letters for all of those who were involved (as she understood the position to be) in the medication error.

152. On 6th July 2017 Ms. Carter therefore handed the Claimant a pre-prepared letter about the error. The letter said this:

> *"As discussed in relation to a medication error on the 16th June when a patient was not administered the medication as prescribed. You agreed that you made the mistake and that you are aware of your professional responsibilities in the administration of medication as set out in the NMC Standards for Medicines Management.*
>
> *It was reassuring how you managed the incident after the error was noted, but if you are involved in an incident again over the next 12 months with regards the administration of medication then the matter may be dealt with in a formal process under the conduct policy 10.1."*

153. Obviously, it was not sensible to pre-prepare and hand a letter of this nature to a member of staff before the matter had actually been discussed and an explanation obtained. We should note in this regard that we accept the Claimant's evidence that this letter was not given to him in a management supervision as Ms. Carter claimed. Within the hearing bundle is a management supervision record dated 6th July 2017 which Ms. Carter contended was a note of a meeting that she had with the Claimant on that date. Coincidentally, the meta data for that supervision session was not available and we remain unclear as to why that was the case. The session recorded that the Claimant accepted that he had made the medication error. The Claimant would of course not have done so as he was concerned for his NMC registration and would not have accepted a mistake that he had not made. We find that Ms. Carter created those notes after

the event so as to cover her back when the Claimant complained about the content of the letter.

154. However, despite that position being damaging to her credibility we are satisfied from the documentary evidence that Ms. Carter was simply working from the template – or more accurately standard letter provided to her - and was under the impression that all members of staff would accept that the error had been made and accept the letter.

155. The Claimant originally contended that he had been singled out in relation to this incident but it is clear from the documentation that we obtained during the course of the hearing that the letters were prepared for other members of staff who had been on duty at the time and not just the Claimant. In short, everyone who Ms. Carter thought had been involved in the medication issue received a letter and not just the Claimant (see pages 460 to 463). They all received an identical letter, albeit some were dated and others were not.

156. On 25th July 2017 the Claimant wrote to Ms. Carter with regard to the medication error. Again, as was his usual practice that was sent by email. The letter was copied to Mr. Fisher and Ms. Griffiths. Although this letter is referred to in the list of issues as being dated 23rd July 2017, it was not in fact emailed until two days later.

157. It is noteworthy that the Claimant did not reference the letter which he contends was sent to Ms. Carter on 1st July 2017 which would have been expected had he received no reply to his complaints over three weeks later. Again, that reinforces our view that that letter was created after the event for the purposes of a later investigation by Annette Magore and was not sent at the time that the Claimant claims that it was.

158. The Claimant's letter to Ms. Carter as sent on 25th July said this:

"Thank you for the undated letter received on the 6th July 2017. I wish to formally reject the contents of this letter for record purposes. As claimed within this letter, I can confirm that I did not discuss any medication errors with either yourself (Harriet Carter) informally or formally within a management supervision. I can also confirm that I did not agree that I made a mistake as highlighted within the letter.

I can confirm that I was not at Rampton Hospital on the 15/06/17 when I am alledged (sic) *to have not administered the medication as prescribed. I take my NMC Standards for Medicine Management very seriously and this alledged* (sic) *medication error has created a lot of anxiety and unwarranted stress.*

It was reassuring to receive a phone call from yourself on the 7th July 2017 in which you were ascertaining the reason for my absence. However, as you had formally written the letter, it was still very distressing to be accused when I was not even on duty.

As Davy Fisher and Martina Griffiths are well aware of the significant difficulties I have faced from Quantock ward, I feel it is better for me to be transferred.

I also think that all these allegations are stemming out from an incident that I reported in my clinical supervision. This incident placed patient's safety at risk as a nurse colleague refused to terminate a session with a patient during a meal time when cutlery was being utilised. Nurse colleague was asked twice to terminate initially by a senior support worker and later by myself and disregarded suggestions to terminate the session with the view to continue after cutlery was counted.

I cannot continue to work when I feel targeted and discriminated. I wish to request a Transfer from Quantock ward as too much has gone off in less than 8 months."

159. Ms. Carter replied to the Claimant's letter the following day and said this:

"Thank you for your letter dated 23/07/17 which clearly stated your anxieties and distress regarding the alleged medication error on 15/06/17.

I must begin by expressing my disappointment in that you weren't able to come and see me to resolve this matter and raise your concerns appropriately prior to involving others. I have looked into this and must apologise on my part, the date was incorrect as it should have stated the 16th June not the 15th June. I have also investigated further and it would appear you worked a long day on Friday 16th June but subsequently moved to Cotswold (I am assuming this was all day as it is not clear on the paperwork). Therefore you did not work on Quantock which would indicate you did not make the medication error. I am sorry for this misunderstanding and further apologise if this has caused you any unnecessary stress. I will ensure the previous letter is removed from your file and this letter is filed.

I was saddened at the context of the letter as you state you feel 'targeted' and 'discriminated' against. As a manager it is my responsibility to ensure you are supported and treated with dignity, respect and our workforce display non-discriminatory attitudes. I am hoping we can meet in managerial supervision so we can explore the situations whereby you have been made to feel this way and find a solution to move forward in a positively (sic)."

160. Mr. Chukwuemeka and the Claimant are critical that Ms. Carter took issue with the Claimant not having come to see her about the matter. It is clear that she could perhaps have phrased this part of the letter more delicately, but it is not unusual for a manager to expect a member of staff to speak directly with them rather than taking a formal stance and copying in higher management.

161. The Claimant accepted the apology from Ms. Carter (see page 519 of the hearing bundle) but later raised a further complaint about the matter to Mr. Fisher on 20th September 2017. It is clear that the Claimant had a difficulty moving on from the medication error issue and that appears to have cast a huge cloud on the rest of his time with the Respondent. Again, the blowing hot and cold with regard to indicating that matters were resolved and then subsequently escalating the issue again was a source of frustration for the ward management.

162. It is clear that the issue surrounding the medication error letter and the inability of the Claimant to move past that soured relations between Ms. Carter and himself to the extent that the working relationship completely broke down.

Letter to the Respondent dated 1st July 2017

163. The Claimant contends that he sent a letter to Harriet Carter on 1st July 2017 complaining about Ms. Fox-Wild. The Respondent's position is that that letter was never received. We accept that it was not and that the Claimant has created it after the event. Whilst Ms. Sadoka gave evidence that she frequently saw the Claimant writing long letters in his spare time, she candidly accepted that she had not read the content and therefore could not say if or when she had seen him preparing this particular letter.

164. The only letters that the Respondent did not receive coincidentally happened to be ones that the Claimant says that he had placed in the internal post as opposed to sending via email which was his usual practice. Despite attempts by Mr. Chukwuemeka to lead him to a possible reason why he had deviated from that practice in re-examination, the Claimant was not able to provide any convincing explanation about that matter. We also remind ourselves that he gave an entirely unconvincing and unsatisfactory explanation about why the meta data for those particular letters was unavailable as we have already set out above and, furthermore the Claimant had been on notice from early on in these proceedings and at a time when he was legally represented that the Respondent contended that that letter had not been received and was seeking evidence to demonstrate that it had been sent (see page 92 of the hearing bundle). That evidence was never provided.

165. It is noteworthy that even that letter, which we are satisfied was written after the event, makes no mention of the race discrimination that the Claimant now says that he was subjected to by Ms. Fox-Wild. Whilst the Claimant made a reference to Ms. Fox-Wild violating his dignity, there was no reference at all to the protected characteristic of race. The Claimant has contended, as part of these proceedings, that both Ms. Fox-Wild and Bethany Lodge said words to the effect of "I am white, you are black". It is inconceivable had that occurred that the Claimant would not have raised those matters rather than, in comparison, minor issues about being required to put dots on medication sheets.

166. On 7th July 2017 the Claimant was absent on the grounds of ill health citing that that was as a result of stress at work.

Meeting between Mercy Mandizvidza and Diana Brennan

167. On 2nd August 2017 Diana Brennan met with the Claimant's Royal College of Nursing ("RCN") representative, Mercy Mandizvidza. Ms. Brennan had replied to an email from Ms. Mandizvidza asking for a meeting about the Claimant. We are satisfied that that was the date of the meeting and not 30th July 2017 as the Claimant contended on the basis of the email arranging the meeting at page 485 of the hearing bundle and the extract from Ms. Brennan's diary at page 486.

168. We did not hear evidence from Ms. Mandizvidza who made it plain in a letter that the Claimant sent to the Tribunal and which appears in the hearing bundle that she did not wish to give evidence. From documentation that appears in the bundle it appears that Ms. Mandizvidza was uncomfortable about giving evidence for the Claimant. The Claimant applied for a witness order in respect of Ms. Mandizvidza but that was refused by Employment Judge Ahmed because it was

made too late in the day. However, contained in the hearing bundle are a number of WhatsApp messages between the Claimant and Ms. Brennan spanning from 12th July to 4th August 2017. A number of those messages are not in English and have not been professionally translated.

169. One of the messages suggested that Ms. Mandizvidza had shown Ms. Brennan "all the letters". We do not know what letters are being referred to and we accept the evidence of Ms. Brennan that she was not shown anything. Ms. Mandizvidza requested that the Claimant be moved from Quantock ward and Ms. Brennan said that she would look into that. We accept that it was not so simple as to arrange an immediate change of ward as the needs of the patients and the gender[1] and experience of those on the various wards had to be taken into account and that a permanent move at that time would leave Quantock ward short staffed.

170. She suggested in the meantime that the Claimant speak to the Central Resource Office ("CRO") to ask the site manager to allocate shifts to another ward daily. As we shall come to below, Ms. Brennan did not speak to CRO directly which it would have been better, in hindsight, for her to have done and it does not appear that they were appraised of the situation. We accept, however, that she believed that that was an appropriate way forward to resolve matters in the interim.

171. We accept the evidence of Ms. Brennan that to the best of her recollection no reference was made on the Claimant's behalf of him wanting to have no further contact from Ms. Carter and, in all events, she would remain his line manager until such time as a permanent ward move was arranged.

172. Ms. Mandizvidza gave an opinion in her messages to the Claimant that Mr. Fisher was "a snake" and that she was being targeted and that "what reason apart from it's colour". Those are opinions only and are of no evidential value to us particularly as we have not heard any evidence from Ms. Mandizvidza about the reasons behind those opinions.

Ward changes

173. The day after the meeting between Ms. Brennan and Ms. Mandizvidza the Claimant was allocated a shift on Cotswold ward. The following day he was allocated a shift back onto Quantock ward.

174. He had expected not to have to work on Quantock ward after the conversation between Ms. Brennan and Ms. Mandizvidza. However, as we have already touched upon the CRO had not been made aware of that position and therefore were not aware that, where possible, the Claimant was not to be assigned to Quantock ward pending a permanent move being looked into. Ms. Brennan did not notify the CRO about that position which we consider that she should have done but we are satisfied that there was no ill will in her inaction in that regard.

175. Whilst it is clear from page 488 of the hearing bundle that there were other Band 5 nurses who could potentially have been swapped with the Claimant as Mr. Chukwuemeka suggests, we accept that it was not as straightforward as that as ward changes would depend on experience, the needs of the patients on the wards and to ensure that there was an appropriate gender ratio on each ward.

[1] So as to ensure that there was an appropriate gender mix of staff to patients on the ward.

176. We are satisfied that if a ward move could have been facilitated on 4th August 2017 then it would have been.

177. The day after, 5th August, the Claimant was allocated onto Cheviot ward because a move on that date was able to be facilitated. However, by that time he had commenced a period of sickness absence and so did not attend work on that date.

178. At the time when the shift change from Quantock could not be facilitated on 4th August 2017 the Claimant spoke to one of the Team Leaders, Darren Lount, who was based on Cheviot ward. Mr. Lount emailed Harriet Carter in the early hours of the following morning. He copied in Ms. Brennan and also Richard Lyons who was the Site and Security Liaison Manager who had also been involved in discussions with the Claimant about the ward move on 4th August. The pertinent points of his email said this:

> *"Just to let you know I spoke with Emerald* (sic) *on Quantock tonight after he had a brief discussion with Richard Lyons about being moved. I agreed with him that I would email you to let you know what we discussed. He tells me that he has agreed with Diana that he should be allocated to a different ward when he's on shift. This has been facilitated for Saturday night but we may need to clarify what's happening with CRO for the ongoing situation.*
> *He told me about an issue with a medication error and as a result he feels targeted and discriminated against and I understand this is the basis of his request to be moved. What was more concerning is other ideas he has about being targeted by colleagues. I spent about 20 minutes providing to him that it was not possible for another member of staff to delete one of his RIO entries. Eventually he did agree that he probably did not make the entry and his concerns over the medication error is making him paranoid. He also told me about an issue of a colleague carrying on named nurse session when he had informed them that lunch was about to be served.*
> *I got the impression he would benefit greatly from increased clinical supervision. He said he had some supervision with Walt Magill recently but prior to that his supervisor was Gail Bennett and given her role it was understandably difficult to get to see her. I have recommended he get a clinical supervisor that does not work on his ward."*

179. Again, this was an example of the Claimant having given the impression that there were no further issues with the "medication error" on Quantock ward (having accepted Ms. Carter's apology) but then to still raise issues to others instead of his line management.

180. Ms. Brennan replied to that email later the same morning. The information that she provided was consistent with her evidence about her conversation with Ms. Mandizvidza. The pertinent points of her email said this:

> *"I haven't spoken with Emerald* (sic) *and so I haven't agreed anything with him personally. I know he has asked for a ward move and so I suggested to his POA rep if we could we would try and facilitate this and that maybe he should ask to move on a daily basis if he is so unhappy until we can do this. However I know this is not always possible and I know this impacts on others too. Nothing was*

set in stone and no promises were made. That said he is clearly unhappy on Quantock.
In regard to the other issues I know Davy has spoken with him but I am not sure RIO was mentioned. We will see him again to try and establish what is going on."

181. Mr. Fisher also replied the same day and his email said this:

"I spoke with him when he came back from leave about thr (sic) *exact same issues, I have also been informed by Harriet she spoke yo* (sic) *him recently about these issues, and it was no longer an issue.*
I will arrange to see him and I would like his rep yo (sic) *be there. If he is currently on nights and is in this frame of mind I am concerned about his ability to cope and further problems may arise. If it's anyway possible I don't think he should be taking charge of a ward until we have sren* (sic) *him to find out exactly what's going on and he seems to change his wishes at frequent intervals."*

182. Again, we are satisfied that that is further evidence of the Claimant blowing hot and cold in respect of his complaints about his time on the ward.

183. Mr. Fisher sent a further email later the same day to say that the Claimant had now gone off sick. In this regard, on 7th August 2017 the Claimant submitted a Fit Note signing him off work with stress and anxiety until 21st August 2017. He later submitted a further Fit Note until 21st September 2017 (see page 526 of the hearing bundle).

184. In reply to Mr. Fisher's email, Richard Lyons replied to all involved in the email chain in somewhat strident terms. The relevant parts of his email said this:

"Yes he has gone sick – his wife rang in for him this evening saying he was sick with work related stress because I had made him work on his own ward last night (a lie). Carl Cooper range him back almost immediately to clarify what was going on and could only speak to his wife as he was in bed. On this occasion she said he had had a bad nose bleed. Carl reinforced that he would not be off at present with work related stress but with the aforementioned ailment.
I spent some time speaking to this man last night by phone (he actually only contacted me just before midnight to tell me of his troubles so must have been ok till then) and got Darren to go to him personally, but it seems he changes his goalposts of desires and needs on a whim. I think we have found one here. If he does bring my name up in conversation I will gladly sit down in front of him and go through what we actually did to assist him as opposed to his apparently (to me) warped notions of victimisation."

185. Mr. Chukwuemeka is critical of Ms. Brennan for not taking Mr. Lyons to task for the tone of his email but we accept her evidence that Mr. Lyons was a member of the Site and Security team and it was not in her remit to take him to task.

186. Ms. Carter also sent a lengthy reply on 7th August 2017. Her email was very lengthy and so we do not set it out in full here. However, the initial paragraph described when she had first met the Claimant when she had been working on Cotswold ward. She set out that he had been complaining about Mr. Sandall and that he felt that he was being victimised because he had not completed a shift change for him and asking Ms. Carter to deal with that. That was in relation to

the shift during his graduation. Mr. Chukwuemeka is critical of language used in that Ms. Carter referred to telling the Claimant that he should not go to other wards to try and "manipulate" others to get what he wanted. Again, that is indicative of the frustrations about the Claimant not raising matters within his line management chain as he should have and escalating issues to others.

187. The email also dealt with the Claimant's preceptorship and the issue about the medication error. The final few paragraphs of Ms. Carter's email said this:

> *"My experience of Emmerald is that he will lie about things to get what he wants and I am concerned that he will try and bring others down with him as a result. He is not a team player on the ward and will make decisions independently which may have a detrimental impact on the ward environment. He can come across as quite rude to staff at times, whether this is part of his culture this is something we have all tried to make him aware of during managerial supervision.*
>
> *I would like him to give me examples for how he is being discriminated against as I have not witnessed any such actions by any staff since starting on Quantock. We have all been extremely supportive of Emmerald and I am disgusted in the way he is behaving.*
>
> *It may be better for him to be managed on another ward however I will not have him bad mouthing the staff on Quantock suggesting we are racist as we have done our utmost to support him appropriately and this has gone unappreciated by him.*
>
> *Whoever managers (sic) this guy will need to consider completing managerial supervision with 2 staff as he will lie about things and deny conversations.*
>
> *I have spoken with Davy this morning and we are going to arrange a meeting with him so we can establish his concerns and find a way to move forward."*

188. Whilst much of the text quoted above was not entirely appropriate and Ms. Carter should have written her email when she was in a less emotive frame of mind, it is clear that she was becoming increasingly frustrated by the Claimant but again we accept that that was because he continued to raise or escalate issues that the management of Quantock ward believed had already been dealt with or resolved.

189. Ms. Carter wrote a further email in not dissimilar terms after she had telephoned the Claimant on 28th August 2017. She recorded that he did not want to discuss the issues but had referenced the medication error letter, a matter which it appears to us that he was unable or unwilling to get past despite Ms. Carter's apology, and that he had been subjected to bullying. The Claimant indicated that he wanted to escalate matters and Ms. Carter indicated that she would pass matters onto her senior managers. Her email did that.

190. The final paragraph of her email said this:

> *"Following this conversation I am not happy to remain his ward manager. He is claiming he is being bullied, I am assuming by me and I am extremely offended and outraged by his continuous false allegations and targeting behaviour. I do not trust this man and I will not be dragged down to his level*

or have him say that staff are bullying him or being racist, he made these allegations about his previous ward manager Mark Sandall."

191. Mr. Fisher wrote to the Claimant on 7th August 2017 inviting him to a meeting with himself and Ms. Carter. Mr. Fisher was not aware at that time that the Claimant had an issue about dealing with Ms. Carter. It was indicated that the purpose of the meeting was to have all of the Claimant's issues documented in full and agree a plan on how they should be addressed. The letter also made reference to the fact that Mr. Fisher was concerned that the Claimant continued to raise matters which he understood had already been resolved.

192. The Claimant replied by email on 10th August 2017 to say that he was unable to attend the meeting due to sickness (see page 507 of the hearing bundle). He made no reference to not wanting to attend a meeting where Ms. Carter was present. After the Claimant submitted a further Fit Note Mr. Fisher sent an email to the Claimant setting out that he was on leave in September and seeking to meet with him. He emphasised the importance of the meeting taking place.

193. Following Ms. Carter's discussion with the Claimant on 28th August and her subsequent email, Mr. Fisher wrote to him again asking him to contact his secretary whilst he was on annual leave to arrange a meeting. He noted that the Claimant had said that he had been subject to bullying and harassment but that he had not given any specific examples. He enclosed a copy of the grievance procedure. We find it unlikely if, as the Claimant contends, the Respondent was trying to close him down or cover up allegations that he would be encouraging him to provide details of his concerns and raise a grievance about them. The Claimant did not reply until some time later.

194. On 19th September the Claimant emailed Mr. Fisher requesting compassionate leave following the sad passing of his father. He indicated that he was aware of the importance of the meeting that Mr. Fisher wanted to have and that he would reply to his letter.

195. The Claimant then replied to Mr. Fisher's letter on 20th September 2017 (see pages 519 and 520 of the hearing bundle). The entire focus of that letter related to the medication issue letter. The Claimant had of course received an apology for that issue. It is unusual in our view for him to have therefore focused on that matter rather than the clearly far more serious racist comments that he now attributes to Ms. Fox-Wild and Ms. Lodge. There would be no finer examples to support his contention that he was being discriminated against than that but yet he was silent on those issues. Again, we are satisfied that that is because those events simply did not occur as the Claimant claims.

196. The Claimant headed the final page of his letter "Reasons for Professional Relationship Breakdown" and the relevant parts said this:

1. False allegation – Harriet confirmed that she made a mistake – apology accepted.

2. Falsified that I had agreed within a discussion re: the medication error – Never had a discussion with Harriet regarding this.

Please do not divert from the reasons why I am absent from work as noted above.

……..

My manager has written an apology which I have accepted. However, for my own NMC and livelihood safety, I feel it is appropriate for me to be moved from Quantock as out professional relationship/trust has broken-down.

Please consider this letter as a second request to be moved from Quantock ward following my first request on the 23/07/17.

I am available for a meeting at a date convenient to you so you can choose a date."

197. Despite the fact that the Claimant has now seen all of the other letters which are written in entirely identical terms he has continued to maintain that Ms. Carter had falsified or, at times, forged, his letter. The reality is that she simply jumped the gun in pre-preparing template letters before she had spoken to all of those involved to see if they agreed that an error had been made or not.

198. Mr. Fisher wrote to the Claimant on 30th August 2017 again seeking details of his concerns. The Claimant replied on 21st September 2017. He still did not provide any of the specifics of the complaints as Mr. Fisher had requested.

199. Mr. Fisher replied the following day asking the Claimant if he wanted the complaint against Ms. Carter to be investigated or if he was just seeking a ward move (see page 523 of the hearing bundle).

200. The Claimant replied on 27th September in the following terms:

"This is 2months (sic) *from the time I received a false allegation from Harriet Carter. I have requested in writing to yourself* ***more than 3 times*** *that I wish to be moved from Quantock ward due to clear professional relationship breakdown between Harriet Carter and myself.*

You write in your email as if I have not requested a transfer to you yet I have – which I find very strange and not supportive to ensure that I return back to work.

I am on rota on the 5/10/17 at ***Quantock despite my Transfer requests X 3*** *to move because of clear reasons that you and the management team including Dianne Brennan are aware of following (Diane Brennan) meeting with my RCN representative 6 weeks ago.*

I am very troubled with how this has been handled and it appears to be continuing that way.

There is no reason for me to put a Complaint against Harriet Carter as nothing will be done about it as clearly evidenced with how this case has been handled from day one. Dragging the case hoping it will go away. I feel management is still continuing to force me to return to Quantock yet there are clear issues acknowledged even by Harriet Carter in her letters i.e. through her apology.

This is the longest I have been off sick due to work related stress. Had this been handled more effectively it would have been shorter than this.

I am available all this week and next for a meeting but I do not see the point other than a Transfer to another ward or Directorate."

201. Mr. Fisher replied to the Claimant to express his disappointment with his feelings as expressed in his email. The pertinent parts of his reply said this:

"1. Investigation – A (sic) *investigating officer as been allocated about 1 month ago, but we have been waiting on you giving us specific details so we don't misrepresent you, as the allegations you have made previously are concerning and as I have stated in previous correspondence we don't take allegations of bullying and discrimination lightly. You will receive the terms of reference for the investigation once they have been rectified.*
2. You have been allocated a ward move to (sic) as there was no clear date, we don't allocate ward to people who are off sick, as this is done when we know they are returning, on return you will be going to cheviot until the investigation is complete.
3. Regarding meeting with you, I have found it extremely difficult to try to arrange a meeting with you, also your refusal to attend Occupational health is even more concerning as this has been done to give us an opinion on your wellbeing, also refusal to attend is a breach of your contract and can be considered as a conduct issue. It is also interesting to me that you have informed us today that you can't attend OH as you are to (sic) *stressed but have returned from sick leave. It is essential that you attend this appointment.*
4. Your request to move ward, you went sick before this was even discussed with you, and I have previously offered you a ward move as early as January 17 but you refused.

I will be in touch to arrange a time to meet please provide me with availability, I am not here Friday 6th but can meet s previously stated around your availability, if need be arrange for your union representative to be present with you."

202. The Claimant replied to thank Mr. Fisher for the move to Cheviot ward but indicated that it would have alleviated unnecessary stress to have undertaken that move sooner. The explanation for not organising a ward move sooner as set out in his email is consistent with the evidence before us. It makes logical sense given that until a return to work date was identified, Mr. Fisher would not know what resource he had on each ward at that time to be able to facilitate a permanent move. It was not only the Claimant who needed to be considered but other members of staff on the wards and the needs of the patients to ensure that those were met.

Freedom to Speak Up Guardian

203. On 21st September 2017 Ms. Sadoka had a discussion on the Claimant's behalf with Helen Auld who is the Freedom to Speak up Guardian. A note of Ms. Sadoka's conversation with Ms. Auld appears in the hearing bundle at pages 668 and 669.

204. During the conversation, Ms. Auld was told that the Claimant had been having significant problems since a false allegation had been made by Ms. Carter; that relationships had broken down and that nothing had materialised in respect of a request for a ward transfer.

205. She was further informed that it appeared that the management were forcing the Claimant to return to Quantock ward despite there being a relationship breakdown with Ms. Carter and other incidents of bullying with other members of staff.

206. Ms. Sadoka also informed Ms. Auld of the difficulties that the Claimant had had when he joined the Trust such as having no access to email or CESA and that he had been signed off with work related stress.

207. There was no reference made to any incidents of racial abuse or discrimination.

Return to work

208. As we shall come to further below, the Claimant was suspected by the Respondent of working elsewhere whilst he was off sick. The Claimant's evidence surrounding whether he had been working as an agency nurse whilst he was on sickness absence was somewhat evasive but he accepted that during a period of paternity leave he had been working for Cygnet Healthcare. The Claimant had little or no insight in our view as to why it would be inappropriate to accept paternity and sick pay from the Respondent but be working elsewhere at the same time. We did not accept his evidence that he had told anyone in the Respondent Trust about the fact that he was working elsewhere.

209. At the time that the Claimant returned to work he was restricted from undertaking bank shifts and overtime. The Claimant was advised about that position at a return to work meeting with Mr. Fisher on 5th October 2017 (see page 537 of the hearing bundle). Mr. Fisher told the Claimant, as is recorded on the return to work form, that that position would be reviewed on or after 5th November 2017 which would give the Respondent time to receive a report from Occupational health and thereafter for the Claimant to resume and settle into patient contact so that his progress could be considered. An appointment had been arranged for the Claimant to attend such an appointment on 10th October 2017 (the Claimant having cancelled an earlier appointment without notifying the Respondent). The Claimant was also restricted from working in direct patient care until he had attended his occupational health referral.

210. We accept the evidence of Ms. Brennan and Mr. Fisher that the reason for that was to ensure that those who were returning from periods of ill health absence needed to be monitored to ensure that they were coping with their "normal" workload and hours before being permitted to undertake additional shifts. That is a logical position to protect both staff and patients and, particularly, when considering the fact that the patients that are treated at Rampton can pose a danger to themselves and others.

211. Despite the fact that the Claimant was aware that he was restricted from working overtime or bank shifts, he nevertheless registered himself as available to work overtime only a few days later and had to be reminded of the arrangements by Mr. Fisher (see page 548 of the hearing bundle).

212. Mr. Fisher wrote to the Claimant on 11th October 2017 to summarise what had been discussed. The pertinent points of the letter said this:

> *"An investigation has been sanctioned regarding your concerns raised about WM Carter. I explained that this investigation is being carried out with the information we have, rather than verbal information from yourself as you never attended any meetings with myself to provide an accurate account of what your concerns where. A Magore, Modern Matron of Women's Services will be conducting the investigation.*
>
> *Due to the reason around your period of sickness you will have no patient contact until we have an opinion from Occupational Health re: your suitability to carry out your role safety. Also you won't be allowed to work overtime or bank, you will not be permitted to work agency or other work outside of your current place of employment, this will be reviewed on 5.11.17. With regards to working in roles within your current employer you need authority from General Manager, Diana Brennan for this to happen.*
>
> *You need to attend your Occupational Health appointment on the 10th October, failure to do this will be considered as a breach of contract.*
>
> *You have been placed on a period of sickness monitoring of 1 period of sickness in 5 months with no more than 3 days during this period of monitoring. This will be reviewed around the 5th February 2018. If you feel this period of sickness was work related then you need to write to General Manager D. Brennan to consider if this period is deemed work related.*
>
> *The need to have appropriate clinical supervision.*
>
> *Any annual leave accrued can be used during your period of non-patient contact. If you wish to discuss anything further then please arrange to see me."*

213. After the Claimant returned to work on 5th October 2017 he did not return to Quantock and instead was transferred on a permanent basis to Cheviot ward. He did not encounter any difficulties on Cheviot.

214. On the day that the Claimant returned to work he had a supervision session with the Cheviot ward manager, Amanda Cartwright (see pages 539 and 540 of the hearing bundle). The Claimant told Ms. Cartwright that he still did not have access to CESA and she arranged access for him the following day (see page 541 of the hearing bundle) along with access to Rio on all Peaks wards. He had previously only had access to Rio whilst on Quantock ward.

215. The Claimant told Ms. Cartwright that he wanted to retain the same shifts that he had worked on Quantock and was told that these would be honoured. Despite that, the Claimant failed to arrange childcare for his shift on 23rd and 31st October 2017 and did not attend work on those dates (see page 562 of the hearing bundle). There was a recommendation from Anthony Wragg, the Site & Security Liaison Manager that the Claimant should have his pay stopped for 31st October given the circumstances. Kerry Burton, who by that stage had taken over as Modern Matron from Martina Griffiths, supported the proposal for no pay and the

Claimant accordingly was not paid for the shift that he had failed to work. We do not find that surprising given the circumstances. The Claimant should have been aware of his shifts – especially as they were the same as he had had on Quantock ward at his request – and had had ample opportunity to arrange childcare as for his other shifts.

216. On 10th October 2017 the Claimant attended an Occupational health appointment with Dr. Murphy who produced a report the same day (see pages 544 and 545 of the hearing bundle).

217. The pertinent parts of the report said this:

> *"Emmerald let me know what happened from his perspective and showed me a copy of a letter from Harriet Carter which he received on 6 July 2017. He also showed me his reply to Harriet dated 23 July 2017. The subject of the letters was the reason for Emmerald's stress.*
>
> *The situation has moved on. Emmerald let me know that he resumed work last week around 5 October 2017. This is to Cheviot Ward. Emmerald is feeling much better and in my opinion is medically for work, including patient contact.*
>
> *……..*
>
> *There is no medical reason that I can detect that would prevent Emmerald from attending meetings with management to do with his recent sick leave and work-related stress and to communicate with management about these issues via other means."*

218. It is noteworthy that the Claimant's focus was entirely upon the medication error letter. Nothing was raised about discrimination or racist comments having been made.

219. Mr. Fisher received the report the same day and reported to CRO and others that the Claimant could now work his normal role but was still restricted from undertaking overtime or bank shifts. We have already set out the reason for that above and that it would be reviewed on or after 5th November.

220. On 14th November 2017 the Claimant emailed Ms. Burton asking why he was still restricted from working bank shifts as he had been informed of that by the CRO. The Claimant appeared to be under the impression that the restriction would end on 5th November 2017 but Mr. Fisher had of course committed to a review of the situation on or after that date as was made plain in the return to work meeting and the Claimant had not been at work between 4th November and 13th November. The Claimant had sent his email to Ms. Burton from a private email account and she responded the same day to say that she would send a response via his work email account so that it was secure. However, before she got the opportunity to do so, the Claimant resigned as we shall come to below.

Investigation by Annette Magore

221. Diana Brennan commissioned an investigation into the Claimant's complaints and she appointed a Modern Matron in Women's Services, Annette Magore, to deal with that. We are satisfied that Ms. Magore was suitably independent to deal with the investigation and she had had no prior involvement nor any significant dealings with Ms. Carter or Quantock ward.

222. Terms of reference were prepared and they appear in the hearing bundle at pages 551 and 552. They were prepared by Ms. Carter and Ms. Fox-Wild during a period of absence on annual leave of Diana Brennan. That was not appropriate given that the thrust of the investigation was in respect of allegations against Ms. Carter and team leaders, of which Ms. Fox-Wild was one. They should not have been involved in completion of any part of the terms of reference given that they would shape the investigation at the early stages at least.

223. Particularly, there were a number of problems with the terms of reference. Firstly, the scope of the investigation was in generic terms only which was to establish whether there was evidence of bullying, targeting or racism. Whilst it has to be said that the Claimant had not assisted by meeting with Mr. Fisher to provide specifics of his allegations, there was no detail provided about the predominant issue in his mind which was the "medication error" letter.

224. Secondly, the terms of reference set out which witnesses should be interviewed but did not include the Claimant. It did not include any of the other staff on the ward other than management or team leaders against whom the allegations were made. Whilst the terms of reference did make clear that the witness list may not be exhaustive, it did not represent a truly comprehensive list of people who should be spoken to and a structure of Quantock ward would have been more appropriate with Ms. Magore then determining who she would need to interview.

225. The terms of reference also set out what policies it was considered that Ms. Magore would need to have regard to when undertaking her investigation. A key omission in that regard was the Respondent's Equal Opportunities Policy which Ms. Magore did not appear to take into account at all.

226. Finally, we have not been able to ascertain what, if indeed any, documents were sent to Ms. Magore with the terms of reference. Although they make reference to material being provided, there is no index to say what that was and it appears from Ms. Magore's evidence that little or nothing was provided and that that had to be gathered from others, mainly the Claimant, during the course of the investigation.

227. Ms. Magore did not conduct a thorough investigation. It was deficient in a number of areas. Particularly, she did not interview the Claimant before any of the other witnesses who had been identified in the terms of reference. Whilst we accept that the running order of witnesses was eventually dictated by when they could be released from the ward and it had been Ms. Magore's intention to see the Claimant first, she did not stick to that position. She should have interviewed the Claimant before anyone else, particularly as the basis of the allegations that he made was so unclear. We cannot see how she could properly investigate with other witnesses who were seen before the Claimant and she did not go back and conduct any second interviews.

228. Furthermore, despite Ms. Magore's evidence that she had asked specific questions developed from notes beforehand, we consider it likely that she has not recalled that properly. There were a number of aspects of her evidence in this regard that she candidly accepted that she had not recalled correctly. We consider that more an issue about the passage of time rather than any attempt to mislead.

229. The notes of each of Ms. Magore's investigation meetings read very much as if she had simply asked each witness to provide all information that they could about the Claimant and Quantock ward rather than asking them specific questions.

230. The notes of the interview that the Claimant had with Ms. Magore are lengthy and they appear in the bundle at pages 616 to 619. We do not set them out in full but the Claimant made the following points to Ms. Magore:

a. That Ms. Carter had falsified information about an alleged medication error and that she had had a meeting with him when she had not;
b. That he had not been connected to the necessary systems such as Rio and CESA to allow him to complete his clinical duties;
c. That he had been subjected to unfair treatment when compared to Matthew Thomas;
d. That he had been subjected to bullying and harassment by Ms. Fox-Wild and Ms. Lodge;
e. That nothing had been done by Mr. Fisher about his letter of 3rd January 2017;
f. That he had not been granted an annual leave request for his graduation and had been asked to swap a shift;
g. There had been a delay in the commencement of his preceptorship when compared to Mr. Thomas;
h. That he was restricted as to what he did on the ward when compared to Mr. Thomas;
i. That he had difficulties getting access to a lease car and that had caused him problems in getting to work;
j. That Ms. Carter had called him whilst he was off sick and he was not comfortable with that;
k. That he had no support and struggled during his sickness absence and that the tone of management had changed following Ms. Sadoka's conversation with Helen Auld;
l. That he had told Katy Twigg that he had had negative conduct from Ms. Fox-Wild and Ms. Lodge;
m. That he had been told to complete an incident report form by Ms. Lodge and Ms. Fox-Wild that he had not witnessed;
n. That Ms. Lodge had disregarded his request to terminate a patient session to commence mealtime;
o. That Ms. Lodge had signed as if she had completed tasks that the Claimant had completed;
p. That he wanted to move wards to avoid "bullying, exclusion and passive aggression" and that he had had an irretrievable breakdown with management on the Peaks;
q. That he had not had equal opportunities to his colleagues and that Ms. Carter's letter had triggered his ill health absence;

r. That he had expected to be treated the same as Mr. Thomas and that management had not been supportive;
s. That CRO had not been told that he should not return to Quantock during the investigation; and
t. That Mr. Fisher had said that he could not do overtime.

231. During the course of the investigation, the Claimant submitted two lengthy letters dated 12th October 2017 which he supplied to Ms. Magore by email on 30th October 2017. We do not accept that they were sent before that point nor sent to anyone else other than Ms. Magore. Although paragraph 7 of Ms. Magore's witness statement set out that she had not seen the second of the letters, she accepted after checking her email inbox during the course of her evidence that the Claimant had in fact supplied that letter to her either during the course of her investigation meeting with him or shortly thereafter. We are not convinced that she read it, or at least read it in detail for the reasons that we shall come to below.

232. The first of the letters ran to three pages of closely spaced text and so we do not rehearse it here in full but it was titled "To Whom it may concern – no equal opportunities" and made the following points:

a. That the Claimant had not had the same access to equal opportunities as Matthew Thomas because he had not had access to email until 14th December 2016 and he had experienced difficulties in booking annual leave for his graduation ceremony and had been asked to arrange a shift swap;
b. That he had had no access to Rio until 29th December 2016 and no access to CESA until 5th October 2017 despite requests for access;
c. That management had a clear intention for the Claimant to fail in his clinical duties from day one and the last resort was the medication error letter;
d. That he had not had the same night shift opportunities as Matthew Thomas;
e. That he had been delayed in his preceptorship sign off; and
f. That he had been refused a lease car and wanted to know the protocol surrounding the provision of lease cars to staff.

233. It is perhaps noteworthy that the Claimant made no reference to race discrimination or alleged racist comments in this letter. He referenced being treated differently to Matthew Thomas but only for "reasons best known to management". That echoed some of his oral evidence before us where he said that he was unsure as to why he had been treated in a certain way.

234. The Claimant's second letter was a complaint about Bethany Lodge. He complained about the incident report issue and what he termed the refusal of Ms. Lodge to terminate a patient session during a mealtime. For the first time, he also made a complaint that Ms. Lodge had used racially offensive language towards him saying words to the effect on two occasions that she was white and he was black and that he should not bother to report matters because she had friends in high places and was a friend of Ms. Carter. We do not, incidentally, accept that Ms. Carter, Ms. Lodge and Ms. Fox-Wild were friends as the Claimant contends and we are satisfied that they were only colleagues with a professional working relationship.

235. Despite that being the only reference to what would be a blatant act of racism if it had occurred (and we say more about that below) Ms. Magore did not interview Bethany Lodge or make any finding about whether the incidents had occurred as complained of by the Claimant.

236. We should say, however, that we do not accept that these incidents occurred at all. Firstly, we consider that the phrase "I am white and you are black" would be rather odd things to say. Ms. Lodge was respectful and uncritical of the Claimant in her evidence and whilst she clearly struggled with recollections given the passage of time, we did not consider her to be untruthful in her evidence. We preferred her account to that of the Claimant on this issue.

237. Moreover, prior to the commencement of the investigation into race discrimination the Claimant had never raised any suggestion about being spoken to in this way yet had focused on much less serious matters in his lengthy letters and emails to the Respondent. If those matters had occurred as the Claimant says, we have had no logical or reasonable explanation as to why he failed to mention them at the time that they occurred. The Claimant was not slow to communicate matters of displeasure and in our view it is key that no such unpleasant and blatantly discriminatory comments were reported until after Ms. Magore commenced her investigation.

238. We would also observe that the Claimant's witness statement did not deal with these alleged comments other than to say that racial comments had been made by Ms. Lodge and Ms. Fox-Wild. In his oral evidence when asked about that he also attributed the same unusual phrase "I am white, you are black" to Ms. Fox-Wild. We consider it an unusual statement for one member of staff to make let alone an identical comment to be made by a second colleague. Furthermore, the Claimant made no reference at all in his complaint letter about Bethany Lodge to Ms. Fox-Wild also making the exact same comment. There was no reasonable explanation for that.

239. For all of those reasons, we do not accept that any such comment was ever made by either Ms. Lodge or Ms. Fox-Wild.

240. Ms. Magore determined that she would interview all members of staff in relation to her investigation on 30th October 2017. As we have already observed, Ms. Magore did not interview the Claimant first which we consider to have been a mistake, particularly in view of the scant information that she had in relation to the basis of his complaints.

241. The Claimant was the third member of staff to be interviewed. The Claimant contends that the first words spoken to him by Ms. Magore were to the effect that he was not going to be sacked. We did not accept that evidence and accepted the account of Ms. Magore that she made no such comment. In the context of her investigation there was no reason for Ms. Magore to have said words to that effect as she was not investigating any disciplinary issue against him.

242. The Claimant is critical of the fact that Ms. Magore used an administrator from Quantock ward, Jayne Wathall, to take notes of her meetings and deal with any administrative issues rather than her own secretary. Nothing turns on that, however, given that all that Ms. Wathall did was to take and transcribe notes.

243. There can be no reasonable suggestion that she somehow manipulated the investigation or played any part in the content of the report or the recommendations.

244. One of the individuals interviewed by Ms. Magore was the Claimant's clinical supervisor, Gayle Bennett. It is notable in our view that she commented that the Claimant had never reported to her any issues about bullying and that he had not appeared troubled. If the Claimant was being bullied and experiencing racist comments and acts, then we are satisfied that he would have told Ms. Bennett with whom he had a good relationship and with whom he had worked as a student.

245. The fact that he did not raise any matters about issues such as access to IT and the like to Ms. Bennett also resonates with the Respondent's evidence that at ground level the Claimant was giving the impression that all was well only to later escalate the same sort of complaints that the Respondent believed had been resolved.

246. Ms. Magore completed her investigation report on 12th December 2017. As well as the earlier deficiencies which we have identified above, there were some elements of the report which were inaccurate. Particularly, with regard to the issue of a lease car the finding which Ms. Magore reached was that there had been delays in processing the application and that those lay with the lease company and not the Respondent. That was of course not accurate as the initial application was rejected by Ms. Brennan and it remains unclear how Ms. Magore reached that particular conclusion.

247. Similarly, Ms. Magore accepted the account of Ms. Fox-Wild regarding an assertion that the Claimant's access to IT systems was delayed because of a change of name. Whilst her evidence was that she thought that she would have spoken to IT about that to verify, there is no supporting documentation to that effect and it was clear that the passage of time had affected her recollection of events. We did not have a complete copy of the report with all documents appended to it to see what evidence had been gathered because this had apparently been sent in hardcopy format only and could not be located.

248. Ms. Magore also concluded that the Claimant had experienced the same difficulties as other new starters but failed to identify any of them. She also failed to note that, other than for CESA access, the Claimant had not experienced the same difficulties as Matthew Thomas and he had, of course, made specific reference to that individual.

249. Ms. Magore did not make any finding as to the medication error letter and whether Ms. Carter had falsified or forged the letter as the Claimant now contends but we are satisfied that that matter was not explicit in his letter to Mr. Fisher and has now taken on something of a new significance in these proceedings, particularly given that he must now accept that everyone suspected of involvement received an identical letter.

250. The relevant parts of the learning points and recommendations section of the investigation report said this:

> *"There is no evidence to support that Emerald (sic) was subjected to institutionalised racism and/or bullying. He appeared to have a positive relationship with some staff including Staff Nurses Team Leaders Katy Twigg and Walt Gill (sic) and Staff nurses Mark Marples and Debra Anderson. When he felt that issues were not resolved satisfactorily at ward level he approached senior managers who resolved his issues to his satisfaction.*
>
> *The ward manager acknowledged that upon investigation Emerald (sic) could not have omitted to administered* (sic) *medication as he was not on duty. However an opportunity was missed whereby the ward manager focused on questioning why Emerald* (sic) *had to involve senior managers when it could have focused on working with Emerald* (sic) *to allay his anxieties of losing his registration over medication errors. The process of addressing medication administration errors could have been reviewed to enable actions to be taken to minimise re-occurrence of errors and empowering nurses to transfer from proficient to competent registered nurses even when they have made a mistake.*
>
> *When Emerald* (sic) *requested to move wards, serious consideration should have been given to his capability and confidence of working with personality disordered patients who present complex, challenging behaviours. Emerald* (sic) *appeared to have had a positive experience in Mental Health Services when he was a student nurse and therefore consideration should be given to him to go there permanently so that he can start building his confidence in delivering high quality care[2]."*

251. Whilst Ms. Magore's investigation was clearly not as comprehensive as it should have been and failed to grapple with the key issues, we do not accept that she or the Respondent acted in such a way as to cover up evidence of racism or wrongdoing. Particularly, Mr. Fisher has actively sought to engage with the Claimant and had invited him to raise a grievance and despite the Claimant saying that he did not see any point in the matter being investigated, the management team within the Peaks sought HR advice and progressed to deal with the matter by appointing Ms. Magore to investigate (see page 551 of the hearing bundle). If they had wanted to cover matters up, it would have appeared easier to have taken the opportunity to accept the Claimant's suggestion not to have any investigation at all or, otherwise, to cease the investigation when he resigned on 15th November 2017. We come further to that resignation below.

252. We should observe that whilst we have found Ms. Magore's investigation somewhat wanting, she did not have any HR support and we understand that the Respondent has since changed their procedures to utilise a bank of specialist investigators such as former members of the police force to investigate grievances and issues of this nature.

[2] It does not appear that anyone informed Ms. Magore that the Claimant had resigned and no longer worked for the Respondent.

Investigation into the Claimant's conduct and resignation

253. On or around 29th June 2017 Ms. Carter had received a reference request for the Claimant from Mimosa staffing (see page 465 to 467 of the hearing bundle) which she completed on 26th July 2017.

254. During the Claimant's later sickness absence Ms. Carter had difficulties contacting him during keeping in touch calls. She would be told in this regard by Ms. Sodaka that the Claimant was unavailable and that, for example, he was sleeping. As a result of that and the reference request, Ms. Carter reported that she believed that the Claimant may be working elsewhere whilst he was off sick with stress and accepting payment from the Respondent for sick pay. As we shall come to below, that was against the express terms of the Respondent's Sickness Absence Management Policy.

255. The matter was then reported to Diana Brennan who wrote to the Claimant on 13th November 2017 to advise him that the Respondent was commencing an investigation that he had allegedly worked for an agency, Tafara, at Cygnet Healthcare from 9th August to 29th September 2017 whilst he had been absent on the grounds of ill health from the Respondent. He was advised that the investigation was being undertaken in accordance with the Respondent's Conduct Policy and Sickness Absence Management Policy and he was provided with a copy of each. He was also told that counter fraud were aware of the allegation.

256. The Claimant was not suspended and was told that once the investigation was complete then Ms. Brennan would decide the next course of action, which could be disciplinary action including dismissal.

257. The Claimant contends that this was the last straw which prompted his resignation. We come to that resignation below.

258. Ms. Brennan therefore commissioned an investigation in respect of the allegation that the Claimant was working elsewhere whilst off sick. Terms of reference for the investigation were produced for the investigating manager, Karen Ackroyd-Rush. They included a reference to the Conduct Policy detailing offences which may constitute gross misconduct and the Sickness Absence Policy, the relevant parts of which provide as follows:

> *"If the employee holds more than one contract of employment with the Trust or undertakes work with an agency/other employer, any period of sickness should affect all work including voluntary work or self employment. The only exception to this would be where a medication practitioner determines that the specific work could be carried out by the individual. In these circumstances confirmation from the medical practitioner would be required. This would not prevent the manager from requesting a second opinion from Occupational Health if that was felt to be appropriate.*
>
> *Employees must not work for another employer whilst on sick leave with the Trust unless the above evidence (section 2.1.9) is provided and it is agreed with the manager. Failure to provide this evidence in advance of any work being undertaken may result in this being regarded as a fraudulent act and/or dishonesty".*

259. Shortly after receipt of the letter, the Claimant hand delivered a letter of resignation to the Respondent on 15th November 2017 and he sent a further copy to Ms. Burton by email on 19th November. He terminated his employment with immediate effect and handed in all of his property, ID badge and fob.

260. The Claimant's resignation letter was extremely brief and said this:

> *"Please accept my resignation letter. Thank you for temporarily having me on your ward following Quantock interim ward transfer.*
>
> *This letter has been hand delivered to Rampton staff."*

261. Ms. Burton emailed the Claimant on 20th November 2017 indicating that she had tried to call him and asking him to contact her to arrange to meet. The Claimant did not contact Ms. Brennan and accordingly there was no meeting.

262. The Claimant was used to writing lengthy letters to the Respondent and it is telling that his resignation letter was so brief. It mentioned none of the reasons that he now relies on in respect of the complaint of constructive dismissal and, particularly, that the letter regarding an investigation into his conduct was the "last straw" as he now contends.

263. The Claimant contends that the investigation should never have been commissioned because he had permission from the Respondent to work elsewhere. The Claimant essentially relies on a letter at page 314 of the hearing bundle which he says that he sent to Diana Brennan on 21st November 2016 which said this:

> *"This is to confirm that, Mr EH Marunda (Staff nurse on Quantock ward) was appointed as a secretary for Ram Personnel Ltd[3] in June 2013.*
>
> *Following advice from my current manager Mark Sandal within managerial supervision to only work as a second staff nurse with other employment agencies, I can confirm that I have commenced work as a 2nd nurse on the 18/11/16 with Tafara Care Services.*
>
> *Please regard this as my written confirmation letter".*

264. Firstly, we accept the evidence of Ms. Brennan that she never received that letter from the Claimant. Again, this is a letter which the Claimant says that he sent via the internal post. It is notable that the Claimant's evidence that he broke his habit of sending letters via email and instead elected to use the internal post only occurred in respect of letters which were not received by the Respondent. Again, the meta data for this particular letter was not available to us. We do not accept that the Claimant sent this letter and again we find it more likely than not that he created it after the event for the purposes of these proceedings.

265. However, even if we had found that the Respondent had received the letter then in all events it did not give him permission to work elsewhere whilst he was off sick as was required by paragraphs 2.1.9 and 2.1.10 of the Sickness Absence

[3] The Claimant and Ms. Sodoka are directors of Ram Personnel Limited which supplies agency staff to end user clients in the health and social work industry.

Policy. Particularly, the Claimant had submitted no evidence from a medical practitioner that he could work at an alternative position and he did not have his manager's permission.

266. The Claimant's position before us appeared to be that because it was his work with the Respondent that was causing him stress and because it was more financially beneficial for him to do so, that there was no issue with him working for an agency whilst he was off sick. That rather misses the point, however, that he was required to have permission under the Sickness Absence Policy and as he did not have that permission, he was in breach.

267. We are satisfied that the Claimant did not resign because of anything that had gone before. By this time he was settled on Cheviot ward and we find that the real reason for his resignation was because of the investigation into his conduct regarding working elsewhere as an agency nurse when he knew full well that he was in breach of the Sickness Absence Policy and that might result in his dismissal. The Claimant is of course rightly proud of his NMC registration and would not have wanted a potential gross misconduct dismissal to blight that or his future career. It is not denied by the Claimant (or at least it was not before the NMC as his evidence before us was rather less clear) that he did work agency shifts whilst off sick and accepting sick pay from the Respondent (see pages 682 and 683 of the hearing bundle) but he denied that he had done so dishonestly.

268. Ms. Brennan acknowledged receipt of the Claimant's resignation on 23rd November 2017. She set out that the report from Ms. Magore's investigation would shortly be finalised and that Karen Ackroyd-Rush would be in touch to arrange for him to give a statement regarding her investigation. It was explained to the Claimant that if elected not to give a statement then the investigation and report would nevertheless be concluded. The Claimant was invited by letter dated 24th November 2019 to contact Ms. Ackroyd-Rush but he did not do so and he did not participate in the investigation.

269. As to that investigation, Ms. Ackroyd-Rush compiled a report dated 11th December 2017 which appears in the hearing bundle at pages 621 to 645. The investigation determined, following information being provided from Cygnet Healthcare, that the Claimant routinely worked shifts for them between 9th August 2017 and 29th September 2017 and that he had worked in the region of 257 hours during that time (see page 652 of the hearing bundle).

270. The only period when the Claimant had not routinely worked at Cygnet Healthcare was when he had requested compassionate leave following the death of his father to arrange the funeral in Zimbabwe. Mr. Thomas had provided information during the investigation that the Claimant had told him that he had been working shifts at Cygnet Healthcare via his own company, Ram Personnel Ltd (see page 643 of the hearing bundle) and that had sparked contact with Cygnet who confirmed the above information by email to the Respondent.

271. During the entire period identified above the Claimant was off sick with stress and claiming sick pay from the Respondent. Ms. Ackroyd- Rush also found evidence of times when the Claimant was working for both the Respondent and at Cygnet Healthcare when he would not have had a sufficient rest period so as to comply with the Working Time Regulations 1998 (see page 632 of the hearing bundle).

272. Ms. Brennan wrote to the Claimant on 11th January 2018 setting out that she had now received the report and had he remained in employment she would have convened a disciplinary hearing. It was indicated that that decision would be reflected in any reference requests to the Respondent and that the matter had been forwarded to the Associate Director of Nursing to determine if there should be a referral to the NMC.

273. The Respondent did refer the Claimant to the NMC who found that there was no case to answer and concluded as follows:

> *"The allegation of your working for Tafara whilst on sick leave at the Trust is not in dispute in this case. You have accepted that fact from an early stage. The issue in your case is whether or not your actions were dishonest.*
>
> *We are mindful that an allegation of dishonesty is a particularly serious matter for any registered professional to face. As such it must be supported by cogent evidence.*
>
> *……..*
>
> *We acknowledge that there may have been a breach of Trust policy. We consider that this, in itself, is not compelling evidence of dishonesty. In our view, the medical evidence strongly suggests that you were unfit to work in your specific role at the Trust at the time, but not unfit to work as a nurse generally. As such, we consider that the evidence in relation to your alleged dishonesty can reasonably be regarded as inherently weak and unreliable.*
>
> *For the reasons given above, we form the view that there is not a realistic possibility that the facts alleged would be found proved. There is, in our opinion, no case for you to answer on the facts of this regulatory concern."*

274. Of course, they were looking at matters from a regulatory perspective rather than from the point of view of an employer.

CONCLUSIONS

275. Insofar as we have not already done so within our findings of fact above, we deal here with our conclusions in respect of each of the complaints made by the Claimant.

276. We should perhaps firstly observe that as we highlighted to Mr. Chukwuemeka at the outset, the Claimant's witness statement was for the most part somewhat vague as to many of the pertinent issues. For example, he made references to verbal racial abuse from Ms. Lodge and Ms. Fox-Wild without any real detail being provided and the statement also did not capture many of the matters that the Claimant relies on such as how he was subjected to detriment or the content – and in all cases the public interest element - of the disclosures that he contends that he made. We had raised that with Mr. Chukwuemeka so that he could give thought as to how to best deal with those deficiencies but there were still areas where, even after the Claimant's oral evidence, those gaps had not been plugged.

Did the Claimant make a protected disclosure or disclosures?

277. We begin firstly with consideration as to whether the Claimant made a protected disclosure or disclosures.

278. The Claimant relies on nine disclosures which he contends are protected disclosures and we deal with each of those separately.

279. The first of those is his email letter to Mr. Fisher of 3rd January 2017. We have already set out the letter in full in our findings of fact above. It is not disputed that the Claimant's letter disclosed information. The information disclosed was that the Claimant was experiencing difficulties getting access to email, Rio and the shared drives; had not commenced his preceptorship; that he had had difficulties arranging annual leave for his graduation ceremony and wanted clarity around lease car arrangements.

280. It is necessary to consider if, in the reasonable belief of the Claimant, the disclosure of information showed or tended to show a relevant failure within Section 43B Employment Rights Act 1996.

281. The main theme that has been explored during the proceedings in that regard is that health and safety was likely to be endangered. That appears to be said to be for both staff and patients given that the Claimant would need access to all relevant drives, programmes and email to be able to discharge his duties and that not having that would place people at risk.

282. However, it is clear to us that this is a matter that has taken on a new significance as a result of these proceedings. The Claimant's letter to Mr. Fisher focused entirely on matters personal to him. He made no express or even implied reference to patient or staff safety in his letter. We do not accept that that was the Claimant's focus or belief at the time of writing the letter. We accept the submissions of Mr. Feeny that if it had been, that would have been explicit within the letter.

283. The closest that the Claimant got was a reference to *"struggling to get connected to email, Rio and all the necessary Shared drives that enables me to carry out my professional ethical duties effectively".* That is, in our view, far too remote to suggest that the Claimant was referring to patient or staff safety. The matters that he was referring to were entirely personal to him.

284. The Claimant's representations on patient safety, particularly at paragraph 14 of his witness statement, appear to us to be matters that have been taken to advance as arguments with the benefit of hindsight, but were not his beliefs at the time that he wrote the letter. If that had been the Claimant's focus, it is telling that his evidence in cross examination about the public interest element did not refer to patient safety at all but that BAME staff should not have to suffer.

285. Mr. Chukwuemeka also set out in his final submissions that Mr. Fisher had accepted in cross examination that the management had failed in their obligations. However, what he did not do in his submissions was identify what the *legal* obligation relied on is said to be. That is a necessary ingredient of the test for whether a protected disclosure has been made.

286. As Mr. Feeny points out, the Scott Schedules prepared on the Claimant's behalf set out that that legal obligation was to "treat all staff fairly" but that contrasted with his oral evidence which was to allow him to have the tools to do his job. However, what has not been identified is the basis on which those are said to be *legal* obligations – such as identification of a regulation or statutory provision which the Claimant says has been breached.

287. The list of issues set out that the Claimant was also relying on a miscarriage of justice but that was not advanced either in cross examination or submissions and so we need say no more about it.

288. We therefore do not accept that the Claimant was, in his reasonable belief, making a disclosure of information which showed or tended to show that health and safety was being endangered; that there was a breach of any *legal* obligation (our emphasis) or that there was any miscarriage of justice.

289. It follows that the Claimant's letter of 3rd January 2017 was not a protected disclosure within the meaning of Section 43B Employment Rights Act 1996.

290. We turn then to the second disclosure relied upon by the Claimant. This is said to be a disclosure to Harriet Carter during clinical supervision. The Scott Schedules do not set out a date for that alleged disclosure. It was said that that date would be provided after disclosure has taken place but that has never occurred. The Claimant's witness statement is also silent on the issue. As we have already touched upon above, that is the case with much of the detail on the case as we remarked to Mr. Chukwuemeka at the outset of the hearing.

291. Despite the fact that the Scott Schedule set out that this also concerned Victoria Fox-Wild, Mr. Chukwuemeka's submissions was that this was the "protected mealtime" incident with Bethany Lodge. It has not been suggested that Ms. Fox-Wild was involved in that.

292. Ms. Carter accepts that the Claimant did tell her about the issue. What she was told was that Ms. Lodge had not terminated a patient session when the Claimant had requested that she do so in order for mealtime to begin. We do not accept the suggestion that the cutlery had already been counted out and/or given to patients or that what he told Ms. Carter inferred that. His gripe was that he had expected Ms. Lodge to agree to terminate the session and she had not done so because she considered that she needed to prioritise dealing with a patient who had just self-harmed.

293. Mr. Chukwuemeka relies on it being in the Claimant's reasonable belief that the health and safety of patients was being endangered but we do not accept that anything that the Claimant told Ms. Carter even implied that. Contrary to the points put by Mr. Chukwuemeka in his cross examination, cutlery had not been distributed on the basis of what Ms. Carter was told; the Claimant had others around to assist and not just Ms. Lodge and the only issue that arose was a slight delay to the commencement of a single mealtime. That did not place anyone in danger and nor could the Claimant have reasonably believed that it had. Again, this is a matter which has taken on new significance in the course of these proceedings.

294. We therefore do not accept that the Claimant made a protected disclosure to Ms. Carter as alleged.

295. The third protected disclosure that the Claimant relies on is his letter of 23rd July 2017. Mr. Chukwuemeka submits that the letter showed or tended to show that there had been a danger to health and safety arising from the Bethany Lodge mealtime issue. We do not consider that the Claimant had any reasonable belief that he was making a disclosure about health and safety of patients being endangered. Firstly, as we have already set out above we are satisfied that no cutlery had been distributed and the only issue was a delay to a mealtime.

296. Moreover, the entire focus of that paragraph was not to bring to anyone's attention issues about health and safety but to say why he believed he had been implicated in the medication error issue.

297. Mr. Chukwuemeka also submits that the letter showed or tended to show that there had been a miscarriage of justice and that a criminal offence had been committed, although the latter element does not feature at all within the list of issues. Despite that, we have dealt with it for completeness.

298. We do not accept that the Claimant had any reasonable belief that he was disclosing information that showed or tended to show that there had been a miscarriage of justice. On any sensible basis, incorrectly identifying the Claimant as having been involved in a minor incident for which no formal action was taken cannot possibly be seen as a miscarriage of justice and despite the significant emphasis that he places on it, we do not accept that that was the Claimant's reasonable belief at the time.

299. We also do not accept that at the time the Claimant had a reasonable belief that he was disclosing any information that showed or tended to show that a criminal offence had been committed. Mr. Chukwuemeka contends that the letter showed or tended to show that Ms. Carter had committed forgery in respect of the content of the medication error letter. We consider that to be a fanciful suggestion. There is nothing within the content of the letter that even hints at that. The Claimant simply says that he is rejecting the content of the letter as being inaccurate. No sensible reading of the letter could infer that the Claimant was complaining that Ms. Carter had committed some sort of forgery.

300. The list of issues refers to "deliberate concealment" but Mr. Chukwuemeka did not develop that in either the evidence or submissions and so we say no more about it.

301. We therefore do not accept that the Claimant was, in his reasonable belief, making a disclosure of information which showed or tended to show that health and safety was being endangered; that there had been a miscarriage of justice, that a criminal offence had been committed or that anything had been deliberately concealed.

302. It follows that the Claimant's letter of 23rd July 2017 was not a protected disclosure within the meaning of Section 43B Employment Rights Act 1996.

303. Even if we had not reached that conclusion, we would not have found that any disclosure was made in the public interest. Mr. Chukwuemeka relies in his submissions on a different public interest to that which was identified in the Scott Schedule and he says that that was Ms. Carter conducting herself in a way which would not bring the Respondent into disrepute. The Claimant's witness statement was silent on the public interest element but in all events it cannot reasonably be

said that Ms. Carter was running the risk of bringing the Respondent into disrepute because she had made a mistake.

304. The fourth disclosure relied upon by the Claimant is fourfold. These are said to be:

a. A conversation between Ms. Brennan and Ms. Mandizvidza. Although the list of issues and Scott Schedule set the date of that meeting at 26th July 2017, as we have set out above that actually occurred on 2nd August 2017;

b. A letter from the Claimant dated 1st July 2017;

c. A letter from the Claimant dated 23rd July 2017; and

d. A letter from Harriet Carter dated 26th July 2017.

305. We will deal with each of those separately.

306. It is accepted that there was a meeting between the Claimant and Ms. Mandizvidza albeit that, as we have already said, that happened on 2nd August 2017. Mr. Chukwuemeka contends that Ms. Mandizvidza showed Ms. Brennan the Claimant's letters of 1st July 2017 or 23rd July 2017 during the meeting. It is difficult to see how it could be pinpointed which precise letters it is said were shown to Ms. Brennan given that all that Ms. Mandizvidza said in her WhatsApp messages to the Claimant is that she had shown Ms. Brennan "all the letters".

307. Whilst the Claimant's WhatsApp messages show that he had attached JPEG files to send to Ms. Mandizvidza, it is impossible for us to ascertain what they were save as for one at the top of page 474 which must have been Ms. Carter's "medication error" letter. We cannot see what the Claimant otherwise sent to Ms. Mandizvidza which she told him she had shown to Ms. Brennan.

308. Moreover, we have accepted the evidence of Ms. Brennan that Ms. Mandizvidza did not show her any letters in this meeting and the emphasis of the meeting was about the fact that the Claimant wanted a ward move which Ms. Brennan said that she would look into and that he was upset about having been implicated in the "medication error".

309. Furthermore, neither the Claimant's evidence or the submissions of Mr. Chukwuemeka deal with the public interest element of this alleged disclosure.

310. We are able to deal with the second part of the alleged disclosure in short terms because, as we have already found above, we are satisfied that the letter of 1st July 2017 was never sent to the Respondent and was created after the event.

311. We can also deal with the third part in short terms because that relies upon the exact same letter as the Claimant relied on for the third disclosure.

312. Finally, the Claimant relies on a letter from Harriet Carter to the Claimant dated 26th July 2017. We have not had any explanation as to how a letter **from** Ms. Carter could possibly amount to a protected disclosure by the Claimant. It was simply a letter sent in reply to his earlier communication about the medication error and apologising for that.

313. We therefore do not accept that the Claimant made a protected disclosure as alleged either singularly or having regard to the totality of the communications upon which he relies here.

314. The fifth disclosure relied upon by the Claimant is his conversation with Darren Lount. Again, there was nothing at all about that conversation in the Claimant's witness statement. We look therefore to the contemporaneous account of Mr. Lount in his email to Harriet Carter following his conversation with the Claimant.

315. That email sets out that the Claimant told Mr. Lount that it had been agreed that he should be allocated to a different ward; that he felt targeted and discriminated against as a result of the medication error letter and that Ms. Lodge had continued with a session with a patient when a mealtime was about to occur.

316. The Claimant's Scott Schedule set out that he had disclosed to Mr. Lount that management had failed to address the discrimination that he claimed that he was experiencing and that patients had been put at risk. We do not accept that that was said as there is no evidence to that effect and it is not reflected in the email from Mr. Lount.

317. We do not accept that what the Claimant told Mr. Lount amounted to a disclosure of information. At best, he was making an allegation or mere assertion about being discriminated against.

318. However, even if that was not the case then we do not accept that anything that he told Mr. Lount was a disclosure of information which showed or tended to show any of the relevant "failures" in Section 43B Employment Rights Act 1996. The Claimant's Scott Schedule relies upon a breach of a legal obligation but that obligation is not identified anywhere in his evidence or in Mr. Chukwuemeka's submissions. Insofar as that might have been a legal obligation under the Equality Act, that was certainly not at all plain from the information given to Mr. Lount.

319. Insofar as the Claimant relies on information showing or tending to show that health and safety was being endangered, he did not make any suggestion that there was a danger to health and safety regarding the incident with Ms. Lodge and, for the reasons that we have already given in respect of earlier disclosures, we do not accept that he could have had any reasonable belief about that.

320. Moreover, the matters that the Claimant was speaking to Mr. Lount about were again issues that were personal to him. They were not made in the public interest.

321. We therefore do not accept that the Claimant made a protected disclosure to Mr. Lount.

322. The sixth disclosure relied upon by the Claimant is Ms. Sadoka's conversation with Helen Ault on 21st September 2017. The best evidence that we have of that conversation is Ms. Sadoka's own contemporaneous note which she confirmed was an accurate reflection of what was discussed.

323. As we have already set out above, Ms. Auld was told that the Claimant had been having significant problems since a false allegation had been made by Ms. Carter; that relationships had broken down and that nothing had materialised in respect of a request for a ward transfer.

324. She was further informed that it appeared that the management were forcing the Claimant to return to Quantock ward despite there being a relationship breakdown with Ms. Carter and other incidents of bullying with other members of staff.

325. Ms. Sadoka also informed Ms. Auld of the difficulties that the Claimant had had when he joined the Trust such as having no access to email or CESA and that he had been signed off with work related stress.

326. That information is in sharp contrast to what the Claimant said Ms. Auld had been told in his Scott Schedule which recorded that the discussion had been about racial abuse, race discrimination and victimisation by Ms. Fox-Wild, Ms. Lodge, Ms. Carter, Ms. Brennan and Mr. Fisher and the failure of senior management to investigate a series of grievances or to protect him. Aside from the fact that none of that was recorded in Ms. Sadoka's note and we do not accept that it was said, the Claimant had in fact not raised any grievance which needed to be investigated. Indeed, he did not even wish his complaint about Ms. Carter to be investigated as we have set out above.

327. Focusing then on what was actually said, the Claimant contends that it was his reasonable belief that the information given to Ms. Auld showed or tended to show that there was a breach of a legal obligation; there had been a miscarriage of justice and that there had been deliberate concealment.

328. In respect of the first of those matters, it is presumed that that relates to the failure to provide the Claimant with access to CESA and email. As we have already set out in respect of earlier disclosures, the Claimant has not identified what legal obligation he actually relies upon and Mr. Fisher accepting that the management had failed in their obligations towards the Claimant is not enough.

329. We also do not accept that the information relied upon showed or tended to show that there had been a miscarriage of justice. We presume that to relate to the medication error letter. For the same reasons that we have already set out in respect of an earlier disclosure, we do not accept that the Claimant can have had any reasonable belief that what Ms. Auld was being told showed or tended to show that there had been a miscarriage of justice.

330. Finally, we do not accept that anything that was said hinted at any issue of "deliberate concealment" and the Claimant could not have any reasonable belief that it was.

331. Moreover, there is nothing within the evidence before us which suggests that anything that was said was done in the public interest. The matters that Ms. Sadoka was referring to were matters which were personal to him.

332. We therefore do not accept that any protected disclosure was made to Ms. Auld.

333. The seventh disclosure relied upon by the Claimant is his telephone call with Richard Lyons on 4th August 2017. Again, there is very little within the Claimant's witness statement about that discussion and it does not reflect what is said either in the Scott Schedule or the list of issues. The Claimant's statement simply records that he "conveyed to management [his] struggles with stress working on Quantock ward".

334. The contemporaneous email prepared by Mr. Lyons does not provide specifics of what the Claimant told him.

335. However, based on the evidence before us we cannot say that there had been a disclosure of information. At best, his witness evidence is that he told Mr. Lyons that he was struggling with stress whilst working on Quantock. The Claimant does not identify the legal obligation which he says that he reasonably believed his disclosure showed or tended to show was being breached and there is nothing within his evidence which could possibly suggest that he reasonably believed that health and safety was being endangered.

336. Moreover, what the Claimant told Mr. Lyons could not reasonably be said to be done in the public interest because they were again matters that were entirely personal to him.

337. It follows that we do not accept that what the Claimant told Mr. Lyons amounted to a protected disclosure within the meaning of Section 43B Employment Rights Act 1996.

338. The eighth disclosure relied upon by the Claimant is what he told Dr. Murphy of Occupational health. The Respondent's position that they outsourced their Occupational health function to an external company was not challenged by the Claimant or Mr. Chukwuemeka. We therefore accept that position.

339. Accordingly, as Dr. Murphy was not employed by the Respondent any disclosure that the Claimant made to him was not made to his employer and therefore not made in accordance with Section 43C(1)(a) Employment Rights Act 1996.

340. An amendment to the list of issues made by Mr. Chukwuemeka suggested that the Claimant was also relying on Section 43C(1)(b) Employment rights Act 1996. However, as we observed to Mr. Chukwuemeka at the outset whilst discussing the list of issues, that section only applies where the worker reasonably believes that the relevant failure relates solely or mainly to the conduct of a person other than his employer, or any other matter for which a person other than his employer has legal responsibility, to that other person.

341. The Claimant was not saying that the relevant failure on which he relies related to any other person other than the Respondent or their employees nor could it be reasonably said that Dr. Murphy had the legal responsibility for any of the people about who he complains in these proceedings. Section 43C(1)(b) is therefore not applicable to the circumstances of this element of the claim.

342. However, even had that not been the case we again have no evidence within the Claimant's witness statement as to exactly what he told Dr. Murphy. The best evidence that we have about what was said is the letter that Dr. Murphy sent to the Respondent after his appointment with the Claimant. That letter recorded that the Claimant had shown him the medication error letter from Ms. Carter and her reply and recorded that those were the reasons for his stress.

343. There was no suggestion, as the Claimant now contends, that any reference was made to there having been a miscarriage of justice or some form of deliberate concealment nor can the Claimant have any reasonable belief that what Dr. Murphy recorded had happened showed or tended to show that.

344. For those reasons, we do not accept that the Claimant made a protected disclosure to Dr. Murphy or, that even if he had, that was a disclosure made either to his employer or to a responsible person within the meaning of Section 43C Employment Rights Act 1996. We also do not find that there was any public interest element to what the Claimant told Dr. Murphy because those matters were once again entirely personal to him.

345. The final disclosure relied upon by the Claimant is his letter to Mr. Fisher dated 20th September 2017. As we have set out above, the entire focus of that letter related to the medication error.

346. Whilst we accept that there was a disclosure of information, we do not accept the Claimant's representations that this showed or tended to show any of the relevant failures set out in Section 43B Employment Rights Act 1996. Mr. Chukwuemeka relies in the list of issues on the Claimant's belief that the letter showed or tended to show that there had been a miscarriage of justice or deliberate concealment. For the reasons that we have already given, we do not accept that the Claimant could reasonably believe that what he was saying amounted to information conveying a miscarriage of justice. As the Claimant was well aware, Ms. Carter had made a mistake about a minor conduct issue for which she had accepted that he was not involved and had apologised to him.

347. There is no evidence in the Claimant's witness statement as to what he says that he contended showed "deliberate concealment". The Scott Schedule suggests that that was evident from the Claimant's words that "nothing will be done about it as clearly evidenced from how this case had been handled from day one" and Mr. Chukwuemeka's submissions vaguely hint at some sort of cover up by Mr. Fisher, Ms. Griffiths and Ms. Brennan.

348. As to the former, the Claimant had not made any complaint that needed to be investigated. He had complained to Ms. Carter about receipt of the medication error letter and she had looked into that; accepted that he had not been involved; apologised and removed the letter from his file. It is impossible to see how that could possibly be a "cover up" by anyone or that nothing had been done.

349. We do not accept that the Claimant could or did have any reasonable belief that his letter to Mr. Fisher showed any form of deliberate concealment about anything let alone a relevant failure.

350. Although it does not feature in the list of issues or Mr. Chukwuemeka's submissions, the Scott Schedule also suggested that the disclosure showed or tended to show that there was a breach of a legal obligation. The legal obligations identified in the Scott Schedule are breaches of the Equality Act; Human Rights Act and the Employment Rights Act. Nothing in the Claimant's letter remotely hinted at that nor do we have any specifics of exactly what is alleged in that regard. We therefore do not accept that the Claimant had a reasonable belief that his letter to Mr. Fisher showed or tended to show that there was a breach of any legal obligation.

351. Moreover, again the information that the Claimant provided related to his upset about the medication error letter and was a matter which was personal to him. There was no wider public interest element.

352. We therefore do not accept that the Claimant made a protected disclosure in his letter to Mr. Fisher.

Detriment

353. It follows that as we have found that the Claimant did not make a protected disclosure, his complaints of detriment contrary to Section 47B Employment Rights Act 1996 fail. However, for completeness we have gone on to consider whether the Claimant was subjected to detriment if we had found that he made a disclosure or disclosures.

354. The first of those matters is said to relate to the Claimant not having access to CESA until October 2017 (12 months after his employment commenced) and that his preceptorship was delayed. We do accept that those matters placed the Claimant at a detriment. However, there were clearly problems with CESA for both the Claimant and Mr. Thomas and we do not accept that any of the matters that he relied on as protected disclosures had any influence on that.

355. Insofar as preceptorship was concerned, the main delay that can be attributed to the Respondent was in allocating the Claimant his preceptorship paperwork and a mentor. All of those matters occurred before the Claimant made any of the disclosures on which he relies and, indeed, after his email to Mr. Fisher matters improved in that regard. As such, there can have been no influence on that failing by any of the matters that the Claimant relies on as being protected disclosures.

356. The second detriment claimed is the alleged failure to investigate the Claimant's grievance of 1st July 2017. We can deal with this matter in very short terms because, as we have found above, the Claimant never sent this letter. It cannot possibly be any form of disadvantage to him to have failed to investigate a letter that the Respondent never received and which we consider it is more likely than not was created after the event.

357. If it is the case that Ms. Magore saw the letter (and we are far from convinced that she did) and did not investigate the contents, we do not accept that that was such as to cause a detriment to the Claimant given that we find, as above, it is more likely than not that it was created for the purposes of bolstering complaints that he was making about discrimination.

358. As set out in the list of issues, the third detriment relied upon by the Claimant relates to the following letters:

    a. The medication error letter handed to him on 6th July 2017;

    b. The letter of 23rd July 2017;

    c. The letter of 20th September 2017; and

    d. The letter of 27th September 2017.

359. It should be noted that the above deviates somewhat from the pleaded case in the Scott Schedule which relied upon a suggestion that there had also been a failure by senior management to investigate the matter. Although that is not in the list of issues, we nevertheless deal with it for completeness.

360. We accept that the medication error letter caused upset to the Claimant but we do not accept that it was such to cause him detriment. The matter was quickly resolved when he pointed out to Ms. Carter that he had not been on shift. She looked into the matter, accepted that the Claimant was correct, offered him an apology and removed the letter from his file and replaced it with the letter of apology. Any residual complaint after that point simply amounted to an unjustified sense of grievance.

361. It is also abundantly clear that the letter was not forged as the Claimant now contends. It was simply a pre-prepared letter which, as he is well aware, was given to each member of staff thought to be involved on the assumption that they had been involved and would take responsibility. The letters were all identical. Whilst the content was not accurate in that the Claimant had not discussed and agreed that he was at fault, Ms. Carter accepted that he had not been involved and the matter was remedied. The letter was sloppy and inappropriate but no more than that.

362. Dealing with the point in the Scott Schedule that the allegations against Ms. Carter were not investigated, the Claimant had not requested that there should be any investigation. When he wrote to Mr. Fisher on 20th September 2017 he was encouraged to raise a grievance about the matter but did not do so although the matter was considered of the Respondent's own initiative in Ms. Magore's investigation. Given that Ms. Carter accepted that she had made a mistake, apologised and removed the letter from the Claimant's file, it is difficult to know what else in fact needed to be investigated.

363. If this is that Ms. Carter falsified or forged the letter then we accept the submissions of Mr. Feeny that it was far from obvious in the letters that the Claimant refers to that that was what was being alleged at the time. Any disclosure or disclosures (if we had found any to have been made) had nothing at all to do with that.

364. Moreover, even if we had found this issue to amount to detriment then we are entirely satisfied from the Respondent's evidence that that had nothing to do with any alleged disclosure. It was made because Ms. Carter saw that the Claimant was listed on the ghant sheets as being on Quantock ward at the time that the medication error was made and therefore sent him, along with everyone else on shift that day, a standard letter on the instruction of Ms. Griffiths. Any disclosure that we may have found the Claimant to have made (and of course we have not) had no influence on that position. It was simply a mistake.

365. Insofar as the other letters relied on by the Claimant are concerned, those are all letters that he sent to the Respondent and as those were therefore actions taken by him, they cannot possibly amount to detriment.

366. The next detriment claimed is a failure to investigate a harassment complaint made by the Claimant on 12th October 2017. There are two letters of that date which were presented to Ms. Magore and which it is accepted she had seen.

367. Given that this element of the claim relies on a complaint of harassment made on 12th October 2017 it logically follows that the letter in question must be the complaint letter about Ms. Lodge.

368. We do not accept that the Claimant was subjected to any detriment. Insofar as any failure to investigate is alleged prior to the Claimant providing the letters to Ms. Magore, we do not accept that they were sent at any earlier stage. Whilst it is correct to say that Ms. Magore did not interview Ms. Lodge and deal specifically with the allegations of racism that the Claimant made in that letter in her report and it was clearly bad practice for her not to have done so, the Claimant cannot have been occasioned any detriment by that because the allegations of racism that he made in that regard we have found to have been false. Failing to deal with a false allegation cannot in our view be said to be a detriment or disadvantage.

369. The next act of detriment of which the Claimant complains is what is termed as a refusal to move him from Quantock ward. We are satisfied that there was no refusal. The submissions of Mr. Chukwuemeka focus on the actions of Ms. Brennan after her meeting with Ms. Mandizvidza on 3rd August 2017. It is abundantly clear that there was no refusal at that meeting to move the Claimant. Ms. Brennan agreed to look into a ward move and in the meantime indicated that the Claimant should speak to the CRO about allocating him a different ward whilst a permanent move could be looked into. It was not possible to simply move the Claimant there and then because other staff and patients had to be taken into account and Quantock would have been left short staffed.

370. Whilst it would plainly have been better for Ms. Brennan to have spoken to CRO directly, we do not find that she did not do so to deliberately disadvantage the Claimant. Whilst he was allocated to work on Quantock ward on 4th August and that may have occasioned him upset, there was certainly no refusal to move him and this element of the claim therefore fails on the facts.

371. The Claimant was absent from work and when he was fit to return he was allocated a permanent move to Cheviot ward. We have accepted the evidence of Mr. Fisher that he could not arrange a move until he had a definitive return to work date as we have already set out above.

372. It follows that this element of the claim therefore fails and is dismissed because there was never any refusal to allow the Claimant a ward move.

373. The next act of detriment complained of is subjecting the Claimant to an investigation. Any complaint that the Claimant may have had in respect of this investigation amounts to nothing more than an unjustified sense of grievance given that he had done all that the Respondent had alleged that he had done. As we have found above, the Claimant was working for an agency undertaking a significant number of shifts whilst he was absent on the grounds of ill health. He knew or should have known that he required the Respondent's permission and confirmation from a medical practitioner that he was fit to undertake another role. He did not have, nor did he seek to get, either. He was in clear breach of the Sickness Absence Management Policy and the Respondent was perfectly entitled to investigate that. There can be no detriment to the Claimant in that as it resulted entirely from his own actions.

374. However, even had we found the commencement of the investigation to have been a detriment then we are entirely satisfied that it was commenced because the Claimant was suspected of being (and was in fact) working elsewhere in breach of the Sickness Absence Management Policy. We are satisfied that the

fact of any disclosures (had we found any to be protected disclosures) had nothing at all to do with the matter.

375. Finally, the Claimant contends that he was subjected to detriment in that Ms. Magore did not use the correct policies to investigate his "grievance". We would first observe that the complaints made by the Claimant were never phrased by him as being a grievance. He was asked by Mr. Fisher on more than one occasion to fully articulate his concerns so that they could be investigated and he failed to do so. He was provided with a copy of the grievance procedure to assist him and offered meetings which he failed to take up. The Respondent chose to appoint an investigator to consider the allegations irrespective of that position.

376. Mr. Chukwuemeka contends that Ms. Magore should have used the Equality and Diversity Policy to consider the issues that the Claimant had raised. We agree, although with respect to Mr. Chukwuemeka it is clear that at times in his cross examination he became equally confused about which policy it was that should have been referred to.

377. Ms. Magore followed the incorrect guidance given to her in the terms of reference and looked towards the Conduct Policy. She did not place reliance on the Equality and Diversity Policy as she should have. Whilst her investigation was clearly flawed for the reasons that we have already set out above, there is nothing that we have been taken to in the Equality and Diversity Policy that would have changed that position if she had followed it.

378. We do not accept the submissions of Mr. Chukwuemeka that Ms. Magore somehow acted as an advocate for the Respondent or that she was not impartial either as a result of some prior dealings with Ms. Carter or being the same grade as Ms. Brennan. Her investigation was poor but she was certainly not assisted by a lack of HR input and a lack of information from the Claimant despite the best efforts of Mr. Fisher to extract that from him.

379. We therefore do not accept that there was any detriment to the Claimant by not expressly following and referring to the Equality and Diversity Policy because we have not been taken to anything to show that it would have had any material difference to the report or its findings or recommendations. However, even if that was not the case it is plain that that had nothing to do with any protected disclosures if we had found any to be made out. The issue came about as a result of Ms. Magore simply following the terms of reference, a lack of information from the Claimant and a lack of HR support.

380. It follows that all complaints of detriment contrary to Section 47B Employment Rights Act fail and are dismissed.

<u>Victimisation</u>

381. The first question that we need to consider is whether the Claimant did a protected act or acts within the meaning of Section 27 Equality Act 2010.

382. We remind ourselves that it will not be sufficient for a Claimant to simply use words such as "discrimination" for that to amount to a protected act and the complaint must be of conduct which interferes with a characteristic protected by the Equality Act. Whilst there need not be explicit reference to the protected characteristic itself, there must be something sufficient about the complaint to

show that it is a complaint to which at least potentially the Equality Act applies (**Durrani v London Borough of Ealing UKEAT/0454/2012**).

383. The Claimant relies on fifteen different items of communication which he contends amounted to protected acts and we take each of those separately. Neither the Claimant's witness statement nor Mr. Chukwuemeka's submissions deal with how any of the communications relied on amount to a protected act. In the case of the submissions, it is simply put that they are said to be protected acts because they reported breaches of duty.

384. However, the first communication relied upon by the Claimant is his letter to Mr. Fisher of 3rd January 2017. There is nothing within that letter which hints at anything which might amount to a complaint under the Equality Act. There is not even a reference to discrimination let alone anything that would hint at a complaint of race discrimination.

385. The closest that the letter comes is referencing what was provided to Mr. Thomas with a comparison of what happened in his own circumstances about access to IT and the like. However, that gave no hint as to any complaint about discrimination or race. We are therefore not satisfied that this letter amounted to a protected act.

386. The second communication that the Claimant relies upon is the letter of 1st July 2017 regarding Ms. Fox-Wild. We can answer that in short terms given that we are not satisfied that that was ever sent to the Respondent. Given that position, that did not amount to the doing of a protected act.

387. The third communication relied upon is comments made at a return to work interview with Katy Twigg which is said to have taken place on 8th July 2017. There is no return to work interview that we have seen for that date.

388. Given the Claimant's evidence on the second day of the hearing we understand this to in fact be a managerial supervision which took place on 15th May 2017. The Claimant's evidence was that during that supervision he had raised with Ms. Twigg a complaint that Victoria Fox-Wild had been racist towards him and had discriminated against him. As we have already set out above, none of that appears in the supervision record and we do not accept that it was ever said.

389. There is nothing at all within the supervision that makes any reference to discrimination or could suggest in any way that the Claimant was complaining about race discrimination. Again, we must therefore conclude that this did not amount to the doing of a protected act.

390. The next communication that the Claimant relies upon is his letter dated 23rd July 2017. This was the letter sent to Ms. Carter on 25th July 2017. The Claimant referred in that letter to feeling targeted and discriminated against. However, as we have set out above that is not sufficient. There was nothing at all in the Claimants letter which hinted at a complaint about race or any protected characteristic under the Equality Act. As such, we are not satisfied that this letter contained anything which would equate to the doing of a protected act.

391. The next communication relied upon by the Claimant is the discussion between Ms. Brennan and Ms. Mandizvidza on 2nd August 2017. This discussion centred around the ward move. We accept the evidence of Ms. Brennan that nothing was said about discrimination let alone race discrimination and that she was not shown any letters during the course of the meeting. It follows that this did not amount to a protected act either.

392. The next communication that is said to amount to a protected act is the Claimant's conversation with Darren Lount. Whilst the list of issues places the date of that conversation as being 8th August, it was in fact four days earlier.

393. Again, the best evidence of what was said there comes from the email that Mr. Lount sent to Ms. Carter and others immediately after their discussion. Whilst the Claimant again referred to feeling "targeted and discriminated against" the context of that was about the medication error. There is no evidence that the Claimant raised race discrimination or anything that might have hinted at that. This discussion did therefore not amount to the doing of a protected act.

394. The seventh matter that the Claimant relies upon is said to be a disclosure to CRO that work related stress caused by a deliberate falsehood by Ms. Carter and her support for Ms. Fox-Wild. Although no date is placed on this, we assume this is a reference to the Claimant's discussion with Richard Lyons on 4th August 2017.

395. The Claimant's witness statement does not provide detail about that and we are again left with Mr. Lyons email as a record of what was said. The nearest that that records any reference to discrimination is to the Claimant's "warped notion of victimisation". There is nothing at all before us to suggest that the Claimant was making a reference to victimisation in anything other than a colloquial sense (or that he actually used that word at all) and certainly it was not sufficient to suggest victimisation contrary to the Equality Act. We therefore do not accept that the Claimant did a protected act in connection with his conversation with Mr. Lyons.

396. The eighth communication relied upon is the discussion between Ms. Sadoka and Ms. Auld on 21st September 2017. Having revisited Ms. Sadoka's note of that discussion it is clear that no reference was made to the Claimant having been discriminated against, whether on the grounds of race or even more generally, and nothing within what is said began to hint at that. It follows that this did not amount to the doing of a protected act.

397. The next matter relied upon is said to be a disclosure to Ms. Burton on 27th September 2017 about the conduct of Mr. Fisher. Again, the Claimant's witness statement is silent on that particular matter and we have no document of that date sent to Ms. Burton nor was any suggestion about a document or discussion on that date put to her in cross examination. There is a reference within the Scott Schedule relating to this matter to annexure EM7 but we have no copy of whatever that document is said to be but in all events and more importantly, Ms. Burton was not asked about it at all.

398. The only document of 27th September 2017 which we have is the letter to Mr. Fisher that we have referred to above. That was copied to a number of people but Ms. Burton was not one of them. It follows that as we have no detail at all of that particular matter, we cannot conclude that whatever may or may not have been said amounted to the doing of a protected act.

399. We turn then to the tenth matter relied upon which is the Claimant's discussion with Dr. Murphy on 10th October 2017. Again, the Claimant's witness statement was silent as to what he says that he told Dr. Murphy. As we have set out above, the report of Dr. Murphy set out merely that the Claimant had shown him his letter to Ms. Carter of 23rd July 2017 and her reply in response and that those were the cause of his stress. There is no reference to discrimination let alone anything that could suggest a contravention of the Equality Act.

400. Insofar as the Claimant may be suggesting that showing Dr. Murphy the letters alone was such as to amount to the doing of a protected act, we reject any such notion on the basis of our conclusions about the fourth communication relied on as a protected act above.

401. It follows that we do not accept that the Claimant said or did anything which amounted to the doing of a protected act by way of his discussion with Dr. Murphy.

402. The next communications relied upon by the Claimant are the two letters dated 12th October 2017 which were emailed to Annette Magore on 30th October 2017. The Claimant's witness statement does not deal with those letters but insofar as it may be suggested that they were sent to anyone before Ms. Magore we do not accept that. The first letter was entitled "no equal opportunities". He referred to not having the same equal opportunities as Mr. Thomas but there was nothing within that letter that hinted at that being any complaint that might be contrary to the Equality Act. Particularly, in relation to his assertion that he had been treated differently to Matthew Thomas he set out that that was for *"reasons best known to management".* Race – or even a hint about that – was not mentioned.

403. Insofar as the second letter was concerned, this did make an explicit allegation that he had been subjected to racist comments from Ms. Lodge and on the face of it would amount to the doing of a protected act. However, we are satisfied that what the Claimant said about what Ms. Lodge is alleged to have done was not true and therefore as a result of the provisions of Section 27(3) Equality Act 2010, the Claimant's letter did not amount to the doing of a protected act.

404. The next matter that the Claimant relies on is the discussions that he had with Annette Magore on 30th October 2017 at their investigatory interview. The Claimant does not deal with that conversation in his witness statement and so the best record that we have about that is the note of the meeting at page 616 to 619 of the hearing bundle which the Claimant signed as an accurate record. The Claimant did not mention discrimination within that conversation. Whilst he did make references to equal opportunities and Matthew Thomas having greater opportunities than he did, that was in the apparent context of preceptorship and access to systems. There is nothing that could be reasonably inferred as a breach of the Equality Act. We are therefore not satisfied that the Claimant did a protected act in respect of his discussions with Ms. Magore.

405. Moreover, even if we had not found that to be the case the Claimant has not identified any later act of claimed detriment that either involved Ms. Magore or which are said to relate to the letters that he provided to her.

406. The next matter that the Claimant relies upon is a conversation with Darren Lount during clinical supervision. No date has been identified for that conversation; the Claimant's witness statement is silent on the issue and we have no notes of any

supervision sessions with Mr. Lount. Whilst the Scott Schedule makes reference to "EM7" which we presume to be an appendix, that has not been provided to us. We can therefore make no finding as to whether any such supervision session ever took place and, if it did, that the Claimant did a protected act during it.

407. The final protected act relied on by the Claimant is a disclosure to Mr. Fisher of 5th October 2017. Again, the Claimant does not deal with that discussion in his witness statement. The notes of that meeting are, however, including in the hearing bundle at pages 535 to 538 and the Claimant has signed them as being an accurate record. That discussion related entirely to arrangements for the Claimant's return to work. There was no mention of discrimination, anything that could possibly be construed as a breach of the Equality Act or the lack of managerial supervision that is referred to in the list of issues and the Scott Schedule. Again, therefore, the Claimant did not do a protected act in this regard.

408. It follows that if the Claimant did not do a protected act, then the complaints of victimisation do not succeed. However, for completeness we have gone on to consider whether, had we found the protected acts to be made out, the Claimant was subjected to detriment and that was materially influenced by those acts.

409. The first act of victimisation that the Claimant contends occurred was the failure to investigate or respond to the Claimant's 3rd January 2017.

410. We do not accept that the Claimant was subject to detriment. He did not suggest that his email was a grievance nor do we find that it was. It was not therefore necessary to investigate. Moreover, despite the Claimant's initial denial, he did attend a meeting with Mr. Fisher at Mr. Fisher's suggestion and thereafter he took the ward managers to task for the lack of action in respect of the Claimant. The Claimant was aware of that position and it cannot be reasonably suggested that no action was taken.

411. Logically, if we had found that the Claimant had been subjected to detriment the only protected act (again had we found it to be one) which would be relevant would be the 3rd January 2017 letter itself. Given that Mr. Fisher acted on the Claimant's email in the way described above, it is nonsensical to suggest that he was motivated not to investigate it further because the Claimant had done a protected act.

412. The second detriment that the Claimant relies on is a failure to investigate a grievance of 1st July 2017 about Ms. Fox-Wild. Again, we can deal with this in short terms because the Claimant never sent that letter to the Respondent. As such, there can be no detriment by not investigating the content of a letter that was never received.

413. The third detriment that the Claimant contends that he was subjected to is the provision of the medication error letter and the fact that there was reference to him having attended a meeting and a failure by senior manager to investigate that error. We do not accept that the Claimant was subjected to any detriment in that regard for the exact same reasons as we have already given in respect of the complaint of detriment for making a protected disclosure.

414. However, even if we had found that to amount to detriment then there is nothing whatsoever to suggest that that was done because the Claimant had done a protected act. Other than the assertion to that effect, there is nothing of substance to that position.

415. It is plain that the reason for sending the medication error letter to the Claimant was because Ms. Carter wrongly believed after checking the ghant sheets that he had been on shift when the error had occurred. The reason why the letter set out that there had been a meeting is because Ms. Carter pre-prepared them on the (here incorrect) assumption that everyone that she sent the identical letters to would accept that they had made the error.

416. There was no failure to investigate the medication error letter by management as the Claimant alleges. That failure was identified by Mr. Chukwuemeka at the outset as being attributed to Mr. Fisher. The Claimant raised the matter with Ms. Carter and she accepted her error, apologised and removed the letter from the Claimant's file. When the Claimant later raised the matter with Mr. Fisher he encouraged him to provide details of all his concerns and raise a grievance. The Claimant did not engage with that process but nevertheless, Ms. Magore was appointed by Ms. Brennan to investigate what information the Claimant had provided. There is nothing other than an assertion to the effect that any of the communications that the Claimant relies on as being protected acts had anything to do with that.

417. The next detriment relied upon by the Claimant relates to the following letters:

a. The medication error letter handed to him on 6th July 2017;

b. The letter of 23rd July 2017;

c. The letter of 20th September 2017; and

d. The letter of 27th September 2017.

418. We have already dealt with the medication error letter issue immediately above and therefore do not need to repeat those matters here.

419. Insofar as the other letters relied on by the Claimant are concerned, as we have identified in the context of the complaint under Section 47B Employment Rights Act 1996, those are all letters that he sent to the Respondent and as those were therefore actions taken by him they cannot possibly amount to detriment.

420. The next complaint of detriment that the Claimant relies on is the failure to investigate his complaint about Bethany Lodge contained in his letter of 12th October 2017. That failure was identified by Mr. Chukwuemeka at the outset as being attributed to Mr. Fisher. However, there is no evidence that the letter was ever sent to Mr. Fisher and we do not accept any suggestion that it was. The first time the Claimant sent that letter was to Ms. Magore on 30th October 2017.

421. Insofar as the complaint might also relate to the failure of Ms. Magore to investigate this element, we are satisfied that that did not amount to a detriment to the Claimant because the allegations that he made in his letter regarding racist language was not true.

422. Furthermore, even if that was not the case there is no evidence whatsoever that Ms. Magore was at all influenced by any of the communications that the Claimant relies upon as being protected acts.

423. The next act that the Claimant contends to be victimisation is the refusal of Ms. Carter, Ms. Brennan, Ms. Griffiths and Mr. Fisher to move him from Quantock ward. For the same reasons as we gave in relation to the same factual complaint advanced under Section 47B Employment Rights Act 1996, this allegation fails on its facts.

424. Even had that not been the case, the Claimant has advanced no factual basis for his assertion that this was done because of the communications that he relies upon as being protected acts.

425. The next act of detriment that the Claimant relies on is receipt of a letter from Ms. Brennan stating that he was involved in two investigations. Although the reference in the list of issues is to a letter of 23rd November 2017, the date of the letter is in fact 13th November 2017. It was of course a matter of fact that the Claimant was involved in two investigations and so simple receipt of the letter of itself could not be seen to be a detriment.

426. What we understand the Claimant to complain of is not the letter itself but the fact of the investigations. It is somewhat difficult to see how the commencement of the investigation by Ms. Magore could be said to be a detriment to the Claimant. Whilst he had indicated to Mr. Fisher that he did not see the point in any investigation, it cannot reasonably be said that commencing an investigation into his complaints placed him at any disadvantage. To any degree that that position did concern the Claimant (and his witness statement does not suggest that to be the case) then that amounts to nothing more than an unjustified sense of grievance.

427. Moreover, the commencement of the investigation can in no way be said to relate to any of the communications that the Claimant relies upon as protected acts.

428. In respect of the investigation into the Claimant's conduct, we would make the same observations and reach the same conclusions as to detriment as we did in respect of the same complaint made under Section 47B Employment Rights Act 1996.

429. However, even if we had not reached that conclusion again other than an assertion to that end, there is nothing at all to suggest that Ms. Carter, Mr. Fisher or Ms. Brennan were in any way motivated by the communications that the Claimant relies on as being protected acts. It is clear that the reason that the investigation was commenced was because the Claimant was suspected of (rightly as it transpired) working elsewhere whilst on sick leave in breach of the Respondent's Sickness Absence Management Policy.

430. The next act of detriment complained of is said to be the failure to follow the relevant policies in relation to the Claimant's grievance and investigation. Again, we reach the same conclusion as to the issue of whether this amounted to a detriment as for the identical complaint under Section 47B Employment Rights Act 1996.

431. Furthermore, there is nothing save as for assertion to that effect to suggest that the failure to expressly reference the Equality & Diversity Policy was in any way influenced, let alone materially influenced, by any of the communications which the Claimant relies on as being protected acts.

432. The final act of victimisation relates to an allegation that Mr. Fisher unilaterally reduced the Claimant's weekly hours and placed a ban on his working bank shifts.

433. It has been difficult to understand the Claimant's position on a unilateral reduction of his working hours as his evidence on that was unclear at best. There was no reduction in the Claimant's working hours. We presume that the basis of this complaint is about a restriction being put on the Claimant working overtime following his return to work from ill health absence by Mr. Fisher.

434. We accept that that and the restriction on bank working did place the Claimant at a disadvantage because he could not work additional shifts if he wished to do so which would have impacted him financially. The Claimant was therefore subjected to a detriment.

435. However, again other than assertion to that effect there is nothing at all to suggest that Mr. Fisher was materially influenced (or influenced at all) by any of the communications that the Claimant relies on as protected acts. It is clear that the reason why bank shifts and overtime were curtailed was to ensure that the Claimant was able to manage with his regular shifts without any issue before taking on additional work and hours.

436. It follows therefore that all complaints of victimisation fail and are dismissed.

<u>Direct race discrimination</u>

437. The Claimant's overarching case is that the Respondent – or at least Quantock ward – were institutionally racist. We do not accept that and there is no evidence to that effect. It is merely an assertion without any factual basis to it. Particularly, for the reasons that we have already given we do not accept that the Claimant was ever subjected to racist comments by Bethany Lodge or Victoria Fox-Wild as he contends.

438. We have therefore examined each of the Claimant's complaints of race discrimination both individually and in the round.

439. The first relates to the initial refusal by Ms. Brennan to agree that the Claimant could have a lease car. That did place the Claimant at a detriment as he had difficulties with his own car and travelling into work, although those matters were not known to Ms. Brennan at the time.

440. However, there is nothing whatsoever to suggest that this refusal was because of the Claimant's race. Ms. Brennan had not met the Claimant before and all she knew about him was that he was going to be joining the Respondent shortly. Whilst Mr. Chukwuemeka suggested that the Claimant's name would be sufficient to alert Ms. Brennan to his race, it still remains that there is nothing at all to suggest that Ms. Brennan's decision was in any way connected to or because of the Claimant's race. Indeed, it is worthy of note that when asked by Mr. Feeny about this part of his claim the Claimant's response was that there was

no reason to decline his application but that he did not know the reason why it had been declined.

441. It is clear from the evidence that the reason that Ms. Brennan had refused the Claimant a lease car was because the Respondent had had their fingers burnt to the tune of £10,000.00 as we have identified above and she wished to be cautious. Once the Claimant had reached three months service and applied again, she granted his application. It appears to us unlikely that she would have done so if her motivation for refusing the initial application – either consciously or subconsciously - was the Claimant's race.

442. The next complaint is about a delay in the Claimant completing his preceptorship. We accept that the Claimant's commencement of his preceptorship was delayed because of a failure to allocate him a mentor at the outset. That was not the case for Mr. Thomas who appears to have been allocated Mr. Marples at an early stage.

443. However, again there is nothing, other than the Claimant's representations to that effect, from which we could draw an inference that race was the reason for the Claimant not initially being allocated a preceptor mentor. The burden of proof therefore does not shift but it appears to us that the failure was again a matter of incompetence.

444. However, after the initial point of the failure to allocate a preceptor, we do not accept that there were failings on the part of the Respondent. The Claimant did experience difficulties but these were as a result of a mixture of factors including Mr. Marples transferring onto nights, Debra Anderson commencing long term sick leave and the difficulty in accessing his paperwork when he had taken it off the ward.

445. However, we should observe that we do not accept that if the Claimant had been allocated a preceptor mentor at the same time as Mr. Thomas that he would have passed his preceptorship at the same time. That would depend on skills and experience and we accept that each nurse progresses at a different rate.

446. The next act of direct discrimination claimed is the restriction that Mr. Fisher placed on overtime and the extension of that after 5th November 2017. We accept that that would have been a detriment to the Claimant because he would not have been able to work additional shifts to top up his wages.

447. However, there is nothing at all to suggest that Mr. Fisher's actions were related to the Claimant's race. We remind ourselves that Mr. Fisher had been supportive of the Claimant and had encouraged him to raise his concerns as grievances so that they could be investigated. There are no facts from which we are able to infer that race played any part in the overtime restriction.

448. In fact, it is clear that the reason why Mr. Fisher placed a restriction on overtime was to ensure that the Claimant could manage his normal workload before increasing his hours.

449. Insofar as the delay in reviewing the Claimant was concerned, it is necessary to properly read what Mr. Fisher told him about the review which was that that would take place on or after 5th November 2017. There is nothing to suggest that the Claimant's race played any part in that matter. Moreover, he was absent

from 4th to 13th November and then resigned a day later so there was not time to conduct a review with him before he terminated his employment.

450. Mr. Fisher's actions therefore had nothing to do with race and this aspect of the claim fails and is dismissed.

451. The next complaint of direct discrimination is said to be the refusal to connect the Claimant to shared electronic resources. We would observe that there was no refusal to connect the Claimant but there was a manifest failure to do so. We accept that that placed the Claimant at a disadvantage because we accept that that affected his ability to undertake his duties as effectively as he could if he had access to electronic records and email and was not reliant on just hardcopy access. In respect of a number of the resources the Claimant was treated less favourably than Matthew Thomas although we have no specific dates of when he was granted access and, as at January 2017, he still did not have access to CESA. However, there is nothing that the Claimant has advanced other than a general assertion to that effect that his race had anything to do with the matter. There was no institutional racism as he suggests nor was there any specific incident of racial comments or bias by staff on the ward as claimed. Unreasonable treatment is of course not enough. As such, the burden does not shift to the Respondent to explain the treatment complained of although it appears to us that the reason why the Claimant was not connected was likely incompetence.

452. The next complaint is said to be a failure to investigate complaints of discriminatory treatment made in the following communications:

a. A letter of 1st July 2017;

b. A letter of 23rd July 2017;

c. A letter of 27th July 2017;

d. A letter of 12th October 2017; and

e. In supervisions.

453. We will deal with each of those separately and begin with the letter of 1st July 2017. As we have already set out above, we are satisfied that the Claimant did not send that letter and as such this element of the claim fails on the facts.

454. Turning then to the Claimant's letter of 23rd July 2017, there was no detriment to him in the content not being investigated. The Claimant did not ask for any investigation of the matter and his letter to Ms. Carter did not read in that way. When he raised the matter with her Ms. Carter accepted that she had made a mistake, apologised and removed the letter from his file. There was no forgery or falsification and thus nothing that required investigation. Any issue that the Claimant continues to take with regard to this matter is no more than an unjustified sense of grievance. We are entirely satisfied that Ms. Carter would have dealt with matters in entirely the same way for a member of staff of a different race who had sent the same letter. There is nothing at all to suggest to the contrary.

455. We have then considered the letter of 12th October 2017 which again concerned Ms. Lodge. As we have already observed, the first time that that was produced was to Ms. Magore. Whilst she did not deal with the matter in her investigation, there was no detriment to the Claimant because the complaints set out in that letter were not true. Moreover, there is nothing at all to suggest that race played any part in Ms. Magore not dealing with this issue in her report.

456. Finally, we deal then with the matter of supervisions. We did not accept the Claimant's evidence that any such matters were raised in supervision sessions. Whilst there have been clear issues with supervision records which we have already dealt with above, the supervisions to which the Claimant refers are ones which he agreed that he attended and which he signed as an accurate record. The closest that he came to making any complaint was in the supervision with Ms. Twigg but that fell short of anything of substance and whilst he was encouraged by Ms. Twigg to discuss those matters so that they could be looked into, he refused to do so. This aspect of the claim also fails on its facts.

457. We should also observe that the comparators identified for this aspect of the claim were not appropriate comparators. They were Ms. Carter, Ms. Lodge and Ms. Fox-Wild but none of those named individuals had raised any complaints which were investigated. There was therefore no less favourable treatment let alone treatment connected to race.

458. We then turn to the next element of the claim which is the sending of the medication error letter. We have already dealt with whether that amounted to detriment in the context of other complaints above. The relevant comparator for these purposes would be a member of staff who Ms. Carter also wrongly believed had made a medication error. Given that identical letters were sent to everyone who Ms. Carter believed had been on shift on the day in question and she had obtained the Claimant's details from the Ghant sheets, there is nothing at all to suggest that someone of a different race would have been treated any differently.

459. Moreover, even if there had been less favourable treatment there is nothing at all to suggest that that was on the grounds of the Claimant's race. The reason why the letter was sent is because Ms. Carter wrongly believed after checking the Ghant sheets that he had been on shift and therefore also responsible for the medication error.

460. The next complaint that the Claimant makes in these proceedings is said to be the racial abuse and discrimination that he contends he was subjected to by Ms. Lodge and which appears in his letter of 1st July 2017. We can deal with that issue in short terms because we are satisfied that none of those events occurred and as such this part of the claim fails on its facts.

461. The next complaint of direct discrimination made is harassment, bullying and race discrimination by Ms. Fox-Wild as contained in the Claimant's letter of 12th October 2017.

462. As we have already set out above, we are satisfied that the Claimant never sent the letter of 12th October 2017 to anyone other than Ms. Magore, which was on 30th October 2017. The fact that it was backdated to suggest that it was sent at an earlier point damages the Claimant's credibility as to the events claimed in that letter. Moreover, the Claimant's witness statement was silent on the matters

claimed in that letter other than a general assertion that he had "endured verbal racial abuse" from Ms. Fox-Wild and Ms. Lodge. His oral evidence went no further than that had been the same phrase said by both as to "I am white and you are black". For the reasons that we have already given above, we do not accept that those comments were made and this part of the claim therefore also fails on its facts.

463. The next act of discrimination claimed is said to be the refusal to transfer the Claimant from Quantock ward. As we have already set out above, there was no refusal to transfer the Claimant. Whilst the Claimant had made earlier requests to Mr. Fisher to move wards we are satisfied that those were not acted on because the Claimant was blowing hot and cold and indicating that all was well after his initial complaints. When he met with Mr. Fisher and was specifically asked if he wanted a ward move he said that he did not.

464. When Ms. Brennan was told on 2nd October 2017 that the Claimant was seeking a ward transfer she agreed that that would be considered and the Claimant was transferred to Cheviot ward as soon as he returned from sick leave. As we have already set out above, he could not be transferred immediately because it would leave Quantock short staffed and other staff and patients needed to be considered. There was, therefore, no refusal to transfer the Claimant and this part of the claim also fails on its facts. Insofar as the complaint might be about delay or the Claimant being put on the rota for Quantock on 4th October 2017, there are absolutely no facts from which an inference could be drawn that that was because of race.

465. The next act complained of is denying the Claimant the opportunity to work night shifts. The only time that the Claimant was not able to work night shifts was before he had passed his preceptorship. Once he had passed, he was allocated night shifts by Ms. Carter as he had requested so as to fit in with his childcare arrangements.

466. Whilst the Claimant compares himself with Mr. Thomas, we do not have any record of the shifts worked by that nurse and to any extent that he worked night shifts before the Claimant, the reason for that was that he had passed his preceptorship earlier. There were good reasons for those who had not yet passed their preceptorships not being able to work nights which were entirely unconnected to race. The reason for that was that there were less staff on a night shift so that only those who were more experienced would be able to work.

467. Insofar as the complaint relates to a delay in the Claimant passing his preceptorship then we have already dealt with that above and need not repeat those matters here.

468. The final complaint that the Claimant makes of direct discrimination is what is said to be a unilateral reduction of the Claimant's weekly hours and the restriction on him working bank shifts. As we have already set out above, there was no reduction of the Claimant's weekly hours. There was only a restriction placed on the Claimant working overtime and bank shifts by Mr. Fisher. As we have set out above, that did place the Claimant at a detriment because he was not able to work additional hours to increase his income.

469. However, there are no facts at all advanced other than a general assertion to suggest that the restriction was anything to do with the Claimant's race. We accept that the reason why the restriction was placed was to ensure that the Claimant was able to cope with normal shifts on a return to work from sick leave before he began to undertake additional hours. His race had nothing to do with matters.

470. In conclusion, neither individually nor when considered together there is nothing that the Claimant has been able to point to so as to allow us to draw an inference that race had anything to do with the treatment of which he complains.

Jurisdiction

471. Although not strictly necessary as a result of the findings of fact that we have made, we turn finally to consider whether, if we had found any of the complaints to have been made out which were not presented within the relevant statutory time limit, we would have extended time to allow them to proceed. We deal with this matter only very briefly, however, on the basis that we have dismissed all of the Claimant's complaints on their merits.

472. The Claimant initiated ACAS early conciliation in respect of the First Respondent on 6th February 2018, with regard to Harriet Carter on 12th February 2018 and on 7th February 2018 in respect of Ms. Brennan. Therefore, in respect of the Respondent Trust any act prior to 7th November 2017 is on the face of it out of time and for Ms. Carter the relevant date is 13th November and for Ms. Brennan 8th November.

473. We have heard no evidence from the Claimant in respect of this matter. His witness statement was silent on the matter. Mr. Chukwuemeka's submissions focused entirely on the issue of a continuing act. However, we would observe that even if the acts complained of had been made out, given the number of different individuals concerned we would not have found all complaints to be linked.

474. Given that position, any complaint predating the dates set out above had we found them to be well founded would have been dismissed because the Tribunal did not have jurisdiction to consider it and the Claimant has not advanced anything to say that it would be just and equitable to extend time.

Automatically unfair dismissal

475. Finally, we turn to the complaint of automatically unfair dismissal. This fails because the Claimant did not make a protected disclosure for the reasons that we have already set out above.

476. However, we have nevertheless gone on to consider whether the Respondent acted in such a way as to breach the implied term of mutual trust and confidence. The Claimant relies on the following events as to that alleged breach:

(a) A failure to investigate the allegations contained in the 3rd January 2017 letter;

(b) A failure to investigate the allegations contained in the 1st July 2017 letter;

(c) An allegation of a medication error by Harriet Carter on or around 6th July 2017;

(d) A refusal to transfer to the Claimant to another ward;

(e) A refusal to investigate the alleged medication error, the Claimant's 23rd July 2017 letter and Harriet Carter's 26th July 2017 letter;

(f) The failure to follow the relevant policy when appointing the investigating manager;

(g) A unilateral reduction of the Claimant's weekly hours and the ban on working bank shifts; and

(h) A repeated refusal by management to respond to the Claimant's emails and negative reaction towards the Claimant by senior management (3rd June 2017, 1st July 2017, 26th July 2017 and 13th November 2017 letters).

477. We do not accept that those matters, either singularly or cumulatively, were such as to breach the implied term of mutual trust and confidence as the Claimant alleges. Particularly we would note the following:

a. there was no failure to investigate the matters set out in the Claimant's letter of 3rd January 2017. Mr. Fisher met with the Claimant and immediately sent an email to the ward management and team leaders instructing them to take action to resolve matters. The Claimant's letter did not suggest that there needed to be any investigation nor did the Claimant request that Mr. Fisher commence one;

b. there was no failure to investigate the letter of 1st July 2017 because it was never received by the Respondent;

c. the allegation as to the medication error was genuinely made by Ms. Carter who believed that the Claimant had been on duty from checking the Ghant sheets. Once he brought that error to Ms. Carter's attention she accepted the position; apologised and removed the medication error letter from the Claimant's file;

d. there was no refusal to move the Claimant to a different ward. Any delay was caused, as we have found above, by the Claimant blowing hot and cold and once the matter was before Ms. Brennan arrangements for a permanent move were looked into and implemented once the Claimant returned to work on Cheviot ward;

e. there was no refusal to investigate the medication error letter. Whilst Ms. Magore could have looked into that had she been clear on what was being alleged, the inevitable outcome would be that Ms. Carter had made a mistake and apologised and had not forged anything as now alleged;

f. there was no failure to follow a relevant policy in the appointment of Ms. Magore. We understand the Claimant to mean in this regard that Ms.

Magore was not independent and/or more senior to Ms. Brennan who commissioned the investigation. We do not accept the suggestion that Ms. Magore was in some way linked to Ms. Brennan, Ms. Carter or anyone else involved in the matter and insofar as she was not more senior to Ms. Brennan, it would not have been at all obvious that the Claimant was apparently making any allegation against the latter at the point of the appointment because he had not cooperated with Mr. Fisher to provide details of his complaints;

g. there was no unilateral variation to the Claimant's working hours, only a restriction on overtime and working bank shifts. That was a time limited position which the Claimant knew was to be reviewed by Mr. Fisher after a period when he had been able to monitor whether he was coping with his existing workload before taking on more; and

h. the Claimant has not identified which emails he contends that the Respondent repeatedly refused to reply to and we have not seen evidence of any. He has also not specified what the "negative reaction" was said to be by his letter of 3rd June 2017 although we are satisfied that those on Quantock ward would not have been happy to receive the later email from Mr. Fisher. Insofar as the 1st July 2017 letter was concerned, that was not received by the Respondent. The letter of 26th July 2017 was from Ms. Carter and did little more than apologise for her mistake and remove the medication error letter from his file. Whilst she could have written some of the letter in slightly softer terms, that is a very minor issue. Finally, the letter of 13th November 2017 was not destructive of trust and confidence because the Respondent was perfectly entitled to commence an investigation into the Claimant's conduct.

478. For those reasons, we do not accept that by looking at an objective assessment it could reasonably be said that the Respondent's conduct was sufficiently serious to amount to a breach of the implied term of mutual trust and confidence.

479. However, even if we had found there to have been a breach, we are satisfied that the Claimant affirmed that breach by returning to work on Cheviot ward after his sick leave. Whilst the Claimant relies on the sending of the letter from Diana Brennan of 13th November 2017 as being the final straw (although that is not expressly included in the list of issues as such) as we have already observed the Respondent was entitled to commence that investigation given the circumstances and the fact that matters pointed to the Claimant working elsewhere in breach of the Sickness Absence Management Policy.

480. Furthermore, even if we had found that the Respondent had breached the implied term of mutual trust and confidence, we would not have found that he resigned in response to it. We are satisfied that the sole reason that the Claimant resigned was because he had been told that he was being investigated for a breach of the Sickness Absence Management Policy; he knew that he was in breach and that disciplinary action might then well follow.

481. For all of the reasons that we have given, the claim therefore fails and is dismissed in its entirety.

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Employment Judge Heap

Date: 4th March 2021

Note:

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Schedule

IN THE MIDLANDS EAST EMPLOYMENT TRIBUNAL **Case no: 2600513/2018**

BETWEEN:

E MARUNDA	Claimant
and	
NOTTINGHAMSHIRE HEALTHCARE NHS FOUNDATION TRUST	First Respondent
HARRIET CARTER	Second Respondent
DIANA BRENNAN	Third Respondent

RESPONDENTS' LIST OF ISSUES

1 Protected disclosures

1.1 Did the Claimant make a disclosure of information:

1.1.1 In a letter dated 3 January 2017 sent to Davy Fisher regarding C's access to shared drives, being connected to CESA, not having started preceptorship and differential treatment on grounds of race; information on Mark sandals conduct towards C [Scott Schedule pages 63-65; POC §2.6 §4.1 §4.8]

1.1.2 Disclosure during clinical supervision to Harriet Carter about the health and safety of patients being put at risk; [Scott Schedule page 67]

1.1.3 In a letter dated 23 July 2017 sent to Harriet Carter, Davy Fisher and Martina Griffiths about bullying arising from previous report of a nurse refusing to terminate session when asked; [Scott Schedule page 67; POC §2.18 §4.1 §4.3 §4.9 §4.20]

1.1.4 In a conversation between Mercy Mandizvidza and Diana Brennan on 26 July 2017 about the 6 July medication error letter, C's 1 July 2017 and 23 July 2017 letters and Harriet Carter's 26 July 2017 letter; [Scott Schedule page 68; POC §2.21 §4.1 §4.10]

1.1.5 In a conversation with Darren Lount, regarding discrimination against C and management's failure to address this, and staff and patients at risk; [Scott Schedule pages 68-69]

1.1.6 In a report by C and Leah Sadoka to Helen Auld on 21 September 2017 regarding race discrimination, harassment and victimisation by Bethany Lodge, Victoria Fox-Wild, Harriet Carter, Diana Brennan and Davy Fisher, and senior management failures to investigate his

grievances or to protect C; [Scott Schedule page 69; POC §2.31 §4.1 §4.12]

1.1.7 In a telephone call with Richard Lyon on 4 August 2017 regarding C's work-related stress caused by Harriet Carter, victimisation by management, who had failed to escalate complaints; [Scott Schedule pages 69-70; POC §2.26 §4.1 §4.11]

1.1.8 In an occupational health session with Ian Murphy on 10 October 2017 about the cause of his work-related stress and complicity of senior management; [Scott Schedule pages 70-71; POC §2.33 §4.1 §4.14]

1.1.9 In a letter to Davy Fisher dated 20 September 2017 regarding falsification of information by Harriet Carter and management cover up surrounding the medication error; [Scott Schedule pages 72-73; POC §2.32 §4.1 §4.15]

1.2 Was any disclosure made in the Claimant's reasonable belief in the public interest?

1.3 Was any disclosure a qualifying disclosure in that the Claimant reasonably believed the disclosure tended to show:

1.3.1 Breach of a legal obligation / miscarriage of justice

1.3.2 Health and safety

1.3.3 Miscarriage of justice / health and safety / deliberate concealment

1.3.4 Breach of a legal obligation / miscarriage of justice / health and safety / deliberate concealment

1.3.5 Breach of a legal obligation / health and safety

1.3.6 Breach of a legal obligation / miscarriage of justice / deliberate concealment

1.3.7 Breach of a legal obligation / health and safety

1.3.8 Miscarriage of justice / deliberate concealment

1.3.9 Miscarriage of justice / deliberate concealment

1.4 If so was any such disclosure protected in that it was made to the First Respondent and other responsible person?

2 Detriment

2.1 Did the Respondents subject the Claimant to a detriment by the following acts or deliberate failures to act?

2.1.1 C not given access to CESA for 12 months and C's preceptorship was delayed; [Scott Schedule pages 90-91; POC §4.38 §4.47]

2.1.2 Failure to investigate C's grievance of 1 July 2017; [Scott Schedule pages 92-93; POC §4.32-3 §4.48]

2.1.3 Giving C an undated letter on 6 July 2017 alleging a medication error and that a meeting had taken place with Harriet Carter, and a failure by senior management to investigate that error; [Scott Schedule pages 93-95; POC §4.41]

2.1.4 Allegation of medication error, the [undated?] letter by Harriet Carter the letters dated 23 July 2017, 20 September 2017 and 27 September 2017; [Scott Schedule pages 95-96; POC §4.32 §4.34]

2.1.5 Failing to investigate the harassment complaint made by C on 12 October 2017; [Scott Schedule pages 97-98; POC §4.32]

2.1.6 Refusing to transfer C from Quantock Ward; [Scott Schedule pages 99-100; POC §4.40]

2.1.7 Subjecting C to an investigation; [Scott Schedule pages 100-101; POC §4.35]

2.1.8 Failure to follow the relevant policies in relation to C's grievance and investigation; [Scott Schedule pages 101-104; POC §4.48]

2.2 Can the Respondents show that the detriment was not done on the ground that the disclosure was made?

3 Automatic Unfair Dismissal

3.1 Was the Claimant constructively dismissed?:

3.1.1 Did the First Respondent breach the Claimant's contract of employment?

(i) Failure to investigate the allegations contained in the 3 January 2017 letter; [Scott Schedule page 76; POC §2.6]

(ii) Failure to investigate the allegations contained in the 1 July 2017 letter [Scott Schedule page 77]

(iii) Allegation of a medication error by Harriet Carter on or around 6 July 2017; [Scott Schedule page 78-79; POC §2.17]

(iv) Refusal to transfer to C to another ward; [Scott Schedule pages 79-82; POC §2.24-5]

(v) Refusal to investigate the alleged medication error, C's 23 July 2017 letter and Harriet Carter's 26 July 2017 letter; [Scott Schedule pages 82-83; POC §2.19-20]

(vi) Failure to follow the relevant policy when appointing the investigating manager; [Scott Schedule page 83; POC §2.41]

(vii) Unilateral reduction of C's weekly hours and the ban on working bank shifts; [Scott Schedule page 83]

(viii) Repeated refusal by management to respond to C's emails and negative reaction towards C by senior management (03/06/17, 01/07/17, 26/07/17, 13/11/17 letters; [Scott Schedule page 84]

3.1.2 Did the Claimant resign in response to any such breach?

3.2 If constructive dismissal is proved, was the sole or principal reason for the dismissal that he had made protected disclosures?

4 <u>Direct race discrimination</u>

4.1 Did the Respondents treat the Claimant less favourably than an actual or hypothetical comparator because of his race (colour, nationality and/or national origin).

4.1.1 Diana Brennan's refusal of C's car lease request; [Scott Schedule pages 105-106; POC §2.40 §3.14]

(i) hypothetical comparator

4.1.2 C was signed off on Preceptorship on 30 May 2017; [Scott Schedule page 106-107; POC §2.11]

(i) Comparators are Matthew Thomas and Bethany Lodge

4.1.3 Davy Fisher placed an overtime restriction on C after his return to work interview and extended this beyond 5 November 2017; [Scott Schedule pages 107-108; POC §2.35-6]

(i) hypothetical comparator

4.1.4 Refusal to connect C to shared electronic resources [Scott Schedule pages 108-109; POC §2.2-2.3]

(i) Comparator is Matthew Thomas

4.1.5 Refusal to investigate C's recurrent complaints of discriminatory treatment made on 1 July 2017, 23 July 2017, 27 July 2017, 12 October 2017 and in supervisions; [Scott Schedule pages 109-110]

(ii) Comparators are Bethany Lodge, Victoria Fox-Wild, and Harriet Carter and hypothetical comparator

4.1.6 Allegation of a medication error on 6 July 2017; [Scott Schedule page 111, POC §2.17 §2.19]

(i) hypothetical comparator

4.1.7 Racial abuse and racial discrimination by Bethany Lodge referred to in Claimant's letter of 1 July 2017; [Scott Schedule pages 111-112]

(i) hypothetical comparator

Harassment, bullying and race discrimination by Victoria Fox-Wild referred to in the Claimant's letter of 12 October 2017; [Scott Schedule page 112]

(ii) hypothetical comparator

4.1.8 Refusal to transfer C from Quantock Ward; [Scott Schedule pages 112-113; POC §2.24-5]

(i) Comparators are Harriet Carter, Bethany Lodge and Victoria WD

4.1.9 Denying opportunity to work night shifts; [Scott Schedule pages 113-114; POC §3.2]

(i) Comparator is Matthew Thomas

4.1.10 Unilateral reduction of C's weekly hours and the ban on working bank shifts; [Scott Schedules page 114]

(i) hypothetical comparator

4.2 Have the Respondents treated the Claimant less favourably as alleged?

4.3 If so, does such treatment amount to a detriment? If so,

4.4 Are there facts from which the Tribunal can conclude, in the absence of any other explanation, that the Respondents discriminated against the Claimant because of his race following the sequence of events from his start of employment?

4.5 If so, have the Respondents shown that they have not discriminated against the Claimant because of his race (colour, nationality and/or national origin).

5 Victimisation

5.1 Did the Claimant do a protected act?

5.1.1 3 January 2017 letter about connection to, shared drives to enable C do his job and preceptorship; [Scott Schedule page 115; POC §2.6 §4.21]

5.1.2 1 July 2017 complaint about Victoria Fox-Wild's treatment of C; [Scott Schedule pages 115-116; POC §4.33]

5.1.3 8 July 2017 return to work interview with Kate Twigg; [Scott Schedule page 116]

5.1.4 23 July 2017 letter about being targeted after reporting a nurse's failure to terminate a session with a patient when asked and 2nd Respondent Falsification of information; [Scott Schedule page 117; POC §4.28]

5.1.5 In a conversation between Mercy Mandizvidza and Diana Brennan on 26 July 2017, where Diana Brennan was shown the 23 July 2017 letter, as well as C's 1 July letter, the letter about the medication error and Harriet Carter's 26 July 2017 letter; [Scott Schedule page 117-118; POC §2.19]

5.1.6 Disclosure to Darren Lount about issues on Quantock Ward on or around 7 August 2017; [Scott Schedule page 118]

5.1.7 Disclosure to CRO that work-related stress caused by deliberate falsehood by Harriet Carter and her support for Victoria Fox Wild and Bethany Lodge; [Scott Schedule page 118; POC §4.22]

5.1.8 21 September 2017 report to Helen Auld by C and Leah Sadoka; [Scott Schedule page 119; POC §2.31 §4.23]

5.1.9 27 September disclosure to Kerry Burton about Davy Fisher's conduct; [Scott Schedule pages 119-120]

5.1.10 10 October 2017 disclosure to Ian Murphy about allegation of medication error; [Scott Schedule page 120; POC §4.25]

5.1.11 12 October 2017 letter regarding equal opportunities; [Scott Schedule page 121; POC §4.32]

5.1.12 12 October 2017 letter regarding Bethany Lodge; [Scott Schedule page 121; POC §4.32]

5.1.13 In a meeting with Annette Magore on 30 October 2017; [Scott Schedule pages 122-123; POC §2.42 §4.30]

5.1.14 Disclosure to Darren Lount during clinical supervision about victimisation; [Scott Schedule page 123]

5.1.15 5 October 2017 disclosure to Davy Fisher about lack of managerial supervision; [Scott Schedule page 124]

5.2 Did the Respondents treat the Claimant detrimentally, as set out at paragraph 5 of the Particulars of Claim.

5.2.1 Failure to investigate or respond to C's 3 January 2017 grievance; [Scott Schedules page 125-126]

5.2.2 Failure to investigate C's 1 July 2017 grievance; [Scott Schedule pages 126-127; POC §4.33]

5.2.3 Giving C an undated letter on 6 July 2017 alleging a medication error and that a meeting had taken place with Harriet Carter, and a failure by senior management to investigate that error; [Scott Schedule pages 127-128; POC §4.41]

5.2.4 Allegation of medication error, the [undated?] letter by Harriet Carter and the letters dated 23 July 2017, 20 September 2017 and 27 September 2017; [Scott Schedule pages 128-129; POC §4.32]

5.2.5 The 12 October 2017 letter making a complaint of harassment and racial discrimination against Bethany Lodge was not investigated [Scott Schedule page 129; POC §4.33]

5.2.6 Refusal of Harriet Carter, Diana Brennan, Martina Griffiths and Davy Fisher to transfer C from Quantock Ward; [Scott Schedule pages 130-131; POC §4.40]

5.2.7 The 23 November 2017 letter from Diana Brennan stating C was involved in two investigations; [Scott Schedule pages 131-132; POC §4.36]

5.2.8 Failure to follow the relevant policies in relation to C's grievance and investigation; [Scott Schedules page 132-134; POC §4.48]

5.2.9 Unilateral reduction of C's weekly hours and the ban on working bank shifts; [Scott Schedule pages 135-136]

5.3 If so, was the Claimant subjected to a detriment as alleged because he had done a protected act or that the Respondents believed that the Claimant had done or would do a protected act?

6 <u>Time limits</u>

6.1 Have the Claimant's complaints been brought within 3 months (including any period of ACAS early conciliation) of the date of the act to which the complaint relates?

6.2 Has there been a course of conduct capable of amounting to an act extending over a period?

6.3 Are any or all of the Claimant's claims out of time?

6.4 If so, would it be reasonably practicable (in relation to the PIDA complaints) or just and equitable (in relation to the discrimination complaints) to extend time in the circumstances?