EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr Paul Bianca-Samou	**v**	Imperial College Healthcare NHS Trust

Heard at:	Aylesbury Crown Court and by CVP	**On:** 2, 3 and 5 November 2020 and on 6 November 2020 and 11 December 2020 (in private)
Before:	Employment Judge Hawksworth Ms S Hamill Mr M Kaltz	

Appearances
For the Claimant: In person
For the Respondent: Mr S Sudra (counsel)

RESERVED JUDGMENT

The unanimous judgment of the tribunal is:

1. The respondent directly discriminated against the claimant because of race in refusing to allow the claimant to undertake a specialist portfolio. The claimant's complaint of direct race discrimination succeeds in respect of this complaint.

2. The claimant's other complaints of direct race discrimination, and his complaints of harassment and victimisation fail and are dismissed.

REASONS

Claim, hearing and evidence

1. The claimant is a bio-medical scientist. His continuous employment with the respondent began on 4 July 2016 and he remains employed by the respondent. The claimant presented a claim on 24 March 2019, after Acas early conciliation was started on 4 March 2019 and a certificate issued on 4 March 2019. He brought complaints of race discrimination, harassment and victimisation. The respondent presented its ET3 on 9 May 2019. The respondent defends the claim.

2. There was a preliminary hearing on 3 January 2020 at which the complaints were clarified and case management orders were made.

3. The main hearing was listed to be heard over five days but this was reduced to four days; the tribunal granted an application by the respondent for the hearing not to take place on Wednesday 4 November 2020 because of a medical appointment.

4. The hearing had been listed to be heard entirely by video conference (CVP) as there was no suitable tribunal room available at Watford employment tribunal. The claimant applied for the hearing to be held in person because he has an unreliable internet connection and no access to a computer. The hearing was converted to an in-person hearing at Aylesbury Crown Court. The judge who made that decision recorded that any application by the respondent for its witnesses to give evidence by CVP would be considered at the hearing. On the first day of the hearing the respondent applied for all of its witnesses to give evidence by CVP. For reasons given at the hearing, we allowed this application. We directed that the claimant would be allowed to question the respondent's witnesses from the witness table where there was a screen which enabled him to see the witnesses more closely than on the wall-mounted screens.

5. This was therefore a hybrid hearing. The employment judge, the claimant, the respondent's counsel and (on the first day) the respondent's solicitor were present at Aylesbury Crown Court. Members of the claimant's family attended with him to support him. The other members of the tribunal, the respondent's witnesses and (after the first day) the respondent's solicitor attended the hearing by video conference (CVP).

6. The respondent produced a bundle which had 951 pages. Page references in this judgment are to that bundle. The final version of the bundle was sent to the claimant later than provided for in the case management orders and the claimant was left with little time to comment. The claimant had prepared a supplemental bundle of 18 pages of documents which he thought should have been in the bundle. The respondent did not object to the supplemental bundle being included. Pages in the claimant's supplemental bundle are referred to with a C prefix (C1, C2 etc).

7. The delay in providing the final bundle to the claimant also meant that some of the page references in the claimant's statement referred to an earlier draft bundle. On the second day of the hearing, the claimant gave us the corrected page references for his statement.

8. On the second day of the hearing, the claimant made an application for witness orders to require the attendance of five of the respondent's staff. (He had applied to the tribunal in writing on 30 September 2020 and provided further information on 14 October 2020 but the application had not been determined before the hearing began.) For reasons given at the hearing, we refused the application. In summary, we did not consider that the evidence of four of the individuals was likely to be relevant to the issues

we had to determine. Ms Nymeth Ali's evidence was potentially relevant to one of the issues. We considered whether it was necessary to make an order compelling her attendance. As a manager of the respondent, she would usually have been called as a witness of the respondent rather than of the claimant. It is up to the respondent which of its managers it calls to give evidence. If Ms Ali was ordered to attend on the claimant's application, she would be the claimant's witness and he would not normally be able to challenge what she said or cross-examine her. Further, we have to deal with the case in accordance with the overriding objective, which includes dealing with it in a manner that is proportionate to the issues. We decided that it was not necessary that a witness order should be made for Ms Ali.

9. We took some time on the first day to read the witness statements. The claimant gave evidence on the afternoon of the first day and the morning of the second day. On the second day we heard evidence from the respondent's witnesses Ms Elaine Moore and Ms Nazia Hussain.

10. The respondent's remaining witnesses (Ms Anne Stephens, Ms Parminderjit Ubhi and Mr David Peston) gave evidence on the third day. The respondent's counsel and the claimant then made closing comments. The respondent's counsel prepared written submissions which were sent to the tribunal and the claimant on 5 November 2020.

11. We reserved judgment and deliberated in private by CVP on 6 November 2020 and 11 December 2020. The employment judge apologises to the parties for the delay in the promulgation of the reserved judgment. This was because the tribunal required further time for deliberation.

Issues

12. The issues for determination by the tribunal were clarified at the preliminary hearing on 3 January 2020. At the preliminary hearing the claimant said that he was thinking about applying to amend his claim to include matters which occurred after he submitted his claim form. On 13 January 2021 the claimant wrote to the tribunal to say that he had decided not to apply to amend his claim.

13. The issues for the tribunal to decide are therefore as follows:

<u>Jurisdiction: time limits</u>

14. In respect of any act or omission that is alleged to constitute unlawful discrimination that occurred before 25 December 2019 (subject to any extension of time offered by the ACAS EC process):

    (a) Do such acts/omissions constitute part of conduct extending over a period for the purposes of Equality Act 2010, section 123(3)(a)?
    (b) If not, would it be just and equitable to extend time in respect of such acts/omissions pursuant to Equality Act, section 123(1)(b)?

<u>Race discrimination</u>

Direct race discrimination (section 13 Equality Act 2010) and/or
Harassment related to race (section 26(1) Equality Act 2010) and/or
Victimisation (section 27 Equality Act 2010).

15. The claimant relies on the following alleged incidents. Can he show that they occurred?

    15.1. The respondent allegedly refused to allow the claimant to undertake a specialist portfolio from 2017 onwards;
    15.2. On 16 October 2018, Elaine Moore asked why the claimant had taken a break;
    15.3. On 17 October 2018, Elaine Moore questioned the claimant, in the presence of others, and asked him what he had learnt from a meeting;
    15.4. The respondent subjected the claimant to an investigation relating to the improper handling of a patient specimen in January 2019;
    15.5. The claimant was accused of wrongdoing in relation to the investigation relating to the improper handling of a patient specimen in January 2019;
    15.6. The claimant was issued with an Attendance Advisory Note on 1 February 2019 in respect of his sickness absence;
    15.7. The respondent allegedly failed to deal with the claimant's grievance against his line manager, Elaine Moore, submitted on 31 July 2018 and resubmitted to the Respondent on 4 February 2019.

16. Harassment: Was any of the treatment found related to the Claimant's race?

17. If so, did the treatment have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

18. If not, did the treatment have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, taking into account:

    (a) the perception of the claimant;
    (b) the other circumstances of the case;
    (c) whether it is reasonable for the conduct to have that effect.

19. Direct discrimination: Did the respondent treat the claimant less favourably than Lisa Williams, who is White British, in respect of any of the above allegations found to have occurred?

20. If so, can the respondent show that the treatment was not because of the claimant's race?

21. Victimisation: The claimant relies on the submission of his grievance against Elaine Moore on 31 July 2018 as a protected act for the victimisation complaint.

22. If that grievance was a protected act under the Equality Act, did any of the treatment as set out above occur because he made the protected act?

Findings of fact

23. In the course of this four day hearing, we heard and read a large volume of evidence. Where we make no finding about an issue (or where we make a finding which goes into less detail than the evidence we heard) this is not because of oversight or omission, but reflects the extent to which the point was of assistance to us in determining the issues we had to decide.

The parties and the claimant's role

24. The respondent is an NHS trust providing healthcare services at a number of hospitals across London, including Hillingdon Hospital, Charing Cross Hospital and St Mary's Hospital. The claimant is a biomedical scientist.

25. Biomedical scientists must be registered with the Health and Care Professionals Council ("HCPC"). After a biomedical science degree, a student biomedical scientist must complete a registration portfolio in order to be registered with the HCPC. The registration portfolio takes about 12 months to complete.

26. After completing the standard registration portfolio, biomedical scientists can go on to undertake specialist portfolios. Specialist portfolios are a higher level of training than the registration portfolio, and reflect masters degree level knowledge and experience. It can take between 12 months and three years to complete a specialist portfolio. Whether a specialist portfolio is required for a particular biomedical scientist role is up to the employer. Portfolios can only be undertaken in laboratories which have been approved for training by the Institute of Biomedical Science (IBMS). Approval applies to individual laboratories, not organisations as a whole.

27. The claimant's employment at Hillingdon Hospital began on 4 July 2016 as a band 6 biomedical scientist. He worked in the cellular pathology laboratory. His manager was Elaine Moore. The claimant's employment started shortly before a merger with the respondent as part of the creation of a combined pathology service called North West London Pathology.

28. Hillingdon Hospital does not have IBMS approval to offer specialist portfolio training to members of staff. Ms Moore explained this to the claimant in his job interview in 2016. Laboratories in other hospitals within the respondent trust, including Charing Cross Hospital, were approved by IBMS to offer specialist portfolio training. We accept the claimant's evidence that Ms Moore referred to the possibility of undertaking a specialist portfolio after the merger with the respondent.

29. On 1 January 2017, the claimant's employment transferred to the respondent under the Transfer of Undertakings (Protection of Employment) Regulations.

30. We have in the main set out our findings of fact in sections which reflect the allegations made by the claimant as summarised in the list of issues. This means that the order of events departs from the chronological at some points, although we have kept to broad chronological order as far as possible.

Specialist portfolio

31. In 2017 the claimant made enquiries about starting a specialist portfolio. He was told that this would not be possible because Hillingdon Hospital did not have IBMS approval for specialist portfolio training. The department could not afford to send him to another hospital to undertake the training (page 346).

32. In August 2017 the respondent published an internal advert for a new role of band 7 biomedical scientist dissection specialist (page 241). The post was to be based at Hillingdon Hospital initially, and to move to a new Cellular Pathology Hub at Charing Cross Hospital in 2018. Lisa Williams, a locum biomedical scientist at Hillingdon Hospital, was appointed to the role. After the role moved to Charing Cross Hospital, she began a specialist portfolio. However after the move Ms Williams still worked frequently at Hillingdon Hospital because part of her role was to standardise dissection procedures at Hillingdon Hospital. Ms Moore's evidence, which we accept, was that Ms Williams spent more of her time at Hillingdon Hospital than at Charing Cross Hospital.

33. Ms Williams, who is relied on by the claimant as a comparator, is white British. The claimant describes himself as Black African. There are 15 band 7 biomedical scientists in the Cellular Pathology department, one of whom is black.

34. Ms Moore's witness statement included the names of three other biomedical scientists who were based at Hillingdon Hospital and who had not done specialist portfolios, one of whom, Ms Miner, was described as African. The claimant's unchallenged evidence was that Ms Miner has a masters degree.

35. We heard evidence about the respondent's training policy. Extracts of the policy were in the bundle (pages 100 to 106). At paragraph 20.1 the policy required biomedical scientists to complete a specialist diploma through the specialist portfolio route (page 102).

36. The training policy did not include any details of the procedure for applying to start a specialist portfolio. This was in contrast to the position regarding sponsorship for a masters degree, where the policy included a procedure for selection of staff (paragraph 20.4.3.2). We accept the evidence of Ms Moore that the procedure to apply to start a specialist portfolio was for the applicant to fill in a study leave application form, following which the training officer would complete a learning needs analysis and the application would then be considered by a training committee.

37. The training policy was issued in February 2017, after Hillingdon Hospital's pathology services transferred to the respondent trust. It was headed 'All Sites'. We were not shown any separate training policy which was specifically for Hillingdon Hospital (either before or after the merger). Nazia Hussain (who was at the time the North West London Pathology Manager, based at Hillingdon Hospital), told us that the respondent's policies applied to Hillingdon Hospital after the merger, and that she followed the respondent's policy in relation to the claimant's request to start a specialist portfolio. There was no evidence before us that the respondent's training policy of February 2017 did not apply to the claimant. We accept the evidence of the claimant and Ms Hussain that it did apply to him.

38. We were shown the cover of a North West London Pathology Training Policy which said it applied to all sites (page C16). We were not shown the policy itself so could not take this into account. (There was a different version of the cover page of this policy on page C18. We understood the claimant to be suggesting that one of the policies was fabricated. We do not accept this, we find that pages C18 and C16 were the covers of two different versions of the policy, versions 1.2 and 2.1.)

39. Ms Moore's evidence was that Ms Ali decided that it was a requirement of Ms Williams' band 7 dissection specialist role to undertake a specialist portfolio. We accept that this requirement is set out in paragraph 20.1 of the training policy. The requirement was not however spelt out in the internal advert for the role (page 241) or the job description (page 242), neither of which expressly referred to the need to have or to undertake an IBMS specialist portfolio. The job description said at paragraph 6.1, '[you] must develop and improve your scientific expertise, which may be via CPD within an appraisal programme. Maintain a portfolio of relevant developments achieved.' In terms of the procedure that was followed for the approval of Ms Williams' specialist portfolio, we were not shown a completed study leave application for her. The training officer for the pathology department at Hillingdon Hospital, Parminderjit Ubhi, a senior biomedical scientist, did not carry out a learning needs assessment for her.

40. There was a dispute between the parties about the extent to which the completion of a specialist portfolio was a requirement of or part of the claimant's role.

41. Ms Moore's evidence was that it was not a requirement for the claimant as a band 6 biomedical scientist at Hillingdon Hospital to undertake a specialist portfolio, because of the lack of IBMS training approval for the laboratory there. We accept that, as with Ms Williams' job description, there was no requirement in the claimant's job description (page 46) that he should complete a specialist portfolio. The claimant's job description said that the postholder should 'be receptive to all training' and 'complete and remain competent in all laboratory training assigned to you within the given timeframe' (page 48). There was also no reference to the need to complete a specialist portfolio in the claimant's terms and conditions of employment (page 53). However, this was not consistent with the respondent's training

policy, and we have accepted the evidence of Ms Hussain that it applied to the claimant.

42. In addition, Ms Ubhi accepted in her evidence that completing a specialist portfolio was part of the job for a band 6 biomedical scientist.

43. We find that there was no requirement prior to the merger for the claimant to complete a specialist portfolio. However, we find that after the merger, the respondent's training policy applied to the claimant, and that policy required that he complete a specialist portfolio.

44. On 20 June 2018 the claimant had a meeting with Ms Hussain. The claimant emailed Ms Hussain the day after the meeting (page 314) and asked why he was not allowed to do a specialist portfolio when a new member of staff (Ms Williams) was allowed to do a specialist portfolio.

45. Ms Hussain replied on the same day (page 314A). She asked the claimant whether he had raised the specialist portfolio in his Professional Development Review (PDR) and whether he had completed the forms to request a specialist portfolio. The claimant did not reply to this email because he did not think the procedure being suggested by Ms Hussain was the right procedure.

46. The claimant also spoke to Ms Ubhi, the training officer, about the specialist portfolio and career progression in general. She told the claimant about an alternative to a specialist portfolio which is a master's degree in biomedical science. She suggested that the claimant look up courses with IBMS accredited universities. Ms Ubhi herself has an MSc in biomedical science as the specialist portfolio route was not available when she qualified.

47. In late 2018/early 2019 the claimant began a secondment to Charing Cross Hospital for around 6 weeks.

48. On 7 January 2019 the claimant completed a study leave application form to allow him to undertake an MSc (page 513). Ms Ubhi countersigned the application and recorded that the cost of the course would be £4,540.

49. While at Charing Cross Hospital the claimant spoke to Nymeth Ali, the training officer based at Charing Cross Hospital, about the possibility of starting an MSc or a specialist portfolio. On 15 January 2019 the claimant emailed Ms Ubhi. He said that Ms Ali had suggested it would be better to start a specialist portfolio than an MSc. He said he was going to fill in an application to start a specialist portfolio and would pass it to Ms Ubhi to be signed (page 524).

50. Ms Ubhi replied on the same day (page 525). She said that the claimant should fill in the application and then they would talk and decide a course of action. She said that she would include the claimant's specialist portfolio in the Learning Needs Analysis (LNA) for the year.

51. There was no evidence that the claimant completed another study leave application form (for the request to undertake a specialist portfolio) but Ms Ubhi understood that he wanted to proceed with this because she took steps to progress the claimant's request to start a specialist portfolio. On 29 January 2019 Ms Ubhi emailed the claimant (page C15) to say,

> *"Could you please ask and confirm with [Ms Ali] that she is going to purchase the specialist portfolio for you? I have put it for this year's LNA and I have confirmed with [Ms Moore] she is OK with it as well."*

52. Ms Moore did not accept that she had agreed to the claimant starting a specialist portfolio. Ms Moore said she had a conversation with Ms Ali while the claimant was on secondment to Charing Cross Hospital. She told Ms Ali that she had not authorised the claimant to undertake a specialist portfolio while based at Charing Cross Hospital, as he was only on a short secondment to Charing Cross Hospital and the training would take between 1-3 years to complete. She said she had no authority to agree to the claimant undertaking the training at a different site. We find, based on Ms Ubhi's contemporaneous email, that Ms Ubhi had been in touch with Ms Moore and understood her to have agreed with the proposal for the claimant to start a specialist portfolio.

53. The claimant's secondment to Charing Cross Hospital ended on 26 February 2019 and he returned to Hillingdon Hospital on 4 March 2019. He had not started a specialist portfolio (page 610).

54. On 8 March 2019 Ms Ubhi emailed Ms Moore (page 642). This email outlined the plans for the claimant to start a specialist portfolio, which were proceeding, and recorded Ms Ali's agreement. It said:

> "…*I met with [Ms Ali] and explained to her [the claimant's] request to start with specialist portfolio and I have added it onto the 2019 training LNA from Hillingdon Histology. I also told her that as we don't have the training status for specialist portfolio we will help him but majority of his training will take place at [Charing Cross]. She agreed to obtain the portfolio from IBMS.*
>
> *…From this meeting I spoke to [the claimant] at [Charing Cross] explaining to him what I said that we were supporting him for his training but [Ms Ali] was going to purchase the portfolio and majority of his training was going to be done at [Charing Cross] (similar to [Ms Williams]) and in his own time."*

55. The claimant's request to start a specialist portfolio was not progressed any further after this. The claimant's request was not considered by a training committee. Ms Ubhi had a discussion with Ms Ali and decided that she could not support the claimant's request for specialist portfolio training. She did not explain why she made that decision or why the claimant's request went no further.

56. To the extent that the respondent was saying that it was not possible for the claimant to undertake a specialist portfolio because Hillingdon Hospital did not have IBMS training approval, we do not accept this. Ms Ubhi and Ms Ali, the training officers for Hillingdon and Charing Cross hospitals, had both agreed that the claimant could undertake his specialist portfolio at Charing Cross while remaining based at Hillingdon. At the claimant's interview, Ms Moore had raised the possibility of a specialist portfolio being undertaken after the merger. It was possible for Ms Williams to undertake a specialist portfolio at Charing Cross when she spent more of her time at Hillingdon.

57. In addition, we do not accept the evidence of Ms Moore about the degree of independence between the various sites after the merger. Ms Moore said that after the merger the laboratories all remained separate and on their own respective sites, and there was no cross-over of staff (paragraph 19 of her statement). This evidence was not consistent with the introduction of the band 7 specialist role, which was based at Charing Cross Hospital but had responsibility for standardising procedures at Hillingdon Hospital. It was also not consistent with Ms Moore's evidence that in around September 2018 she arranged short secondments at Charing Cross Hospital for members of staff including the claimant.

58. Ms Moore also said that for the purposes of training and rotas the sites were entirely independent of one another. This was not consistent with her evidence that Ms Hussain introduced standard operating procedures for rotas across all the laboratories. It was also not consistent with her evidence that part of Ms Williams' role was to train staff at Hillingdon Hospital in the techniques that were being used at Charing Cross. We heard and read a lot of evidence about interaction between the laboratories and about standardisation of procedures. We find that there was more interaction between the laboratories than suggested by Ms Moore in paragraph 19 of her statement.

<u>Performance issues raised with the claimant</u>

59. During the period February 2018 to 30 May 2018 a number of performance issues were raised with the claimant by Ms Moore and Ms Williams:

    59.1. On 12 February 2018 Ms Moore said the claimant had left an alcohol bottle on a bench when in fact this was done by a colleague;
    59.2. On 26 February 2018 Ms Williams asked why the claimant hadn't reported a blank slide and insisted that the claimant complete a non-conformance form but did not complete non-conformance forms for two similar slides which she worked on on 6 and 7 July 2018;
    59.3. On 19 July 2018 the claimant was blamed for not reporting a discrepancy with a specimen, however he was unaware of it;
    59.4. On 31 May 2018 a senior biomedical scientist told the claimant that blocks he had cut for slides the previous day were too thick, and he was asked to recut them.

60. The blocks cut by the claimant on 30 May 2018 were recorded by Ms Moore on a slide technical quality control record (page 333). Ms Moore included

the claimant's initials in a column headed 'Action taken'. She wrote 'PBS informed of cutting thick sections'. The record contained entries by a number of managers over a period of around 3 months. No other individual was named in any of the other entries in the record.

The claimant's grievance

61. The claimant submitted a grievance on 31 July 2018 complaining about treatment by Ms Moore. He completed the respondent's grievance form (page 339). In the background information section, he wrote:

> *"Bully, harassment and prejudice.*
> *Please see attached document."*

62. The document attached to the grievance form was a letter. There were two versions of the letter in the bundle. It is not clear which of these was the version submitted by the claimant with his grievance form. It appears more likely to us that the shorter letter at pages 340 to 342 is a draft and the longer letter at pages 343 to 346 is the final version. However, nothing turns on which version was sent.

63. In his grievance letter the claimant complained about treatment by Ms Moore. He said he found her behaviour unprofessional and challenging. He said he was treated unfairly in front of colleagues and had been shouted at like a child, scolded, and accused of lying. Neither version of the claimant's grievance letter contains any reference to race, or to discrimination or harassment on ground of race, or to breaches of the Equality Act 2010.

64. On 16 August 2018 the claimant met with Danya Cohen, the divisional director. At the meeting the claimant told Ms Cohen that he did not want to pursue his grievance. Ms Cohen's note of the meeting (page 355) records that the meeting ended with the following exchange:

> *"You said that you don't want to pursue the grievance or get unions involved so I will inform HR. Is that what you want. Yes."*

65. The respondent did not write to the claimant to confirm the closure of the grievance. We find that there was a misunderstanding or miscommunication about what the claimant wanted the respondent to do. Although he did not wish to pursue a formal grievance, he wanted his concerns to be dealt with informally. We reach this finding because on 26 September 2018 the claimant spoke to Kathy Clark, an HR business partner, to discuss what he described as his existing grievance.

66. Later on 26 September 2018 Ms Clark emailed Ms Hussain, Ms Moore and Ms Cohen (page 381). She suggested that a meeting be set up for the claimant to articulate his concerns and for a way forward to be found informally.

67. The meeting took place on 12 October 2018. It was attended by the claimant, Ms Cohen, Ms Hussain and Ms Moore. A note was taken of the

meeting (page 400). At the start of the meeting Ms Cohen said that it was an informal meeting to discuss the concerns the claimant had raised with Ms Clark. There was following exchange between Ms Cohen and the claimant:

> *"DC – when I spoke to you, you said you didn't want to raise a formal grievance*
>
> *PB – Yes I don't"*

68. The meeting ended with Ms Cohen summarising a number points which the claimant and Ms Moore had agreed to try to work more productively together. The claimant confirmed that Ms Cohen had not missed anything and that he did not need anything from her or Ms Hussain.

69. The respondent did not write to the claimant after this meeting to confirm the position regarding his grievance.

16 October 2018

70. On 16 October 2018 the claimant started work at 7.00am. At around 9.25am he went to the tea room for his tea break. He wanted to have a break because he was feeling hot from working in the laboratory, where the temperature is high because of the equipment. He also wanted to plan and organise work for the day.

71. When he was sitting in the tea room, Ms Moore came in to ask the claimant a question about work. After they had discussed the work issue, Ms Moore commented to the claimant that 9.25am was an early tea break. The claimant said that people who start at 7.00am take an early tea break. Ms Moore said, 'Tea break is at 10.00 for those who start at 7.00 and 10.15 for those who start at 8.00.' She reminded the claimant that a standard operating procedure about rotas including tea break timings had been introduced and discussed at a staff meeting at which the claimant was present.

72. Ms Moore and the claimant walked back to the laboratory together. The claimant said that he did not think it was fair that those who start at 7.00 had to take their tea break at 10.00. He said he thought Ms Moore did not care. Ms Moore said, 'Let me show you the policy'. She took the claimant to a notice board in the laboratory. She showed him the standard operating procedure with staff rota instructions which included a table setting out when breaks could be taken (page 207L). It said that for those starting at 7.00am the tea break would start at 10.00am.

73. The new standard operating procedure had been introduced recently and discussed at a meeting which included the claimant. However, he had not yet received a copy of the procedure via the respondent's online system, ipassport. The procedure was sent to the claimant on ipassport on 22 October 2018 (page 416).

74. The claimant took the remaining 10 minutes of his break at 10.00am.

75. Ms Moore spoke to her manager Ms Hussain about this conversation. Ms Hussain advised Ms Moore to discuss it with the claimant.

17 October 2018

76. On 17 October 2018 Ms Moore asked the claimant to come to the laboratory managers' office. Ms Moore intended to discuss the tea break issue of the previous day, and plans to move forward following the meeting on 12 October 2018.

77. The managers' office is a shared office. When the claimant and Ms Moore arrived three other managers were already there.

78. Once they were seated, Ms Moore asked the claimant what he thought about the meeting on 12 October 2018, and how he wished to move forward, given the encounter they had had the previous day.

79. The discussion became heated, with both parties trying to speak. The claimant raised his voice saying, 'Let me finish'. There was a dispute about what had been said the previous day. The claimant said he did not want to carry on the conversation, and left the room. Ms Moore was upset and shaken after the meeting.

80. Two of the other managers who were present in the room sent emails to Ms Hussain on 22 October 2018, giving their accounts of the meeting (pages 417, 418). At Ms Hussain's request, Ms Moore and the claimant made statements about the meetings of 16 and 17 October 2018 (pages 408, 410 and 420). We have taken these records into account when reaching the above findings about what happened at the meetings on 16 and 17 October 2018.

Disciplinary investigation

81. On 10 December 2018 the claimant attended a disciplinary investigation meeting. Allegations had been made against the claimant including that on 4 October 2018 the claimant had behaved unprofessionally towards a patient and had inappropriately handled a patient's specimen by not discarding a specimen prior to taking the paperwork for the next patient. There had been a complaint by a patient about the incident (page 387).

82. The disciplinary investigation meeting was conducted by Ann Stephens, a band 7 Senior Biomedical Scientist at Hillingdon Hospital. The claimant wrote to Ms Stephens after the meeting setting out his response to the allegations (page 484). He said that the allegation of inappropriately handling a specimen was a false allegation, as the specimen had never actually been handed to him.

83. Ms Stephens' disciplinary investigation report was dated 22 January 2019 (page 539). She concluded that there had been no breach of any standard

operating procedure in respect of the handling of a patient's specimen on 4 October 2018. The respondent did not take any further steps in respect of this allegation. The allegation against the claimant of behaving unprofessionally to a patient was dealt with by way of an informal warning. The claimant was not subject to any formal disciplinary proceedings as a result of this investigation.

Sickness absence

84. A stage two formal sickness absence meeting under the respondent's sickness absence management was held with the claimant on 18 January 2019.

85. The policy sets out trigger points for short-term sickness absence, above which steps will be taken under the policy (page 140). The trigger points are: five episodes or eight working days or 60 hours of sickness absence in a rolling 12-month period, or an unusual pattern of absence, eg either side of annual leave.

86. Ms Moore had held a stage one informal meeting under the sickness absence policy with the claimant on 11 September 2018. He had 40 days sickness absence over ten episodes over the 12-month period from September 2017 to September 2018. Ms Moore told the claimant that if his sickness absence continued to be a cause for concern during the next six months, then she would progress to a stage two formal meeting under the policy (page 364). A monitoring meeting was set for 9 October 2018. At that meeting, Ms Moore told the claimant that his attendance had improved and they would not need to meet again unless the situation changed.

87. The claimant was on sick leave on 27 and 30 December 2018, between two periods of annual leave. Ms Moore sought advice from the respondent's HR department. She was advised that these absences triggered a stage 2 formal sickness meeting under the policy.

88. The stage two formal sickness meeting took place on 18 January 2019 (page 511). At the meeting, Ms Moore and the claimant reviewed his sickness record (page 360).

89. Ms Moore wrote to the claimant on 1 February 2019 to issue an attendance advisory notice (page 554). The notice would remain live on the claimant's file for 12 months. In her letter, Ms Moore said that the claimant had confirmed at the meeting that his sickness absence record was accurate.

90. The claimant did not respond to the letter to say that he had not agreed that his record was accurate, but he did appeal the attendance advisory notice on 12 February 2019 (page 574). The appeal was conducted by Ms Hussain and took place on 7 March 2019. The claimant was accompanied by his union representative Abi Omojola.

91. Ms Hussain wrote to the claimant with her decision on 8 March 2019 (page 647). She did not overturn the Attendance Advisory Notice but she partially

upheld one ground of appeal, which was that a stress assessment undertaken for the claimant was not discussed in the stage two meeting. Ms Hussain made recommendations relating to better communication between Ms Moore and the claimant.

92. At the hearing before us, the claimant said that the sickness absence record was not accurate as he had been on annual leave not sick leave during the period 25 September 2017 to 29 September 2017. He said that he had raised this at the stage one and two meetings with Ms Moore and at the appeal meeting. There was no evidence that he did challenge his sickness record at any of these meetings. He did not expressly mention any inaccuracy in the sickness record in his appeal letter. In any event, the claimant's sickness absence was above the trigger points even if this period of absence was disregarded.

93. Ms Williams was also subject to a stage one informal review meeting (page 949). She had less sickness absence than the claimant (page 948). We do not accept the claimant's evidence that Ms Williams had more sickness than him and that the respondent had fabricated her sickness record. There was nothing to suggest that Ms Williams' record had been fabricated.

The claimant's grievance

94. In February 2019 the claimant contacted the respondent's HR about the grievance he had submitted in July 2018. He wanted to resubmit his grievance and have it formally considered. In an email dated 4 February 2019 to Elizabeth Raleigh of the respondent's HR department, copied to Ms Hussain, he asked that his grievance be considered. He said he did not want to re-write it, and asked that it be considered 'as it is' (page 559).

95. Ms Raleigh replied the same day and asked the claimant to send through his grievance document so that she had the right copy. There was no record of any response to this email.

96. On 12 February 2019 the claimant submitted a second grievance (pages 561 to 566). He sent the grievance by email to David Peston who was at that time the divisional manager for cellular pathology. Ms Raleigh was copied in. Mr Peston was given some advice about the conduct of the grievance by Alaa Tahir from the respondent's HR department, who told Mr Peston that this grievance would be seen as a new grievance and would not be linked with any previous grievance (page 576).

97. On 14 March 2019 Ms Moore raised a concern with Mr Peston about the claimant that she had heard from Ms Ubhi. She said that the claimant had been telling staff that he wanted to work at Charing Cross Hospital and that the staff at Hillingdon Hospital are all bullies (page 666).

98. The claimant's second grievance was considered by Mr Peston. These events occurred after the submission of the claim, but we include a summary of the outcome of the second grievance for completeness. There was not as we understand it any dispute about these facts.

99. The grievance hearing was delayed because the claimant was on sick leave and he asked that any meetings be postponed until he was fit to return to work (page 697). The claimant was fit to return to work in August 2019. The claimant's union representative was unavailable for the first suggested hearing date (page 808). The date was finally set for 23 September 2019.

100. At the grievance hearing Mr Peston identified four concerns raised by the claimant. He wrote to the claimant with his decision on 27 September 2019 (page 821). The first three concerns were not upheld. The fourth issue, harassment by staff at Hillingdon Hospital, was partially upheld. Mr Peston noted that this issue was similar to the allegations raised in the claimant's previous grievance of 2018. Mr Peston agreed that it was best practice for a manager to speak to a member of staff in private about personal matters. He also concluded that actions could have been taken sooner to prevent the escalation of the claimant's stress and anxiety (pages 822 and 823).

101. Mr Peston recommended that the claimant be assigned to a different workplace to facilitate his return to work and minimise stress. The claimant moved to St Mary's Hospital from 9 September 2019 (page 823).

102. The claimant appealed against Mr Peston's decision (page 825). His appeal was heard by Angela Jean-François on 11 November 2019. The claimant's appeal was not upheld but Ms Jean-François made some observations and recommendations (page 838). These included the following:

- *"Elaine Moore has now left employment with the Trust. I will work with David Peston and [North West London Pathology] HR Business Partner to review the culture within the Cellular Pathology department across NWLP and ensure that all management are aware of the Trust policies and how to apply them.*
- *You have raised significant concerns going back to the initial grievance in 2018. Following review of the concerns raised during this appeal, I recommend that you remain working on the St Mary's site until the centralisation of [the department] on the Charing Cross site occurs.*
- *I recommend to David and his management team on the St Mary's site to ensure that you are receiving the required level of support as outlined in the grievance hearing outcome. This includes completion of a workplace stress assessment and regular monthly 1:1s with your manager to discuss any issues that you may be experiencing."*

103. The claimant is still employed by the respondent and remains at St Mary's Hospital.

The Law

104. Race is a protected characteristic under sections 4 and 9 of the Equality Act 2010.

Direct discrimination

105. Section 13 of the Equality Act provides:

> *"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

106. Section 23(1) provides that:

> *"On a comparison of cases for the purposes of section 13 [direct discrimination] ... there must be no material difference between the circumstances relating to each case."*

107. Section 39 prohibits discrimination in the employment context. It states that an employer (A) must not discriminate against an employee (B):

> *"(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training…*
> *(d) by subjecting B to any other detriment."*

Harassment

108. Under section 26 of the Equality Act, a person (A) harasses another (B) if

> *"a) A engages in unwanted conducted related to a relevant protected characteristic, and*
> *b) the conduct has the purpose or effect of –*
> *i) violating B's dignity, or*
> *ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."*

109. In deciding whether conduct has the relevant effect, the tribunal must take into account:

> "*a) the perception of B;*
> *b) the other circumstances of the case;*
> *c) whether it is reasonable for the conduct to have that effect."*

Victimisation

110. Victimisation is prohibited by section 27 of the Equality Act:

> *"(1) A person (A) victimises another person (B) if A subjects B to a detriment because*
> *(a) B does a protected act…"*

111. A protected act is defined in section 27(2) and includes:

> *"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."

Overlap between complaints

112. Section 212(1) of the Equality Act provides that detriment does not include conduct which amounts to harassment. This means that any conduct which amounts to harassment cannot also amount to a detriment for the purpose of a direct discrimination or victimisation claim.

Burden of proof in complaints under the Equality Act 2010

113. Sections 136(2) and (3) provide for a shifting burden of proof:

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

(3) This does not apply if A shows that A did not contravene the provision."

114. The shifting burden of proof recognises the fact that discrimination can be hidden or even unconscious, and difficult to prove. In Igen v Wong [2005] ICR 931 the court set out guidance on the shifting burden of proof. The court's guidance is not a substitute for the statutory language and the statute must be the starting point.

115. In a direct discrimination complaint, section 136(2) means that if there are facts from which the tribunal could properly and fairly decide that the claimant was treated less favourably than a comparator, and the difference in treatment was because of the protected characteristic, the burden of proof shifts to the respondent. The respondent must then prove on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of the protected characteristic. If the burden shifts to the respondent, and the respondent's explanation for that treatment is unsatisfactory or inadequate, then the tribunal must make a finding of discrimination.

116. At the first stage, when deciding whether the burden shifts to the employer, the substance of the employer's explanation is excluded. However, the tribunal may draw inferences from the fact that there are inconsistencies in the employer's explanation: "the substance of the explanation should be excluded from consideration when deciding whether the burden of proof should be reversed, [but] the fact that explanations had been given which were inconsistent could be taken into account" (Veolia Environmental Services UK v Gumbs) EAT 0487/12.

117. Where there is more than one allegation, each allegation must be considered separately to decide whether the burden of proof shifts to the respondent (Essex County Council v Jarrett EAT 0045/15).

118. Lord Justice Mummery in Madarassy v Nomura International plc 2007 ICR 867, CA gave further guidance on what is required for the burden of proof to shift to the respondent. He said:

> *"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal could conclude that, on the balance of probabilities, the respondent has committed an unlawful act of discrimination."*

119. "Something more" than a difference in treatment between a claimant and a comparator is needed for the burden to shift to the respondent, although this "need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred..." (Deman v Commission for Equality and Human Rights [2010] EWCA Civ 1279.) Indeed, "it would be a retrograde step if there had to be something obviously and blatantly discriminatory before the burden of proof was reversed" (Veolia Environmental Services UK v Gumbs) EAT 0487/12.

120. Unreasonable or unfair conduct is not, by itself, enough to raise an inference of discrimination to shift the burden of proof. If unreasonable conduct occurs alongside other indications that there might be discrimination on racial grounds, that would alter the position, but those indications must relate to the prohibited ground (Commissioner of Police of the Metropolis and anor v Osinaike EAT 0373/09).

121. If the burden of proof shifts to the respondent, the respondent must at this second stage prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever based on the protected ground. The guidance of the Court of Appeal in Igen v Wong is that 'the tribunal would normally expect cogent evidence [from the respondent] to discharge that burden'.

122. Similarly, in a complaint of race harassment, before the burden can shift to the respondent, the claimant must adduce some evidence from which the tribunal could conclude that the conduct was related to race.

Conclusions

123. We have applied the relevant legal tests to the findings of fact that we have made, to reach our conclusions on the issues for determination (using the numbering from the issues set out above). We have first considered whether the treatment we have found to have taken place amounted to direct discrimination or harassment. We have dealt separately with victimisation, and we have left the question of time limits to the end.

14.1 Refusal to allow the claimant to undertake a specialist portfolio

124. The first stage for us to consider is whether the claimant has proved facts from which we could determine that the respondent has directly discriminated against him because of race. When considering this, we bear in mind the words of the guidance in Igen v Wong that that "it is unusual to find direct evidence of [race] discrimination. Few employers would be prepared to admit such discrimination, even to themselves."

125. We have found that the claimant was told in 2017 that he could not undertake a specialist portfolio. In January and March 2019, Ms Ubhi's emails to the claimant suggested that he would be permitted to undertake a specialist portfolio, with the majority of his training to be done at Charing Cross Hospital. (We refer to this as a 'split-site' arrangement). However, after 8 March 2019 Ms Ubhi decided that she could not support the claimant's request.

126. We have found that Ms Williams, who is white British, started a specialist portfolio after being promoted to a band 7 role which was based at Charing Cross Hospital.

127. We have considered whether Ms Williams is an 'actual' comparator within the meaning of section 23 of the Equality Act. The respondent said that the difference in location of role between the claimant and Ms Williams was a material difference in relation to this issue, because a specialist portfolio could only be done in a laboratory which was approved by the IBMS. The laboratory at Hillingdon Hospital was not approved for specialist portfolio training.

128. We do not accept that this is a material difference in circumstances. We have found that Ms Williams in fact spent most of her time at Hillingdon Hospital. We consider that the difference in location of role is better categorised as part of the respondent's explanation for the difference in treatment, which should be left out of the assessment at this first stage.

129. We have found that Ms Williams, who is white British, was allowed to do a specialist portfolio on a split-site basis, but the claimant, who is black African, was not. The difference in race and the difference in treatment between Ms Williams and the claimant are not, on their own, sufficient to raise a prima facie case of discrimination such that the burden of proof shifts to the respondent. We have considered whether there is 'something more' from which we could decide, in the absence of any other explanation, that race played a part in the decision not to allow the claimant to undertake a specialist portfolio. We have concluded that there is.

    129.1. We have found that the respondent's training policy, which required biomedical scientists to complete a specialist portfolio, applied to the claimant as well as Ms Williams. This was Ms Hussain's view. Not allowing the claimant to undertake a specialist portfolio conflicted with the respondent's policy and was less favourable than the treatment afforded to Ms Williams.
    129.2. The procedure followed in the claimant's case was confused. Ms Moore explained the procedure for applying to undertake a specialist portfolio, and we have accepted that evidence. She said that after a

learning needs assessment was completed, an application would be considered by a training committee. The claimant's case did not follow that procedure. Although he did not complete a study leave application, a learning needs assessment was carried out, but his request was not considered by a training committee.

129.3. Ms Moore's evidence about the independence of the various sites in respect of the cross-over of staff, training and rotas was not consistent with other evidence, including her own evidence. We could infer from this that her evidence was put in this way in an effort to bolster the explanation that the claimant could not undertake a specialist portfolio on a 'split site' basis.

129.4. The respondent's witnesses' evidence about the decision not to progress the specialist portfolio for the claimant in March 2018 was inconsistent. Ms Moore said she had not agreed to it, but Ms Ubhi said she had, and we have found that Ms Ubhi understood that Ms Moore had agreed to it, as recorded by Ms Ubhi in a contemporaneous email.

129.5. The explanation by the respondent for the halting of the arrangements which were being put in place by Ms Ubhi and Ms Ali in January to March 2019 for the claimant to undertake a specialist portfolio on a split-site basis was inconsistent. Ms Ubhi said she decided not to support the request after speaking to Ms Ali, but earlier she said that Ms Ali had agreed to obtain a portfolio for the claimant.

130. At this stage we are considering what inferences it is proper to draw from these primary facts. We do not have to reach a definitive determination that such facts would lead us to the conclusion that there was an act of unlawful discrimination. We are looking at the primary facts to see what inferences of secondary fact could be drawn from them.

131. We have concluded that the facts set out above are facts from which we could decide that the decision not to permit the claimant to undertake a specialist portfolio was direct race discrimination. The failure to follow the respondent's policy and procedure, and the inconsistency of the respondent's evidence and explanations are facts from which we could draw an inference of discrimination.

132. A potential inference of discrimination at this stage is rebuttable by the respondent. We have considered our findings about the explanations we were given for the respondent not allowing the claimant to undertake a specialist portfolio.

132.1. We have found that the respondent's training policy which required the completion of a specialist portfolio applied to the claimant. Ms Moore may have assumed that it did not, but this was not what Ms Hussain said, and we have accepted Ms Hussain's evidence on this point.

132.2. Even if Ms Moore thought that the training policy did not apply to the claimant, the fact that there is no policy requirement for an employee to carry out a particular training course does not mean that a request

to do that training cannot be considered. We would have expected a training request to be considered even if it is not a strict requirement, especially where, as here, the training is something which will assist career progression.

132.3. We have found that the procedure was not followed in the claimant's case, and there was a considerable degree of confusion in the process that was applied to him. His request was not put to the training committee.

132.4. Ms Ubhi and Ms Ali had both agreed to the claimant undertaking a specialist portfolio on a split-site basis. It was apparent from Ms Williams' experience that it was possible to carry out the training in this way, and indeed Ms Ubhi recorded in her email that the claimant's training would be 'similar to Ms Williams'. Ms Ubhi and Ms Ali were the training officers from Hillingdon and Charing Cross who would have been responsible for supporting the claimant in the training, and who were familiar with training matters. They were taking initial steps over a number of weeks to put the training in place for the claimant (as recorded in Ms Ubhi's emails of 29 January 2019 and 8 March 2019).

132.5. The respondent's explanation for why those arrangements were halted was unclear. Ms Ubhi said she decided not to support the claimant after speaking to Ms Ali but an earlier email said Ms Ali had agreed to purchase the portfolio for the claimant. The respondent did not call Ms Ali to give evidence. Ms Moore said she had never agreed to the claimant doing the training, but Ms Ubhi's contemporaneous email said she had.

132.6. There was no written record of the discussions around the decision to halt the arrangements for the claimant's specialist portfolio or the reasons why, and the claimant was not informed in writing about what had happened.

133. The respondent relied on the fact that Ms Williams was a band 7 biomedical scientist, whereas the claimant was band 6, and that Ms Williams' role was based at Charing Cross, whereas the claimant's was based at Hillingdon which was not approved by IBMS for training. Unlike biomedical scientists at Charing Cross, those at Hillingdon were not required to complete a specialist portfolio.

134. This appears to us to be an incomplete explanation. It might explain why it was easier for arrangements to be made for Ms Williams to do a specialist portfolio or why her managers wanted her to do one, but it does not explain why the claimant was not permitted to do a specialist portfolio. Ms Williams spent more of her time at Hillingdon Hospital than at Charing Cross Hospital, and we have found that it was possible for a member of staff to do a specialist portfolio on a split-site basis.

135. Further, the difference in Ms Williams' and the claimant's roles and work location does not explain why the respondent's training officers agreed in January to March 2019 that the claimant could undertake a specialist portfolio on a split-site basis similar to Ms Williams, and were taking steps to put that

in place, but then halted the process. We were not given an adequate explanation about this, and for this reason, we have concluded that the respondent has not satisfied us that the treatment of the claimant in this respect was in no sense whatsoever based on race.

136. As we have decided that burden shifted to the respondent and the respondent's explanation is unsatisfactory, then we must make a finding of direct race discrimination in respect of the respondent's refusal to allow the claimant to undertake a specialist portfolio.

137. Section 212(1) prevents us from making a finding of harassment and a finding of direct race discrimination about the same facts. We consider that this treatment falls more readily within the category of direct race discrimination than harassment.

14.2 16 October 2018

138. We have found that there was a discussion between the claimant and Ms Moore on this day about a new standard operating procedure regarding the timing of tea breaks. We have found that at the time of this discussion, the claimant had been at a meeting when this was discussed, but that he had not yet received a copy of it on the online system 'ipassport'.

139. In those circumstances, Ms Moore could have been more understanding about the claimant taking an early tea break. However, we had no evidence of any actual comparator being treated any differently in this respect, or any evidence from which we could conclude that a hypothetical comparator would have been treated differently.

140. There was no other evidence from which we could decide that Ms Moore's treatment of the claimant in this respect was related to race.

141. This means that the burden of proof does not shift to the respondent in respect of either the complaint of direct discrimination or harassment.

14.3 17 October 2018

142. We have found that Ms Moore invited the claimant to the laboratory manager's office to discuss the tea break incident and the meeting on 12 October 2018.

143. It is best practice to have this kind of discussion in private. However, we had no evidence of any actual comparator being treated any differently, or evidence from which we could conclude that a hypothetical comparator would have been treated differently. There was no evidence from which we could conclude that Ms Moore's treatment of the claimant in this respect was related to race.

144. The burden of proof on this allegation does not shift to the respondent in respect of either the complaint of direct discrimination or harassment.

14.4 and 14.5 Disciplinary investigation

145. We have found that the claimant was subject to a disciplinary investigation concerning his handling of a specimen on 4 October 2018. He was not subject to any formal disciplinary proceedings in respect of the complaint.

146. We have found that the respondent investigated this matter because it had received a complaint from a patient that the claimant had dealt with a patient inappropriately and had not handled a specimen properly. The respondent's initial investigation concluded that there been no breach of any standard operating procedure regarding specimen handling, and no further steps were taken in respect of that allegation.

147. We would expect the respondent to investigate if a patient made a complaint. There was no evidence from which we could conclude that a comparator or hypothetical comparator had been or would have been treated differently, or that the respondent subjecting the claimant to an investigation relating to the improper handling of a patient specimen was related to race. Therefore, the burden of proof on this allegation does not shift to the respondent in respect of either the complaint of direct discrimination or harassment.

148. We understood the claimant's complaint that he was accused of wrongdoing in relation to the investigation relating to the improper handling of a patient specimen to be the same complaint as the previous one.

14.6 Attendance advisory note

149. We have found that the claimant was issued with an attendance advisory note on 1 February 2019.

150. The claimant's sickness absences fell within the criteria set out in the respondent's sickness management procedure to trigger action under the procedure. Before inviting the claimant to the stage two formal meeting, Ms Moore sought advice from HR and was advised that stage two had been triggered. We have found that the claimant did not expressly raise concerns about the accuracy of his sickness record in any of the meetings he had about this, but that his sickness absences would have fallen within the criteria for action even if the dates in September 2017 were discounted. It would have been better if the respondent had asked the claimant to sign a copy of the sickness record and the meeting notes as part of this process as this would have avoided the claimant's subsequent doubt about its accuracy.

151. However, there was no evidence from which we could conclude that a comparator or hypothetical comparator had been or would have been treated differently, or that the respondent issuing an attendance advisory note was related to race. Therefore, the burden of proof on this allegation does not shift to the respondent in respect of either the complaint of direct discrimination or harassment.

14.7 Failure to deal with the claimant's first grievance

152. We have found that the respondent did not formally investigate the claimant's grievance of 31 July 2018. There were meetings with the claimant on 16 August 2018 and on 12 October 2018. We have found that there was a misunderstanding or miscommunication between the claimant and the respondent about whether any informal steps would be taken to address the claimant's complaint. The respondent did not write to the claimant to say that his grievance was being closed; if it had done the position may have been clearer.

153. In February 2019 the claimant tried to resubmit his first grievance. Ms Raleigh from the respondent's HR department understood that this is what the claimant was requesting but the first grievance was not progressed by the respondent.

154. There was no evidence from which we could conclude that a comparator or hypothetical comparator had been or would have been treated differently, or that the respondent's failure to deal with the first grievance was related to race. Therefore, the burden of proof on this allegation does not shift to the respondent in respect of either the complaint of direct discrimination or harassment.

Overview for issues 14.2 to 14.7

155. Having considered each of the alleged acts of direct discrimination and harassment separately, we stepped back and considered the treatment in the round, including the fact that we have made a finding of direct discrimination in relation to the refusal to allow the claimant to undertake a specialist portfolio.

156. We have considered whether there was other evidence from which we could make an inference of discrimination in respect of the claimant's other allegations of direct discrimination and harassment.

157. We found that only one of 15 band 7 biomedical scientists in the Cellular Pathology department is black. This was a very general snapshot of the racial breakdown of a small number of employees of the respondent. We were not told the period when it applied. We did not have any other statistical evidence. We did not hear any evidence about the number of black biomedical scientists in other bands, including in the claimant's, band 6. We do not find this fact to be of any probative value or to be evidence from which we could infer that the claimant was subject to race discrimination in respect of his complaints at issues 14.2 to 14.7.

158. The claimant referred in his witness statement at paragraph 44 to occasions on which he said he was racially targeted. One was the inclusion of his initials on a slide technical quality control record. No other individual was named in any of the other entries in the page of the record we were shown. The record was completed by a number of different managers, not only the claimant's

manager. We were only shown the record for a three month period (1 page). The naming of the claimant on this record may have been unreasonable or unfair to the claimant, but we have not found that anything about this incident related to race or that there was anything from which we could conclude that the claimant was subjected to direct race discrimination.

159. Secondly, the claimant said that the exchange between Ms Moore and Ms Ubhi in March 2019 about whether the claimant had told staff that he wanted to work at Charing Cross Hospital and that the staff at Hillingdon Hospital were all bullies was racially targeted. He said this was gossip and lies. Again, the claimant may have felt that the exchange was unfair and unwarranted, but there was no evidence to suggest that it was related to race in any way.

160. Finally, the claimant refers to the performance issues that were raised with him during the period February 2018 to May 2018. Again, we have not found anything about these occasions which was related to race.

161. Considered as a whole, we did not find any facts from which we could properly and fairly conclude that that the respondent had directly discriminated against the claimant because of his race, or harassed him, in relation to issues 14.2 to 14.7. Our conclusion means that the burden of proof in respect of those complaints of direct race discrimination and harassment does not shift to the respondent, and those complaints therefore fail.

Victimisation

162. The claimant relied on his grievance of 31 July 2018 as a protected act. We have found that the claimant's grievance comprised his grievance form and the longer grievance letter at pages 343 to 346. We found that another version of the grievance letter was at page 340 to 342.

163. For the grievance to amount to a protected act, it would have to fall within section 27(2) of the Equality Act. It would have to have made an allegation of a breach of the Equality Act, or to have done something else for the purposes of or in connection with the Equality Act.

164. Neither the claimant's grievance form or either version of the grievance letter contain any reference to race, to discrimination or to race harassment.

165. There is a reference in the form to 'bully, harassment and prejudice'. The reference to harassment is not sufficient to amount to an allegation of a breach of the Equality Act, especially when read in the context of the more detailed matters set out in the grievance letter. The complaint is more reasonably understood as a complaint of general bullying and harassment, rather than harassment related to race.

166. We have concluded that the grievance does not make any allegation of a breach of the Equality Act or do anything else for the purposes of or in connection with the Equality Act and therefore that the claimant did not do a protected act.

167. In the light of our conclusion that the claimant did not do a protected act, the complaints of victimisation cannot succeed.

Time limit

168. The respondent's refusal to allow the claimant to undertake a specialist portfolio was conduct extending over a period for the purposes of section 123(3) of the Equality Act 2010.

169. The respondent had not permitted the claimant to undertake a specialist portfolio at the time the claimant notified Acas for early conciliation on 4 March 2019 and presented his claim form on 24 March 2019. We conclude that the complaint in relation to the refusal to allow the claimant to undertake a specialist portfolio was presented in time.

Summary

170. We have decided that the respondent directly discriminated against the claimant because of race in refusing to allow the claimant to undertake a specialist portfolio.

171. The claimant's other complaints of direct race discrimination, as set out in issues 14.2 to 14.7 do not succeed.

172. The claimant's complaints of harassment and victimisation also fail.

Remedy hearing

173. The hearing before us was to consider liability only. Notice of remedy hearing and case management orders for the hearing will be sent separately.

174. Pursuant to regulation 3 of the Employment Tribunal Rules 2013, the tribunal encourages the parties to explore (whether via the services of Acas or other means) whether it is possible to resolve the outstanding remedy issues by agreement.

_____

Employment Judge Hawksworth

Date: 14 December 2020

Sent to the parties on: .....

.....
For the Tribunals Office

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