EMPLOYMENT TRIBUNALS

Claimant: Mr A Mahbub

Respondent: Northern Lincolnshire and Goole NHS Foundation Trust

AT A FINAL HEARING

Heard: Remotely, via CVP **On:** 7, 8, 12, 14 & 15 April 2021
and in chambers on 16 July 2021.

Before: Employment Judge R Clark
Mrs D Newton
Mrs K McLeod

Appearances
For the Claimant: Mrs Chowdhurry, Mr Mahbub's wife
For the Respondent: Mr B Williams of Counsel

JUDGMENT

The unanimous decision of the tribunal is: -

1. The claims of direct race discrimination **fail and are dismissed.**
2. The claims of harassment related to race **fail and are dismissed.**
3. The claims of victimisation **fail and are dismissed.**

REASONS

1. Introduction

1.1 The claim before us has narrowed considerably since it was originally presented. It now alleges discrimination under three forms of prohibited conduct and in relation to one protected characteristic, namely race. They are direct race discrimination under s.13; harassment related to race under s.26; and victimisation under s.27 of the Equality Act 2010 ("the Act").

2. Issues

2.1 We have been given an agreed list of issues which has been refined both as between the parties and as a result of the three preliminary hearings conducted in this case (see

appendix). We adopt that as the questions we are required to provide answers to in order to determine these claims.

2.2 The only aspect that requires qualification is in respect of time limits. Both parties confirmed their understanding that the question of whether the claims were in time or not was argued solely on the basis of the acts extending over a period, the underlying state of affairs said to amount to the continuing act being described as the continuing involvement of Ms Logan. We have not, therefore, addressed the question of just and equitable extension of time and the parties have not adduced evidence on that.

2.3 Similarly, we make clear that despite how the claimant's case is phrased, there is no claim against Ms Logan. Whilst she is the focus of the claimant's allegations and the principal alleged discriminator, the only claim is against the respondent employer which accepts it would be liable under the Equality Act 2010 for the actions of Ms Logan.

3. Evidence

3.1 For the claimant we have heard from Mr Mahbub himself and Mr Lascelles, his GMB trade union representative.

3.2 For the respondent we have heard from: -

a) Ms Mandy Logan, Operational Manager for Acute Therapies.

b) Ms Andrea Riley, the claimant's Team Leader and immediate line manager.

c) Ms Jane Brown, Ward Manager of ward 27 who was involved in one discrete allegation concerning the claimant's use of the staff room whilst working on the ward as a visiting therapist.

d) Ms Karen Fanthorpe, a Senior Manager who, before retiring, was involved in the review of the internal investigations.

e) Mr Anthony Rosevear, who replaced Ms Fanthorpe and undertook the final review of the investigation and dismissed the allegations against Ms Logan.

3.3 We received a bundle of over 1000 pages and considered those pages we were taken to. Both parties made oral closing submissions.

3.4 We are grateful to both representatives for their considered approach to the case and wish to repeat our observations given at the time of the competent manner in which Mrs Chowdhurry performed her role as a lay representative and also how Mr Williams assisted us in ensuring a fair hearing.

4. Facts

4.1 It is not the Tribunal's purpose to resolve each and every last dispute of fact between the parties. Our focus is to make such findings of fact as are necessary to answer the issues

in the claim before us and to put them in their proper context. On that basis, and on the balance of probabilities, we make the following findings of fact.

4.2 Mr Mahbub has been employed by the respondent since April 2013. He continues to be employed but has remained absent on sick leave for some considerable time. His original employment was as a Senior Health Care Assistant. He was subsequently successful in an application for the post of 'Assistant Practitioner – Physiotherapy'. Although an internal move, his appointment was subject to the employer's system of pre-employment checks. He took up that post on 3 January 2019. This was a part time role, working approximately 26 hours per week and would lead to an increase in pay if he successfully demonstrated the competencies in the role and completed the associated foundation degree.

4.3 Practice within the new role was defined by a set of competencies which have to be learned and demonstrated on the job. We find the claimant was supported by colleagues to learn on the job and to begin working towards those new competencies. His progress was to be reviewed by a senior therapist. That task was split across two of the main professional areas of the Therapies Department. Ms Logan undertook the role for Occupational Therapy. Emma Jarret did so for Physiotherapy.

4.4 Demonstrating competence in the role was important on a number of levels. First, and obviously, it is necessary as part of performance management and an employee that fails to meet or maintain competencies will be at risk of a being made subject to a performance management process and development plan. Whilst we find such a process is supportive of improvement in the first instance, it may lead to sanctions if the standards are not achieved. Secondly, it defines the individual's ability to operate to a safe and professional standard which enables the employer to then roster that individual on shifts where there may be few other qualified staff on duty. During the week, the level of support from others was such that a developing employee could receive the support necessary to learn and acquire the competencies. At the weekend, however, only two staff were on duty which meant, for clinical and staff safety reasons, both had to be competent. Therefore, Mr Mahbub was not rostered to work weekends.

4.5 The role came with other developmental opportunities and expectations linked to the competency framework. One was the enrolment on a foundation degree. We accept that whilst enrolment on the foundation degree was expected from the outset of his appointment, it was always subject to satisfactory progress towards achieving the competencies. In other words, the employer would not support an employee on that course if they were failing to demonstrate competencies. We find it was expected that competencies would be demonstrated in a relatively short period, especially as Mr Mahbub had already gone through the equivalent process in respect of the competencies relevant to the previous role of health care assistant.

4.6 There was clearly a requirement for record keeping. The two specialisms in therapies had slightly different approaches to their clinical documentation. Whilst both worked to a

SOAP principal (subjective, objective, analysis, and plan), physiotherapy records tended to be in bullet point form. Occupational therapy records required more of a narrative form. Mr Mahbub has a good command of English, both spoken and written, but it is not his first language. He would find the physiotherapy records easier to complete to the satisfaction of the qualified staff than was the case with the occupational therapy records.

4.7 We accept that working in therapies is a physically demanding job where manual handling of patients is a key concern and back disorders can be a frequent occupational injury. It may or may not be any more or less physically demanding than that of the previous role of HCA but we are satisfied it remains one in which the presence of a potentially serious back complaint is something the employer was entitled to be concerned about. It raises issues not only of the ability of the employee to do the role but, more particularly, the risk of injury that such a person might be exposed to when doing it and the risk of injury to colleagues and patients.

4.8 Mr Mahbub had a long standing back condition that would ultimately require surgery very early in his new employment although he attributed different causes to the injury as a means of distinguishing them. We find part of that desire to distinguish the cause arose from the fact that he had failed to declare his long standing back injury on his pre-employment questionnaire. Whilst one might think such a situation would be picked up on internal recruitment, it meant certain additional pre-employment checks were not undertaken in this case. One significance of this is that it would set the tone of the new relationship with his new managers which inevitably included some level of mistrust.

4.9 At all material times Mr Mahbub has continued to work in a second role for the trust. This is as part of the Trust's "bank". The bank is, in effect, the internal temporary labour agency providing flexible cover across many areas of patient care. The role he performs whilst working on the bank is that of his old role of Health Care Assistant.

4.10 Mr Mahbub is of Asian Bangladeshi national and ethnic origins and that is how he defines his race.

4.11 The claimant's absence record in his previous role was such that he had been subject to formal attendance management procedures at the time of his application and selection for the current post. Those procedures had led to him being subject to what is defined as "stage 2" of the employer's formal procedure. In short, that is a period of 6 months of formal monitoring during which targets for attendance must be maintained. This expired on 21 December 2018. Whilst that meant he had satisfied the stage 2 targets set, we find that to finally conclude the process and avoid further formal steps being taken required a clear period of one month's attendance after the stage 2 period had ended. The consequence of a further absence within that period meant that the stage 2 process would be resumed.

4.12 After starting his new role on 3 January 2019, the claimant worked for only 9 shifts before he went off sick again on 21 January 2019 with his long-term back complaint. This

would in due course require surgery. Accordingly, he re-triggered the formalities of stage 2 of the sickness absence management process.

4.13 We find the managing attendance policy and procedure is detailed and structured. It sets out the purpose and aims behind the policy. They include supporting an employee back to work but also the consequences of unauthorised absence and other factors which might not be conducive to a return to work. One such factor would be working in a second role which is potentially both an issue undermining recovery and also potentially a disciplinary matter if the employee is off sick claiming contractual sick pay at the same time.

4.14 There are a number of stages and processes within the policy. We accept Ms Logan's actions were driven solely by her understanding of what the policy required of her as a senior manager. It includes guides to managers and a checklist of issues to prompt discussion at the various forms of review meetings. We find these formed the basis of the discussions that would follow. In other words, all the discussions held by Ms Logan were based on the areas of enquiry those checklists required her to engage with.

4.15 The line management structure was such that the claimant reported to Andrea Riley. She and Ms Jarret both reported to Ms Logan. Not only was Ms Logan the Operational Manager for Acute Therapies, but that is a role which is spread across all sites operated by the trust. Most day to day management was therefore with Ms Riley. She reported Mr Mahbub's absence to Ms Logan, in part because of the consequences of the formal process and we find also because it was typical for Ms Logan's level of management to be involved in the formal sickness absence procedures. That state of affairs was in turn partly by instruction from her own manager, Paula Broomhead, and all of that thinking was itself informed by the fact the policy entitled an employee at such a formal review meeting to have a trade union representative attend with them. Whilst it may not be known whether the employee would in fact exercise that right to be accompanied, the fact they had such a right is what we find informed the level of manager that would deal with the issues. Consequently, we find nothing improper in the individuals who would ultimately conduct the future meetings.

4.16 Pausing there, we need to deal with matters raised in evidence concerning any earlier contact between Ms Logan and Mr Mahbub. We find Ms Logan had no real knowledge of the claimant before then and the first time they would properly meet in person would be on 1 April 2019. Mr Mahbub alleges that they met in passing in a large office area soon after his appointment during which she called him by the wrong name. He says this happened twice. His evidence is that she said "Morning Mohamed" and that he replied "morning". He says he did not correct her. There is no suggestion anyone else corrected her or engaged with him afterwards about her error. Ms Logan categorically denies this and believes she spoke to him for the first time on 12 March and met him for the first time on 1 April. In support, the claimant relied on the notes of the 1 April meeting prepared by Ms Amy Davies of HR which says they had "met once before". We have not heard from Ms Davis and there is much about her notes which we have found gives rise for caution about what we can take from them. They have been used to support contentions when it suits yet it is clear they are not full and complete.

On other occasions both parties challenge the accuracy of these notes, indeed Ms Logan had cause to formally put on record her concern about them at the time. Even what the notes actually do say is not conclusive. We have given careful thought to this matter. Although potentially a minor and insignificant incident, it is part of the basis on which the claimant seeks to establish a racial link to Ms Logan's later actions. We have doubts about the claimant's evidence on this but the limited consequence of this matter and the insignificance of the reactions at the time lead us to conclude, on balance that it is unlikely that such an event would be imagined. It is more likely than not that he was addressed as Mohamed. Equally, Ms Logan's denial is born out of the lack of any recollection which itself would be entirely plausible if there was a simple mistake. There is nothing in such a mistake that gives rise to any negative motivations towards the claimant related to or because of his race. Indeed, the fact that she I said to have greeted him in the friendly manner described by the claimant leads us to conclude it points the other way.

4.17 The claimant's absence continued through February. At some point, the employer's procedures would require the local managers to take some action. It was known that the planned surgical operation was imminent and believed to be on 12 March. The need to deal with this matter was on Ms Logan's list of actions as a manager before that date. An issue in this case is why Ms Logan would choose 12 March to telephone the claimant to let him know of the plan in respect of his long-term absence and referral to occupational health. The choice of this date is said to be an allegation of racial harassment.

4.18 In preparation for the stage 2 process we find Ms Logan made further enquiries about Mr Mahbub's employment history to understand more about his employment record. This showed information about the stage 2 process, his previous sickness absences, his employment record and the fact he had declared having additional outside employment.

4.19 We heard different views and opinions on what the policy said amounted to 'long term' absence and when occupational health should be contacted. None of it was not helpful. The claimant said 6 weeks, the policy seems to say 28 days but it also says management intervention might be appropriate from day 1. This was explored in the context of explaining why Ms Logan chose 12 March to make the call. The key facts seem to be that we are satisfied she knew the claimant had re-triggered stage 2 of the procedure and she therefore knew there would have to be a referral to occupational health. Despite that she did not make that referral immediately, presumably due to the imminent surgery. In fact, it was made on 11 March and we suspect that having done so was the trigger for making the call. We also find that Ms Logan did know or at least believed that the claimant was expecting to be admitted to hospital on or around 12 March as 4 days earlier the claimant had informed Ms Riley as such. Mr Mahbub says in fact he was admitted on the 12th although his evidence of the chronology is not clear and other evidence suggests a call from the hospital on 12 March, an admission on 13 March as planned, surgery on 15 March and a discharge on 16 March 2019. We accept that Ms Logan was concerned that Mr Mahbub was informed of the Occupational Health referral before the operation and so that he did not receive the formal letter of appointment cold on his return from hospital. It seems it was known that there was likely to

be a significant period of post-operative recovery of at least 6 weeks after the surgery. An option would have been to simply wait until he was in that period and then make the referral. It is common ground a referral had to happen at some point, the issue in this case is why it happened on 12 March.

4.20 We find that was Ms Logan's first meaningful contact with the claimant. There is nothing to support a contention this was in anyway a deliberate or malicious act with intent to cause stress. Mr Mahbub took the call. He listened to what was said but did explain he could not speak for long as he was waiting for a call from the hospital to let him know when a bed became available. We find the reality is this was simply a job done that needed to be done and Ms Logan had no reason to think there was any reason ***not*** to do it on that day.

4.21 As to Mr Mahbub's reaction, it was no doubt disappointing for him to learn that the stage 2 implications of the policy had been resurrected. He was no doubt anxious about the impending surgery. Beyond that we do not find that the consequences of the call led to him feeling anything more about the situation than simply that she could have waited until after the surgery.

4.22 The call was followed up with a letter confirming the position the next day. It confirmed that he would be referred to Occupational Health and enclosed a copy of the Managing Attendance Policy & Procedure. He was invited to a long-term sickness meeting then scheduled for 20 March 2019. Although that date was put in the diary, we find he was told all dates could be rearranged due to his state of health. This was followed up with a further letter to confirm the details of the meeting and that the claimant was entitled to be accompanied by a trade union representative or a workplace colleague.

4.23 At that time, the claimant was still within the expected 6-week recovery phase of his surgery and he indicated that he was unable to attend. We find this was accepted without question and caused no concern with the managers. It was simply rescheduled, albeit it was stressed that the meeting needed to happen at some point when he was fit to participate. A new date was set for 1 April 2019 on which day it did take place.

4.24 Ms Riley attended the meeting along with Ms Logan. Mr Mahbub is critical of this. We accept that Ms Riley was inexperienced in conducting this type of meeting and was in attendance principally as part of her own development.

4.25 The procedure and guidance available to managers under the policy includes a checklist of topics to explore with an employee during such a review meeting. One such topic area is secondary employment. We find Ms Logan was already on notice from the information she had that suggested the claimant had previously had secondary employment in a restaurant or takeaway. He said he did not have secondary employment. It is against that discussion that the key exchange in this case is alleged. Mr Mahbub says in evidence that Ms Logan tested his denial of secondary employment by saying to him: -

> ***"most people from your community have two jobs".***

Ms Logan and Ms Riley deny that was said. We do not accept this was said and return to our analysis of the evidence of this matter in more detail below.

4.26 A further specific area of complaint arising from this meeting is that Ms Logan is said to have questioned the claimant regarding a medical procedure he underwent from two years prior to the meeting said to have involved and embarrassing procedure to which Ms Logan is said to have commented critically

> ***"10 days for that".***

We find that topic was discussed although the allegation of "Botox in the back passage" is not a phrase we find Ms Logan would have made up if it was not expressed in those terms by the claimant or was a term of describing the procedure. We note he would soon after use these words to describe what he said to her. On balance the period of absence associated with it will have been said.

4.27 Within this meeting we accept Ms Logan expressed some concern about his fitness to carry out the role and the risk he might be exposed to. We do not accept it was inappropriate for her to do so. The claimant interprets this as her expressing negative views about him without medical evidence. We do not agree insofar as we are satisfied this was a reasonable area of concern to discuss. Moreover, she said this in her capacity of an employer with the knowledge of the work. In other settings, it might be quite dangerous for an employer to attempt to exercise their own clinical judgement about an employee but she was not without relevant clinical competence to legitimise her concerns and, in any event, all the future conduct of the claimant's case was based not on her own assessments, but on occupational health advice.

4.28 On or around 12 April 2019, Ms Logan received the occupational health report. In summary, it stated that the surgery had been successful in resolving the back pain and the associated leg pain was improved, but still present. His job role was described as supporting the orthopaedic ward for which manual handling was involved. He was assessed as unfit for that work. The prognosis was for a return to duties, including manual handling, by 3 months but that it would then require a phased return to work.

4.29 On 27 April 2019 the claimant wrote to Ms Logan about the meeting on 1 April. This is the first protected act and warrants setting out in full. It says: -

> ***RE: Long Term Sickness Review Meeting 15*April 2019***
> ***i am writing to inform you that I have received the minutes from the sickness review meeting on the 25th April 2019.***
> ***I would like to bring to your attention that during the meeting I did not understand the purpose of the meeting because you said the meeting was to make sure I was ok, and whether or not I would return to work as it is heavy manual work. I felt as though you were trying to push me out of work, somewhat bullied and discriminated against my health. I was questioned as though I was a criminal. I can understand that you were concerned that I did not declare on my employment occupational health form that I had on and off back pain. However, as I explained during the meeting, I did not take time off work for past 2 years for my back as the pain was manageable***

with help of physio. Therefore, didn't think it was classed as health condition because majority of people have back pain. I have apologised for this error as it was a genuine mistake of not understanding the question. if I had intention of hiding the fact, I had back pain I would not self-refer within the trust, I would have had referral sent by GP to capital physiotherapy or gone private. You said that if you had known that I had back problems you would not employ me. I was already working for the Trust as a Senior Health Care Assistant which was more heavy manual work than my current role. If I was able to work in my previous role without my health affecting my role, I don't understand why you would not employ someone with back problems when I can guarantee there are Physiotherapist and other staff within the same department who suffer with back problems.

Also, to clear confusion, before I started work for you, I did not have this kind of back pain and I was not aware I would require surgery. The pain started suddenly and was extreme hence I had to take sick leave and was referred for urgent surgery. The surgeon has been very reassuring that I will make full recovery, he quoted he is 95% sure, however you made it clear that I will not make full recovery and feel that I will struggle with my role as it is heavy manual work. After speaking to the consultant, he has further assured me that I need intense physiotherapy and I will make recovery to return to work. He has also mentioned that I would know when I am ready to go back to work as the pain will be manageable. A relative who is a Dr has requested that I ask you if you are in a clinical position to decide whether I am fit for work or not, as he believed it was only the Dr's who can make that decision.

You then questioned me in front of everyone as to what surgery I had undertaken couple of years ago. You had the information in front of you because you were aware of the date and the number of days I had taken for that episode. However, you still questioned me and wanted to know what kind of surgery it was. I reluctantly told you that it was Botox injection in my back passage. When you replied very sarcastically "you took 10 days for that". i am sorry but I don't think anyone should be treated like this especially when I had surgery 2 weeks before.

You later questioned me if I was still working outside of the trust. I don't have a clue why you had asked me this question as I have not worked outside of the trust for approx. 8 years and secondly not fit to work anywhere. When I informed you of this you further questioned me and asked if I was working in a restaurant in the evenings. I would like to know why you had questioned me in this manner, was it because in your view majority of asian men work in restaurants?

Towards the end of the meeting you suggested a phase return and possible restriction on bank shifts for 6 months. When I am fit to return to my role of 26.5 hours per week, I do not understand why i would not be able to work bank shifts. If I was on a full-time contract would you have reduced my hours or allowed me to return to 37.5 after phrased return period. I am a responsible adult and if I feel I am not feeling well I will only work my contracted hours but if my health allows, i would want to do bank shifts as my main income is from the bank contract. I feel this is another way of you trying to push me out of my role.

My union rep David did mention that he felt it was early stage to comment on how I would be when I return to work. I totally agree with David. I was put through unnecessary stress when this meeting could have taken place closer to my return to work date which would have given me time to recover. I am dealing with anxiety at the moment and blood pressure has increased.

I have received another letter today which invites me to another long-term sickness meeting for the 02 May 2019. I would not be able to attend this meeting as it is short notice, I would like my wife Thamina Chowdhury to accompany me with David my union rep.

I would like you to please respond to my letter, before the next sickness review meeting.

4.30 On 16 May, Ms Logan responded to the claimant's letter. We find it conciliatory and supportive whilst maintaining the obligation to engage with the sickness absence procedure. She apologised for how he had felt as a result of that meeting and explained why she had to go through that process. In respect of the key allegations, we set out her reply in full. It stated: -

My questions regarding your previous health conditions and surgery were asked in an attempt to understand the broader picture, as you were newly appointed to the team when you commenced this period of sickness absence. I apologise if this made you feel

uncomfortable.

With respect to my question regarding any work outside of the Trust, this is a question I am directed to ask under the Managing Attendance Policy; I have attached a copy of the long term sickness review meeting form completed at the meeting, for your information. In this context I had made specific reference to you working in a restaurant – this was information I had gleaned from your personal file, received from your previous manager. As stated above, you were newly appointed to the team when your absence commenced and we had not had the opportunity to get to know each other, neither had your team leader had the opportunity to get to know you, therefore the information in your personal file was all that was available to me. I apologise if this caused you offence, however I hope that my explanation reassures you that this was not intended.

The discussion regarding bank shifts was related to the current management of your attendance under the Managing Attendance Policy, specifically that this period of absence has triggered stage 2 of the policy. As your attendance is a concern I would wish to ensure that any additional work does not impact on your ability to sustain regular attendance in your substantive role. I am sorry to hear that you are suffering with anxiety and raised blood pressure currently and I would encourage you to discuss this further at your Occupational Health report in respect of any advice or support that may be offered.

4.31 This was the first formal meeting that Mr Lascelles attended and it is appropriate to say something about the contribution of Mr Lascelles' evidence to this case. Mr Mahbub is a member of GMB union. We do not know whether there were no local GMB representatives available to support him or if his membership entitled him to representation by a full time official but, whatever the reason, Mr Mahbub benefitted from representation by an experienced full time trade union official in Mr Lascelles. He is the local branch secretary and covers all industries in the local area in which there are GMB members. That includes healthcare.

4.32 Mr Lascelles attended before us on a witness attendance order obtained by the claimant. He has provided a brief statement which, in its terms, seems to support the respondent. He makes clear he saw nothing wrong at this, or any, of the subsequent meetings he attended and certainly nothing discriminatory. The notes of the meetings, including his personal notes disclosed during the hearing, also seem to support the general thrust of the respondent's case. He is noted to have intervened at times in those meetings to agree with contentions and observations made by the employer. His oral evidence was entirely premised on the fact that whilst he saw and heard nothing wrong and nothing discriminatory, after discussing the meetings with Mr Mahbub and realising how upset he was he now accepts that there had been discrimination. That was not convincing. His apparent enlightenment was said to have happened immediately after the very first meeting on 1 April 2019. However, if it were the case that he was put right in his understanding and perception of what was happening at that early stage it did not alter his later approach at any of the further meetings, two of which were critical to the case, in which he continued to express a view that nothing was wrong and continued to support many of the points being made by the employer.

4.33 In short, the reliability of his evidence is such we have to take extreme caution about what he says. It is now influenced heavily by reflection and reconstruction after the event.

His later accounts given during the respondent's internal investigation of things alleged to have actually been said do not accord with contemporaneous evidence. Whilst we have no doubt he was trying to do his best to assist the process, we found his oral evidence to be fluid and variable and even when given in its most supportive terms, did not address the key facts we needed assistance on.

4.34 Returning to the chronology, the employer's intention was for a re-referral to occupational health in May in anticipation of identifying the adjustments needed to put in place a phased return to work. That did not happen and Ms Logan had to make a further referral in early June. That referral took place, and a further occupational health report was received on or around 14 June 2019. It said that the claimant's symptoms were continuing to resolve and that he would be able to return to work in early July 2019 on a phased return, the terms of which were: -

> ***Up to 2 weeks of 3 maximum of non-consecutive shifts (Mr Mahbub Is keen for this to progress to full duties if he feels able after week 1 – I have advised him to discuss this at the end of week 1 with his manager)***
>
> ***Mr Mahbub should not be restricted in his ability to complete his job long term and I would not anticipate periods of sickness due his previous back symptoms (this has been resolved through surgical procedure)***

4.35 We pause here to record that we did not agree with the claimant's interpretation of the phrase "should not be restricted". On a proper reading of the report, this was not an *instruction* to the managers as to what measures they could or could not impose on the claimant, it was an *opinion* of the likelihood that there would not be any future restriction in ability arising from his previous injury and symptoms.

4.36 On 20 June 2019 a further long term sickness review meeting was held. Mr Mahbub attended represented by Mr Lascelles. Significantly, they both confirmed that they were satisfied with Ms Logan's response sent on 16 May in reply to the claimant's concerns about the meeting on 1 April. A phased return was agreed of 50%, then 75% plus annual leave increasing to 100% after about 3 weeks. The parties agreed that that the claimant would work through his competencies to ensure he was competent before working at the weekends.

4.37 We have already touched on aspects of the claimant's training and development and the inter-relationship of each. It is important that we set out the four strands of training relevant to his role.

a) First and foremost are the competencies of the role itself which the claimant was required to acquire and demonstrate to the necessary standard.

b) Secondly, is the foundation degree. Originally, the claimant was rostered to work on Mondays as that was the day of day release for attendance on that course. For this course the academic year runs, unusually, from January to December. The claimant had barely started before his absence commenced. By the time of his return he had missed half of the year.

c) Thirdly, as a condition of admission to that course imposed by the university and not the employer, students had to have a minimum qualification in English and Maths. As Mr Mahbub did not have that required minimum qualification, he was required to undergo what is known interchangeably as “functional skills training” or “key skills”.

d) Finally, there is “Mandatory Training”. This is a cycle of internal periodic training and refreshers in key areas of clinical practice applicable across clinical disciplines such as safeguarding, manual handling and infection control. All clinical staff have to undergo this training.

4.38 We reject Mr Mahbub’s assertion that the respondent cancelled his functional skills and his foundation degree. We prefer and accept the respondent’s evidence that these were postponed. There were two aspects to this decision. First, the foundation degree lasts one year. By the time of his return to work he had missed 6 of the 12 months of study and we find there was no realistic prospect of him re-joining that year’s cohort. Instead, he would restart the programme the following January. That decision to re-enrol him the following year in itself undermines any suggestion there was by then a plan or desire to see him out of the department. Secondly, the foundation degree and the functional training were directly related. The alleged denial of functional training was made a focus of the claim before us, particularly drawing on the extent to which Mr Mahbub might have benefitted from any further help with English and maths beyond the essential status it had for the foundation degree. We find this functional training was not in place as part of the job nor was it there as a result of any sense Mr Mahbub needed help with English (or maths). He may well have benefitted but we find this course cannot be equated with courses such as “English as a Second Language” but, rather, these are necessary academic minima for the foundation degree, leading to some level of award. We therefore find there was no conscious decision to penalise or restrict Mr Mahbub in not undertaking this but that it was understood to run alongside the foundation degree. Added to that was a desire to support him in focusing and achieving his competencies in the new role. That is particularly important as he had by this time worked only 9 shifts. The decision had been made that it was necessary to focus on the competencies as it would soon become clear that whilst Mr Mahbub was making progress, it was slow and more support and input was needed to get him up to speed. He could not be rostered safely for weekend work until he achieved his competencies and we accept this legitimately became the focus. We therefore accept that was given a priority. Whether it was the best option or whether there were other options does not really alter the fact that this was a reasonable option open to the employer with logical reasoning and on which we accept was genuine and unrelated to his race or any of his prior actions or complaints.

4.39 On 2 July 2019, the claimant returned to work and commenced his phased return to work. His initial attendance was full although his progress against his competencies was slow to the point that it appeared to Ms Logan and Ms Riley that there may be difficulties in him actually meeting the necessary competencies. A significant fact in the phased return was to limit the hours the claimant worked and, in particular, roster him to allow recovery days in

between working days. As the department were making this adjustment, there was an expectation that it would not be undermined by other work activities.

4.40 During that first month back, further matters came to Ms Logan's attention which gave her cause for concern. We find some more serious than others. Some were minor and, in isolation, do not appear to us to warrant the concern that was given to them. We accept, however, that against the background of the rocky start this working relationship got off to, we find the cumulative picture emerging before Ms Logan appeared to reinforce the question of trust and became a cause for concern in how Mr Mahbub did or did not follow instructions and how he conducted himself.

4.41 On 19 July 2019, and again on 22 July, Ms Logan was contacted by Nina Scott, Senior Administrator, to say that the claimant had approached her in respect of carrying over annual leave entitlement. We find the claimant first approached Ms Riley who provided some answer but referred him to Nina. Nina explained his current leave entitlement to him which was less than he expected. Understandably, he challenged this. When it was looked into in more detail, it seems he had lost some untaken entitlement from the previous leave year which, as it was said not to be part of EU leave, and because he had not been prevented from taking it, there was no contractual provision to carry over. It seems to us, therefore that there was a legitimate question to be asked and answered in a complicated area of employment rights where Mr Mahbub was entitled to challenge for an explanation. Whilst the concern at the time was genuine that he was being challenging to colleagues after having been given a clear answer, we find he was not aggressive or rude and the fact he may have repeated his question to more than one person can be readily explained in the context that he simply believed he was entitled to more and any explanation of rights in this area of law is inevitably complicated and may be difficult to understand.

4.42 The second matter relates to him resuming his foundation degree. There had been discussion about this and the plan was for the claimant to restart the following January was settled. On 23 July 2019, the claimant contacted Anne Bontoft, a clinical development practitioner. This contact had again been genuinely, but we find erroneously, interpreted as him going behind the department manager's view that he should restart the following January and instead re-join that year's course. However, we find at most this enquiry could be interpreted as him being unsure of the date of the next cohort start. We have not heard from Ms Bontoft but have seen the correspondence. The request from Mr Mahbub was in terms that reasonably interpreted, showed he understood he was to restart on the next cohort and he asked "could you please let me know when is next cohort start". This led to a communication that Ms Logan would need to authorise the release to study which, we find, was simply a matter of fact statement as she would not necessarily know that this had already been agreed. Despite that, it seems Mr Mahbub was put out about the decision not to let him restart the course that year and he sought to compare himself to a colleague in the therapies department who had been absent with a similar back complaint during her foundation degree year and yet had been allowed to resume her studies. She was not of an Asian origin. We find that she is not a material comparator. We find she was on top of her competencies at the

material time and had not been absent from the course for the extensive period of time that the claimant had. We are satisfied the decisions in both cases were related to the reasonable assessment of the individual's ability to successfully complete the year's course.

4.43 Consequently, those two matters in isolation might lead us to conclude that his actions were viewed through a lens which resulted in Ms Logan being quick to criticise him. However, the events that followed soon after give some credible basis for why criticism was legitimate.

4.44 We find during his supervision sessions with Ms Riley, Mr Mahbub was reminded he needed to focus on getting his mandatory training back up to 100%. He took that on board. On 11 July he logged onto the system to book himself on to a safeguarding children course to take place on Monday 22 July. We find he did not inform Ms Riley that he had booked the course on what was for him a non-working day. Mr Mahbub sought unsuccessfully to explain to us in evidence why this was not a non-working day for two reasons. They were (i) because any day other than weekend was a working day and/or (ii) his previous attendance on the foundation degree meant he was rostered on Mondays to facilitate training which was not now happening. We reject those contentions. We find as a fact he was no longer on that course and was not being rostered to work on Mondays, at least on the date in question. We find a non-working day is simply a day on which the employee is not rostered for work. Indeed, his knowledge of what had been put in place for the foundation degree meant he knew that there needed to be special arrangements to roster an employee on a day to attend training and to be paid for it as a normal shift. It was also suggested to us that he did not need to tell Ms Riley what he had done as there is an online booking system. Again, we reject that contention. We find the online booking system would send an email to the employee's line manager. We find that as she was off work, she was not aware of that email. We find the lack of response to him booking training on a non-working day was not a reasonable indication that it had been approved. We find the established practice is that approval for training is needed. If it fell outside a working day it would have to be approved in advance to be booked and paid. It was not. The reason for this relates to working time and scheduling but principally it is a question of budget. That is likely to be a significant consideration at any time but it was particularly so at this time as the respondent trust was subject to special measures scrutiny in respect of its financial circumstances. The ability for the managers to simply pay him an additional shift simply did not exist. Had Ms Riley been asked beforehand, she would either have had to change his shifts or refuse permission to book on that particular course.

4.45 On 22 July 2019 the claimant did in fact attend the mandatory safeguarding training. It was still a non-working day.

4.46 Around this time the claimant was also working additional bank shifts and it came to the Ms Logan's attention that he was working excessive hours, in one analysis this appeared to be around 70 hours over 10 consecutive days. A number of issues arose in Ms Logan's thinking. First and foremost, the department had modified its needs to provide a phased return to work only for the claimant then to immediately engage in back to back days of

working. We find the plan for return was to limit the bank shifts to no more than full time for 6 months. Ms Logan raised her concern with HR about this. She was concerned he had not followed the instruction about working and wanted to make it clear that he was not to exceed full time working. HR advised that she speak with Mr Mahbub and inform him that he could not continue doing this and to limit his work to 37.5 for the time being.

4.47 Ms Logan met with Mr Mahbub to tell him. This meeting was held in the context his continuing monitoring under stage 2 of the policy.

4.48 On 25 July 2019 the claimant sent an email to Mandy Logan raising further concerns. In summary, it challenged the decision to limit his working week to full time hours whilst he was in the scope of his recovery from the long-term sickness absence

4.49 We then need to deal with a discrete incident occurring on Ward 27. The claimant had previously spent much of his time on this ward as a health care assistant. He continued to work there both as a visiting Assistant Practitioner and also would undertake many of his bank shifts on that ward. We find each ward or clinical team tends to have their own staff room where belongings can be left, breaks and lunch taken and in which discussions may be held involving sensitive matters. We find the general convention across the trust was that each ward or team took their breaks in their own team's staff room.

4.50 The confusion in this case arises from a number of issues converging. First, there may be times when there is no real issue with a visiting clinician from outside the team taking a break in that area's staff room. That is particularly so if there was a meeting or, for example, a need for some other private discussion. The issue becomes problematic at lunchtime as these rooms are typically not large. We find the room on ward 27 was not really big enough for the ward staff themselves who might legitimately expect to be able to use it. Additionally, there is another convention whereby qualified staff tend to take their lunch in the proximity of the ward in case they are called upon. The idea was that practices should not develop which had the effect to encourage them to leave site or be away even though they of course were entitled to do so. Another complication is that a member of the bank staff working on that ward at the time would of course be classed as a member of that team and able to use the facilities. Mr Mahbub was such a person.

4.51 On 26 July 2019, the claimant was working on ward 27. At lunch time, he entered the ward staff room to eat his lunch but was stopped by the ward Sister, Sister Brown, and told that he could not eat his lunch in the Ward staff room. She raised it with Emma Jarret in the first instance, the person she understood to be Mr Mahbub's supervisor. Ms Jarret agreed and couldn't understand why he didn't take lunch with his colleagues in their own staff room where they could interact. She agreed to mention it to Mr Mahbub.

4.52 We find Mrs Brown was unaware of the claimant's letter to Ms Logan of 27 April 2019 nor was she aware of any material aspect of his work in the therapies department. In fact, she had next to no awareness of Ms Logan herself. We find the reason for the request was due to the physical space and conventions in place such that we find, on the balance of

probabilities, that the same approach would have happened with anyone in the same circumstances as the claimant but who was not of an Asian Bangladeshi ethnic origin. The claimant compares his treatment to “any other person working on ward 27” but we are satisfied that the application of the practice distinguishes between those employed on ward 27 (or as the case may be) and those practitioners visiting that ward. It applies the other way around in that ward staff would generally not be permitted to take their breaks in the staff room of another department.

4.53 During the later meeting when this was discussed he was encouraged to join his own therapy colleagues for lunch in his own staff room not least because it was important to get to know them. We find David Lascelles agreed with the respondent’s assessment about Sister Browns decision. He did not think it was discriminatory.

4.54 Mr Mahbub sought to demonstrate comparisons with others whom he felt were in similar situation. We did not accept that they were in comparable situation being either in different circumstances or simply taking their lunch at their desk as opposed to attempting to use the ward staff room.

4.55 Moving on in the chronology, in respect of the mandatory training on a non-working day, we find Mr Mahbub attempted to alter his roster himself in order to be able to claim a shift payment. He was unable to do so on the system which we find reinforced the expectation that approval or authorisation is obtained from a manager with authority to alter the roster. The consequence was that he was not able to claim payment.

4.56 On 07 August 2019, he raised a complaint. On 08 August 2019 Mandy Logan and the claimant met regarding the various matters raised over previous weeks of concern to both parties, again it was under the auspices of the ongoing stage 2 review meetings. The issues discussed also included his level of bank shift working, his foundation degree, his annual leave and being denied permission to take his lunch on Ward 27 as well as the complaint from the previous day about not being able to get paid for attending the training session.

4.57 Ms Logan was concerned that the claimant was misinterpreting things and not following what instructions were being communicated. He was instructed not to seek views of other members of staff but to raise any issues or questions he had with Mandy Logan or Andrea Reilly. We find the issue being raised here was in respect of what appeared to be confusion on his part about what is being communicated. The responsibility for communication lies with the managers and it appeared Mr Mahbub may have been taking his lead from what others said and not his managers’ instructions which had only resulted in scope for misunderstanding. This instruction seems to be a step that might reasonably be taken in this situation to avoid future misunderstandings.

4.58 In respect of the training day, Mr Mahbub was advised by Katherine Hill from HR that he could not claim additional hours for attending the training session on a non-working day because he had not obtained prior permission. This was another matter in respect of which Mr Lascelles agreed with the employer.

4.59 In the weeks that followed, matters then became far more serious. There had by now been a number of decisions and instructions communicated to the claimant and there was concern he was not acting on them or going behind them. As we have said, some were minor in them self. However, we have to accept that there was now evidence before the employer showing that he had not only blatantly ignored what he had been told, but his actions now touched on being dishonest. The first was in respect of the total hours worked and his managers were again concerned that Mr Mahbub continued to work a large number of bank shifts. Secondly, and more significantly, it came to Ms Logan's attention that after Mr Mahbub had been told that he could not claim pay for attending training on the non-working day, the claimant had in fact made a claim for payment through his bank contract. Initially, it was not clear when the claim had been made and it seems he was given the benefit of the doubt that he may have made the claim before he was told it would not be paid because it had not been authorised. On further enquiries being made the situation got worse. The claim had in fact been made the day after he had been told he would not be paid for it. Moreover, such claims would normally be made electronically. The fact he made this particular claim on a paper form gave even greater concern to Ms Logan that this was dishonest and an attempt for it to be hidden from her.

4.60 Ms Riley met with Helen Clark, the Bank Office Manager, on 27 August 2019 and she confirmed that the 22 July 2019 bank shift for mandatory training had been added without authority and that the claimant would not be entitled to payment in any event as the mandatory training had to be completed in the employee's substantive role, not their bank role. Their concern was such that they referred the matter to the respondent's Fraud Advice Officer, albeit no action was subsequently taken due to the sums involved and they were advised to deal with it as a management issue.

4.61 On 29 August 2019, Mandy Logan met with the claimant regarding his claim for payment for the mandatory training through the bank contract. Subsequent HR advice led to consideration begin given to a disciplinary case. We are satisfied that there was a clear basis on which this issue had to be referred and that was the sole motivating factor driving the managers involved. Subsequent correspondence between the parties showed the question of whether he "had been accused of fraud" proved emotive, notwithstanding the referral to the fraud advice officer. On balance it seems to be more of a dispute about whether the word 'fraud' was used, as opposed to the underlying contention he had deliberately attempted to obtain payment against the instruction he was not entitled to it.

4.62 We find the decision to refer the matter for further investigation was made immediately and in fact we accept the "ball was rolling", as it was put in evidence, from 27 August 2019. We record that this course of action was settled by then not only because it goes to the reason for the action, but the timing in relation to the alleged protected acts.

4.63 Mr Mahbub's second alleged protected act does not happen for another 3 weeks on 19 September 2019. Clearly, an earlier event cannot be caused by a later event. The claimant seeks to overcome this in this way. He says that he had emailed HR with his *intention* to raise

a grievance and goes on to assert the respondent's defence is misleading insofar as it suggest that he had not raised a formal grievance until after getting the disciplinary investigation letter. The email concerned was dated 30 August 2019. It said : -

> ***I would like to raise a formal grievance. Can you please inform me how I can do this. I have given many opportunities for Mandy to resolve ongoing issues at work but instead of resolving these, more is being added. I have been falsely accused of fraud when in fact it's the other way round. When I came into work on my non working day to complete mandatory training I thought I would either receive payment or I would get time back in lieu. I thought I was doing the department a Favour by not disrupting the Rota. But because I did not discuss this with my manager prior to attending the mandatory training I was denied the payment or time back in lieu. The fair agreement would have been we can't pay you as this was not agreed but we can give you time back in lieu, in future please discuss before you book. As I have two contracts with the trust I then approached bank office to see if they could pay as this mandatory training is also required on my bank contract. they asked me to complete form and return to them which I did. They had the chance to either accept or decline. They authorised the payment and I got payment. I did not force anyone to pay me. However, Mandy has accused me of fraud. If I had obtained time back in my substantive role and payment from bank office this would be fraud or if I had obtained payment from both that would be fraud, however I did not do this. I am fed up of having to explain myself and being treated unfairly. Please can you advise how to raise formal grievance.***

4.64 We can express two observations about the facts in this email. First, we accept that it is indeed an email expressing an intention to raise a grievance as the claimant says. However, it says nothing which could be construed as a protected act, nor is it relied on as a protected act. Secondly, within the body of the email it refers to being falsely accused of fraud. In substance, that is broadly what the disciplinary allegation was and it is therefore consistent on its face with the fact that the disciplinary matter was in train before the grievance.

4.65 On 18 September 2019, the formal terms of reference were drawn up by Dawn Daly for a disciplinary investigation into the claimant's conduct. On 19 September the claimant was informed that this would be investigated. The claimant's grievance proper was filed later that night and was addressed to Paula Broomhead, Ms Logan's manager. We find It is a lengthy document but it makes clear in the opening paragraph that: -

> ***"I believe I am being discriminated against, based on my health (disability) and my race by Mandy and other senior staff. "***

4.66 Concerns with the claimant's bank work continued. On 24 September 2019, Ms Riley met with the claimant to discuss his practice of booking bank shifts that commenced immediately after his substantive shift finished. Meaning there was no break and no time to get from one role to another or even to change uniform. We accept Ms Riley explained that she had concerns that this was not appropriate or healthy for the claimant and that he should make time between the roles. We find the claimant was upset about her interventions. We find these were entirely reasonable in the circumstances, that they related to genuine operational considerations and concern for his own well-being and that they would have arisen with any employee and we can detect no connection to the claimant's race. We find

the claimant in fact reflected on this and modified his practice in respect of shift starts, giving himself at least 15 minutes to changeover.

4.67 In early October, the bank shift records show the claimant was once again exceeding his full-time hours.

4.68 On 15 October 2019, Mr Mahbub was asked to provide a statement and was invited to a disciplinary investigation meeting. This was held on 19 October and chaired by Mandy Logan and again on 31 October 2019.

4.69 From 7 November 2019, the claimant went off sick and has remained off sick since.

4.70 In the main, that point marks the end of the events on which we need to reach principal findings of fact to determine the claims. It is clear that the claimant was by then resolved to present a claim to the employment tribunal. He had engaged with ACAS early conciliation on 11 October 2019 and was issued with the certification on 11 November. The ET1 followed on 4 December 2019. The claim was stayed whilst the various ongoing internal procedures and appeals were concluded. These internal matters do not give rise to any claims before us but because they contain statements of the material events in question, they have had some limited relevance to our assessment of witnesses and their evidence. They are relevant also because for a period Ms Logan found herself facing disciplinary investigation.

4.71 There is then a year's worth of evidence drawn from those internal investigations before us. A great deal of this has been relied on by the claimant. That presents a significant issue for us to weigh the content. In summary, this takes on a secondary role in our assessment of the evidence and we have given it little weight for the following reasons. First, we are not bound to agree with the internal conclusions. Secondly, much is drawn from individuals we have not heard from in evidence. Thirdly, there are issue with the notes taken that cause us serious concern about how much we can rely on them for their accuracy. Fourthly, they amount to multiple hearsay. That is one absent witness's notes on what they interpreted another absent witness may or may not have said and meant at the time. Fifthly, in some cases we can identify inconsistency in the evidence relied on. Sixthly, we are concerned with the way that some questions were put and the witnesses led on specific issues. Often the foundation or premise of a question was assumed and not explored. Finally, even putting all that to one side, the evidence is sometimes uncertain in that, even taking it at face value, it suggests the witness is not clear of their recollection.

4.72 Overall, the value of this second episode is this. It sets out the full chronology. It has offered some opportunity to test consistency and credibility of some of the witnesses we have actually heard from. Beyond that, the content, so far as the truth of what is said is relied on to advance or defend the claim, is secondary to the first-hand primary evidence we have heard.

4.73 For completeness, we can summarise the remaining events briefly.

4.74 The claimant's grievance process began with an initial discussion on 17 January 2020. His ongoing long-term sickness management continued in parallel. His first grievance hearing took place on 28 February 2020 after which the investigator interviewed a number of witnesses. The grievance investigation report was concluded on 7 April 2020 followed by a review meeting on 5 May 2020 between Nicola Hellewell, Jennie Mien and Karen Fanthorpe. Karen Fanthorpe prepared the grievance feedback report which was shared with the claimant on 26 May 2020 the outcome of which he did not accept. The claimant raised a number of comments before appealing the outcome on 28 May 2020. The investigation that was by then concluded was then re-opended and the terms of reference extended on 18 July 2020, principally in respect of the allegation that Ms Logan had used the phrase "usually people from your community have more than one job". Further investigations took place on 21 July when David Lascelles and Amy Davies were interviewed and Andrew Riley reinterviewed. The claimant was also re-interviewed.

4.75 On 31 July 2020 an addendum to the investigation report was produced by Jennie Mein. This made new recommendations that there should be a disciplinary investigation into whether she had said those comments.

4.76 By 25 August 2020, Anthony Rosevear had taken over from Ms Fanthorpe. He met with Ms Logan on 13 September 2020 and the further investigation was initiated. On 05 October 2020 she was notified of the formal disciplinary investigation to be held and Mr Mahbub was updated. The process continued through October and November. Ms Logan set out her position in response in some detail. On 2 December 2020, Nicola Glen published her summary investigation report. She analysed all the evidence available focussing on the circumstances of the alleged comments and concluded on balance that they had not been spoken by Ms Logan. On 04 December 2020, Mr Rosevear gave Ms Logan his decision. It was that he was satisfied on balance that the comment had not been made and he brought the disciplinary proceedings against her to a close.

4.77 On or around 21 January 2021 the claimant was updated on both his grievance and the disciplinary matter still pending against him. We understand that remains outstanding.

4.78 Finally, we must return to our own findings of fact on whether those words were spoken by Ms Logan at that meeting on 1 April 2019. That is the crucial factor in this case in determining whether adverse inferences can properly be drawn on the motivation for the later events. The principal evidence we have is from some of those present. Mr Mahbub says it was said. Ms Logan and Ms Riley say it was not said. Mr Lascelles is not clear. We have not heard from the other person present, Miss Amy Davies who took the notes but can see that her notes do not record this being said, although we accept that her notes are extremely brief in all respects and also said to be inaccurate in a number of ways. We also have the contemporaneous complaint raised by Mr Mahbub about Ms Logan's conduct of that meeting and the subsequent exchanges accepting how it was conducted.

4.79 Those are our primary sources of evidence. We place little weight on the multiple hearsay evidence found in the internal investigation for the numerous reasons we have already stated.

4.80 We do not accept that when exploring secondary employment, that Mandy logan said "most people from your community have two jobs". We reject the claimant's case after weighing the following factors: -

a) the issue of secondary employment was a legitimate one to raise as a result of both the checklist for the review meeting and the fact that the claimant's personal record showed he had previously worked in a restaurant. To that extent it provides the context for the topic being raised.

b) The claimant's contemporaneous complaints are not consistent in the reason for his complaint as between "two jobs" or the nature of it being in a "restaurant". It is the question about 2 jobs we find was the reason for his dissatisfaction.

c) He was represented by a trade union official who says in evidence he would have intervened if a discriminatory comment was made but did not. His notes do not record the alleged comments at all. We were not able to place any confidence in his evidence which was without focus and his answers easily distracted to irrelevant considerations. It is fair to say he is white and may not appreciate some more subtle implications that might be drawn from comments, but he is also a local trade union official with some experience and training in these issues. We did not accept that what level of upset Mr Lascelles was later able to appreciate could be severed from the mere fact of him being in the stage 2 process again. We also note that a great deal of what Mr Lascelles understood about the events was informed by later discussions about how Mr Mahbub found them. That process inevitably overlaps with how the alleged comment was restated in later discussions. As a result, the most we can take away from this witness is that he neither witnessed nor recorded anything now said to be harassment.

d) Above all else, the most significant piece of contemporaneous evidence we have is the claimant's letter of 27 April 2019, written soon after the meeting. It was also written with the benefit of the notes of that meeting from Amy Davis. This is a considered and detailed complaint setting out the various exchanges during the meeting. It explicitly takes issue with being questioned about secondary employment. What he says is of particular significance for two reasons. First, he does not allege that Ms Logan said what he now alleges. The second is that he poses it as a rhetorical question to challenge the reason why she was asking him about second employment. An omission might, in isolation, leave the door open for it to be alleged later but posing the rhetorical question is not only positively supportive of the issue having been raised only in the way described by Ms Logan consistent with the checklist, but we find undermines it being said in the way now suggested.

e) There is then the response to that question sent by Ms Logan in May. She sets out her position. It is in generally friendly tone and contains apologies where appropriate in response to his feelings generally. It is understandable that it does not explicitly address the rhetorical question. The significance of this is that it was discussed in the June absence review meeting and we find the response was accepted. We doubt events could have unfolded in that way if such a comment had been made.

f) We have rejected Mr Mahbub's explanation for his silence on this issue. It was said that he was just focusing on getting back to work and didn't want to, or was advised not to, make an issue of it. We reject that. Firstly, he was making an issue of the exchange in the 27 April email and we have not been given any reason why certain matters warranted forceful challenge and others not. Secondly, by the time we get to the formal grievance, there is no longer any sense of not rocking the boat. The formal grievance of 19 September explicitly mentions the 1 April meeting and sets out Mr Mahbub's position in respect of being questioned about alternative employment. On that subject it simply says: -

> ***During the sickness review meeting on the 15th April 2019 I was treated like a criminal by Mandy I was questioned about having other jobs outside of the trust, with no evidence against me.***

We have no explanation why this further statement of the events did not include the comments now alleged.

4.81 When this grievance came to be formally investigated, the issue was explored by the external HR consultant in February 2020. The claimant's response to that initial investigation does not support the allegation. Mr Mahbub is recorded as saying: -

> ***She treated me like a criminal asking if I had another job working in a restaurant. Why specifically indicating I have second job in a restaurant? She said she found in my folder. I asked why ask me about a previous job, when my file mentions it was previous work approx. 9 years ago, on file other previous work was there like factory/retail at but Mandy decided to use restaurant, <u>implying</u> I work in a restaurant in the evening like people in our community.***

4.82 David Lascelles then added: -

> ***She <u>made out</u> everyone that comes from your community has more than one job but working in a hospital you have less of a need for that.***

4.83 The underlining is our emphasis of the way these complaints were advanced to the investigator at this stage. The fact both referred to "implying" or "making out" the state of affairs reinforces our conclusion that this was their impression of the reason for the questions being asked, rather than the actual alleged words or statement being made.

5. The Allegations of Direct Discrimination

5.1 Section 13 of the 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.***

5.2 By that provision, we are required to identify the reason why the treatment complained of occurred. That is the crucial question in cases of direct discrimination (**Nagarajan v London Regional Transport [1999] IRLR 572 HL**) and if we are able to, we will seek to make an explicit finding of the reason why it occurred. (**Amnesty International v Ahmed [2009] IRLR 884 EAT**). In this regard, the "because of" and "less favourable" questions are not always apt for separate consideration, particularly where the comparator is hypothetical.

5.3 Where the reason why is not readily apparent, we will turn to s.136 of the Act which provides: -

> ***(2) if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.***
> ***(3) But subsection (2) does not apply if A shows that A did not contravene the provision.***

5.4 We considered **Madarassy v Nomura International PLC [2007] IRLR 246** as authority for the proposition that the burden does not shift by proving a difference in treatment and difference in characteristic alone, something more is required; and **Bahl v The Law Society and others [2004] IRLR 799** for the proposition that unreasonable treatment in itself is not a basis for inferring discrimination.

5.5 Against that direction, we consider each of the allegations of direct discrimination as set out in the list of issues. Something potentially applicable to most if not all allegations is the question of whether we draw any adverse inferences from any of the primary facts. There are two matters that have potential for that to happen. The most significant is the allegation that Ms Logan disclosed some stereotypical and presumptive state of mind about Asian men during the meeting on 1 April. We have rejected that as a fact. The other is her addressing him incorrectly, albeit in friendly and welcoming tones, soon after he started. We are not satisfied anything in that could give proper basis to draw adverse inferences. That necessarily limits the scope for the claimant proving facts from which we could conclude his race was a material factor operating on the decision.

a. On 26 July 2019 in the claimant being told by Sister Brown that he could not eat his lunch in the Ward 27 staff room when compared with "any other person working on ward 27".

5.6 We have some doubt whether the circumstances of the request to use his own team's staff room could be said to be of such a gravity that it is capable of amounting to a detriment. An unjustified sense of grievance will not be sufficient. However, the threshold is otherwise low. The claimant had used the staff room in his capacity as both an HCA and as an Assistant Practitioner. We are just about satisfied being told he could not use the room on that occasion was enough to amount to a detriment.

5.7 The key question is why and, more particularly, was it in anyway because of his race? We are satisfied that the reason was in no way whatsoever because of the claimant's race. There is nothing from which we could draw any inferences that race was a factor affecting

Sister Brown's decision making. She was not aware of any of the matters alleged against Ms Logan. There was a positive history between the claimant and Sister Brown from his previous employment. None of the matters that have been argued as a basis to draw adverse inferences have any application to Sister Brown. There is no collusion between Ms Logan and Sister Brown. In fact, there was next to no awareness of each other. At the other extreme, we have a picture in the evidence of the claimant's long standing working relationship on ward 27 with the staff on that ward and no suggestion of any issues arising. The sole operative reason was, as we found, the relatively small size of the room and the convention of taking lunch breaks in one's own team's staff room. It is a convention we find is sufficiently well established to remove any concerns that it was a false justification for some ulterior motivation. We have not been shown evidence of an actual comparator in materially similar circumstances who was treated more favourably, and we are satisfied any hypothetical analysis would arrive at the same treatment. This allegation must fail.

b. In denying the claimant access to functional skills training when compared with "all staff".

5.8 Firstly, we are satisfied this allegation as it is put fails as a fact. The claimant was not denied functional skills training, the course was directly linked to his foundation degree and both were simply deferred to be undertaken when it was resumed the following year.

5.9 Secondly, we record here that by application of s.212 and the definition of detriment, we have considered this allegation first as an allegation of harassment as it is alleged to amount to both. We consider it here as an allegation of direct discrimination in the alternative only because that, and the equivalent claim of victimisation, has failed (see below).

5.10 We are satisfied the treatment was not in any way because of his race. The decision flows directly from his ill health sickness absence over a number of months and his return to work at a time when he had missed half of the course and it was simply not realistic to expect him, or anyone in his situation, to be able to pick up the course after having missed so much of it. The fact that there was no question on the employer's part about re-enrolling the claimant on the course for the following year in itself is an indication that there was no view held that his employment would not be continuing into the following year. We considered what evidence there was of a comparator and rejected that there had been less favourable treatment as in that case as there were material differences in the comparator identified, particularly in relation to the period of absence relative to the studies and the likelihood of her ability to resume the studies successfully. There are no other factors in the evidence that have been suggested would play into how we might construct a hypothetical comparator. However, the actual comparator, although not in materially similar circumstances, does still form part of the evidential landscape from which we construct and assess any hypothetical comparison. We are equally satisfied that any hypothetical comparator in materially similar circumstances would have been treated in exactly the same manner as the material consideration was the time lost and ability to successfully complete the course in the remaining time.

c. In being instructed by Mandy Logan not to speak with other members of staff and only to raise concerns with Mandy Logan and Andrea Reilly when compared with "all other employees".

5.11 In broad terms, we have found that there was a discussion in which an instruction along these lines was made. We have set out in our findings of fact the context of this which flow directly from a concern Mr Mahbub was either not understanding instructions, seeking the answer he preferred or the like. It was not an unreasonable topic of discussion in the circumstances to direct him to explore any matters on which he had any questions with the managers concerned. There was legitimate concern that he was unnecessarily involving others leading to confusion and Ms Logan had a legitimate interest in him getting a clear and consistent message. That is the reason for this topic of discussion. We can see nothing in it which is inherently related to race. There is nothing from which we could conclude race was a material factor. There is no actual comparator in this allegation. Any analysis of the treatment against a proper hypothetical comparator not of Asian origin would have to include those same background concerns such that we cannot conceive the approach being any different.

5.12 We are therefore not satisfied that the claimant has established less favourable treatment still less that race played any part in the treatment.

6. The Allegations of Harassment

6.1 Section 26 of the Act provides: -

> ***(1) A person (A) harasses another (B) if-***
> ***(a)A engages in unwanted conduct related to a relevant protected characteristic, and***
> ***(b)The conduct has the purpose or effect of-***
> ***(i)violating B's dignity, or***
> ***(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.***
> ***(2)…***
> ***(3)…***
> ***(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account-***
> ***(a)The perception of B;***
> ***(b)The other circumstances of the case;***
> ***(c)Whether it is reasonable for the conduct to have that effect.***

6.2 We are required to consider separately the discrete elements of this provision, namely whether any conduct found to have taken place was unwanted, had the proscribed purpose or effect and was related to the relevant protected characteristic (**Richmond Pharmacology v Dhaliwal [2009] IRLR 336**). The **Richmond** case is also particularly relevant to the threshold test of when conduct amounts to harassment, Underhill P (as he then was) said at para 22: -

> ***"We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was***

> ***unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."***

6.3 Whilst that passage focused on the violation of dignity as one proscribed purpose or effect within s.26(1)(b)(i), the essence of a threshold test applies similarly to the nature of the other prohibited purposes or effects listed in s.26(1)(b)(ii) and that threshold is regulated by the concept of the reasonableness of the conduct having the prohibited effect as set out in in s.26(4)(c). As the Court of Appeal stated in **Grant v HM Land Registry & Another [2011] IRLR 748**, the significance of the words in that section must not be cheapened.

6.4 At paragraph 11, Elias LJ observed how under what is now s.26 of the 2010 Act: -

> ***there is harassment either if the purpose of the conduct is to create the circumstances envisaged in (a) or (b), or if that is the effect of the conduct, even though not intended. Where it is the purpose, such as where there is a campaign of unpleasant conduct designed to humiliate the claimant on the proscribed ground, it does not matter whether that purpose is achieved or not. Where harassment results from the effect of the conduct, that effect must actually be achieved. However, the question whether conduct has had that adverse effect is an objective one - it must reasonably be considered to have that effect - although the victim's perception of the effect is a relevant factor for the tribunal to consider as sub-regulation 2 makes clear.***

6.5 And at para 47, when dealing with the words used to define the proscribed effect of the unwanted conduct, he said: -

> ***They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.***

6.6 We consider each of the allegations in turn.

a. On 12 March 2019, Mandy Logan calling the claimant on the day of his admission to hospital for surgery to inform the claimant that he was progressing to stage 2 of sickness monitoring.

6.7 On our findings of fact, we are satisfied that Ms Logan did in fact telephone the claimant on this date to inform him of the issues relating to stage 2 and the consequential referral to occupational health.

6.8 We can detect nothing in the circumstances of that conduct which could be said to relate to the protected characteristic of race. That is so whether we consider the subject matter or the timing of the conversation. We accept, however, that the causal test of "related to" can be found in less tangible circumstances than explicit references or overt hostility. It can arise in more subtle ways or in circumstances where the conduct in question only arises because of a state of affairs within the dynamic existing between the individuals concerned. In this case there is still nothing to assist the claimant in this claim. There is nothing to evidence the necessary context or state of affairs from which the conduct could be related to race. This is not a claim of direct discrimination and we are conscious not to inadvertently turn it into

one. However, the forensic tool of comparison provides some assistance if only to the extent that we are satisfied anyone in the claimant's circumstances would have been contacted by their manager at some point to inform them of the situation just as the claimant was.

6.9 It follows that we are not satisfied the conduct was related to race and we are equally satisfied it was not done with the purpose of creating the proscribed consequences.

6.10 We have been unable to find as a fact that this contact violated his dignity or as a fact caused the necessary proscribed environment. If, contrary to our findings that was in fact the case, we are nonetheless satisfied that it is not reasonable in these circumstances for it to have that effect.

6.11 For those reasons this allegation must fail.

b. On 1 April 2019 during the sickness review meeting Mandy Logan asking inappropriate questions surrounding the claimant having secondary employment in a restaurant and an alleged comment that "most people from your community have two jobs".

6.12 We have rejected the conduct alleged. We have found what caused the offence was the topic of questioning about secondary employment in a restaurant. That is not in itself related to race. It is a claim based on the premise that the questioner was asking their questions arising from their stereotypical assumption about members of the claimant's race generally. As a premise for a claim of harassment, it is clearly one which could engage the "related to" causal link. However, it is one we have rejected as a fact. Without that, there is nothing to support it.

6.13 The conduct that did happen may have nonetheless been unwanted in any event. However, absent the finding of fact necessary for this allegation to succeed, we can also say that the topic flowed directly from the checklist applied to all in materially similar circumstances. Again, we make clear that we do not seek to apply a comparative test to harassment as we would in claims direct discrimination but, as a forensic tool, it illustrates the surrounding circumstances which operated on the situation and explains why the conduct was neither because of nor related to race.

6.14 There was therefore an entirely legitimate and non-discriminatory reason for engaging in the topic. We therefore have to conclude it was not done with the purpose of causing the proscribed consequences. The offence taken by Mr Mahbub in this exchange flows from his own presumption which appears in the rhetorical question he posed and not the actions of Ms Logan. To the extent that the effects were in fact experienced, it is not reasonable that the conduct that actually happened should have that effect.

6.15 For those reasons this allegation must fail.

c. On 1 April 2019 during the sickness review meeting in Mandy Logan questioning the claimant regarding a medical procedure from two years prior to the meeting involving administering "Botox in his back passage" and then Mandy Logan saying "10 days for that".

6.16 We have reached findings that support, in broad terms, this topic of conversation taking place in broadly the terms alleged. It is, again, no doubt unwanted conduct but the nature of that derives from the scrutiny of his past medical conditions and absences from work in circumstances that one can readily appreciate might be embarrassing. It is impossible to see, however, in what way this conversation could be said to be related to race. There is nothing inherently related to race in the topics discussed or words spoken. Mr Mahbub has not established any evidence of the surrounding circumstances by which this could be related to race in any round-about way.

6.17 For those reasons this allegation must fail.

d. Mandy Logan being negative about the claimant's return and her view that the claimant would not make a full recovery, allegedly without reference to any medical evidence.

6.18 We have found some concerns were expressed about the claimant's condition relative to the role he undertook. We do not characterise them as anything more than the basis on which there was legitimate concern on Ms Logan's part and the subsequent referrals made.

6.19 We have some concerns whether this could be unwanted conduct as it was in part these concerns which led to the occupational health reports and the implementation of the return to work plan. It is a positive step before any decision affecting an employee's employment for better or worse, is then taken. However, to the extent it is unwanted conduct it is not related to race. We repeat our previous observations on the absence of any evidence that explicitly or by any form of inference of indirect route, can establish the necessary causal link that this conduct was related to race. It has neither the purpose nor was it reasonable that it had the effect of any proscribed consequences even if they were in fact felt.

6.20 For those reasons this allegation must fail.

e. Denying the claimant access to Functional Skills Training.

6.21 As it has been pleaded, the conduct did not arise. The claimant was not denied functional skills training, the course was directly linked to his foundation degree and both were deferred to be undertaken when it was scheduled to be repeated the following year.

6.22 To the extent that 'denying' can be read to mean 'delaying', that was no doubt unwanted but there is nothing in that conduct which could be said to be related to race. We have no doubt Mr Mahbub was disappointed in that decision although, on reflection, he might have agreed that deferring to the *full* following year was a better option than potentially failing the course in that remaining half year. However, we are not satisfied that disappointment can be elevated to the necessary proscribed consequences on the environment or to violate his dignity so as to amount to harassment. To the extent that his case was premised on the fact that it did have that effect, we are satisfied it is unreasonable to have that effect.

6.23 For those reasons this allegation must fail.

f. Denying the claimant payment of time off in lieu of a mandatory training course which the claimant had attended on a non-working day.

g. During a sickness review meeting, Mandy Logan accusing the claimant of asking Nina Scott (Secretary) to increase his annual leave entitlement.

h. During a sickness review meeting, Mandy Logan accusing the claimant of contacting Anne Bontoft to book onto the foundation degree without prior approval.

6.24 We have grouped the remaining allegations of harassment as the conduct alleged occurs. The conduct was no doubt unwanted by the claimant. However, as has arisen throughout the discrete harassment allegations, there is nothing inherent in the conduct itself from which it could properly be said the conduct was related to race. If it is to satisfy the causal test of related to, something less overt must be found to establish that causal link. We have seen nothing in the evidence which provides the basis for such a conclusion. All of the conduct in question occurs within a context from which the reasoning can be understood, particularly the growing concern that Mr Mahbub was not listening or following the instructions of his managers and whilst that logically does not preclude the possibility the conduct was otherwise related to race in some way, it presents a further requirement for the claimant to establish what that link is to make out a prima facie case. We are not satisfied any link to race can be made out and these claims must fail also.

7. The Allegations of victimisation

7.1 Section 27 of the Act provides: -

> ***(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 allegations, is not a protected act if the evidence or information given, or the allegation is made, in bad faith.***

7.2 In lay terms, this form of prohibited conduct can be reduced to three parts. An act by the employee which is capable of amounting to a protected act; a subsequent act by the employer amounting to a detriment and a causal link between the two. In other words, that the reason why Mr Mahbub was subjected to the detriment was because he had done the protected act (or that it was believed Mr Mahbub had done, or may do a protected act). The protected act need only be part of the reason why the detriment is imposed, all that matters is that it has some material causal link.

Protected Act

7.3 The two protected acts are agreed. The correspondence was made as a fact and whilst they each contain a wide range of complaints, they do both reference discrimination as a reason. The 27 April 2019 correspondence refers to discrimination in relation to health. It does not matter for the purposes of a claim of victimisation that the disability claim is no longer maintained.

7.4 The grievance of 19 September 2019 sets out his complaints in detail. He does so against an opening paragraph in which he makes clear he is alleging discrimination based on two protected characteristics under the Act, namely disability and race. It does not matter if he is wrong in his belief. It does not matter if he is very wrong. His mistake only engages to prevent the complaint amounting to a protected act if the circumstances of the error go to establish that it was in fact made in bad faith. In this case we do not take the view that the claimant's mistaken view of the situation can properly amount to bad faith, and this is not argued in any event.

7.5 We then turn to the three detriments said to have been suffered by Mr Mahbub as a result of this protected act.

a. The commencement on 19 September 2019 of a disciplinary investigation into alleged fraudulent claiming of time during which the claimant attended a mandatory training course out of the working hours of his main role.

7.6 We dismiss this part of the claim.

7.7 First, the premise of the allegation is not consistent with the surrounding facts which show to us beyond doubt that the issue leading to the disciplinary investigation was started long before the claimant did his protected act on 19 September 2019. Clearly a later event cannot influence and earlier event. Nevertheless, we have gone on to examine two further aspects of this part of the claim.

7.8 The first of which is the "intimated grievance" argument. Mr Mahbub did email seeking guidance on the grievance he intended to submit. He did this on 30 August. Two issues arise in the application of section 27. First, a document intimating a grievance to be lodged in the future is not sufficient to attract the protection of section 27 unless the intimation itself can be said to be a protected act. We are not satisfied it is and it is not suggested to be so. Secondly, even if it does not itself amount to a protected act, it could be relevant if by intimating such a grievance leads an employer to believe that the employee *may do a protected act*. We do not accept that is the case here. The employer had embarked on the path towards the disciplinary investigation before the correspondence intimating a future grievance and we are satisfied the issues arising from the claim for payment through his bank work in the face of the decision he could not claim for it was the operative reason for that decision. The age of the other protected act on 27 April 2019 and subsequent history reinforces our conclusion and does not support the claimant's contention. That was not understood to be a protected act, it was apparently resolved to everyone's satisfaction at the time, and it is so far back in the chronology and its subject matter so remote to the issues now

in hand that we are rule it out as having any material effect on the employer's decision making.

7.9 Secondly, we acknowledge that whilst later events cannot logically be the original *cause* of an earlier event, they can still influence the path that that earlier event takes afterwards as it unfolds. For example, it might be the case that an original concern would have been resolved in a certain manner until a protected act is then done, following which it then takes on a more serious path. The claimant does not put his case in this way but as a litigant in person, we take the view we should consider it. Unfortunately for Mr Mahbub, having considered this we reject it.

7.10 The reason we are satisfied that this was the path the case was taken in part flows from Mr Mahbub's own evidence of how Ms Logan responded to the matter. We have evidence of the terms of reference being drawn up before the protected act and, on any measure, we are satisfied this was potentially a very serious matter which renders it entirely reasonable and expected that disciplinary action would be likely to follow. That is the reason why it follows, not the protected act and not any belief that he was about to do a protected act. To analyse it another way, if we strip out the protected act, we are entirely satisfied the same path would have been taken such that we can say with confidence the protected act played no part whatsoever in the mental processes and decision making.

7.11 This part of the claim is dismissed accordingly.

b. The claimant allegedly being denied the opportunity to undertake functional Skills Training.

7.12 This allegation has featured as under all three forms of prohibited conduct. We reject this part of the claim for similar reasons as we have already, albeit analysed through the prism of section 27.

7.13 First, as a matter of fact we are not satisfied that the claimant was denied the opportunity to undertake functional skills training. It is a fact that it was always intended he would be able to undertake the functional skills training alongside the foundation degree when that re-started the following January.

7.14 Secondly, and in any event, it fails on the causation point for two further reasons. The first is that this is said to occur before the September protected act. We have been unable to establish any connection between the earlier correspondence of 27 April and the matter of functional training or any change to the training requirements. We are satisfied that the reason for the steps that were taken all formed part of the phased return to work in an attempt to return the claimant to full functionality against a background where he had missed the first half of a one-year course. The fact that these were reasonable steps to take and with clear and sound basis only reinforces that conclusion.

7.15 This part of the claim is dismissed accordingly.

c. The claimant being denied the ability to take his lunch in the Ward 27 staff room on 26 July 2019.

7.16 This part of the claim has to be dismissed. The decision maker to whom discriminatory motivation has to be fixed for it to succeed is Sister Brown. It occurs before the second protected act and must therefore rely solely on the first. There was no evidence to support a contention that Sister Brown was in anyway aware of the claimant's correspondence of 27 April 2019, and we found as a fact that she was not. If she did not know of it, it cannot have had any material bearing on her decision making.

8. Time limits

8.1 Because of the conclusions we have reached on the substance of the claims, it is both practically unnecessary and somewhat artificial for us to determine the jurisdiction point in order to dispose of the claims. However, it is technically a live issue and we have heard some submissions on it. As such we deal with it briefly.

8.2 In order for two or more events to form part of an act extending over a period, there must be some discriminatory state of affairs which links them. In this case that is said to be the continuing involvement of Ms Logan. We have found that she was not involved in all claims, particularly those levelled at Sister Brown's actions, but the only matters which are potentially out of time relate to the actions of Ms Logan on 12 March and 1 April 2019. All other allegations were in time. For any two events to form part of a discriminatory act extending over a period, the later act must be both in time and made out. Where the later acts are not made out, their presence as mere allegations in the claim does nothing to bring the earlier matters in time. In this case, there is a degree of circularity in dealing with continuing acts as the result of our conclusions on the substance means there is nothing in time for any earlier events to rely on and, indeed, those earlier claims have also failed. However, as our conclusions stand, the allegations arising on 12 March and 1 April 2019 are strictly out of time and we do not have jurisdiction to determine them.

EMPLOYMENT JUDGE R Clark

DATE 3 September 2021

APPENDIX

AGREED LIST OF ISSUES

INTRODUCTION

1. The claimant presents claims on grounds of:

a. Direct discrimination because of race contrary to s.13 of the Equality Act 2010;
b. Harassment related to race contrary to s.26 of the Equality Act 2010; and
c. Victimisation contrary to s.27 of the Equality Act 2010.

TIME LIMITS

2. Are the following alleged acts of discrimination presented outside of the three month time limit imposed by the Tribunal for the presentation of discrimination claims:

a. The telephone call on 12 March 2019 between the claimant and Mandy Logan; and/or
b. The events of the claimant's sickness absence review meeting on 1 April 2019?

3. If they are presented out of time, are they permitted to proceed because they form part of a continuing course of conduct which ends with an act which is presented within the correct limitation period?

4. ~~If not, would it be just and equitable to extend time to allow them to proceed?~~

DIRECT DISCRIMINATION

5. Did the respondent treat the claimant less favourably than it did or would treat others in not materially different circumstances in any of the following alleged acts/omissions:

a. On 26 July 2019 in the claimant being told by Sister Brown that he could not eat his lunch in the Ward 27 staff room when compared with "any other person working on ward 27";
b. In denying the claimant access to functional skills training when compared with "all staff"; and
c. In being instructed by Mandy Logan not to speak with other members of staff and only to raise concerns with Mandy Logan and Andrea Reilly when compared with "all other employees".

6. Was that treatment done on grounds of the claimant's Race – Asian Bangladeshi?

HARASSMENT

7. Did the respondent subject the claimant to unwanted conduct? The claimant relies on the following unwanted conduct:

a. On 12 March 2019, Mandy Logan calling the claimant on the day of his admission to hospital for surgery allegedly to inform the claimant that he was progressing to stage 2 of sickness monitoring;
b. On 1 April 2019 during the sickness review meeting Mandy Logan allegedly asking inappropriate questions surrounding the claimant having secondary employment in a restaurant and an alleged comment that “most people from your community have two jobs”;
c. On 1 April 2019 during the sickness review meeting in Mandy Logan allegedly questioning the claimant regarding a medical procedure from two years prior to the meeting involving administering “Botox in his back passage” and then Mandy Logan allegedly saying “10 days for that”;
d. Mandy Logan allegedly being negative about the claimant’s return and her view that the claimant would not make a full recovery, allegedly without reference to any medical evidence;
e. Allegedly denying the claimant access to Functional Skills Training;
f. Denying the claimant payment of time off in lieu of a mandatory training course which the claimant had attended on a non-working day;
g. During a sickness review meeting, Mandy Logan allegedly accusing the claimant of asking Nina Scott (Secretary) to increase his annual leave entitlement; and
h. During a sickness review meeting, Mandy Logan allegedly accusing the claimant of contacting Anne Bontoft to book onto the foundation degree without prior approval.

8. If so, was that conduct related to race?

9. Did that conduct have the purpose or effect of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

10. Is it objectively reasonable for it to have had that effect on the claimant?

VICTIMISATION

11. Did the claimant do a protected act? The claimant has relied on:

a. His complaint regarding Mandy Logan on 27 April 2019; and
b. His grievance of 19 September 2019.

12. If so, did the respondent subject the claimant to a detriment because he had done, or the respondent suspected that he had or would do, that protected act? The claimant has relied on:

a. The commencement on 19 September 2019 of a disciplinary investigation into alleged fraudulent claiming of time during which the claimant attended a mandatory training course out of the working hours of his main role;
b. The claimant allegedly being denied the opportunity to undertake functional Skills Training; and
c. The claimant being denied the ability to take his lunch in the Ward 27 staff room on 26 July 2019.

Agreed between the Parties
18 February 2021