EMPLOYMENT TRIBUNALS

Claimant: **Mr C Sterling**

Respondent: **Leeds Teaching Hospitals NHS Trust**

Heard at Sheffield (by CVP) **On: 4, 5 and 6 January 2022**
7 January 2022 (in chambers)

Before: **Employment Judge Brain**
Members: **Mr Q Shah**
Mr G Wareing

Representation

Claimant: **In person**
Respondent: **Miss C Souter, Counsel**

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The claimant's complaints of direct discrimination because of race fail and stand dismissed.
2. The claimant's complaints of victimisation fail and stand dismissed.
3. Save in respect of the matter referred to in paragraph 4 below, the claimant's complaints of harassment related to race fail and stand dismissed.
4. The claimant's complaint of harassment related to race upon the issue referred to paragraph 36.1.d of the Order of 25 January 2021 (when read with paragraph 36.1.b.i) succeeds.
5. The claimant's complaint in paragraph 4 above was brought outside the limitation period in section 123 of the Equality Act 2010.
6. It is just and equitable to extend time to vest the Tribunal with jurisdiction to consider the claimant's complaint in paragraph 4.

REASONS

Introduction and preliminaries

1. The claimant was employed by the respondent as a clerical officer/receptionist in the sexual and reproductive clinic run by the respondent from the Seacroft Hospital in Leeds.

2. The claimant was employed upon a fixed term contract for a period of one year to run from 19 August 2019 to 18 August 2019. In the event, the claimant resigned during the currency of the fixed term contract. He gave four weeks' notice to bring the contract to an end early. The notice expired on 17 July 2020.

3. The claimant's offer letter is at pages 122 and 123 of the hearing bundle. The contract of employment is at pages 124 to 130. The claimant was employed to work full time hours of 37.5 per week. By clause 12 of the contract, the fixed term contract was terminable by either side upon notice.

4. The claimant brings complaints of discrimination upon the grounds of his race and harassment related to his race. He also brings a complaint of victimisation. In the opening paragraph of his witness statement, the claimant says that he is a *"British born citizen of Caribbean heritage. I had been the only black employee within the [relevant] office."*

5. This case has benefited from two case management preliminary hearings. The first came before Employment Judge Little on 9 November 2020. The second came before Employment Judge Shore on 25 January 2021.

6. A copy of the record of Employment Judge Shore's case management hearing is at pages 56 to 65. The issues to be decided in the case are set out in paragraph 36 of the record. We shall consider these in more detail later in these reasons: see paragraph 135. Suffice it to say at this stage that the claim consists of:

   6.1. 21 allegations of direct race discrimination.

   6.2. 26 allegations of harassment related to race. (These comprise of five stand-alone harassment allegations together with the 21 allegations of direct discrimination which are also brought as complaints of harassment).

   6.3. 12 allegations of victimisation. These are, in fact, the same as the 10th to 21st allegations (inclusive) of the direct discrimination and harassment complaints and brought in the alternative as complaints of victimisation.

7. The Tribunal heard evidence from the claimant. On behalf of the respondent, we heard evidence from:

   7.1 Sarah Taylor. She is employed by the respondent as assistant business manager.

   7.2 Antony Rider. He was employed by the respondent between 1 January 2019 and 27 September 2020 as communications manager within the respondent's fertility clinic. He now carries out that role for a charity. He is no longer an employee of the respondent.

7.3 Robyn Hoaksey. She is employed by the respondent as the service manager for women's services.

Findings of fact

8. We now set out the relevant facts. We observe at the outset that much of the claimant's evidence was unsatisfactory. He was a less impressive witness than were those called by the respondent. We agree with Miss Souter's submission that the claimant's evidence was inconsistent, poor and lacking in credibility upon some points. He was also unclear on dates and times and frequently became muddled in his account of events. Examples of this will be given in due course. In contrast, all three of the respondent's witnesses were very clear in their recollection of events. They were consistent and impressive. As a general observation, therefore, where there is a conflict of evidence, we prefer that of the respondent.

9. Mrs Taylor was the claimant's line manager. Her evidence is that the claimant was supervised on a day to day basis by Sarah Harrison who is one of three supervisors in the clinic holding the post of PA supervisor. Those three act as personal assistants to a medical consultant. The claimant said that at no stage was he informed that Sarah Harrison was his supervisor. The claimant was also provided with a mentor, Michaela Wardman. (She is known as '*Kyla'* within the workplace).

10. Sarah Taylor's evidence was that all of the respondent's employees are provided with a mentor from their first day of work. The claimant accepted this to be the case but then immediately said that he was "*not sure".*

11. It may be observed that the respondent's case around supervision and mentorship would have been stronger had it been supported by documentation (in the form of an induction or the like) documenting that the claimant had been informed of his immediate support structure. That being said, we accept the respondent's case that the claimant was provided with a supervisor and a mentor. Firstly, as we shall see, Sarah Harrison attended a meeting with the claimant to discuss his performance on 2 December 2019. She would have no credible reason to be there were she not to have any involvement with the claimant. We reject the claimant's suggestion that she was there undertaking some kind of training. Secondly, it is against the probabilities that the claimant was not provided with support as a new employee dealing with matters as important as clinical records and patient care.

12. As will be seen, during his time with the respondent the claimant worked in three offices within the clinic. He started work in what was known as the *"admin office".* On or around 25 February 2020 he was then moved to work in the secretaries' office. Around two weeks or so after that he moved again to work in the *"active office".* The claimant described these offices as being around a minute's walk from one another. Mrs Taylor said that they were closer than that. She said that they were within very close proximity of one another upon the same corridor and that it was possible to go from one to the other within a matter of seconds. At all events, there is no dispute that the offices were in close proximity.

13. Clause 2.1 of the contract (at page 125) says that the claimant's main duties and responsibilities were set out in *"the job description".* No job description was provided for the Tribunal. The claimant agreed that all of the tasks which he was asked to do within the three offices fell within the range of duties set out in the job description.

14. It is unfortunate that in their printed witness statements neither party furnished the Tribunal with an overview of the duties which the claimant undertook. This is understandable in the case of the claimant, acting as a litigant in person. The Tribunal would have expected more assistance upon this point from the respondent. It was left to Miss Souter to seek to plug the gap in the respondent's evidence upon this issue by eliciting an account of the claimant's duties (with the Tribunal's permission and with the consent of the claimant) by way of supplemental questioning of her witnesses.

15. The position can, we think, be broadly put in this way. The claimant was engaged to undertake administrative and clerical duties, in particular assisting with the administration of patient files. Duties extended to preparing files for clinic, pulling notes and scans and photocopying. These formed the core duties in all three offices.

16. When he worked in the secretaries' office, the claimant became responsible for placing letters in files. In the active office, he was expected to pull out notes for scans and out-patient appointments, photocopy case notes and do what was known as "*a daily closed run".* This is described in paragraph 52 of her witness statement by Sarah Taylor as being *"a trip to the library just outside the department where all our inactive notes were filed. On a daily basis we had notes to be filed in that library and that notes were required to come back on to the unit as the patients were commencing treatment again."* The claimant was also responsible for inputting data on to the respondent's computer system.

17. When listing the issues to be determined in the case, Employment Judge Shore did so by way of theme rather than chronologically. This was an eminently sensible approach. However, in making our factual findings it makes more sense to do so chronologically. Therefore, against the general background which we have just described, we now turn to make our findings of fact upon events in question. We shall then go on to a consideration of the relevant law. We will then arrive at our conclusions upon each of the issues in turn by application of the relevant law to the factual findings which have been made.

18. The first matter to which the claimant refers occurred in October 2019. The claimant says that Mrs Taylor asked him to attend a brief meeting with him at some point during that month. The claimant's account is that he had found the training received by him to be sporadic. Mrs Taylor, according to the claimant, said that she likes new staff to become proficient within four months. In paragraph 3 of his witness statement, the claimant says that Mrs Taylor praised his work and assigned him a mentor. (As we understand it, paragraph 3 of the claimant's witness statement is a description of what occurred at the meeting with Mrs Taylor in early October 2019).

19. We reject the claimant's case that Mrs Taylor assigned the claimant a mentor only in October 2019. We have dealt with this issue already in paragraphs 9 and 10 above.

20. We accept the claimant's account that Mrs Taylor told him that he was expected to be proficient within around four months. This is consistent, as we shall see, with what Mrs Taylor is recorded as saying to the claimant at a later meeting which took place on 7 November 2019. (The notes of that meeting are at pages133 and 134). It is probable that she would have said something to him along these lines at an earlier meeting.

21. Mrs Taylor in fact makes no reference, in her printed witness statement, of meeting with the claimant in October 2019. However, she does say that there were genuine concerns about the claimant's performance. We accept Mrs Taylor's account that there were performance issues as early as October and November 2019. We find it probable that she would have had cause to peak to the claimant prior to November 2019 and would not have waited from August to November to raise issues with him. We accept her account that there were performance issues upon the basis of the meetings which took place on 6 and 7 November 2019 to which we shall now turn.

22. In paragraph 10 of her witness statement Mrs Taylor says, "*I had a conversation with Kyla on 6 November 2019 in which she detailed the concerns that she and other members of the team had about Charles' performance."* She then goes on to detail those concerns. A record of the discussion between the claimant and Kyla Wardman is at page 132.

23. This then led to a discussion with the claimant on 7 November 2019. As we have already said, a record of this is at pages 133 and 134.

24. The evidence given by the claimant about this meeting, under cross-examination, was the first of a number of instances which served to undermine the claimant's credibility. He maintained that Kyla Wardman had not been present at the meeting of 7 November 2021 and that it had been attended by Sarah Harrison. The claimant was confusing the meeting of 7 November 2019 (attended by Mrs Taylor and Kyla Wardman) with that of 2 December 2019 (attended by Mrs Taylor and Sarah Harrison).

25. It is not in dispute that following the 7 November 2019 meeting Mrs Taylor and Kyla Wardman relieved the claimant of his duties to deal with telephone calls while working in the admin office. On any view, this was a helpful and supportive step upon the part of Sarah Taylor. This is one of a number of examples of Sarah Taylor's positive management of the claimant which serves to undermine the claimant's case that Sarah Taylor pursued a discriminatory course of conduct and was aggressive towards him.

26. There was a dispute of fact between the claimant and Mrs Taylor as to whether or not the issue of training had been raised at the November meeting. Mrs Taylor says that she offered the claimant further training, but he declined it. The claimant says that the issue of training was not raised, and he would have accepted it had it been offered. We find that it was mentioned as the contemporaneous note records that it was raised.

27. Upon the issue of training generally, in paragraph 62 of her witness statement, Sarah Taylor says that, "*Charles commenced in post in August 2019, and attended various training courses. He was then trained by members of the team in his daily work tasks"*

28. There is no dispute that *"on the job"* training was provided. This consisted of being shown how to do the tasks during the course of the working day. There is an acknowledgement by the claimant that he received some training both in the evidence which he gave under cross-examination and in paragraph 6 of his witness statement.

29. As with the observation made by the Tribunal about the induction process, the respondent may have helped itself by providing the Tribunal with a copy of the claimant's training record. The Tribunal received no clear evidence as to the nature of the training received by the claimant. Sarah Taylor's reference to training courses tells us nothing about the content of the training material.

30. The claimant fairly acknowledged, in evidence given under cross-examination, that Sarah Taylor provided the claimant with training within the clinic as to the steps needed in order to input scan details and pregnancy scans on the database.

31. Although in many respects the claimant's evidence was unsatisfactory, he impressed the Tribunal as an intelligent individual. The impression which the Tribunal has is that the claimant's role was clerical in nature and was one which ought to have been well within his capabilities. We have seen that performance concerns were raised with the claimant in early November 2019. As we shall see, the claimant acknowledged difficulties in the role in February 2020. The evidence was that there never came a time where the respondent was entirely satisfied with the claimant's performance while he was working in the admin office.

32. Upon the basis of this evidence, the Tribunal cannot be satisfied that the respondent furnished the claimant with effective training to equip him to undertake the role (at least in the admin office). There was no comprehensive evidence or record of the training received by him.

33. The claimant's evidence is that the training which he received was sub-optimal when compared with that enjoyed by others. However, a difficulty for the claimant is that he was unable to give any evidence of the training received by any of the respondent's other employees at the material time. He conceded, under cross-examination, that he had no detail of the training received by others from the respondent.

34. The next incident with which we will deal is that set out in paragraph 4 of the claimant's witness statement. The claimant gives an account of experiencing difficulties with his computer. He says that Mrs Taylor approached him "*in a combative, animated and irritated manner that I had not contacted the IT department promptly."* For her part, Mrs Taylor says, in paragraph 6 of her witness statement, that she remembers *"that Charles had some IT issues when he first started at the Trust and that we had various discussions about how they could be sorted out but I did not reprimand Charles."*

35. In cross-examination, the claimant acknowledged that IT issues were commonplace. That said, the claimant accepted this episode to be a one-off incident.

36. There appears to be no dispute that the claimant was experiencing IT difficulties upon a day around November 2019. There can be nothing sinister in that, given the claimant's fair acknowledgement that IT issues were not infrequent occurrence. In our judgment, it is against the probabilities that Sarah Taylor unfairly reprimanded the claimant given that IT issues were a frequent occurrence and the support which she gave to the claimant that month by relieving him of the obligation to answer the telephones while working in the admin office. The claimant was unable to explain how this issue was related to his race.

37. The next issue concerns a serious incident in which the claimant became involved. He says that at some point in November 2019 he was shot at with a high-powered pellet rifle while travelling into work. The respondent does not dispute that the claimant was shot at as he describes.

38. An issue arises, however, because the claimant's case (in paragraph 5 of his witness statement) is that upon he arrived late because of the shooting incident and Mrs Taylor raised her voice and reprimanded the claimant in front of colleagues.

39. Mrs Taylor, for her part, says (in paragraph 7 of her witness statement) that she has no recollection of the claimant telling her that he had been shot at by an air rifle. She said that had she been informed of such a serious incident she would have offered support and would have encouraged the claimant to go to the police.

40. Upon this issue, we prefer the respondent's account. As we shall see, Mrs Taylor took prompt action when dealing with a serious issue involving one of the respondent's cleaners. Her actions were taken in December 2019 and then in June 2020. These actions persuade the Tribunal that had she been told that the claimant had been involved in such a serious matter then she would have acted supportively and not reprimanded him as alleged. Such negative conduct is also inconsistent with the support which Mrs Taylor gave to the claimant on 7 November 2019 in relieving him of the telephone duties which he found difficult. It is against the probabilities that Mrs Taylor would not have remembered such a (thankfully) rare and serious incident.

41. The claimant was absent from work between 27 November 2019 and 2 December 2019. The return to work meeting notes (signed by the claimant and Mrs Taylor) are at pages 136 and 137.

42. Sarah Harrison was present at this meeting. Mrs Taylor says that she involved Sarah Harrison because *"she was Charles' supervisor and I wanted to ensure that she was kept informed of his performance so she could ensure that she and I supported him."*

43. The note of the meeting is at page 135. Sarah Taylor noted that there remained concerns about the claimant's *"prepping".* She records that she informed the claimant that she "*would prefer staff to be competent within four and a half months in post".* This is consistent with the claimant's account of what he was told in October 2019 (as we have already

observed). The note records that the claimant said that he did not require any further training and he was comfortable with the system which he was required to use. She also reminded the claimant to stop answering the telephones (as had been said at the meeting four weeks earlier).

44. The note records that the claimant was asked whether there were any underlying issues at home or at work which may account for the claimant's sub-standard performance. In cross-examination, the claimant accepted that Sarah Taylor had asked him whether there were any such issues and he had volunteered none. This is inconsistent with the claimant's account that the treatment of him by Sarah Taylor in particular, and the respondent generally was discriminatory or harassing. Had it been so, one may have expected the claimant to raise it as an issue. The claimant also fairly accepted that all of the issues referred to in the six bullet points at the end of the note were discussed.

45. In the first paragraph of his witness statement, the claimant alleges that Sarah Taylor (during the course of the meeting of 2 December 2019) said to the claimant, *"what do you think you're playing at, if you keep this up when the time comes for a possible extension for your work contract to be considered it will not happen."* He also alleges that Sarah Taylor made a remark about an employee of the respondent who had taken a period of sick leave absence and was then discovered to have been working elsewhere. The claimant says that he was concerned about the imputation of this remark.

46. The Tribunal rejects the claimant's account. We are satisfied that the note of the meeting at page 135 is accurate. The respondent may reflect that it may have been wise to have the claimant sign this to avoid dispute. Nonetheless, the claimant in evidence before us fairly accepted the accuracy of much of the note and upon that basis we find it difficult to accept that pejorative remarks to the effect that the claimant's contract would not be removed were made by Sarah Taylor. In any case, the decision as to whether to extend or renew the claimant's fixed term contract was not a decision for Sarah Taylor to take. In our judgment therefore it is inherently unlikely that she would have made such a remark, particularly in the presence of Sarah Harrison (who was junior to her).

47. We do not accept the claimant's case that there was a suggestion that he was involved in any kind of misconduct to do with the taking of a period of sickness absence. We can see that the *pro-forma* mandates the manager conducting the return to work interview to ask the employee whether they have worked elsewhere whilst on sick. It follows therefore that Mrs Taylor was doing no more than going through the *pro-forma* as required. The Tribunal therefore cannot accept this to be an improper imputation against the claimant's integrity.

48. We now turn to the matters which occurred between 9 and 11 December 2019. It may be thought surprising that there is nothing in the claimant's witness statement about these matters. That said, it was made clear by the respondent's solicitor at the case management hearing before Employment Judge Little that the respondent accepted that the incidents complained of by the claimant about a cleaner's conduct on 9 and

10 December 2019 were conceded. It follows therefore that no evidence is required in any case.

49. We shall set out Sarah Taylor's unchallenged evidence about these matters. As this evidence is unchallenged (and of course is accepted by the respondent) the Tribunal finds as a fact that the incidents of 9 and 10 December involving the cleaner took place as described by her:

"(15) On 9 December 2019, I was working late in the admin office when a cleaner came into the office to empty the bins. I asked her for a black sack for my bin and she pointed to Charles' desk and said, "there is one over there". I thought that she meant there was one on the desk and so I got up to look. I could not see a bag and so I asked her where. She repeated "you know, over there". I could not understand what she was talking about and did not pursue it any further.

(16) Sandra Newmarch and Sarah Harrison were both present in the office when the cleaner made those comments and after the cleaner had left the room they came over to me and explained that she had been making racist remarks about Charles and had in fact been referring to him as a "black sack". I was appalled and immediately went to find the cleaner. I told her that what she had said was not funny or acceptable and that such behaviour would not be tolerated. I was extremely firm with her and made it very clear that it must not happen again. She told me that she was sorry and that she was not racist because she had mixed race children. At that point, I believed that she had understood that she had done wrong and would not do it again and so I saw no reason to take any further action.

(17) The following day on 10 December 2019, I saw the same cleaner come into the office again and speak to Charles. I was on the telephone and so could not hear what she was saying. I was working late again that evening, and was going through my emails and noticed I had an email from Charles. A copy of Charles' email is at page 139 of the bundle. Upon receipt of the email, I asked Sandra and Sarah, who had been present while the cleaner was speaking to Charles, to come over to the desk and I asked them what she had said. They told me that she had relayed the previous day's incident to him and said that someone had asked for a black sack and so she had pointed to his desk. Sarah told me that she had followed the cleaner out of the room and told her that she should not have said it.

(18) A copy of the statement I made immediately after the incident is at page 140. I also asked Sandra, Sarah Harrison and Charles to write statements and they are at pages 141 to 143 of the bundle.

(19) I did not tell Charles about the incident on 9 December 2019 immediately because I thought it would upset him unnecessarily. On 11 December 2019 when I discussed the incident with him, I did tell him what had happened the previous day but I did not tell him that the cleaner had "previously made numerous racist and derogatory comments to me personally towards Charles." I knew only of the incidents on 9 and 10 December 2019.

(20) I then contacted the cleaner's supervisor to report the matter and ask them to investigate as per the Trust's disciplinary policy.

(21) Charles now alleges that I in some way altered the statement which he had made and which was later used in the disciplinary hearing. That is absolutely not true and I note that Charles has not pointed to any specific changes which I supposedly made."

50. It appears that Sarah Taylor's reference to the claimant's email is incorrect. The email appears to be at page 138 and not page 139. It is dated 10 December 2019 and timed at 17:20. The claimant said in the email that, *"A few moments ago a cleaning member of staff made an inappropriate comment (based on race) in front of other members of staff within the office. It was both uncalled for, without justification or provocation. The reasons for the comment remain unclear."* Mrs Taylor responded twenty minutes later. She agreed with the claimant that the behaviour was unacceptable. She asked the claimant for a statement.

51. The claimant emailed Mrs Taylor on 12 December 2019. This email is at page 139. The claimant says in the email that the cleaner made derogatory remarks towards him. In particular, reference was made to him being a *"black sack".* The claimant says that this incident took place between 16:20 and 16:40 on 19 December 2019. *(The date must, of course, be a mistake given that the claimant's email describing the incident was dated 12 December 2019. It is possible that the claimant simply made a typographical error by striking '9' instead of '0' on his keypad. There appears to be no dispute that the cleaner made untoward remarks towards the claimant on 10 December 2019).*

52. The claimant's statement is at page 143. This in fact contains the same dating error. (The statement appears to have been copied and pasted from the email at page 139 of 12 December 2019).

53. On 1 May 2020 the cleaner was served with a written warning to remain effective until the end of August 2020. That was in fact eight months from an investigation meeting with her of 30 December 2020. The respondent did not furnish the Tribunal with any explanation for the reasons why the investigation took so long.

54. The investigation into the cleaner's conduct was undertaken by Sukhdeep Panesar. The document at pages 144 to 146 records Miss Panesar's interview with the cleaner.

55. In paragraph 22 of her witness statement Sarah Taylor says that she fully supported the claimant through the cleaner's disciplinary process by accompanying him to meetings. She gave unchallenged evidence that the claimant welcomed her support when she accompanied him to his meeting with the facilities manager (who was the cleaner's line manager). That the claimant looked to Sarah Taylor for support over what was doubtless an upsetting and traumatic incident for him is consistent with the respondent's case that Mrs Taylor was generally supportive of the claimant and is undermining of the claimant's case that she was not. Indeed, it is difficult to reconcile the claimant's allegation that Sarah Taylor discriminated against him and purposely harassed him upon the grounds of race throughout his employment on the one hand with the claimant's decision to turn to her for support upon an issue of racist abuse on the other.

56. The claimant's allegation that Mrs Taylor altered the claimant's statement prior to submitting it to Miss Panesar was difficult to understand. It is the case that Miss Panesar emailed the claimant on 29 January 2020 (page 152). Miss Panesar said that, *"The author of the document was showing Sarah Taylor. HR was wondering if she wrote the statement on your behalf not you. Also the date on the statement is wrong."*

57. As we have seen, there is an explanation for the incorrect date being on the statement, which is that the claimant copied and pasted his email of 12 December into the statement that we see at page 143. The incorrect date was thus carried forward from the email into the statement. Mrs Taylor herself provided a statement (page 140). It is therefore difficult to see why Miss Panesar would think that Sarah Taylor had also prepared the claimant's statement. The claimant had to concede, during cross-examination, that he had not seen what he alleged was an altered witness statement purporting to be from him. Again, the claimant's decision to accept Sarah Taylor's invitation to accompany him to a meeting with the cleaner's line manager does not sit easily with an allegation against her that she altered the claimant's statement to his detriment in connection with the very same incident to be discussed at that meeting.

58. The claimant also alleges that Mrs Taylor told him that the cleaner had previously made numerous racist and derogatory comments about the claimant. There was no evidence upon this issue from the claimant in his printed witness statement. While it may be understandable that the claimant did not include within his statement passages concerning what happened on 9 and 10 December 2019 in view of the respondent's concession at the case management hearing before Employment Judge Little, it is difficult to understand why the claimant did not include a passage around this aspect of the matter (which was in dispute). There is therefore simply no evidential basis upon which the Tribunal may find that Sarah Taylor alluded to other incidents than those of 9 and 10 December 2019.

59. Miss Souter put to the claimant that it was Mrs Taylor's position that she did not tell him of the cleaner's remarks on 9 December 2019 in order to protect him and prevent him from being upset. In evidence given under cross-examination the claimant said, *"it would have helped me if I'd known. I could report it myself."* Ironically, it was the cleaner herself who told the claimant on the evening of 10 December 2019 what she had said to Sarah Taylor around 24 hours earlier. The claimant was unaware that Sarah Harrison had, on 10 December 2019, followed the cleaner out and reprimanded her. That said, the claimant knew that Mrs Taylor was taking positive action about the matter within 20 minutes of his complaint of 10 December 2019 (at page 138).

60. The next incident chronologically concerns an issue which arose on Friday 17 January 2020 between the claimant and a co-worker whom we shall refer to as 'X'. Mrs Taylor was alerted to the incident by Kyla Wardman.

61. Kyla Wardman provided a statement dated 17 January 2020. This is at page 147. She says that another employee named Kath Atkinson was present. A statement from Kath Atkinson is at page 149.

62. Kath Atkinson says that the claimant was speaking loudly and sternly with X. It appears from this that there was a dispute between the claimant and X about work which the claimant had carried out which X said was not being done properly. Kath Atkinson says that the claimant excused himself upon the basis that he had been asked to do other tasks the previous day. For her part, X (in a statement dated 17 January 2020) says that the claimant spoke to her aggressively and she became upset. Kyla Wardman's account is largely corroborative of that of Kath Atkinson and X.

63. Mrs Taylor says that when the matter was drawn to her attention, she spoke to the claimant first because she could not find X. She received the claimant's versions of events. She complains that the claimant raised his voice to her saying that she (Sarah Taylor) was questioning the claimant's integrity.

64. The claimant says (in paragraph 9 of his witness statement) that Mrs Taylor told him that *"this is not how we behave"* and alleged that he had *"no idea how the NHS operates."* Further, the claimant's account is that Mrs Taylor told him that she had a black relative who had been subjected to the same treatment being experienced by the claimant and that it would be a long time before anyone within the clinic came round to liking the claimant.

65. Mrs Taylor says that after collating the evidence from Kyla Wardman, X and Kath Atkinson she contacted Dominic Barnes in HR. He suggested that she speak to the claimant to ask him to reflect on what had happened over the weekend. Mrs Taylor's account (in paragraph 21 of her witness statement) is that she acted upon this advice. On Monday 20 January 2020 the claimant told her that he stood by his version of events. She therefore referred the matter to Claire Goodman, general manager for her to make a decision on the next steps.

66. The contemporaneous statements around the incident of 17 January 2020 are at pages 147 to 150 inclusive. The claimant's contemporaneous account is at page 150. The claimant fairly accepted that there had been a brief heated discussion, but he blamed X for becoming *"highly irritable and argumentative."*

67. Following a period of ill health between 28 January 2020 and 25 February 2020, the claimant raised a grievance against Sarah Taylor. This is at page 158 and is dated 25 February 2020. The grievance is solely about the incident of 17 January 2020. The contents of this grievance undermine the credibility of the claimant's account before the Tribunal that on 17 January 2020 Sarah Taylor made an inappropriate reference to a black relative, that she berated the claimant by saying *"we don't behave like that"* (or words to that effect) and that she accused the claimant of not knowing about the operation of the NHS. No mention was made of Mrs Taylor's conduct in the grievance letter. Mrs Taylor told us that she does not have a black relative. Given our findings as to how supportive she was of the claimant (by removing unwelcome telephone duties from him and the support which she gave to him with reference to the cleaner) it is in our judgment against the probabilities that she would have made up the

existence of a relative whom she does not have, particularly as such could very easily be disproved.

68. The grievance also undermines the credibility of the claimant's case that Sarah Taylor was generally unsupportive of him in relation to events between the date of commencement of the claimant's employment and 25 February 2020. The grievance is materially at odds with how the claimant now seeks to portray matters before the Tribunal. Had she acted as alleged by the claimant, he may have been expected to complain about it in the grievance letter.

69. No action was taken against the claimant arising out of the incident with X of 17 January 2020. Again, had Mrs Taylor been set against the claimant one may have expected her to recommend that Claire Goodman take action against him.

70. The claimant's next complaint is that upon the day he started his sickness absence (28 January 2020) Mrs Taylor had improperly asked him whether he needed further training. It appears not to be in dispute that the claimant left a note for Mrs Taylor on the evening of Monday 27 January 2020 informing her that he had a medical appointment the next morning. This accounts for the claimant's late arrival at work on Tuesday 28 January. Mrs Taylor says that upon his arrival, she simply asked the claimant if he was alright. She says that his work performance was not mentioned as there was no reason for it to be.

71. The claimant said that Mrs Taylor was confrontational and that there was an '*edge'* (our word, not the claimant's) to her asking him whether he needed further training when he got into the office on 28 January 2020. It appears to be an odd feature of this case that the claimant was complaining that Mrs Taylor asked him if he needed further training on the one hand in circumstances where he says that the training was deficient on the other. At all events, the claimant's case is that he was deterred from accepting her offer (on his case) because of the confrontational way in which he approached him.

72. We do not accept that Mrs Taylor acted in a confrontational manner for the reasons set out in paragraph 67 upon Mrs Taylor's support of the claimant generally.

73. During the claimant's period of absence from work between 28 January and 25 February 2020 Mrs Taylor contacted him. There is a note to this effect on page 154. This records that on 11 February 2020 Mrs Taylor asked the claimant if there was any further support which she may offer him.

74. The claimant's return to work form dated 25 February 2020 is at pages 155 and 156. It is signed by the claimant and Mrs Taylor. Towards the end of the form it is recorded that the claimant was uncomfortable working in the admin office. He was asked if he would feel more comfortable working in the secretaries' office or the active office. The claimant replied that he would. Arrangements were therefore made by Sarah Taylor to transfer the claimant to the secretaries' office upon a phased return to work basis. He was to work 25% of his contracted hours during his first week back, 50% during his second week and 75% during his third week.

75. As we have already said, the claimant's tenure in the secretaries' office was short lived as he moved to the active office around mid-March 2020. The claimant complained that he had no clarity as to his role when working in the secretaries' office. He was just required for *"ad hoc"* duties.

76. It was suggested to the claimant by Miss Souter that the secretaries were grateful to the claimant for the assistance which he was able to give with the filing of letters, as it enabled them to tackle a typing backlog which had built up. The claimant complained that there was not a lot of work and that a job had effectively been created for him.

77. The claimant also said that he was working on his own in the secretaries' office for around a week and a half. He said that there were four typing secretaries. (These are additional to the three PAs to whom we referred earlier). Mrs Taylor said that she would never countenance a position where no secretaries were available to service the needs of the consultants. When pressed upon this issue, the claimant appeared uncertain as to who was present and when during his short tenure working in the secretaries' office.

78. The claimant also said that he was uncomfortable being moved into the secretaries' office. The Tribunal cannot accept this account given that he has signed the return to work form at page 156 indicating to the contrary.

79. The move of the claimant into the active office followed a discussion between Sarah Taylor and Robyn Hoaksey. This discussion is referred to in paragraph 51 of Sarah Taylor's witness statement and paragraphs 17 to 19 of Robyn Hoaksey's. The view taken by each of them was that the best course of action would be to allow the claimant to complete the tasks that he could do during the remainder of his fixed term contract. Mrs Taylor and Mrs Hoaksey said that there was a moratorium on performance management processes being initiated because of the pandemic. In short, therefore, it appears that a view was taken by the respondent to utilise the claimant as best they could for the remainder of the fixed term contract by moving him into the active office. As we have seen, these duties were described in paragraph 52 of Sarah Taylor's witness statement (referred to in paragraph 16 above).

80. Robyn Hoaksey was delegated to investigate the claimant's grievance against Sarah Taylor. She met with him to discuss this on 13 March 2020.

81. However, before turning to the disposition of the claimant's grievance against Sarah Taylor, the Tribunal needs to pull together the threads of the events which we have just described in order to arrive at our conclusion from 17 January 2020. At the risk of repetition, it is plain from the evidence that Sarah Taylor was supportive of the claimant. Upon his return to work, she was accommodating of his wish to move from the admin office. She afforded him the opportunity of working in the secretaries' office upon a phased return to work basis and then in the active office. There is no evidence that she positively sought action against the claimant arising out of the incident with X on 17 January 2020. Upon this basis, we therefore prefer the respondent's account that nothing untoward was said by her upon the claimant's return to work from his medical appointment on 28 January 2020 and that there was simply no reason for Mrs Taylor to raise the claimant's work performance with him on that day. It also

corroborates our findings that Sarah Taylor said nothing adverse towards the claimant during the course of the meeting on 17 January 2020 and did not attack his integrity.

82. The claimant's assertion that he was expected to work in the secretaries' office on his own is a further example of an inherently implausible account which serves to impugn his credibility. In our judgment, it is inherently unlikely that the respondent would leave themselves exposed to having no secretarial support for a significant period of time (of around a week and a half) in the performance of such an important public service. The Tribunal takes judicial notice that such a state of affairs would simply not be tolerated by the respondent (and in particular the medical consultants working for them).

83. We now turn to the grievance procedure. Robyn Hoaksey's evidence is that the claimant asked her *"to feed back to Sarah [Taylor] about the way he felt he was treated to avoid this from happening again."* Her account is that the claimant said that such a resolution would satisfy him and would resolve the matter. Miss Hoaksey acted as requested by the claimant. She says that she was unable to resolve the dispute between the claimant and Mrs Taylor given that there were no independent witnesses. She was unable to conclude therefore that Sarah Taylor had behaved inappropriately but she did understand that the claimant had a perception that she had not behaved as she should have done. Miss Hoaksey gave evidence that she had no concerns about Mrs Taylor's management style after testing it in a role play. However, she gave Sarah Taylor some feedback *"about the importance of tone and body language."* For her part, Mrs Taylor said that she accepted Miss Hoaksey's feedback.

84. For his part, the claimant fairly accepted that he raises no complaint in this case about Miss Hoaksey's handling of the grievance. The claimant accepted that he had not told Miss Hoaksey about anything other than the incident of 17 January 2020 in the course of the grievance process. Indeed, the claimant told her that all that he wanted to say was contained in the grievance letter at page 158. As Miss Souter said, it is odd that the claimant did not take the opportunity of raising other issues of concern given that he had Miss Hoaksey's ear on 13 March 2020. Again, such is inconsistent with the claimant's position of discriminatory and harassing treatment throughout his employment.

85. The claimant complained that he had not been notified by Miss Hoaksey of the grievance outcome. The outcome letter is at pages 165 and 166. There is some justification in the claimant's complaint that this was not well communicated. Miss Hoaksey says that she decided to post this to the claimant in circumstances where it could easily have been handed to him or emailed to him. Miss Hoaksey's decision to post it plainly ran the risk of the letter not being received. That said, there is much in the respondent's point that the claimant may have been expected to complain were he to have heard nothing for a significant period after 13 March 2020. The absence of such a complaint from the claimant persuades us that he did in fact receive the letter at pages 165 and 166.

86. The claimant also told us that Robyn Hoaksey informed him that were he to wish to appeal he would not be given the outcome of the grievance.

Such was a very difficult contention to understand. How could he raise an effective appeal in such a situation? Miss Hoaksey explained that she had told the claimant that if the grievance outcome resulted in disciplinary action against Mrs Taylor, then for reasons of confidentiality the claimant would not be given the details of that action. It appears that the claimant misunderstood what Miss Hoaksey was saying. She was not telling the claimant that he would not be told the outcome at all. Such plainly would be an unsustainable position for the respondent to adopt. We accept that he was told by the respondent that confidentiality may bar the claimant from being privy to any action being taken against Mrs Taylor and which the claimant has misinterpreted or misunderstood.

87. The next incident of which the claimant complains took place on 17 March 2020. At this stage, the claimant had been working in the active office for several days. He wished to complain about his workload. Mrs Taylor acted upon the claimant's concerns and arranged to meet with the him. She approached Mr Ryder to sit with her. Mr Ryder in fact played no part in the meeting (on his account). The respondent's case is that, essentially, Mr Ryder was there as a witness as by this stage Mrs Taylor had become concerned that the claimant was misrepresenting what she was saying to him.

88. Mrs Taylor's note of the meeting is at page 168. This records her reassuring the claimant that the tasks which he was charged to undertake in the active office were not urgent and did not need to be completed within a day. She also offered support. The note records the claimant declining such support. Mrs Taylor's account (in paragraph 59 of her witness statement) is that that the meeting was amicable.

89. The claimant complains that Mrs Taylor spoke inappropriately to him in the meeting by raising her voice and saying aggressively that, "*we are a team here, we work as a team."* Mrs Taylor accepts that she did make reference to working as a team, but this was intended to be a supportive comment.

90. The claimant also alleges that Mr Ryder spoke inappropriately and said, *"we all need to flipping knuckle down, stop complaining and get on with it, as more shit in terms of the Covid is coming."* Mr Ryder denies saying words to this effect. On his account, he had no involvement in the conversation. He was sitting in the room getting on with his work.

91. In evidence given under cross-examination, the claimant fairly accepted that Mrs Taylor had said to him that he had no need to rush his tasks within the active office. He said that he could not recall whether she offered support during the course of the meeting but did not discount that as a possibility. The claimant appeared uncertain as to when during the meeting Mr Ryder had made the "*knuckle down"* comment. He said initially that he had said this during the middle of the meeting but then later changed his evidence to say it was towards the end of it.

92. When giving evidence under cross-examination, Mr Ryder said that on one occasion he had seen the claimant from his (Mr Ryder's) car waiting at a bus stop on a cold night. He had pulled over and invited the claimant to get into his car in order to give him a lift home.

93. Mr Ryder impressed the Tribunal as a professional, calm and mild-mannered individual. It is difficult to envisage him becoming angry and using foul language as alleged by the claimant. Further, such is at odds with Mr Ryder being friendly towards the claimant to the extent of going out of his way to give him a lift home in his car on a cold winter's night. Further, there was no evidence that Mr Ryder was familiar with the history between Sarah Taylor and the claimant. It is in our judgment against the probabilities that Mr Ryder would have spoken up and involved himself when there was no call for him to do so.

94. We accept that Sarah Taylor made the *"we work as a team"* comment with a view to being supportive of the claimant. This is consistent with how, as we find, she had treated the claimant throughout their working relationship.

95. Another of the issues raised by the claimant is that Sarah Taylor breached his confidentiality by writing upon a white board in the office that the claimant needed medical support. The claimant's case upon this issue in fact shifted as his initial account was that she had written upon the white board that the claimant was undergoing occupational health support. The claimant then changed his account to say that the entry upon the white board referred to occupational support and not occupational health support.

96. It is the case that Sarah Taylor had offered the claimant occupational health support following the return to work meeting of 25 February 2020. Her letter to this effect is at page 157. In addition to that, in the same letter, she referred the claimant to four other sources of support (in addition to that from her and occupational health). The inconsistency in the claimant's account results in the Tribunal being unable to accept his version of events. We accept Sarah Taylor's evidence (given under cross-examination) that writing such a message upon a public notice board would be inappropriate for confidentiality reasons. It is also inconsistent with the acts of a manager who has offered an employee six sources of support immediately following a return to work meeting.

97. There appear to be no further incidents of any significance after 17 March 2020 as between the claimant and the respondent until 15 May 2020 when Mrs Taylor wrote to the claimant (pages 175 and 176). She notified the claimant that his fixed term contract was due to expire on 18 August 2020. She said that, *"the Trust does not foresee your contract being renewed because there is no foreseeable prospect or further funding to renew/extend your post."* She invited the claimant to attend a meeting to discuss the proposed termination of his contract. This was scheduled for 21 May 2020.

98. In the event, the claimant did not attend an exit interview on the last day of his employment as is routine within the respondent. The claimant said in evidence that he had attended an exit interview. He was in fact referring to the meeting of 21 May 2020. In our judgment, the claimant can be forgiven for thinking that the meeting of 21 May 2020 was effectively an exit interview.

99. On 11 June 2020 the claimant saw the cleaner who had been at the heart of the events of 9 and 10 December 2019. He sent an email to Sarah Taylor on 11 June 2020 at 16:54 (page 178). She replied on

16 June 2020 to the effect that she had escalated the matter to the facilities manager. A favourable inference is drawn in her favour from the alacrity with which she acted.

100. The evidence of Sarah Taylor (at page 66 of her witness statement) is that after the December 2019 incident the cleaner would no longer be working at the Leeds Fertility Unit. It appears however that the facilities manager had permitted her to work elsewhere within the hospital hence the unfortunate encounter between the claimant and the cleaner the following June.

101. The claimant was then absent from work between 12 June and 18 June 2020. Mrs Taylor recorded the claimant's absence as being attributable to Covid symptoms between 12 and 15 June and then due to stress and anxiety between 16 and 18 June. At this point, Sarah Taylor was working from home. The claimant was concerned that the sickness recording was inaccurate. This was remedied by Sarah Taylor. The claimant fairly accepted in cross-examination that she had simply made an administrative error.

102. On 15 July 2020, there was an issue about some missing notes for a patient. It appears that these were found by the claimant. Mrs Taylor says that she spoke to the claimant that day in order to understand what had happened.

103. The next day, 16 July 2020, Mrs Taylor says that she spoke to the claimant to ask him to ensure that the notes were filed correctly in alphabetical order. She then says that around 10 minutes later the claimant asked to see her again. She says that he spoke to her inappropriately and accused her of questioning his integrity. Her account is that she felt very frightened.

104. Mrs Taylor's account that the claimant behaved inappropriately is corroborated by two members of staff who provided supportive statements at pages 185 and 186. One of these is, in fact, X (who was the individual with whom the claimant had the issue on 17 January 2020).

105. The claimant accepted, in evidence given under cross-examination, that notes frequently go missing. Indeed, he said that this was a huge problem within the respondent. He also accepted that Mrs Taylor had spoken to him in a civil manner on 16 July 2020. However, he denied being aggressive towards her in the second meeting of that day a few minutes later. The claimant then packed up his belongings and left work. He did not attend for work upon the final day of his employment on 17 July 2020.

106. Sarah Taylor's account is corroborated by two members of staff. We therefore accept that she did not behave inappropriately towards the claimant and that the reverse was in fact the case.

107. This concludes our findings of fact.

Discussion: the relevant law and our conclusions

108. We now turn to a consideration of the relevant law. It is for the claimant to provide sufficient evidence to persuade the Tribunal that discrimination, harassment or victimisation has actually taken place. It is for him to show, on the balance of probabilities, facts from which in the absence of any other explanation, the Tribunal could infer an unlawful act of discrimination,

harassment or victimisation has occurred. If the claimant succeeds in establishing a *prima facie* case, then the burden of proof moves to the respondent to prove that they did not commit the act in question. The burden of proof provisions are enacted within the 2010 Act in section 136.

109. The relevant prohibited conduct with which the Tribunal is concerned in this case is direct discrimination upon the grounds of race, harassment related to race and victimisation. We shall look at each of these in turn.

110. By section 13 of the 2010 Act, 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. By section 23, on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case. Direct discrimination is prohibited in the workplace. By section 39(2), an employer must not discriminate against an employee (*inter alia*) in the way in which the employer affords the employee opportunities for promotion, transfer or training or by subjecting the employee to any other detriment.

111. Pursuant to the burden of proof provisions in section 136, it is for the claimant to show a *prima facie* case that he was less favourably treated than others were treated or would have been treated by the respondent because of race.

112. The test posed by the legislation is an objective one – the fact that a claimant believes that they have been treated less favourably does not of itself establish that there has been less favourable treatment. The claimant said on a number of occasions that he felt that the respondent had discriminated (or harassed) him. Such is insufficient to establish facts from which unlawful conduct may be inferred.

113. A complaint of direct discrimination will only succeed where the Tribunal finds that the protected characteristic was the reason for the claimant's less favourable treatment. The protected characteristic need not be the only reason for the treatment, provided that it is an effective cause of it. In essence, the Tribunal has to determine whether the claimant was less favourably treated by the respondent than others were or would have been and if so the reason for the treatment. Was the treatment because of the protected characteristic (wholly or materially) or was it for another reason?

114. By section 26 of the 2010 Act, a person harasses another if they engage in unwanted conduct related to a relevant protected characteristic and that conduct has the purpose or effect of violating the other's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. In deciding whether the conduct has the effect of creating an intimidating *etc* environment, the perception of the complainant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect must all be taken into account. Harassment of an employee by an employer is made unlawful within the workplace by section 40 of the 2010 Act.

115. In contrast to a complaint of direct discrimination, a complaint of harassment does not require a comparative approach. It is not necessary for the worker to show that another person was, or would have been, treated more favourably. Instead, they have to establish a link between

the harassment and a relevant protected characteristic. The Equality and Human Rights Commission's *Code of Practice on Employment* notes that unwanted conduct can include a wide range of behaviour. We refer to paragraph 7.7 of the Code. The conduct may be blatant (for example, overt bullying) or more subtle (for example, ignoring or marginalising an employee). An omission or failure to act can constitute unwanted conduct as well as positive actions.

116. The Code provides in paragraph 7.8 that the word *"unwanted"* in the legislation is essentially the same as *"unwelcome"* or *"uninvited".* In **Thomas Sanderson Blinds Limited v English** EAT 0316/10 it was held that unwanted conduct means conduct that is unwanted by the employee. The necessary implication of this is that whether conduct is *"unwanted"* should largely be assessed subjectively, *ie* from the employee's point of view.

117. The conduct does not have to be directed specifically at the complainant in order for it to be unwanted by them. Further, the employee does not have to be present when the words or actions occur.

118. Conduct that is by any standards offensive or which obviously violates a complainant's dignity will automatically be regarded as unwanted. The Code gives an example of what it terms "*self-evidently unwanted conduct"* of sexist remarks being made to a female electrician that she should go home to cook and clean for her husband. The female electrician would not have to object to such conduct before it is deemed to be unlawful harassment.

119. The Code makes the point that a serious one-off incident can amount to harassment. We refer to paragraph 7.8.

120. The unwanted conduct in question must have the purpose or effect of violating the claimant's dignity or creating an intimidating *etc* environment for them. Conduct that is intended to have that effect will be unlawful even if it does not in fact have this effect. Conduct that in fact does have that effect will be unlawful even if that was not the intention. In an assessment of whether the conduct has the proscribed effect, the Tribunal will take account of the complainant's perception, whether it is reasonable for the conduct to have that effect and all the circumstances of the case. The adverse purpose or effect can be brought about by a single act or by a combination of events.

121. The conduct in question must be related to a relevant protected characteristic. Where a direct reference is made to an employee's protected characteristic the necessary link will usually be clearly established. Where the link between the conduct and the protected characteristic is less obvious then Tribunals may need to analyse the precise words used, together with the context, in order to establish whether there is any negative association between the two.

122. By section 27 of the 2010 Act, a person victimises another if they subject them to a detriment because they have done a protected act, or they believe that the other has done or may do a protected act. A protected act includes the making of an allegation of a contravention of the 2010 Act. It is not necessary that the 2010 Act must actually be mentioned in

allegation. However, the asserted facts must, if verified, be capable of amounting to a breach of the 2010 Act.

123. In the course of her submissions, Miss Souter referred to a trilogy of cases a summary of which we shall set out here. The first is **Beneviste v Kingston University** EAT 0393/05. Here, the complainant said that she had been victimised because she had raised various grievances. She admitted that she had not at the time complained that her treatment was on the grounds of sex or race but thought this did not matter. The EAT held that a complainant does not identify a protected act *"merely by making a reference to a criticism, grievance or complaint without suggesting that the criticism, grievance or complaint was in some sense an allegation of discrimination or otherwise a contravention of the legislation."*

124. In **Durrani v London Borough of Ealing** EAT 045/12, the complainant said that he had been subjected to a detriment of having complained to his employer of *"being discriminated against."* The Employment Tribunal held that the complainant had used the term *"discriminated against"* to refer what he perceived as general unfairness, rather than to detrimental action based on his race. The Employment Appeal Tribunal upheld the Tribunal's decision. It was clear that the complainant had not raised any complaint which could be understood as alleging treatment contrary to the 2010 Act.

125. The third case as **Fullah v Medical Research Council and Another** EAT 0586/12. The complainant brought a complaint that he had been *"physically, verbally and psychologically bullied and harassed, discriminated and victimised."* He made no mention of race. A year later, he made explicit claims of race discrimination. The EAT accepted that the word *"race"* does not have to appear, but the context has to indicate a relevant complaint and here that context was lacking (particularly when set against the complainant's actions a year later).

126. The Code says (in paragraphs 9.8 and 9.9) that, "*Generally a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage."*

127. Crucially, there must be a causal link between the protected act on the one hand and a detriment suffered on the other. To succeed in a claim of victimisation the complainant must show that they were subjected to the detriment because they did a protected act, or the employer believed that the complainant had done or might do a protected act. The essential question, as with the complaint of direct discrimination, is what, consciously or subconsciously, motivated the employer to subject the claimant to the detriment?

128. The protected act may not be the only reason for detrimental treatment for victimisation to be established. Indeed, it need not be the primary cause of a detriment, so long as it is a significant factor.

129. The victimisation of an employee is made unlawful in the workplace pursuant to section 39(4). An employer must not victimise an employee by (amongst other things) subjecting the employee to detriment or in the way that access to training is arranged.

130. By section 123 of the 2010 Act proceedings must be brought before the end of the period of three months starting with the date of the act to which

the complaint relates or such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period.

131. Section 140B of the 2010 Act provides for an extension to the section 123 time limit to take account of the time spent in ACAS early conciliation. The days between notifying ACAS and the issue of the ACAS earlier conciliation certificate do not count to the calculation of the three months' period.

132. Time limits are exercised strictly in employment cases. It is for the complainant to convince the Tribunal that it is just and equitable to extend time. The exercise of the discretion is the exception rather than the rule. In considering whether to exercise discretion under section 123 to extend time, all factors must be considered including in particular the length and the reason for the delay.

133. The Tribunal's discretion is a wide one. The factors which are almost always relevant are the length and reasons for the delay and whether the respondent suffers prejudice. There need not be a good reason for the delay. It is not the case that time cannot be extended in the absence of an explanation for the delay from the claimant. The most that can be said is whether there is any explanation or apparent reason for the delay and the nature of any reason are relevant matters to which the Tribunal ought to have regard. However, there needs to be something to convince the Tribunal that it is just and equitable to extend time. (Authority for these propositions may be found in the case of **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640).

134. In summary, the Tribunal finds that all of the complainant's complaints but one fail upon the facts. That being the case, it is convenient, we think, to cross-refer the relevant findings of fact to the list of issues in paragraph 135. The cross-referencing is by way of bold italics.

135. The issues in the case were, as has been said, identified by Employment Judge Shore at the preliminary hearing which came before him on 25 January 2021. The issues (identified in paragraph 36 of his record of the hearing) are now set out:

1. ***Race Discrimination***

a. *<u>Jurisdiction</u>*

Does the Tribunal have jurisdiction to hear the claim insofar as the acts of discrimination alleged occurred more than three months before the ACAS Early Conciliation was commenced, i.e. on or before 12 May 2020?

The Claimant contacted ACAS for Early Conciliation on 11 August 2020 and the Early Conciliation certificate was issued on 21 March 2020. The Claim Form was presented to the Tribunal on 30 August 2020.

b. <u>Direct discrimination</u>

i. Did the following occur?

1. Ms Taylor improperly failed to tell the Claimant that a member of cleaning staff had made a racial comment on 9 December 2019 before repeating it to the Claimant on 10 December 2019;

Mrs Taylor failed to tell the claimant of the cleaner's remarks made on 9 December 2019: see paragraphs 49 and 59.

2. Ms Taylor told the Claimant that the member of cleaning staff had previously made numerous racist and derogatory comments about the Claimant;

This fails upon the facts: see paragraph 58.

3. Ms Taylor in any way altered the statement produced by the Claimant in respect of the incident on 10 December 2020;

This fails upon the facts: see paragraphs 56 and 57.

4. Ms Taylor improperly criticised the Claimant's work, or displayed personal bias towards him, between October and December 2019 or at any other time;

This fails upon the facts: see paragraphs 8, 21 to 25, 41 to 47, 68 and 81.

5. In November 2019, Ms Taylor told the Claimant, in front of Sarah, a personal secretary, "what do you think you are playing at, if you keep this up, when the time comes for a possibly extension for your work contract to be considered it will not happen";

This fails upon the facts: see paragraphs 45 to 47.

6. Ms Taylor purposefully humiliated the Claimant in November 2019 in front of a colleague;

This fails upon the facts: see paragraphs 24 to 33, and 42 to 47.

7. In January 2020, Ms Taylor, at an impromptu meeting, raised her voice, pointed her finger and was aggressive towards the Claimant such that the Claimant reasonably felt threatened;

This fails upon the facts: see paragraphs 60 to 66 and 81.

8. At the same impromptu meeting in January 2020, Ms Taylor spoke to the Claimant inappropriately or improperly about a black relative and told the Claimant that she understood him to believe that she had been improperly involved in the incident which took place on 9 December 2019;

This fails upon the facts: see paragraphs 60 to 66 and 81.

9. *Ms Taylor behaved improperly or inappropriately on 17 [January 2020] when she discussed the complaint by another member of staff with the Claimant;*

This fails upon the facts: see paragraphs 60 to 66 and 81.

10. *Ms Taylor did not take adequate steps to ensure that the Claimant was managed correctly when he returned to work on 25 February 2020;*

This fails upon the facts: see paragraphs 74 to 79, 82 and 87.

11. *The Respondent improperly moved the Claimant into a different role in the Active Office in February 2020 (the move was at the Claimant's request) and required him to assist the secretaries when they did not in fact require assistance;*

This fails upon the facts: see paragraphs 74 to 79 and 82.

12. *The Claimant had no colleagues to work with or effectively communicate with;*

This fails upon the facts: see paragraph 82 in particular.

13. *In February and March 2020, Ms Taylor improperly allocated tasks to the Claimant which had previously been undertaken by the whole clerical team and which were impossible to complete in the timeframe required;*

This fails upon the facts: see paragraphs 74 to 79 and 87 to 94.

14. *In February and March 2020, Ms Taylor did not offer the same support and opportunities for personal development training which she offered to other members of the team;*

This fails upon the facts: see paragraph 33.

15. *In March 2020, the Claimant was improperly required to undertake the role in the Active Office permanently and was given duties which were not suitable for him;*

This fails upon the facts: see paragraphs 74 to 79 and 87 to 94.

16. *Details about the Claimant receiving Occupational Health support were displayed on a whiteboard in the office;*

This fails upon the facts: see paragraphs 96 and 97.

17. *The Claimant was allocated work which was designed for two people to complete;*

This fails upon the facts: see paragraphs 74 to 79 and 87 to 94*.*

18. *The Claimant was moved to a non-existent role;*

This fails upon the facts: see paragraphs 74 to 79 and 82.

19. *The Claimant was managed improperly;*

This fails upon the facts: see in particular paragraphs 25,30,36,40,43,49-50,55,59,74,78-79,81,87-88,91,96 and 99.

20. *Ms Taylor was hostile and aggressive in a meeting at some point after March 2020 at which the Claimant's view that he had too much work was discussed;*

This fails upon the facts: see paragraphs 87 to 94.

21. *Whether in respect of the Claimant's absence in June 2020, Ms Taylor purposefully recorded the reason for the Claimant's sickness absence incorrectly; and*

This fails upon the facts: see paragraph 101.

ii. *If so, did such acts and omissions amount to less favourable treatment as compared with a hypothetical comparator?*

iii. *If so, was such less favourable treatment because of the Claimant's race? The Claimant identifies as being of British Black African Caribbean race.*

c. *<u>Victimisation</u>*

i. *Was the grievance of 25 February 2020 a protected act for the purposes of s.27(2) Equality Act 2010?*

ii. *If so, did the Claimant suffer the detriments set out at (b)(i)(10-21) above because he did that protected act?*

These allegations fail upon the facts: see above.

d. *<u>Harassment</u>*

i. *Did the acts and omissions listed at (b)(i)(1-21) above occur?*

These allegations fail upon the facts: see above.

ii. *In addition, did the following occur?*

1. *In November 2019, Ms Taylor improperly reprimanded the Claimant over not contacting the IT department in a timely manner;*

This fails upon the facts: see paragraphs 34 to 36.

2. *In November 2019, Ms Taylor was aggressive towards the Claimant and spoke to him inappropriately when he was late logging into the computer system after being shot at by a pellet air-rifle;*

This fails upon the facts: see paragraphs 37 to 40.

3. *In January 2020, Ms Taylor, upon meeting the Claimant after he had attended an appointment with his GP, said "what seems to be the problem, do you need further training [sic]" and improperly questioned the work which the Claimant had been doing;*

This fails upon the facts: see paragraphs 70 to 72.

4. *In March 2020, Ms Taylor, when asked by the Claimant for support in respect of the tasks he had been asked to complete, became aggressive in front of Anthony Rider, a communications manager, and improperly told the Claimant "we are a team here, we work as a team";*

This fails upon the facts: see paragraphs 87 to 94.

5. *In March 2020, in the same incident as listed at paragraph 54(d) above, Anthony Rider looked at the Claimant aggressively and told him "we all need to flipping knuckle down, stop complaining and get on with it, as more shit in terms of Covid (sic) is coming".*

This fails upon the facts: see paragraphs 87 to 94.

iii. *If so, did such acts and omissions amount to unwanted conduct?*

iv. *If so, were such acts and omissions related to the Claimant's race?*

v. *If so, did such acts and omissions have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?*

vi. *If so, was it reasonable for the acts and omissions to have that effect on the Claimant?*

136. In summary, the Tribunal finds that all the complainant's complaints but one fail upon the facts. We find that Mrs Taylor failed to tell the claimant that a member of cleaning staff had made a racial comment on 9 December 2019 before she (the cleaner) repeated it to the claimant on 10 December 2019. There is no evidence that she would have acted differently had a like remark been made about an employee of a different race. Therefore, the claimant has not established that he was less favourably treated than another and thus the complaint of direct race discrimination must fail upon this issue must also fail. All of the other complaints of direct race discrimination fail as the claimant has not shown a *prima facie* case of less favourable treatment in comparison to another of a different race. Indeed, the claimant has not established any factual basis for his claim as all of the complaints (but one) have failed upon the facts in any case. The complaints of harassment (save for one) fail for the same reason,

137. Upon the victimisation complaint, the Tribunal finds that the claimant did not do a protected act. In submissions, the claimant sought to rely upon the final paragraph of the grievance letter at page 158. This says, *"I believe behind this pretence of complaint conceals one of malicious opportunism based on prejudice and bias. I have no doubt that there is a concerted effort to both undermine my position and cause personal distress towards me by an employee or employees within the administration department."* The claimant makes no express reference to race.

138. There is nothing from the context of the grievance which, upon a fair reading, could point the respondent in the direction of a complaint of an infringement of the 2010 Act. By application of the case law to which we refer above we find that the grievance does not make an allegation of any breach of the 2010 Act. A reference to prejudice and bias is not sufficient. In any case, the claimant gave no evidence and made no submissions in support of his case that any of the 12 alleged detriments were materially influenced by the grievance. We accept the respondent's account that Sarah Taylor first became aware of it only when she met with Robyn Hoaksey on 13 March 2020. There can be no causal link between the claimant's treatment by Sarah Taylor on the one hand and the grievance on the other upon any pre-13 March 2020 incidents. Upon this basis alone, the allegations listed in (10) to (15), (17) and (18) must fail. In any case, we find that none of the 12 acts of alleged detriment complained of are established on the facts in any case.

139. We now turn to the one successful complaint. This is that the claimant was subjected to unwanted conduct when Sarah Taylor failed to tell him that the member of cleaning staff had made a racial comment about him on 9 December 2019.

140. The wording of the allegation in paragraph 36.1(b)(i)(1) could fairly be construed as a contention that the impugned conduct is that of both Sarah Taylor and the cleaner. During submissions, the claimant made it claim that he brought no complaint about the cleaner's conduct. The complaint is solely about that of Sarah Taylor.

141. The claimant's case therefore is that he was subjected to harassment because Mrs Taylor omitted to tell him that the cleaner had made racist remarks on the evening of 9 December 2019. This was an omission upon the part of Sarah Taylor. As we saw in paragraph 115, an omission to act can constitute an act of harassment.

142. The claimant says that this omission was unwanted conduct. Essentially, his evidence (given in cross-examination) is that he ought to have been told of what had happened by Mrs Taylor (as his line manager) in order that he could decide what to do about it for himself. His position was that it was not for Sarah Taylor to take it upon herself to effectively keep him in ignorance about it even if she had a benign motive.

143. The Code and the **Thomas Sanderson** case are authority for the proposition that generally it is for the complainant to decide what is unwanted conduct. We therefore accept that the claimant was subjected to unwanted conduct by being kept in ignorance of the cleaner's inappropriate remarks made on the evening of 9 December 2019.

144. It is difficult to see upon what basis it can be contended that Mrs Taylor's actions were *'wanted'* from the perspective of the claimant. We accept that this presented the respondent with an acute dilemma. In our judgment, on balance it is not appropriate for the employer to keep an employee in ignorance about an unlawful act or course of conduct concerning them. Such would only be to encourage a lack of transparency within the workplace. Further, such is potentially harmful as it may lead to a repetition of the impugned behaviour. This may seem harsh upon a well-meaning employer seeking to save an employee form knowledge of hurtful remarks. However, the case law and Code and the interests of transparency favour disclosure.

145. Indeed, this is very much what happened in this case. The claimant found himself being subjected to unwanted conduct upon the part of the cleaner 24 hours later, on the evening of 10 December 2019. Had the claimant known what the cleaner had said the previous evening then he may have been able to persuade the employer take steps to stop him coming across her. She may have been moved or suspended. The failure to inform the claimant of the events of 9 December 2019 and to take meaningful management action exposed the claimant to an incident of race-related harassment the next day. Upon this analysis therefore we accept that the claimant was subjected to unwanted conduct.

146. We have no hesitation in finding that Sarah Taylor's conduct was not done with the purpose of violating the claimant's dignity or creating an intimidating *etc* environment for him. We accept entirely that she had a benign motive in keeping this information from the claimant.

147. We do accept however that her acts reasonably had the effect of violating the claimant's dignity and of creating an intimidating *etc* environment for him. He was kept in ignorance of what had happened the previous evening. He was then subjected to the cleaner relaying to him the abusive remarks that she had made the previous evening. The link with the protected characteristic of the claimant's race is obvious. It was the claimant's race which caused Sarah Taylor to keep the claimant in ignorance and his race which led the cleaner to act as she did. In those

circumstances there can be little doubt that it was reasonable for the claimant to perceive that Mrs Taylor's acts had the effect of violating his dignity or creating an intimidating *etc* environment for him.

148. We accept that Mrs Taylor acted quickly after 10 December 2019 once she discovered what had happened that evening. The violation of the claimant's dignity and the creation of an intimidating *etc* environment for him was therefore short lived. The cleaner was moved to work away from the clinic. Nevertheless, there is a clear causal connection between the unwanted conduct of keeping the claimant in ignorance on the one hand and the creation of an intimidating *etc* environment and violation of the claimant's dignity for a short time on the other related to the claimant's race.

149. When taken in isolation as a one-off act, this complaint has plainly been brought out of time. The claimant commenced early conciliation on 11 August 2020. The claim was deemed to have been received by the Tribunal on 21 September 2020. The impugned act of harassment was in short compass ending on 11 December 2019 when Sarah Taylor took decisive action. The claimant needed to have commenced early conciliation no later than 10 March 2020 and then to have presented his complaint within the relevant three months' time limit as adjusted pursuant to section 140B of the 2010 Act.

150. Upon the facts as found, none of the other acts of which the claimant complains were discriminatory or race-related harassment. Thus, they cannot bridge the gap so that the claim was presented in time. The successful claim was presented outside the time limit.

151. However, we accept that upon the claimant's cases as pleaded there was a continuing course of conduct throughout the period of his employment. We do not accept Miss Souter's case that that course of conduct ended on 17 March 2020 with a gap of in excess of three months. The alleged incorrect recording of his sickness covered the period between 12 and 18 June which is within three months of 17 March 2020. Further, the claimant came across the cleaner who had so offended him on 11 June 2020. From the claimant's perspective, Sarah Taylor was his line manager and was responsible for the course of conduct of which he complains. That being the case, the Tribunal finds that at the height of the claimant's case there was a continuing course of conduct ending only on 15 July 2020.

152. Partly for this reason, we hold it to be just and equitable to extend time to consider the complaint arising out of the incidents between 9 and 11 December 2019. In our judgment, the balance of prejudice favours the claimant. The respondent suffered no forensic prejudice. There was no evidence adduced by the respondent that the delay in the claimant bringing a complaint about the incident of December 2019 in any way prejudiced their position evidentially. The respondent was able to deal with the allegation.

153. The claimant's pursuit of the matter has to be seen in the context of what he perceived to be a cause of discriminatory and harassing conduct ending only when he left the respondent's employment. After he did so, he presented his claim form within two months of the effective date of termination. We are satisfied that his perception of matters constitutes a

good reason for not presenting the claim in time. The prejudice to the claimant of not allowing the successful complaint of harassment to proceed for want of jurisdiction is significant. He will be left without a remedy for a serious act of harassment related to race.

154. The case shall now be listed for a remedy hearing. The parties are directed to submit their dates of availability within 14 days of the date of promulgation of this Judgment. Dates of availability should cover the next four calendar months. Should the parties consider that the case will benefit from a case management hearing before the Employment Judge for the good conduct of the remedy hearing then an application may be made.

Employment Judge Brain

Date 31 January 2022