EMPLOYMENT TRIBUNALS

Claimant: **Mr Adil Mouti**

Respondent: **Oxford University Hospitals NHS Foundation Trust**

Heard at: **Reading (via CVP)**

On: **8th- 12th and 15th to 16th November 2021**
25th, 26th and 28th January 2022
(And in Chambers on 7th, 8th and 10th March 2022)

Before: **Employment Judge Eeley**
Ms D Ballard
Mr P Adkins

Representation
Claimant: **In person**
Respondent: **Ms B Criddle, counsel**

RESERVED JUDGMENT

1. The claimant's claim of automatically unfair constructive dismissal for making a protected disclosure fails and is dismissed (sections 94, 95(1)(c) and 103A Employment Rights Act 1996).

2. The claimant's claim that the respondent breached its duty to make reasonable adjustments within the meaning of the Equality Act 2010 fails and is dismissed (sections 20 and 21 Equality Act 2010).

3. The claimant's claim of direct disability discrimination fails and is dismissed (section 13 Equality Act 2010).

4. The claimant's claim of direct sex discrimination fails and is dismissed (section 13 Equality Act 2010).

5. The claimant's claim of direct race discrimination fails and is dismissed (section 13 Equality Act 2010).

6. The claimant's claim of victimisation contrary to section 27 of the Equality Act 2010 fails and is dismissed.

7. The claimant's claim for unauthorised deductions from wages fails and is dismissed (section 13 Employment Rights Act 1996).

REASONS

BACKGROUND

1. By a claim form presented to the Tribunal on 30 March 2018, the claimant brought various claims against the respondent arising out of his employment with the respondent as a Research Co-Ordinator between 16 January 2017 and 11 December 2017. The case was actively case managed and, following a two day long preliminary hearing, Employment Judge Hawksworth agreed the list of issues with the parties which was to be determined at the final hearing. That list of issues was to be found at pages 228-238 of the final hearing bundle. At the outset of the final hearing the Tribunal confirmed with both parties that the list still accurately reflected the issues in the case. The Tribunal confirmed that those were the issues which this Tribunal would determine at the end of the final hearing.

2. The Tribunal received witness evidence from the following witnesses by way of written statement supplemented by oral evidence at the final hearing:

a. The claimant, Mr Adil Mouti.

b. Mrs Toni Hall, Clinical Unit Operational Manager for Radiology (at the times relevant to this claim).

c. Mrs Jennifer ("Jenni") Lee, Clinical Research Operational Manager and Programme Director for the Biomedical Research Centre (at the times relevant to this claim).

d. Mrs Baldish ("Bobbie") Sanghera, Divisional Research and Development Manager (at the times relevant to this claim).

e. Miss Jaleesa Douglas, HR Consultant (at the times relevant to this claim).

f. Mrs Toni Mackay, Operational Service Manager Diagnostics.

g. Mrs Claire Ridgeon, Radiology Site Manager at the Churchill Hospital and CT Modality Lead (at the times relevant to this claim).

h. Mrs Samantha Messenger, Personal Assistant (to Professor Fergus Gleeson, Dr M Anderson, Rachel Benamore and Toni Hall) and Thermal Ablation Administrator.

3. In addition, the respondent relied on the written witness statement of Mrs Karen Olliffe (Senior Research Radiographer). Mrs Olliffe was unable to give oral evidence at the hearing for the reasons set out in a letter dated 2 November 2021 from Judith Richardson, Community Psychiatric Nurse/CBT Practitioner. We read Mrs Olliffe's witness statement and gave it such weight

as was appropriate taking into account the fact that it her evidence was not tested in cross examination.

4. The Tribunal was also referred to the documentary evidence contained within the agreed final hearing bundle (1691 pages). We read those documents to which we were referred by the parties. Numbers in square brackets below are references to pages within the final hearing bundle unless otherwise indicated.

5. At the conclusion of the hearing we received written submissions from the respondent which were supplemented by oral submissions. We heard the claimant's oral submissions.

PRELIMINARY ISSUES

6. The first three days of the final hearing were taken up with determining three separate applications made by the claimant. In addition, on the afternoon of the second day of the hearing, before we had started to hear the witness evidence, the claimant made an application for witness orders. We started to consider this application but the claimant withdrew it before we were able to communicate our decision on the application to the parties. The claimant had applied for orders requiring the attendance at the final hearing of: Professor Fergus Gleeson (Professor of Radiology and Divisional Director for Clinical Support Services), Mr Martyn Leja (HR Consultant), Mr John Drew (Director of Culture and Improvement) and Mrs Diane Pratley (Research Administrator). He made no application (withdrawn or otherwise) in respect of the attendance of Ms Jennifer Wright (Senior HR Consultant) or Ms Kay Clayton (HR Business Partner).

Strike out application

7. On the first morning of the hearing we heard the claimant's application that the respondent's defence to all his claims should be struck out. We took time to consider it and gave our decision with oral reasons in the early afternoon of the first day of the hearing. We refused to strike out the defence to the claim. The claimant requested written reasons in respect of this decision. Those written reasons appear in the following paragraphs.

8. The claimant applied to strike out the response to the claims by way of letter and documents dated and sent to the Tribunal on the 2 November 2021. We heard submissions orally from the claimant and from Ms Criddle on the first morning of the final hearing and the Tribunal discussed the appropriate approach to the application.

9. The claimant's application was based in on two different elements. Firstly, the claimant took issue with the list of witnesses attending on behalf of the respondent for the final merits hearing. He said that there were material witnesses who were missing from the list and that some of the witnesses who had, in fact, been called to give evidence were not relevant to the issues in the case. He summarised his position by saying that the respondent had effectively 'cherry picked' the witnesses that they were putting before the

Tribunal and that this was unfair. As a consequence he asserted that there could be no fair hearing of his claims.

10. Secondly, the claimant talked about the absence of full disclosure of documents by the respondent. He referred to various documents which he said he would have expected to have received in disclosure during the course of proceedings. He said those documents had not been disclosed and were not within the bundle to be used during this final hearing. He said that this was in breach of the Tribunal's orders and that a fair hearing of the claims was no longer possible as a result.

11. In relation to the respondent's list of witnesses, the Tribunal explained to the claimant that it is for the respondent to choose which witnesses it wishes to call to give evidence in order to defend the claimant's claims. The Tribunal will hear that witness evidence. It is then open to the Tribunal to draw any appropriate adverse inferences from the respondent's failure to call a particular witness when the Tribunal comes to its decision at the end of the hearing. The Tribunal will note whether there are any material gaps in the witness evidence presented in relation to the relevant issues in the case. If such gaps exist, the Tribunal can consider whether there is any reasonable explanation for the gap and whether the absence of a relevant witness should strengthen or weaken either party's case. Any inferences drawn may assist the Tribunal in making its relevant findings of fact.

12. At the beginning of the final hearing the written witness statements were (largely) unsigned but the Tribunal took the view that by the conclusion of the hearing they would be signed and, more importantly, each witness would have confirmed, on oath, that their witness statement was true and accurate to the best of their knowledge and belief. That is a standard practice adopted in the Employment Tribunals.

13. In responding to the claimant's application to strike out the defence, the respondent explained the basis of its decision as to the appropriate list of witnesses to the Tribunal. The respondent's position was that the list of witnesses had been tailored to the agreed list of issues that the Tribunal will be asked to determine at the conclusion of the final hearing. The respondent sought to call those witnesses who could give relevant evidence in relation to the specific allegations made by the claimant within the list of issues. The rationale was as follows:

    a. Samantha Messenger was called to deal with a specific allegation in relation to a Christmas party invitation which the claimant alleged is an incident of discrimination. She could deal with the circumstances in which invitations were (or were not) sent out to staff and who was (or was not) invited to the event in question. That was her relevance as a witness.
    b. Jaleesa Douglas was called to deal with the unauthorised deductions from wages aspect of the claim. She could give relevant evidence from an HR perspective as to the claimant's entitlements.
    c. There were two "missing witnesses" as the claimant put it: Professor Gleeson and Mr Drew. The respondent had taken the view that there were no allegations (of discrimination or otherwise) which specifically involved those two witnesses. Hence, they had not been called to given evidence to this Tribunal.

14. The Tribunal concluded that the claimant had had the opportunity (as had the respondent) to decide which witnesses he wished to call to give evidence at the final hearing. He had not made any applications for Witness Orders by the start of the final hearing or by the time he made this application to strike out the defence. The claimant had chosen only to call himself to give evidence and had not sought to call the other witnesses which he said would assist his case. That was a matter for him. Both parties were therefore in the same position vis-a-vis the Tribunal hearing and their choice of witnesses. It would be for the claimant to cross examine the respondent's witnesses. He would have the opportunity to make submissions at the conclusion of the hearing as to what weight, if any, should be given to their evidence and also what inferences the Tribunal could (and should) draw from the absence or presence of a particular witness.

15. Turning to the issue of disclosure, the claimant was asked to point out which specific documents he thought were missing from those that had been provided by the respondent. It was noted that there had been a lengthy preliminary hearing in this case and there were various pieces of correspondence dealing with clarifying the issues. Ms Criddle pointed out that the respondent had provided some of its disclosure to the claimant before the list of issues had been finalised. She said that this explained why not all matters of disclosure were dealt with at the very outset. The relevance of some documents (and therefore the fact that they were disclosable) only became apparent once the list of issues for determination at the final hearing had crystallised. As the list of issues shed light on the relevance of the documentation then further disclosure was made, as appropriate and in line with the respondent's ongoing duty of disclosure.

16. The claimant had already applied for a strike out of the respondent's defence on the basis of a lack of disclosure on several occasions prior to the final hearing. On each occasion that application had been declined by the Tribunal dealing with the case that stage. The respondent had been ordered to explain the basis of its search for documents in relation to various different categories of documents and no previous order for specific disclosure had been made by the Tribunal. There was nothing presented to *this* Tribunal to indicate that the respondent had failed to comply with that order to provide an explanation of their search for evidence for disclosure purposes.

17. The respondent gave us an explanation for the apparently late disclosure of an email [at 169]. It was disclosed on 1 October 2021. We were told that the reason for late disclosure was that the witness in question was interviewed for the purposes of providing her witness statement and it was at that point in time that the document was mentioned. Consequently it was disclosed. The witness had not been spoken to before the summer of 2021 because it was not apparent that she would be one of the relevant witnesses in this case until the list of issues had been clarified. The email was therefore disclosed in compliance with the respondent's ongoing duty of disclosure in the proceedings as soon as its relevance and the fact that it was disclosable became apparent.

18. The claimant made reference to a number of gaps in the documentation. He took us to his comments on the chronology at page 15 of that chronology and

the paragraphs numbered 15, 16, 17 and 19. The respondent was able to provide explanations in relation to those documents as follows:

a. Page 610: the respondent has disclosed what they have, there is no copy of an attachment on the file.

b. Some documents that the claimant is asking for are no longer in existence. For example, at page 806 there is a letter which is said to summarise a discussion at a meeting. The claimant says that there should also be handwritten notes from the meeting which should also have been disclosed. The respondent's position is that the normal procedure within the organisation is for the HR employee supporting the case/meeting to take their own handwritten notes during the meeting. The HR employee then uses those contemporaneous notes to draft a typed letter which then forms the formal record of what took place at the meeting. The handwritten notes are then disposed of. The letter effectively replaces the handwritten notes. The Tribunal noted that, at the conclusion of that letter (in the last paragraph) the claimant was given the opportunity to raise any queries he had about the contents of the letter soon after the meeting took place. It is apparent that the claimant had the opportunity to query or challenge the accuracy of the record of the meeting which was contained in the letter in question. The respondent cannot disclose a document (handwritten notes) which is no longer in existence.

c. In relation to the remaining documents requested by the claimant, the respondent was either able to take us to the relevant pages within the bundle to show that the document had in fact been disclosed and included, or was able to explain that no such document actually existed (despite the claimant's expectations to the contrary).

19. The conclusion that the Tribunal reached, taking all of that into account, was that we could not be satisfied at that stage (on the first day of the final hearing) that the respondent was, in fact, 'cherry picking' in relation to its choice of witnesses in the manner alleged by the claimant. Nor was there any basis for thinking that it had done anything untoward in its choice of who to call as a witness at the Tribunal. Furthermore, we could not be satisfied that there were still relevant and disclosable documents in existence which had not already been disclosed to the claimant. We could not conclude that there had been a persistent breach of the Tribunal's orders by the respondent in the manner alleged by the claimant, or at all. It followed that we could not conclude that there was no longer the possibility of a fair trial in the case or that a strike out would be proportionate as a response to the application, particularly given the stage which the proceedings have reached (i.e. the beginning of the final merits hearing). It would be wholly disproportionate to strike out the respondent's response at this stage.

20. The appropriate, fair and proportionate way to deal with this issue was for the claimant to cross examine the respondent's available witnesses in relation to any gaps in the documentation which he perceives still remain. The witnesses could be questioned as to where those documents were. If there was no appropriate witness to put such questions to in relation to any given document, the claimant could make submissions at the end of the hearing

about the presence and relevance of any such gaps in the documentation. He would be able to invite the Tribunal to draw whatever inferences were appropriate in the circumstances. Those inferences might well be adverse to the respondent and supportive of the claimant's case. It was possible that inferences might be drawn which undermined the respondent's case. (It was impossible to know either way at the beginning of the hearing). However, it was, as previously stated, for the respondent to decide which witnesses should be called to give evidence and the respondent would have to deal with the logical consequences of its own litigation choices.

21. The Tribunal reminded itself that the applicable test for determining a strike out application is that set out at rule 37 of the Employment Tribunal Rules of Procedure 2013. Rule 37 states that a Tribunal may strike out all or part of a claim or response on any of the following grounds:
    a. that it is scandalous or vexatious or has no reasonable prospects of success;
    b. that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
    c. for non-compliance with any of these Rules or with an order of the Tribunal;
    d. that it has not been actively pursued;
    e. that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

22. Rules 37(c) and (e) were the relevant parts of the rule in the context of the claimant's strike out application. In light of the foregoing, we did not find any relevant breach by the respondent of the Tribunal's rules or orders. We concluded that it was eminently possible to have a fair trial of the case. In any event, we noted that the sanction of striking out a defence is the most draconian one open to the Tribunal. It would be entirely disproportionate to apply such a sanction in the circumstances of this case. Furthermore, and for the avoidance of doubt, we did not consider that anything said in the course of the strike out application indicated that the defence had no reasonable prospects of success or that the manner in which the respondent had conducted the proceedings was scandalous, unreasonable or vexatious. Nor could it be said that the defence had not been actively pursued by the respondent. In short, the tests set out at rule 37 were not satisfied in this case and the Tribunal therefore declined to strike out the respondent's defence to the case. The Tribunal decided that it would then proceed with reading the parties' witness statements and the documents we were referred to so that the hearing could go on to hear the oral witness evidence.

Application for specific disclosure

23. The Tribunal gave its decision and reasons in relation to the claimant's strike out application orally. Upon receiving our decision the claimant indicated that he wanted to make an application for specific disclosure and that this needed to be determined before the substantive part of the final hearing could get underway. The Tribunal asked the claimant to provide a written application so that both the Tribunal and the respondent could see exactly what he was asking for (and why) before the Tribunal heard the parties' submissions and

determined the application. The finalised document was emailed to the Tribunal and the respondent and the application was heard on 9 November 2021 (day two of the hearing).

24. Essentially, the claimant set out a list of various documents which he considered must be in existence and which he would therefore wish to have disclosed. They were referred to in a series of sixteen paragraphs plus reference to a total of nine emails. We went through the claimant's document paragraph by paragraph identifying (from the sections that the claimant had highlighted) precisely what documents he thought were in existence and available for disclosure. In the same manner we were assisted by respondent's counsel who helpfully went through the paragraphs in the same fashion providing the respondent's submissions.

25. This Tribunal could only make an order for disclosure of a document that is still in existence. The Tribunal largely had to accept the respondent's submissions as to the documents' continued (or prior) existence, in the absence of evidence to the contrary. During the course of his cross examination of the relevant witnesses it remained open to the claimant to point out to the witness where a document had not been disclosed and to put to them his doubts about the lack of documentation and any points he wished to make about what had happened to those documents. The Tribunal would then be able to draw whatever inferences appeared appropriate following cross examination and following any submissions the claimant wished to make about the respondent's credibility (and whether they have told us the truth in relation to the continued existence of the documentation).

26. Nevertheless, we had to deal with the substance of the claimant's application. Overall the requested documents fell into one of two broad categories. Either there were no written documents in relation to an oral discussion at all (because not every discussion is documented in writing) and therefore the written document could not be disclosed because it never existed. Or, alternatively, any handwritten notes that *were* created during meetings had been superseded by a typed document and the handwritten notes had been destroyed. As noted above, it was the HR practice within this respondent Trust to draw up a fair copy of the notes in a typed letter and send it to the claimant for his comments. Once that was done the respondent's handwritten notes were disposed of. The respondent felt that there was no need to retain them. They were therefore no longer available for disclosure.

27. Finally, there was a document which had not previously been identified by the respondent's solicitors. It was disclosed to them by the respondent but missed when the solicitor dealt with disclosure. It had been disclosed as part of the claimant's Subject Access Request but not as part of these proceedings. The attachment was forwarded to the claimant on the second day of the final hearing. The claimant confirmed that he had received it and was in a position to look at it and use it during the hearing, if required. The text of that document which is in black shows the original draft and the green and yellow amendments show the suggested amendments. The finalised version of the document was already within the hearing bundle so it was effectively available to the Tribunal should the need arise. All three versions could be examined: original; text with suggested amendments; and then the final version.

28. We dealt with the claimant's application paragraph by paragraph:

28.1 Paragraph 1: a meeting took place but no notes were taken at the meeting. Consequently, there was no document to disclose.

28.2 Paragraph 2: there was a handover document already in the hearing bundle (page 737). There was nothing additional, nothing further that could be disclosed. The redacted portions of the document at page 737 did not relate to the claimant and were redacted to preserve the confidentiality of third parties.

28.3 Paragraph 3: was page 732 in the bundle. The witness Mrs MacKay had been asked about this and she could not remember if there was a meeting or not but confirmed that if there was a meeting there were no notes taken at the time, it was just a discussion. Therefore there was nothing further to disclose in that regard.

28.4 Paragraph 4: reference to taking advice. There was no meeting. Legal advice was given. Legal advice is privileged and therefore not disclosable before this Tribunal. The Tribunal cannot go behind that and order disclosure.

28.5 Paragraph 5: email page 786. It was clarified that the briefing note that was referred to was the document at pages 787-788 of the bundle. There was nothing further to disclose.

28.6 Paragraph 6: there was an email at page 798; the email response was at page 801. There was no other document of a discussion between the relevant parties, Mr Leja and Ms Wright.

28.7 Paragraph 7: was page 801. The reference there should be read as a reference to a phased return to work and the reference to a discussion on the 10 November. The respondent's position was that Mr Leja took no note of the 10 November but he did write the letter which we see at pages 807-808 as a record of the meeting. Consequently, there was nothing further that could be disclosed.

28.8 Paragraph 8: was the email at page 806 with the attached letter at pages 807-808. There was nothing further to disclose.

28.9 Paragraph 9 – was the email at page 837. The prior communications that are referred to in that email were at page 838. There was an email at page 901 on 22 November and the response was at page 837. There was no note of any further verbal conversation between Chapman and MacKay and the point is made that the relevant parties can be cross examined about that.

28.10 Paragraph 10: handover notes, again cross referring to page 737. The recollection in relation the separate handover notes by Jenni Lee was that she created a table to handover to Toni Hall and that no longer exists, primarily because we are looking at events which took place 4 ½ years ago and also because Mrs Lee retired in June 2017. Since then Jenni Lee had not been working with the respondent's systems or keeping up to date with correspondence within the respondent. She

would not have had access to the respondent's computers and email systems during that period.

28.11 Paragraph 11: the submission was that Mrs Sanghera and Mrs Lee met with Ms Wright and then subsequently with the claimant on the day in question. There was no separate meeting with Professor Gleeson and there was no further note of the pre-meeting discussion. The Tribunal refers back to the previous paragraph that deals with that.

28.12 Paragraph 12: references were made to page 610 and the attachment there which is headed 'Performance Review 3 Doc'. That did not exist on the HR file. This was the document which had been disclosed on the day of the application having been disclosed by the respondent's solicitor. The Tribunal noted the respondent solicitor's apology in that regard. The document would be examined in that context. As set out above, by looking at the colour of the text the Tribunal now has all three versions of the document available to us should it prove necessary to compare them.

28.13 Paragraph 12: there was a meeting on 12 July. The respondent's position was that if notes were taken then they no longer exist. They were superseded by the typed letter which was sent out on 13 July [648]. Paragraph 13: likewise, the same is true of paragraph 13 and the meeting on the 8 August. Handwritten notes were destroyed once they had been replaced by the letter at [691]. Paragraph 14: the same is true here. The letter at [734] replaced any handwritten notes.

28.14 Paragraph 15: there was a return to work meeting on 10 November. As previously noted Mr Leja did not take notes but did create the letter (draft version at [807-808]) with a final version at [810-811].

28.15 Paragraph 16: the stage 3 meeting which is referred to there never actually took place. The invitation was sent out but then the claimant came back to work so the meeting did not need to take place. There are therefore no documents in relation to the meeting which did not happen.

29. We dealt with the claimant's emails in numbered format again:

29.1 Email number 1: there were no notes to disclose.

29.2 Email number 2: there were no notes of a discussion between Wright and Gleeson. The review of the draft was the document already disclosed with the green and yellow amendments. There was no written instruction from Gleeson to dismiss the claimant (or about dismissing the claimant). It was not possible to order disclosure of the document in those circumstances.

29.3 Email number 3: was the document at [611], the attachment referred to was the colour coded document disclosed on the second day of the hearing. The template letter that the claimant sought a copy of was actually derived from the probationary procedure at [1333] of the bundle and it was not a bespoke template created for the claimant's case.

Consequently, the claimant and the Tribunal would be able to look at the procedure for a copy of the template.

29.4 Email number 4: the respondent's position was that there were no written instructions in relation to that email, the attachment had been disclosed on the second day of the hearing and there was nothing further to be said or done about it.

29.5 Email number 5: at [622] – there was no written advice from Kay Clayton to Toni Hall so there was nothing to disclose. The handover document has already been dealt with in a previous paragraph. There was a meeting between Jennifer Wright, Bobbie Sanghera and Jenni Lee on 15 June and then the meeting with the claimant. There was no other meeting of a similar composition on 21 June and indeed Mrs Lee retired on that day. As no meeting took place there can be no document disclosed in this regard.

29.6 Email number 6: page 622. The letter was never drafted. There was an intention to draft a letter but the claimant then went off work on sick leave. There were then two subsequent changes in line manager before the claimant returned to work and so the letter in question was never drafted. There was no document relating to an update and there is no note of a discussion between Hall and Wright.

29.7 Email number 7: cross refers to page 623 in the bundle. The respondent's position was that there was no written advice and there was no note of a meeting taken which could be disclosed.

29.8 Email number 8: the claimant withdrew any submission in relation to email number 8.

29.9 Email number 9: there was no note of a meeting referred to in that document. There was just a call with no corresponding written document therefore there was nothing to disclose.

30. In short, everything that could be disclosed and was still in existence/available to be disclosed already had been disclosed by the respondent. The Tribunal was satisfied that the respondent had responded appropriately to the requests for disclosure. If the claimant should remain dissatisfied he could ask the Tribunal to draw an adverse inference in relation to the respondent's credibility or honesty. He would have the opportunity to address this in cross examination with the relevant witnesses and also in his closing submissions. The Tribunal would, of course, draw such inferences as were appropriate in all the circumstances.

Recusal application

31. On the third day of the final hearing the claimant made an application for the Tribunal to recuse itself and for a fresh Tribunal to hear his case. His application was, in essence, that the Tribunal should recuse itself on grounds of apparent bias. The Tribunal had dismissed two applications by the claimant for the reasons set out above and the claimant felt that he could no longer expect a fair hearing from this Tribunal panel. The Tribunal took time to

consider what had been said by the claimant in writing and orally on the third morning of the final hearing. We also considered the observations of the respondent's counsel. We also took time to remind ourselves of the appropriate legal tests to be applied when considering a recusal application.

32. Bias can be said to be a situation where the decision maker is 'predisposed or prejudiced against one party's case for reasons which are unconnected with the merits the issue (R v Inner West London Coroner, Ex parte Dallaglio & Another [1994] 4 All ER 139). The leading case on the test to be applied is that set out in Porter v Magill 2002 2 AC 537 HL. A Tribunal has to be not only truly independent and free from actual bias but also must not appear in an objective sense to lack these qualities. It must be free from 'apparent bias' as well as from 'actual bias'. The claimant's application focused more on the risk of apparent bias rather than any alleged actual bias on the part of the Tribunal although both types of bias were considered by the Tribunal in determining the recusal application.

33. The Tribunal had to consider whether the circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the Tribunal was biased. The hypothetical observer in question would be apprised of all the relevant circumstances, including matters not necessary known to the parties at the time of the hearing, as well as the employment judge's or members' explanations. The hypothetical observer need not apprehend that bias actually existed, nor even that it was 'likely' or 'probable', only that there was a risk that was more than minimal. We also reminded ourselves that there is a distinction to be drawn between the factors which may be said to satisfy the test for 'apparent bias' and the understandable disappointment and frustration felt by a litigant who has not obtained his desired outcome from his applications to the Tribunal.

34. We have dealt with the substance of the application, the grounds that the claimant put forward and the observations that have been made in the paragraphs which follow.

35. The first and most obvious issue raised by the claimant in support of the recusal application was our decisions in relation to his earlier applications for strike out of the defence and for specific disclosure. We looked at them again and we decided that our decisions did not indicate, or lend support to, an allegation of apparent bias. The decisions were based on the submissions made and put before us by the claimant and the response from the respondent. We had then taken time to consider both sides of the argument. We reminded ourselves that we took the equivalent of one day of tribunal hearing time to deal with each of the applications (i.e. two days in total) even though they overlapped to some extent with previous applications that the claimant made at an interim stage and which had already been dealt with by previous judges. In making our decisions we had heard the submissions and decided, in light of those submissions and the applicable law, whether the tests for strike out or for an order of specific disclosure were met. We had found that neither application should succeed based on the material we had available to us at the relevant time.

36. The Tribunal had given the claimant every opportunity to say what he wanted to say in support of his applications and we fully considered everything that he put before us. We had also given him significant time to produce any

written applications or documents that he wanted to rely upon in making his applications.

37. The claimant said, in support of his recusal application, that the Tribunal apparently believed the respondent and not him. However, we highlighted that we questioned both parties in relation to the applications that we had to determine because we needed to understand how both sides put their case. We then dealt with the applications in the most even-handed manner that we could and based on their responses to questions. We also pointed out that at this stage of the case we had not yet heard any oral evidence from any of the witnesses. This was not a question of the Tribunal deciding that one witness was apparently more credible than another. We simply had not reached that stage in the proceedings. We were merely clarifying the basis of the applications and the basis of the response to the applications before we made a determination.

38. The claimant apparently did not recognise that because we had not yet started the substantive part of the hearing, we had not yet heard any evidence. The appropriate response to the strike out application was therefore to allow the claimant to test the evidence of the respondent's witnesses, put questions in cross examination and make submissions to us about, for example, the absence of documents which the claimant believed should still exist and be part of the hearing bundle. He would be able to put his case to us at the conclusion of the hearing at least partially on the basis that the respondent's HR practices are either 'illegal' or 'inappropriate' and that the respondent's witnesses were not to be believed because of the gaps in the documentary evidence. Once he had done that we might be invited to draw adverse inferences against the respondent. Depending on the evidence that we had heard from both sides at that stage we would come to a conclusion based on that evidence. We had not got to that stage in the hearing yet. We had to ask ourselves, when faced with the claimant's two applications, what could/should we have done differently? If the Tribunal is told that a document does not exist we cannot realistically make an order for disclosure of a non-existent document. The claimant may argue that that is why the Tribunal should have struck out the defence but, for the reasons we have already given in the strike out decision, a strike out on the first day of a final hearing would be disproportionate and premature. We had to consider whether a fair trial was still possible and whether a strike out was the proportionate response. We concluded that it was not. If the Tribunal were then to proceed with the trial and hear the evidence and decide that the respondent's case was significantly undermined, it would be at *that* stage that we would uphold the whole or part of the claimant's claims. In short, we should have a trial on the evidence and reach conclusions of fact and law at the end of a full hearing. The claimant asked us for a strike out at a preliminary stage, before any evidence had been heard. We reminded ourselves that strike out powers are not routinely used on the first day of a final hearing and are only usually deployed in quite a clear case. The fact that we refused to strike out the defence did not mean that we had closed our minds to the claimant's case or could reasonably be seen to have closed our minds to the claimant succeeding at the end of a trial. We had not prejudged the issue and we had not taken any irrelevant considerations into account.

39. The claimant went on to assert that we were discriminating against him because of his race, nationality or ethnicity. We did not think that there was anything which the claimant could point to which would give any appearance

of bias on that basis. All that had happened here was that his applications had been dismissed and he is of Moroccan nationality/ Arab ethnicity. Those factors would not be sufficient to shift the burden of proof to a respondent in a discrimination claim. We were unable to conclude that it disclosed any element of apparent or actual bias in this case. The Tribunal had not said or done anything that had in any way brought the claimant's race into the equation. Nor had we given any indication that it was a factor in our deliberations.

40. We reminded ourselves and the parties that part of this Tribunal's raison d'être, is to hear and determine race discrimination claims on a daily basis. We are acutely alive to the issues that race discrimination claims present. We are very aware of the possibility of unconscious bias and, as far as it is possible for any human beings to do so, we try our best to eliminate unconscious bias. There was nothing about this case and the way we had dealt with it thus far that marked it out from any other race discrimination claim that comes before the Tribunal or gave weight to any argument that there was a real possibility of apparent bias.

41. Moving on to a specific point that the claimant made about language, he indicated that English is his fourth language and that in itself may have gone against him in some way. We record that the Tribunal was at pains throughout the hearing up to this point to explain the process and procedure and to ensure that the claimant understood what was happening, and why. We told him to ask for clarification at any stage, if required. The claimant never requested an interpreter or indicated that one was required. Furthermore, a two day long preliminary hearing took place before this Tribunal became involved in the case. The record indicates that the claimant did not have the assistance of an interpreter during the preliminary hearing or request an interpreter for either the preliminary hearing or the final hearing. There was nothing about this case on the face of the papers to indicate that a language barrier was likely to be an issue. Indeed, once the hearing started and thereafter there was nothing in the way that the claimant expressed himself which suggested that an interpreter was required. Quite to the contrary: he put his case eloquently on his own behalf. We do not accept that a language barrier has in any way prevented a fair trial or adversely impacted upon the way that we have decided matters or conducted the hearing.

42. In support of his recusal application the claimant made reference to his depression and the fact that he is disabled. At no stage during the hearing did the claimant request reasonable adjustments in relation to his disability. There was no indication that specific steps were required on the part of this Tribunal because of the claimant's disability in order to ensure the claimant had a fair hearing. There was no indication in previous orders that such adjustments would be required. In any event, we have, in fact, taken breaks on a frequent basis. By the time we had to decide the recusal application it was day three of the hearing and the parties had not spent a full working day in the Tribunal on any of those three days. The parties had not been before us for more than half a day at a time. In any event, we took breaks. For example, after the claimant had made his submissions in support of his specific disclosure application we had a ten minute break so that the parties could refresh and take stock. That was but one example of the way that we conducted this hearing.

43. We are obviously aware of the claimant's disability because of the nature of his claim. Another example related to his specific disclosure application. The Tribunal gave him time overnight from day one to day two to actually produce a written list of the documents that he wanted in disclosure. That is another example of adjustments, to give a litigant in person who suffers from a disability extra thinking time to prepare for the next stage of the tribunal process.

44. The claimant sought to draw a contrast between the way that we dealt with him as compared to how we dealt with one of the respondent's witnesses, Karen Olliffe. However, it is important to ensure that the Tribunal is comparing 'like with like' and that the objective observer looking for evidence of apparent bias is also comparing 'like with like'. That was not the case here. Karen Olliffe was one of the respondent's witnesses. Due to her ill-health the respondent decided not to call her to give oral evidence at the hearing. (The respondent's decision not to call her as a witness was also supported by a letter from the witness's treating clinician indicating that she was not well enough to give evidence in person). As a Tribunal we were not called upon to make a decision about whether that witness should attend. It was for the respondent to decide who it called as a witness in the same way as it was for the claimant to decide who he called as a witness. The Tribunal will adopt what has become the standard practice in the Employment Tribunals in relation to a hearsay witness. We require that their statement is signed with a statement of truth and the Tribunal then gives such weight to it as is appropriate in the circumstances bearing in mind that, other things being equal, the evidence of a witness who submits to cross examination will generally be given more weight than that of witness who has not been cross examined.

45. The claimant also made observations about the length of time he would be allowed for cross examination. That is a matter that was yet to be finalised given that we had not finished dealing with preliminary applications by the time the recusal application arose. However, in all our discussions with the parties thus far, the indications were that we were going to adopt the earlier suggested (and more generous timetable) that the claimant would be cross examined for about a day and he would then have five days in which to cross examine seven witnesses. That was our expectation before the evidence started and before we were able to assess how quickly questions could be formulated or answered. The Tribunal reiterated a point that was made to the claimant earlier, which was that our aim in timetabling was to ensure a fair hearing between both parties, to do justice to both sides and to ensure that each side had the opportunity and sufficient time to put all relevant questions in cross examination. We would look to ensure that equality of opportunity to put the relevant questions. That does not automatically mean that each witness will be cross examined for the same length of time irrespective of the scope of the relevant evidence that they are able to give. There may be good reasons why some witnesses take longer to cross examine than others and that is taken into account. Some witnesses will not give evidence in relation to as much of the relevant chronology and therefore will not be cross examined for as long.

46. Furthermore, the claimant was assuming in advance that he was going to run out of time to carry out cross examination of the respondent's witness. We

had not reached that point at this stage and there was nothing to suggest that he would not have time to do the cross examination in the allotted time nor that the Tribunal would be inflexible or unfair in this regard. Once again, there was nothing in the way the hearing had been conducted by the Tribunal by this stage to indicate a real possibility of bias.

47. The claimant made submissions about the need to transfer this case out of the current region into one of the London Regions. The basis for this suggestion appeared to be his view that the Tribunals which sit in London would perhaps be more sympathetic to issues of racial diversity and discrimination and would perhaps look more kindly or more straightforwardly on his claim of race discrimination or his claim as a whole.

48. We wished to disabuse the claimant of any understanding that the sensitivity of tribunal panels to racial discrimination varies according to the region in which the tribunal hearing takes place. Every tribunal in every region is alive to the issue of race discrimination and approaches it, as far as possible, in the same way. There is nothing to suggest that a tribunal in the London Regions would be more experienced or have greater expertise in dealing with a case of this type. Indeed, one of the Non Legal Members on this Tribunal usually sits in one of the London regions, so as a matter of fact we have a regionally mixed panel, to the extent that that could be considered a relevant factor. Every region would deal with the case on its merits based on the evidence presented. That is as true of a tribunal in Reading as it would be for any tribunal based in London. All tribunals hear discrimination cases from day to day. Some cases will succeed and some will fail but that will be on the basis of evidence heard and the applicable law, not the geographical location of the tribunal panel.

49. The claimant also asserted that there was a culture 'of lawyers tapping each other on the shoulder in pubs.' The implication was that there is what used to be referred to as an 'Old Boys' Network' where everybody knows everybody else within the legal community such that the Tribunal could not be impartial when sitting on cases where a professional lawyer represents at least one of the parties. This Tribunal wished to make it clear that the judge on the panel had never had Ms Criddle appear in a case before her and did not believe that she had had any prior professional dealings with her whatsoever. Certainly the Non Legal Members on the panel did not recognise respondent's Counsel as someone who had appeared before them before. We also looked at the name of the respondent's solicitors and the judge on the Tribunal had had no professional dealings with them at all prior to this hearing as far she could discern. So there were no grounds, reasonable or otherwise, to think that this Tribunal would favour either the respondent's counsel or the respondent's solicitors or indeed the respondent themselves on the basis of the nature and identity of their legal representatives.

50. Finally, the issue of witness orders and witness evidence was raised. The claimant initially made an application for witness orders which we were in the process of determining when he withdrew it. We had a genuinely open mind about the application in relation to at least one of the witnesses: Professor Gleeson. However, we did not make a decision on the application before the claimant withdrew it so the hypothetical observer would not be able

to draw any conclusions about our approach to such matters and whether it indicated any element of bias.

51. For all of the above reasons and reiterating the test as set out in Porter v Magill, we concluded that there were no grounds for us to recuse ourselves on the basis of actual or apparent bias. The applicable test was not met and we therefore refused to recuse ourselves from the case.

SUBSTANTIVE DECISION

52. Once the claimant's preliminary applications had been determined we proceeded to hear the evidence and submissions on the substance of the claimant's claims. The Tribunal took care to set the preliminary issues to one side so that it could focus with a fresh, clear mind on the merits of the case without being distracted by what had gone before. We took care to ensure that appropriate adjustments were made to the hearing process in light of the claimant's disability so that he had sufficient time to prepare at each stage and regular and sufficient breaks throughout.

Findings of Fact

53. The claimant is a Moroccan born male of Arab ethnicity. He is Muslim. Prior to taking up employment with the respondent he had worked for the Royal Marsden NHS Foundation Trust. His employment with the Royal Marsden ended on 27 October 2015 [277/282].

54. The claimant spent a period of time out of work prior to starting his employment with the respondent. In his application for the job with the respondent he effectively characterized this as a sort of 'gap year' where he went travelling. This was a part of his application which apparently impressed the respondent. The Tribunal's conclusion is that the claimant did indeed undertake some travel during this period. The evidence indicated that he had travelled to China, Russia, Vietnam and Cambodia. He also went home to Morocco for at least one visit. However, the claimant's GP records indicate that this was not a continuous period of 12 months spent travelling. The records of his consultations with his GP indicate that he spent a considerable part of the year in London and that this was broken up by separate trips abroad rather than one continuous year spent travelling. To the extent that we were asked to make a finding about the truthfulness of the claimant's representations on his job application form, we concluded that he did not fabricate his personal statement but he perhaps gave the impression of a 'gap year' of continuous travel in order to make the statement more impressive to recruiters. This would also have had the side effect of deflecting future recruiters from asking too many questions about the gap in his employment history on his CV. They would perhaps not be as motivated to ask many questions about the circumstances in which he had left his employment at the Royal Marsden or to pose questions about his mental or physical health. He effectively managed to bridge the gap in his CV by putting his 'year out' from employment in the best possible light.

55. The respondent is a large, acute NHS Teaching Trust made up of four hospitals: The John Radcliffe; The Churchill; Nuffield Orthopaedic Centre (all in Oxford); and the Horton General Hospital (in Banbury).

56. The claimant applied for (and was appointed to) a role in the Radiology Department at The Churchill as a Research Co-Ordinator. It was a Band 4 role. The claimant's previous NHS employment had been at Band 3 level. This was his first Band 4 post. He received an offer letter (10 January 2017) following an interview with Jenni Lee and Claire Ridgeon. He had obviously impressed both of them enough at interview for them to offer him the job. At the recruitment stage neither Mrs Lee nor Mrs Ridgeon were deterred from offering the claimant employment for any reasons connected to his race, sex or disability.

57. Prior to taking up his new post the claimant completed a pre-employment health questionnaire [1160]. The claimant's mental health condition predated his employment with the respondent. If he had answered the questions in the questionnaire fully and honestly he should have disclosed his mental health condition. However, he did not do so. The evidence before the Tribunal indicated that from January 2016 to January 2017 the claimant had eight consultations with his doctor about his depression. This information was not captured by the respondent at the outset of the claimant's employment as the claimant failed to disclose it. The claimant's explanation for not ticking the correct boxes on the questionnaire was that he had not read the form properly. The Tribunal is somewhat skeptical about this explanation given that the claimant would previously have had to fill in similar forms when applying for NHS jobs. We consider it more likely that he was concerned that if he disclosed his pre-existing health condition to the respondent then his application would not get through to the next stage of the application process and he would not, ultimately, be appointed to the post.

<u>Contractual terms and policy documents</u>

58. The claimant started work for the respondent on 16 January 2017. His main contractual terms were set out in the document at [1664]. Clause 4 [1666] provided for a probationary period thus: *"The first six months of your employment will be on a trial basis and the Trust reserves the right to terminate your employment either during or at the end of that period on one week's written notice. During this time you will be required to have regular meetings with your manager to review your performance. The Trust reserves the right to extend the probationary period by up to five months. During your probationary period the Trust's Managing Work Performance and Disciplinary Procedures will not apply."*

59. Clause 2 of the contract dealt with 'continuous employment' [1665]. It stated: *"Your employment in this post will commence on the start date detailed above and your continuous period of employment with the Trust began on that date. Your continuous previous service with a NHS employer will be recognised as*

reckonable service in respect of NHS agreements on redundancy, maternity, sick pay and annual leave. In addition, previous employment with a NHS employer will be recognised in relation to entitlements to sick pay, subject to the Agenda for Change Agreement."

60. Clause 7 of the contract dealt with overtime and stated that "all overtime must be agreed in advance with your line manager or team leader." The claimant's individual terms and conditions operated in line with the Agenda for Change Agreement. Clause 3.4 of Agenda for Change stated, in relation to overtime payments: *"The single overtime rate will apply whenever excess hours are worked over full-time hours, unless time off in lieu is taken, provided the employee's line manager or team leader has agreed with the employee to this work being performed outside the standard hours."*

61. Clause 9 of the claimant's contract document dealt with sick leave and sick pay [1667]. There was nothing within that document to indicate that the respondent could recategorize sick leave as some other type of leave once an employee had exhausted his entitlement to sick pay. As set out below, at one point during the relevant chronology in this case, the claimant wanted to be put onto paid suspension once his entitlement to sick pay had been exhausted. This part of the contract makes no provision for the respondent to do as the claimant asked.

62. The respondent also had a Probationary Periods Procedure which applied to the claimant's employment [1333]. The following portions of the policy were relevant in this case:

"*17. The process to be followed should involve the following stages (please note the outcome of the regular performance review meetings and the formal review meeting in month three will determine the next stage is to be followed):*
17.1 Regular Performance Review Meetings.
17.2 Formal Review Meeting in month three.
17.3 Final Formal Review Meeting.
17.4 Confirmation of Successful Completion of Probationary Period.
17.5 Meeting to Consider Termination of Employment.
17.6 Termination of Employment.

19. Throughout the six-month probationary period the line manager should carry out monthly informal one-to-one meetings with the employee as a minimum, or more frequently if required. Meetings should cover the following:
19.1 establishing and reviewing clear, measurable performance standards;
19.2 progress with induction and any mandatory training;
19.3 reviewing performance against objectives set;
19.4 identifying any training/support required;
19.5 reviewing the outcomes of any training/support provided;
19.6 consideration of any other factors which may be impacting on performance;
19.7 setting objectives for the next month/remainder of the probationary period;
19.8 any concerns of the employee; and
19.9 any concerns of the line manager.

20. It is vital that any issues or concerns are dealt with as they arise and that appropriate support is given to assist the new employee to attain the required level of performance. For example, this may be through the provision of on the job support or formal training.

21. A written record of the review meetings should be made by the line manager and shared with the employee. If there are any shortfalls in performance these should be addressed in a Performance Improvement Plan (PIP) to ensure both parties are clear about the outcomes required. This record should be discussed at the formal review meetings and a suggested format can be found in the toolkit that supports this procedure. If an employee does not meet the required standards or objectives set then consideration will be given to terminating employment. This should be clearly explained and confirmed in writing to the employee."

63. In following this Probationary Periods Procedure there should be a series of review meetings (starting in month three of the probationary period) where the employee's performance should be measured against the competencies detailed in the job description and person specification. This is also designed to provide an opportunity for the line manager to signal if there are shortfalls in performance which may jeopardise the employee's continued employment. The written policy sets out a number of points which should be covered by the manager in each review meeting. The policy also sets out the possible outcomes for each review meeting. At the end of the first formal review meeting there are five possible outcomes: early confirmation of successful completion of probationary period; continuation with the probationary period; extension of the probationary period; suspension of the probationary period; and progression to a meeting to consider termination of employment. Early confirmation of successful completion of probation will be used when it is clear that performance has been above the level required during the probationary period. The employee is thus confirmed in post early. If performance is generally satisfactory but more time is required to make a full assessment then the regular one-to-one meetings and supervision will continue until the final formal review. If the level of performance is below that required then the line manager may wish to consider extending the length of the probationary period. In those cases, the reason for the extension is explained, the standards required are reiterated and the available support is made clear. The employee should be told that any shortfall in achieving expected standards of performance may lead to termination of the employment. It is noted that if a probationary period is extended a PIP should be completed. Where a probationary period is extended consideration should be given to arranging a further formal review meeting during the extension period in advance of the final formal review meeting. If prolonged absence of an employee has occurred (e.g. long term sickness absence) the manager may wish to suspend the probationary period for a set amount of time until the employee returns to work. Where it is clearly demonstrated that the employee is not capable of meeting the required standards despite further training or coaching and support being provided, termination of their contract of employment may be considered. In those circumstances the employee should be notified that a meeting to consider termination of employment will be arranged.

64. Where an employee has not received early confirmation in post, a final formal review meeting must be held with the employee before the end of month six, or the end of the extension period. The purpose of the meeting is to review the probationary period and the employee's ability to perform the job. The

manager is directed to send the employee a letter informing them of the meeting. A number of specified points should be covered during the final formal review meeting. Once again, the outcome of the final review meeting may be confirmation of successful completion of probationary period, extension of probationary period (if there has been no previous extension); suspension of probationary period; or progression to a meeting to consider termination of employment. In relation to a meeting to consider termination of employment the policy indicates that termination of employment can take place at any stage during the probationary period as well as during the extension to the probationary period, but must be instigated before the end of the probationary period. Prior to arranging a meeting to consider termination of employment, at least one formal review meeting should have been held and the employee provided with the opportunity to address any shortcomings unless in cases where a significant level of unsuitability for the role and continuing continued employment has been demonstrated. Potential reasons for consideration of termination of employment may include but are not limited to:

- failing to demonstrate behaviours and/or attitudes aligned to the Trust's values;
- serious complaints received from patients, families, colleagues or other service users;
- failing to meet the required standard of work, meet deadlines or satisfactorily complete tasks;
- not being able to work effectively independently, or as part of the team;
- not adhering to policies and procedures;
- poor relationships with colleagues; or
- poor attendance, including persistent lateness and unsatisfactory levels of sickness absence.

The manager will prepare a brief management case detailing the process that has been followed and all action that has been taken, including copies of the written records from all review meetings and any agreed PIP. The meeting to consider termination of employment will be chaired by a senior manager to the line manager involved in the process to date and must be chaired by a member of staff who has the authority to act as a dismissing officer. Employees have the right to be accompanied at such a meeting and should be provided with at least 14 calendar days' notice of such a meeting and have sight of the management case and all associated documents at this point. If the employee plans to rely on documentary evidence not included in the management case this should be provided to the Chair in advance of the meeting. If the employee wishes to invite witnesses to give evidence on their behalf they should arrange for their attendance and provide details to the Chair in advance of the meeting. After the evidence has been heard the meeting should be adjourned to allow the Chair to consider the information provided and the possible outcomes which are: confirmation in post (where the Chair is satisfied the member of staff has demonstrated performance to a satisfactory standard); extension of the probationary period (where no previous extension has occurred and where the chair believes the shortfalls can be rectified with a period of further support); termination of contract

(where the employee has continued to underperform or failed to meet the standards required despite having had clearly identified objectives set and having received relevant training and support). The decision is usually confirmed to the employee verbally and then later in writing. The maximum period of any extension is five months and only one extension of the probationary period shall be granted.

65. Clause 24 of the policy states: *"24.4 If prolonged absence of an employee has occurred, e.g. long term sickness absence or maternity leave, the manager may wish to suspend the probationary period for a set amount of time until the employee returns to work. The manager may seek guidance from an HR representative and should refer to the section 'Suspension of the Probationary Period' below."*

The claimant's job and his colleagues.

66. The claimant was employed as a Research Co-Ordinator. He was the only person doing this job. He was based in the Radiology Department and Jenni Lee was the line manager for the Radiology Research Team which included the claimant. Jenni Lee also managed the claimant's colleague Kayode Fadina. In addition, she jointly managed the research radiographers (Karen Olliffe, Kenneth Jacob and Nigar Syed) with Claire Ridgeon, the Clinical Manager at the Trust. In addition to his line manager Mrs Lee, the claimant had a mentor in his role. This was Mr Olukayode "Kayode" Fadina. He supervised the claimant's 'onboarding' when he joined the Trust. He was of black African ethnicity and worked in a Band 5 post. Jenni Lee, Claire Ridgeon and Karen Olliffe were all white, female employees.

67. During the clinical trial approval process the Radiology Research Team was responsible for co-ordinating the review of any trial intervention planned to be conducted in the Radiology Department. There is a particular process for approving new clinical trials. The team is approached by researchers regarding new studies. The researchers send the Radiology Research Team a trial protocol to review along with a specified list of other documents. The protocol sets out what the researchers want to evaluate and how they will conduct their study. The Ethics Committee considers any study from an impartial perspective examining the benefits of the potential outcome of the trial and any risks to participants. It is one of the responsibilities of the Research Co-Ordinator to obtain the signature of a Clinical Research Expert from radiology (usually Professor Fergus Gleeson) for any non-routine radiology intervention as part of the study, to authorize that the radiology department is able to carry out the proposed scans for a study and that it is reasonable to do it from a safety, scientific and logistical perspective. The Ethics Committee then decides whether the trial is ethically approved to go ahead or not. Finally, the Trust will provide its final approval for the trial to commence, depending on the contractual agreement with the sponsor. The sponsor takes on other regulatory responsibilities for the trial and also pays for the project.

68. The claimant was hired as Research Co-Ordinator which was a full-time Band 4 post. It was a largely administrative role which was at the same Band as a medical secretary. The job description was at [267-270]. The principal part of the claimant's work involved co-ordinating the radiology part of studies. He had to prepare the radiology review which formed part of the documents which the Clinical Research Expert for the Radiology Department needed to authorise so the study could be sent to the Ethics Committee. One of the main important requirements of the claimant's role was that clinical trial approval requests were to be processed within five days in preparation for the ethics review. The people that the claimant was working for in this respect were Professor Gleeson and Kath Room. Professor Gleeson was Professor of Radiology, Divisional Director for Clinical Support Services. He was a white male. (His Personal Assistant was a white female named Samantha Messenger, who gave evidence at the Tribunal hearing). Various people, including the claimant, shared a radiology research email inbox. This included Karen Olliffe, Kenneth Jacob, Kayode Fadina, Diane Pratley, Jenni Lee and possibly others. Diane Pratley, a white female, was employed a Research Administrator which was a lower band job than the claimant's. Karen Olliffe was also a white female and was employed as a Senior Research Radiographer.

69. The claimant's predecessor in his post was called Cali Whitley. She did the job well and as far as the witnesses in the case were aware, never raised any complaints about it or any particular difficulties with it or the workload. She had designed some of the processes used in the role and prepared a handover document for her successor when she left called "Research Co-Ordinator Responsibilities" [387-418]. This document could be described as a manual for someone joining the department to show them what the role entailed and how it should be done. A sort of "how-to" guide. When the claimant joined the department he sat with Diane Pratley and Christopher Dean in an area down the corridor from Jenni Lee. At the end of May 2017 they all moved to the open plan area just outside Jenni Lee's office.

70. In addition to the above-named individuals the claimant also had cause to work with Mrs ("Bobbie") Sanghera, the Divisional Research and Development Manager. She is of Indian ethnicity and Sikh religion. In addition, during the course of his employment with the respondent the claimant also worked alongside Methilda Wan who is of Chinese ethnicity.

<u>The claimant's work for Mrs Sanghera</u>

71. In February 2017 the claimant approached Mrs Sanghera stating that he wanted to undertake a project to assist him in learning his new role and better understanding the work of the Radiology Research Team. She decided to give him a task specifically tailored to accommodate the needs of a new starter in the team. The project that he was given related to "Standard of Care". "Standard of Care" refers to the standard NHS treatment given to a patient with a specific condition. That would constitute the standard benchmark. During a clinical trial, a patient may receive additional treatment

required by that trial which would be over and above the basic 'Standard of Care'. For example, it might be standard practice to have a follow-up appointment with a consultant two weeks after a procedure but if the patient is part of a research programme they might be seen one week after the procedure as well. This would be an extra task. What Mrs Sanghera was trying to ascertain (in relation to each trial that was being run in the Radiology and Imaging Directorate) was which treatment was 'standard' and which was 'additional'. She wanted to have this information in order to ensure that the respondent was accurately charging the sponsor organisation running the trial for the additional treatment given to the patient by the respondent Trust. The claimant's task was to go into the records for each trial and view one approved document per trial: the SSI ("Site Specific Information"). All the SSI documents were identical as they were completed using a template. The details were filled in jointly by the study sponsor and the respondent at the outset of the trial. Mrs Sanghera told the claimant that he only needed to look at one specific paragraph on one specific page of each SSI, and then copy and paste the information into a separate spreadsheet. This task was worthwhile because in the future employees would not have to go into every separate SSI when trying to understand what constituted standard care and what did not. Instead, they would be able to go into one spreadsheet and compare all the different trials on one document. The claimant was not required to do any analysis of the information that was collected. It was a data entry job and a 'copy and paste' task. It was designed to capture specific information and hold it on the centralised spreadsheet thereby simplifying the task for users of the information who would not have to go and look for it in each individual file. Mrs Sanghera went through several examples with the claimant to show him what to do in order to train him on how to do this task. He assured her that he was comfortable to attempt the task. It was, by its very nature, a repetitive task. Mrs Sanghera told the claimant that it was not a high priority and there was no specific deadline for it to be completed. She also told him that he should be mindful that the data collated would inform plans for further work. He could take six weeks to complete the task. She suggested that whenever he had a spare five minutes then he could work on it. She explained to the Tribunal that it was the kind of task that he could do for a small part of every day in order to 'keep it moving'.

72. It is important to note that the claimant's part in this project was data entry not data analysis. We accept that his task was not time critical. It was an ongoing data capture task which would not reach an end point whilst new research studies were being started by the department. The Tribunal's impression was that he should do it in 'bits and pieces' and should fit it around the other core parts of his job role as it was a discrete task to run alongside his core responsibilities. He had volunteered to take on this extra work. We are satisfied that the claimant had the task properly explained to him and was fully aware of what was (and what was not) his responsibility.

73. The claimant became aware that the data he was capturing and centralizing might indicate that the respondent was not fully reclaiming extra costs from trial sponsors for procedures that the respondent undertook over and above the Standard of Care. The claimant became interested in this feature of the

data. It was apparent to the Tribunal that the claimant saw this Standard of Care task as a way to develop his role and justify being given higher level work within the respondent's organisation. On that basis he was keen to do the task allotted to him but did not seem willing to accept the limits on the task he had been given. He did not seem to accept that it was not his job to go beyond data entry towards data analysis. In some ways he felt that the data entry nature of this task was perhaps somewhat below him. This was not a misunderstanding on the claimant's part. The respondent had clearly explained the limits of what it wanted him to do. Rather, he was interested in the task as a way of being seen to 'stretch himself' and show his worth to the organisation. Unfortunately, this meant that he was reluctant to follow the instructions he had been given where this prevented him from expanding the task into something more interesting and meaningful to him. We do not accept that being given this task was a 'detriment'. It was a job that needed doing, which the claimant had volunteered for and which was suitable for someone who was a new starter in the Research Co-Ordinator role. Given the limited nature of the task, Mrs Sanghera was justified in thinking that he would be able to do it. He accepted in evidence before the Tribunal that this was not a task which could be finished. It was ongoing work which had started before he commenced in post and which might be ongoing after he left. Mrs Sanghera gave evidence that Mr Fadina could have done the job but it was essentially below his pay grade. This shows that it was relatively menial job that was allotted according to pay grade rather than due to ethnicity or other protected characteristic. The claimant said that one of the reasons he worked longer hours than he was contracted to was because he had to work on/finish this task. However, there was no expectation that he would complete the task and so this was not a justification for him working overtime. We appreciate that the claimant was genuinely working diligently and trying to do a good job. The task itself may well have been time-consuming given that it required sifting relevant data out of bigger documents. Email correspondence within the bundle [e.g. the chain at 431] indicates that the claimant was genuinely seeking assistance at times in order to get the information extracted in a reasonable time frame. It also shows, however, that the analysis that the data was used for was not part of the claimant's job. He was providing the data for others to analyse and decide whether or how Standard of Care should develop from there.

<u>First probation review meeting 10 March 2017</u>

74. In line with the respondent's probation policy the claimant underwent his first probationary review with his line manager Jenni Lee on 10 March 2017. A record of the meeting was taken using a template [444].

75. The record of the meeting indicates that this was a relatively unremarkable probation review meeting. The claimant's positive work achievements were apparently acknowledged. The document records compliments about his interactions with his colleagues and notes that he was meeting the five day deadline that he was supposed to work to. The record also notes that there was a lack of supervision for the claimant because Mr Fadina was not working full time. Although this was noted as a problem no solution to the lack of

supervision is recorded and there is no 'action point' at the end of the document to indicate that this was to be resolved. The document also notes that the claimant had timekeeping issues and records that his working hours were discussed and amended. The claimant and Mrs Lee both signed the document, unlike later records which the claimant refused to sign. The Tribunal infers that when the claimant disagreed with the contents of a document or thought that it was not an accurate record of a discussion he would not sign it, at least not without dispute. As the claimant has signed this document the Tribunal finds that it is an accurate summary of the main points of discussion at the meeting. It is not a verbatim record but it was not intended to be.

76. The claimant's case is that during this meeting he said that his heavy workload was adversely affecting his health. The note of the hearing makes no mention of the claimant having said this. On balance, we do not accept that he said this at this meeting which was so early in the employment relationship. The document shows that Mrs Lee made a note that the claimant's medication caused 'brain fog' which caused him difficulty in starting work at 9am. She recorded that the respondent needed to amend the claimant's working hours in order to help him in this regard. If she took the trouble to record this aspect of the claimant's comments about his health then we cannot see that she would fail to record the assertion that the heavy workload was adversely affecting his health too if the claimant actually said this. Whilst this written record is by no means verbatim, we do not accept that something as significant as this would have been left out if it was actually raised by the claimant in the meeting. We certainly do not accept that Mrs Lee would have thought it necessary to deliberately leave it out of the written record.

77. In relation to this particular meeting, we do not accept that any handwritten notes were taken during the meeting which were later destroyed. We come to this conclusion on the basis that there is a template designed and used specifically for capturing the main points of discussion so a handwritten note would have been superfluous. Furthermore, we note that the typed document was signed on the same day as the meeting took place. This suggests that the notes were made directly onto the template and then printed and signed off by the parties at the conclusion of the meeting, or very shortly thereafter.

<u>Changes to the claimant's working times.</u>

78. At this meeting there was a discussion about the claimant's working times. He was supposed to work from 9am to 5pm each day. As a result of this probation review meeting his hours were changed to 10am to 6pm each day. Prior to this meeting it had been noted by some members of staff that the claimant had not always arrived at his desk to start work at 9am. Furthermore, the claimant had himself said that he often worked later than 5pm. The claimant and Mrs Lee discussed why the claimant did not always work 9am to 5pm. He explained that his medication caused brain fog which made it harder for him to start earlier in the morning. He wanted to change his hours

to accommodate this problem. Consequently, Mrs Lee amended his hours so that he would work 10am to 6pm.

79. In the course of his evidence about this issue the claimant indicated that there were other members of staff who did not arrive to start work on time. He was not the only one who did not adhere to fixed times, in his view. He thought that there were other members of staff who had flexibility as to when they started and finished work. He thought that some people did not have a fixed start and finish time but could vary these from day to day at their own discretion.

80. Having considered the evidence we have concluded that the claimant was mistaken about this. His colleagues did not have the flexibility he wanted for himself. The claimant actually had limited knowledge or visibility of the working hours or patterns of his colleagues. He thought that they had been given greater flexibility and discretion than was actually the case. He did not think that they arrived in work for a fixed time every day. Hence he thought that the respondent could (and should) accommodate him coming and going at his sole discretion. This was not in fact the case. At least one of his colleagues split her time between two different parts of the hospital. She would be at work but not visible to him as she would be working in a different location. Furthermore, he did not know his colleagues' agreed start and finish times and so would not be able to tell if they were starting and finishing work earlier or later than their official times on any given day.

81. The claimant said that he wanted this additional flexibility and discretion to cope with the 'brain fog' caused by his medication. Hence the respondent moved his start time back to 10am. We did not hear any evidence that the claimant actually wanted or needed to start work any later than 10am to accommodate his disability or the side effects of medication. By contrast, the evidence showed that he actually started work at 7am on occasion. We also heard evidence that the claimant sometimes wanted to finish work early on a Friday so that he could travel back to London to see his family for the weekend. It may well have been that he started work early to facilitate an early finish. He did not raise this directly with the respondent. There was one occasion, set out below, where there was email traffic about an early finish but there was no general agreement to allow the claimant to determine his own start and finish times.

82. In essence, the claimant's case to this Tribunal was that he should have been given full flexibility and discretion to decide his own start and finish times. He felt that as long as he did the required number of hours during the working week it should not matter to the respondent precisely when that work was done. We did not accept that it was reasonable to expect the respondent to grant this degree of flexibility to the claimant to decide his own start and finish times. It was reasonable for them to amend the start times to accommodate a particular side effect of medication but not reasonable of the claimant to demand full flexibility to come and go as he wished as long as he did sufficient hours every week. The claimant's preference for flexibility took no account of

the following relevant factors which the respondent was entitled to take into account:

a. The claimant was still working through his probationary period. In those circumstances it was reasonable for the respondent to want him to be at work consistently at the same time as others so that they could provide any necessary supervision or assistance to him, as required.

b. The claimant's work tasks meant that he needed to interact with other staff members. He was not working in a vacuum. It was therefore important that he and his colleagues were at work during broadly the same time periods so that they could communicate and co-ordinate work, as appropriate. This might not require absolutely identical hours but a reasonable degree of overlap and a reasonable degree of predictability was not unreasonable for the respondent to demand in the circumstances in order to promote efficient working and co-operation between colleagues.

Instruction to monitor claimant's hours of work?

83. One of the claimant's assertions in this case was that from 14 March 2017 Claire Ridgeon instructed Diane Pratley to monitor his hours of work and report back to her. The claimant felt that this is what had happened, that it was unfair and that he was being singled out for additional surveillance which was not applied to other members of staff. Claire Ridgeon's evidence to the Tribunal was that her office was down the corridor from the claimant's desk in the open plan area. Her general practice at the start of each working day was to go round her team checking that everyone was ok and that there were no problems that she needed to deal with. This general practice meant that she was able to see for herself who was and who was not in the office and at their desk by 9am. That said, she accepted that due to her own schedule of meetings and the fact that she did not share an office with the claimant, she could not always see for herself exactly what time the claimant arrived for work or left at the end of the working day. Her evidence was that she would also walk around the office during the course of the working day and would walk past the area where the claimant's workstation was located. She noticed on a couple of occasions that the claimant was not at his desk at his contractual start time of 9am. She conceded that he may just have been temporarily away from his desk as she happened to walk past. However, she pointed out that when she went past his desk there was no sign of him having been in the office at all that day. For example, his computer was switched off and there was nothing on his desk, such as a drink, to suggest that he had already arrived but left the vicinity for a comfort break or similar. This contradicted the claimant's evidence to the Tribunal which was that he had arrived at work on time but had temporarily stepped away from his desk at the material time. On balance, the Tribunal is inclined to accept Mrs Ridgeon's observations as accurate. Her evidence was not overstated and she did accept that she did not have complete visibility over the claimant's comings and goings. Those concessions suggest that where she 'stuck to her guns' about her observations she had good reason for doing so.

84. A couple of other members of the team, such as Diane Pratley and Karen Olliffe, went to Mrs Ridgeon and told her that the claimant was not arriving for work at 9am. Mrs Ridgeon had not asked for or prompted these observations. She had not asked them to monitor the claimant and report back to her. On being made aware of this information Claire Ridgeon initially gave the claimant 'the benefit of the doubt' and said to Mrs Pratley and Mrs Olliffe that any lateness might just be due to the claimant adjusting to his commute whilst he was settling in. She told them that if the problem continued then she would speak to him about it. The Tribunal found that there was nothing untoward in Mrs Ridgeon's approach to keeping an eye on timekeeping as she started the working day with her team or as she moved around the building during the course of the working day. She was not specifically checking up on the claimant but discharging her general duty of care to all those who were working in the building where she was site manager. This was entirely reasonable as an approach to her own job as site manager.

85. The claimant's colleagues reported back to Mrs Ridgeon that the claimant's timekeeping was not improving. She wanted to make sure that the claimant was ok and to understand if there was a reason for his lateness so she asked him to pop in to see her. She told him that it had been noted that he was not arriving to work at 9am, that she appreciated that he had a long commute and that she wondered whether he was struggling to get into work on time. She suggested that if transport and distance were making it hard for him to get in to work for 9am he could agree to change his working hours with Mrs Lee so that the beginning of the day was not so stressful. She suggested that he think about what would work for him and have a conversation about changing his hours if it would help. She also explained that he could always come and talk to her if he had any issues or concerns that he wanted to raise or if he needed any help, especially regarding clinical matters or if Mrs Lee was on leave and something urgent arose for him to deal with. She felt some responsibility for him as she was the Site Lead. Mrs Ridgeon thought that the conversation with the claimant had gone well and nothing about the way the claimant presented during the conversation concerned her. Although Mrs Ridgeon was not the claimant's line manager, she felt a general responsibility for all staff because she was the site manager. At that point in time she believed that the claimant was commuting daily between London and Oxford which she considered a long commute. The claimant had not told her anything to the contrary. She was unaware that he may have had a flat in Oxford from 16 January 2017. She knew that the traffic in both London and Oxford could be terrible and, as site manager, as long as the claimant worked regular hours in a regular pattern she did not mind if his working day started a little later. The thing which was most important to Mrs Ridgeon (and the respondent's other managers) was knowing when the claimant would be in work. It needed to be a regular and predictable working pattern. Mrs Ridgeon understood that when Mrs Lee returned to work she discussed the issue with the claimant. As a result, his working hours were changed from 9am to 5pm each day to 10am to 6pm each day. She copied Mrs Ridgeon in on the email informing his colleagues of this on 10 March 2017 [447].

86. Mrs Ridgeon was clear in her evidence that she had not asked any staff (whether Diane Pratley or anyone else) to monitor the claimant's hours of work. She maintained that Mrs Pratley and Mrs Olliffe had come to her voluntarily to tell her about the claimant's poor timekeeping. They would have noticed this because the claimant's predecessor and other members of the administrative team kept their regular hours and were at work when needed. They would have noticed the difference in the claimant's approach. Claire Ridgeon did accept, however, that once the issue had been raised with her, she may have asked Diane Pratley and Karen Olliffe to let her know, as a casual observation, whether it was an ongoing problem. This was not a request to monitor the claimant, as such, and was a response to their initial report. Mrs Ridgeon's position was that if the claimant's timekeeping was still a problem, then the Trust needed to do more to help support him. It was not an attempt to catch him out, nor was she asking the claimant's colleagues to spy on him. As a manager, Mrs Ridgeon felt that she was generally flexible and accommodating to staff. She would not tell employees off for the odd incident of lateness but if they were late regularly, as a manager, she would want to know so that she could help. She also knew that Jenni Lee's office was not located in the vicinity of the claimant's desk so that Mrs Lee would not always be aware what time the claimant arrived and departed either. Mrs Ridgeon was, therefore, trying to ensure that a problem was not missed simply because no individual manager was present at all times to observe it for themselves. Mrs Ridgeon's evidence was that she may have suggested to Karen Olliffe and Diane Pratley to 'keep an eye' on the situation but not to monitor the claimant. This indicates that she was trying to manage the issue with a light touch rather than set up heavy-handed or intrusive monitoring of the claimant. Essentially it was the least heavy-handed method she could come up with for ensuring that a timekeeping problem was not overlooked and further support was offered if it was required.

87. Despite having made the allegation in the list of issues that it was Mrs Ridgeon who had asked others to monitor him and report back, the claimant was actually very complimentary about Mrs Ridgeon's general approach to managing him during his cross examination of her and during his own evidence to the Tribunal. He did not seem keen to question or challenge her motives or to suggest that she was acting in anything other than good faith. This does not sit particularly well with the assertion in the agreed list of issues that she was in some sense asking people to spy on him. In fact, it fits better with what she said when asked if she had encouraged Diane Pratley and others to bully him. She said she had asked them to give him the benefit of the doubt as he was new and had a long commute in from London. As it turned out, she subsequently discovered that he in fact had a flat in Oxford and was not commuting from London on a daily basis. This was something he had not initially disclosed to the respondent.

88. The Tribunal also heard evidence about an occasion when the claimant had actually come into work *earlier* than his agreed start time. When the claimant asked Claire Ridgeon about the fact she had gone to Jenni Lee to check why the claimant was in work *early* Mrs Ridgeon confirmed that she would have

done this for anyone in the same circumstances. Jenni Lee was the claimant's line manager and Mrs Ridgeon would not have known if an early start had actually been agreed between the claimant and Jenni Lee for some reason. The Tribunal accepts that there was nothing untoward in Mrs Ridgeon checking this with Jenni Lee rather than the claimant. It was appropriate given the line management structure within the organisation and does not indicate suspicious behaviour or some form of arranged or endorsed bullying or spying. The claimant accepted, during the course of the Tribunal hearing, that Claire Ridgeon had treated him well and had been polite and supportive. This does not sit well with an allegation that she was being malicious or bullying him.

89. The Tribunal was also referred to various emails which dealt with the issue of timekeeping. First, there was an email chain starting on 14 March [448] between the claimant and Jenni Lee. This was after the parties had agreed to change the claimant's working hours from 9-5 to 10-6. Mrs Lee had noticed that the claimant had already left for the day and it was not yet 6pm. She had expected him to be available to deal with a query that she had but he had already left. She challenged him about this in an email as she felt it was important to have a written record. His response was that according to *his* computer he had finished at 6pm. Mrs Lee's own experience was that the claimant continually told her that he was working extra hours and staying later than his agreed finish time but she often went to his desk and he would not be there. This was also commented on by other colleagues such as Mr Fadina and Mrs Pratley. This explains why Jenni Lee did not necessarily trust that the claimant would be where he was supposed to be at any given time of day. She felt that she had caught him out. Once trust between an employee and his line manager starts to be undermined it can be difficult to rebuild it.

90. The Tribunal was taken to an email chain [462] from 7 April 2017. At 12:53 the claimant sent an email to Mrs Lee: *"Can I finish at 4pm today as I started at 07:40 and I finished yesterday at 18:45, even though most of the time I do stay until 19:00 or 18:45. I hope that okay with you?"* Mrs Lee's response at 13:39 was: *"Yes that's okay. Claire asked me why you were in so early today, so maybe give me more notice next time, but it's fine."* The claimant's response to this email was at 14:11: *"Thank you Jenny, is it an issue for Claire to be here early? I hope does not cause any problem coming too early."* Her response was: *"No, not at all, I think she was just keeping an eye. 07:40 is not that early except when you usually start at 10. She is just keen to see that you are here when you need to be i.e. 10 to 6."*

91. The Tribunal finds that Jenni Lee was not criticizing the claimant for being in early or late, she was just reiterating what his proper, agreed working hours were. This is not surprising given the hours he mentions in his emails which are actually quite different to his agreed working hours. He was clearly working something quite different to his agreed working pattern. Mrs Lee's response was not unreasonable given what the claimant says in those emails. His emails could give the impression that he is disregarding the 10-6 arrangement. Furthermore, the emails from the claimant are sent only shortly before he wants to leave the office. He has not given Jenni Lee much

opportunity to disagree or refuse his request. She is basically telling him not to assume that it is ok next time and not to assume that she will give permission at short notice. Given the claimant's actual agreed working hours she would have been within her rights to say that he actually needed to *ask* to change his hours rather than just 'give me more notice next time'. Arguably she was not being as strict with the claimant as she was entitled to be. She could have been more robust with him. This correspondence did not assist the respondent in the long run as this flexible approach may have made it more difficult to manage the claimant's expectations about his role and timekeeping.

92. Claire Ridgeon explained the working patterns of other members of staff within the building. Apart from Mr Fadina and the claimant, who worked in the administrative research team, everyone else in the Radiology Team had responsibilities outside of the research office. The administrative research team did not have any clinical work outside of the office and had fixed hours. Consequently, she would not expect all three members of the administrative team (Mr Fadina, Mrs Pratley and the claimant) to be off at the same time as the rest of the staff rely on them being available during fixed hours. This is part of their role. The radiographers (which included Karen Olliffe and Kenneth Jacob) were managed by Mrs Lee and Mrs Ridgeon jointly. As radiographers, their roles differed from the claimant's. Karen Olliffe spent about 50% of her hours undertaking clinical work whilst Kenneth Jacob did clinical work for a minimum of one day per week. Clinical staff do not work the same times every day. Their clinical hours are part of a clinical shift rotation. They are not flexible hours: they vary according to a shift pattern rather than at the employee's own discretion. For health reasons, Karen Olliffe would do her clinical work in the mornings and her research in the afternoons. Kenneth Jacob did a whole day of clinical work but if the respondent was short staffed he might be asked to cover clinical duties on other days, with the agreement of Jenni Lee.

93. Although Diane Pratley was another research administrator, unlike the claimant, she had a split role. For the radiology team she covered the radiology reception desk between 7:30am and 9am. She made biopsy appointments for NHS patients, as well as managing all research imaging appointments. She had separate line management for her NHS work on reception and with NHS appointments through an administrative manager, Joanne Brazier. Jenni Lee was responsible for managing Diane Pratley's research work with the support of Mrs Ridgeon as Site Lead. Diane Pratley's shifts followed a clerical appointment pattern historically 7:30am to 3:30pm. Given all this, the Tribunal has no difficulty in accepting that the claimant may well have seen Diane Pratley leaving work at 3:30pm and may not have realized that she had in fact been working since 7:30am in her NHS role. He would have misunderstood her working pattern through no fault of his own, purely because he did not have a full understanding of the terms and conditions she was working to and the nature of her role apart from research administration tasks.

94. The Tribunal has concluded that the claimant probably didn't realise that other members of staff had different clinical responsibilities which meant that they were away from their desks at different times during the day (as per their own employment contracts). He probably assumed that those other staff members were working flexibly (i.e. coming and going according to their own discretion as long as the hours they were contracted to work were completed each week). That was a misperception on his part. We find that, in fact, no one in the team worked flexibly in this way. Nobody else in the team worked in such a way that they exercised their own discretion and decided when to start and finish work from day to day as long as the correct number of hours were completed each week/month. Start and finish times mattered to the respondent although different members of staff clearly worked different hours doing a variety of different tasks for different parts of the organisation. There were scheduled start and finish times, they just differed according to the role performed by the individual employee for the Trust.

95. The nature of the claimant's role meant that the respondent wanted him to be present in the office during the same hours as the rest of the department. This would facilitate him working alongside those other members of staff and providing the administrative support that he was employed to do. Other members of staff were generally in work between 9am and 5pm even if they were away from their desk undertaking clinical duties. The claimant's regular presence on site as an administrator was important for the smooth functioning and effective communication of the radiology research team. We find that this was an entirely reasonable approach for the respondent to take given the nature of the claimant's role and the reasons for which he was employed by the Trust.

96. Although the agreed list of issues for the Tribunal to determine suggested that it was Mrs Ridgeon who was alleged to have instructed staff to keep an eye on the claimant, during the course of the hearing the claimant's questions actually suggested that it was Diane Pratley and others who chose "to spy on him" and who "had it in for him" in some way. One explanation as to why this might be was the fact that Mrs Pratley had applied for the job that the claimant had been appointed to and therefore resented his position within the office. This was the claimant's belief but we saw no other evidence to support his conclusion.

<u>Second probation review meeting 24 April 2017</u>

97. There was a typed record of the meeting on 24 April 2017 [476] which was signed by the claimant and Mrs Lee. The impression from the meeting record is that, once again, this was quite an open discussion between the claimant and his line manager which went into quite a bit of detail. It does not seem to be the record of a meeting where the parties were unable to communicate properly or effectively with each other. The written record notes quite a few positive features of the claimant's work. For example, it is specifically noted that his timekeeping had improved. Some elements of his performance are scored at level 1 which indicated that they were below the required level. For example, he scored 1 for "skills and ability" and "communication". It records that there was too much social talking which may undermine others' ability to

concentrate and get on with their work. It was also noted that colleagues had reported that his work was not always accurate. Comments in the outcome section note that the claimant asked to be involved in the costing procedure.

98. There is no mention of the claimant's health in the record of the meeting. The Tribunal finds that the claimant was unlikely to have complained that his workload was exacerbating his health problems given that he was recorded as asking for more/new work. Why would he ask for more if he was already overworked or his health was deteriorating due to his workload? The Tribunal is satisfied that if the claimant had complained about his health this would have been logged and commented on when the parties were discussing the possibility of extra work for the claimant and/or when there was a discussion about whether it was appropriate to put the claimant on a PIP (Performance Improvement Plan) at this stage. If health and workload had been flagged up as relevant to his performance then the Tribunal finds it hard to accept that this would not be noted somewhere within the written record. The claimant has signed the record even though it does not record him linking his workload to his health problem. This suggests that he accepted it as an accurate record of the discussion. If there were significant omissions from the record he could have flagged this up and annotated his signature to indicate that there should be additions or amendments to the notes of the discussion.

99. There is a document at [480] which purports to be the claimant's PIP. It is not dated or signed. The claimant could not remember whether he had been given it. There was no witness evidence from Jenni Lee about it being discussed and agreed with the claimant at either this probation review meeting or a separate one. She just refers to it at paragraph 48 of her statement on the assumption that the claimant should be working to it. We are not satisfied that it was ever discussed and agreed with the claimant. There was no email to confirm that it had been discussed and properly implemented either. The Tribunal would expect to see that as a minimum in relation to such a PIP process.

100. In the Tribunal list of issues, the claimant alleges that there was a meeting on 28 April. In fact, we find that there was no such meeting on 28 April. Rather, the record of the meeting which took place on 24 April was signed by the parties on 28 April. There was no evidence to suggest that an additional meeting occurred on 28 April.

101. The claimant was signed off work on sick leave from 19 May 2017 to 24 May 2017. The reason for absence is described as flu-like symptoms, chest and respiratory problems. There is nothing in the record to indicate that it was in any way disability related [545-554].

<u>Probation review meeting 30 May 2017</u>

102. The written record of this meeting was at [561- 565]. On this occasion the claimant did not sign the record of the meeting. It is always difficult to decide precisely what words were said in a meeting of which there is no audio recording. As a Tribunal we have to do the best that we can with the evidence

which has been presented. On balance, we consider that the claimant *did* communicate to Jenni Lee at this meeting that his workload was affecting his health. There are a number of reasons for this conclusion:

a. The notes of the probationary review at [561] state that that the claimant said there was too much work for the number of employees available.
b. After the comment that "there is too much going on" it is recorded that Jenni Lee was unsure if this was purely work-related and perhaps refers also to personal life. This indicates that the problem was at least *partly* work-related even though there might be other contributory factors. There could be more than one underlying problem.
c. The notes refer to the claimant feeling 'under pressure'.
d. Jenni Lee made a referral for an occupational health report via email. In it she sates, *"lately we are more concerned about his resilience and his ability to cope with the job"*. This wording suggests that the workload was adversely impacting upon his health. Otherwise 'resilience' and 'ability to cope with the job' would not be a relevant matter for consideration.
e. Paragraph 50 of Jenni Lee's witness statement is internally contradictory. She states: "Adil never said that he could not cope because of his health. It was that he could not cope because the job was rubbish or it was impossible." She then proceeds to say "Adil Mouti may, however, have said at this meeting that his workload was affecting his health which is why I referred him to occupational health." She then continues, " He sometimes made reference to his history of depression but never said that his problem with depression was active at that time or that work was worsening his health….He never directly said that the job was making him ill."
f. Jenni Lee was unable to provide much in the way of assistance during her oral evidence on this and many other points. She was overly reliant on her witness statement. We are not convinced that she can really remember what the claimant said to her in this meeting in the absence of a contemporaneous note of it. She could not add much to the documents we had available to us.

102. The claimant signed and approved the occupational health referral on 30 May 2017. Amongst the questions asked of occupational health was: "Is there any evidence that the work environment is contributing to sickness absence? If so what alterations may be beneficial?"

103. During the meeting on 30 May 2017 Mrs Lee passed on some feedback she had received in relation to the claimant's work. Mr Fadina had said that the claimant was still struggling with decision making (i.e. knowing what to do with routine tasks). One of the objectives set for the claimant was that he should review the manual on how to do his job again. It is notable that this was still an objective at this stage, almost five months into his employment in the job. Mrs Lee was concerned that the claimant indicated a lack of awareness about areas in which he could develop despite the feedback from multiple members of the team. There were ongoing issues with the claimant managing the trial approval requests timeframe.

Claimant not appointed to IT systems analyst post May 2017

104. In the list of issues the claimant asserts that: "An interview panel of three not appointing the claimant to the role of IT systems analyst in May 2017" was one of the incidents about which the Tribunal would have to make specific findings of fact. Despite this, he actually gave no evidence about this and there was no documentary evidence relating to this within the hearing file. He led no evidence to show that he had applied for this role and had not been appointed. He gave no evidence as to who the 'panel of three' were and no documents to show his application. On that basis the Tribunal is unable to find this factual allegation proved on the balance of probabilities.

Probation review meeting 9th June 2017

105. The written record of the meeting was at [599] in the hearing bundle. It contains no reference to the claimant asserting that his workload was adversely impacting upon his health. There was clearly a lot of discussion during this meeting about his work and whether he was achieving the necessary standards. Although the claimant did not sign the notes of the meeting, he did send an email pointing out what he didn't agree with and disputing the written record [607]. This would have been a perfect opportunity to raise this issue again. He could either point out that the record wrongly omitted an assertion he had made during the meeting that the workload was affecting his health or, he could reiterate this complaint after the meeting as part of his email exchange with Jenni Lee. He did not take that opportunity. So, on balance, we do not accept that he raised the link between his workload and his deteriorating health again in this meeting on 9 June.

106. The Tribunal accepts that by this time it was clear that the claimant was struggling to cope with his work. He had not understood what his role was despite going through the research coordinator document/manual several times and the additional supervision given to him by the members of the team. By the time this meeting took place, Mrs Lee had not yet had advice from occupational health as the claimant had not engaged with them. Mrs Lee was due to leave her employment with the respondent imminently. By the time she left her role the claimant was already off on sick leave and so would not have come to an occupational health appointment. He did not start engaging with occupational health until around 14 July 2017. Mrs Lee gave evidence that she did not know how to proceed in terms of managing the claimant and handing over line management of him to someone else. She did not know whether she needed to extend the probationary period and how she should support him without advice from occupational health. Mrs Lee confirmed that during the probationary review meeting the claimant was upset and told her that he would not sign the probationary review form whatever she wrote on it. She emailed the form to him anyway on 9 June and he responded saying that he disagreed and setting out his reasons why [607-608].

The Orra Database

107. The ORRA project was something which Mrs Sanghera was working on in conjunction with James Harries (who worked in the nuclear physics department). Mr Harries had created the ORRA database which looked specifically at radiation and the safety implications for patients of what the respondent was doing. Some of the scanning that is done in radiology uses high levels of radiation. Consequently, the physics department has to check the safety of some procedures before they are carried out on patients. For example, they will ensure that a patient is not having too many high radiation scans too close together. Prior to the ORRA project, the nuclear physics department were working independently and the radiology department did not have a live database, just an Excel spreadsheet. Only the people who were actually working on that spreadsheet had access to it. Mrs Sanghera and Mr Harries realised that if they both used the same database the information that radiology could input into it would help the nuclear physics department and vice versa. The plan was for both departments to combine their databases so that both could work from the same database. Furthermore, it would be a 'working' document in real time as opposed to a static document. This would save time and provide a clear flowchart and study set up pathways as to where the work was going. The Tribunal accepts that this was quite a complex database with many elements which needed to be built specifically for the respondent's needs. This is why it took a long period of time to get it up and running. Each time a part of the database was developed it had to be pilot tested. This testing was ongoing in June 2017. Not every member of staff had to have it installed on their computer during the pilot phase as they would not necessarily be working on it and it was safer to limit access to the database in the early stages in case someone unwittingly altered it or damaged it. Access to the database was on a 'need to access it' basis. Different groups of staff were given access to the database as the project progressed and the programme became more robust. They were added at a point in time where it was appropriate to give them access because of the nature of their job and the type of work they might need to carry out using the database. This was seen as the safest and most efficient way to develop the ORRA database.

108. Mrs Pratley and Mr Fadina may have had the database added to their computers in June 2017. Mrs Pratley would have been given access to it because part of her role was to set up studies and the documentation she created as a result was some of the early information which needed to go on this database. She also managed the radiology database. She would therefore have been involved in considering what work she normally did on the radiology department database and what would or would not work as far as the ORRA database was concerned. Mr Fadina was given access because he was part of the team who made sure that documents were correct. He would look at whether feasibility and costing papers had been signed off. This had to be achieved in within a limited time frame of a number of days.

109. At this stage the claimant was still relatively new to the department and he was being asked to provide information that Mrs Pratley and Mr Fadina would input into the database. Over time things would become more efficient and they would be able to get the claimant to help with it. Mrs Sanghera and Mr Harries did not want too many people accessing the database to pilot it because it made it more complicated and might undermine the integrity of the information uploaded to the database during the pilot. Mrs Sanghera gave evidence that the claimant was not excluded from the database at this time, rather it was just not the right time to give ham him access. She also confirmed that even when she left the respondent's employment in 2019 not everybody had had the ORRA database installed onto their computer.

110. From correspondence dated 20 March 2017 [1677] it was clear that there had been some delay with ORRA and the next step was for Diane Pratley to test the first stage of the system development. There was a further email exchange in December 2017 [1002-1007] relating to installation of the ORRA database. It shows that Karen Olliffe asked for the ORRA database to be put on the claimant's computer after he returned to work [1004]. Various other people had it installed at the same time. This indicates that the installation of the ORRA database on staff members computers was an ongoing project, of which the claimant was only one part. An email on 3 November 2017 indicated that it was only at this stage that Claire Ridgeon was to be added to the list of those employees with access to the ORRA database. She was one of eight other employees who were to be added to the database access list.

111. It is clear from the evidence we heard, none of which we have any reason to doubt, that the ORRA database was being developed and tested and piloted. Consideration therefore had to be given as to who needed to be involved in the pilot and at what point people needed to be given access. Not everyone had access from the start. People higher up the line management structure than the claimant did not have access during this period, including Claire Ridgeon. We accept the respondent's case that the claimant did not need access to the database at this stage in order to be able to do his job. Given the fact he was on his probationary period and that his performance was being managed as it did not yet meet the required standards, this would be a good reason *not* to give him access at this point. We also note that there were said to be issues with the accuracy of the claimant's work . Given the need to ensure the accuracy of the information on the database in real-time (as it was a live document, not a static one) it was understandable that the respondent would choose not to give the claimant access in circumstances where his involvement could reasonably foreseeably undermine the accuracy and reliability of the new database. This would have the potential to undermine the pilot scheme. The Tribunal is satisfied that this decision had nothing to do with any of the claimant's protected characteristics. Rather, it was a business decision based on solid reasons of practicality and feasibility. In any event, we are satisfied that he was not singled out for different treatment. He was one of a sizeable number of employees who did not get access to the database until later. The claimant was to be added to the database upon his return to work in December 2017.

15/16 June 2017 meeting between the claimant and Jenni Lee with Bobbie Sanghera present.

112. Following the probationary review meeting on 9 June Mrs Lee attended a meeting with Jennifer Wright from HR to discuss the claimant's work. They also needed to consider the lack of occupational health advice and how best to proceed. Jennifer Wright brought Mr Fadina into the meeting to ask if the claimant was achieving what he needed to in his job and Mr Fadina confirmed that the claimant was not doing the work he should be doing.

113. Mrs Lee knew that she needed to have a further meeting with the claimant prior to the end of her employment with the respondent. She confirmed (and we accept) that the meeting on 15 June was not a formal meeting under the probationary period procedure. There was no agenda for the meeting as it was a meeting of limited scope. Jennifer Wright from HR had asked that Mrs Lee hold the meeting in order to let the claimant know that some documents were due to be sent out to him from HR. Jennifer Wright had also advised that there should be someone else there to support Mrs Lee at the meeting. Mrs Lee therefore asked Mrs Sanghera to support her. As things transpired, Mrs Sanghera was required to take a more active part in the meeting than had initially been anticipated.

114. Mrs Lee and Mrs Sanghera normally shared an office. Outside that office was the open plan area where the claimant sat at the time that this meeting took place. If the claimant came in to speak with Jenni Lee in her office then Mrs Sanghera would automatically be there too (unless it was a confidential meeting in which case she would have to leave the room). There were very few available meeting rooms apart from the offices, which were normally occupied.

115. At some point before the meeting in question Jenni Lee explained to Mrs Sanghera about the probationary period meeting that she had had with the claimant and explained that he did not want to sign the notes of the most recent meeting (which took place on 9 June). They discussed the situation with Jennifer Wright of HR and, having taken that advice, it was agreed that Bobbie Sanghera would accompany the claimant and Mrs Lee at the meeting where they would ask him to sign the record of the previous probation review meeting. Both managers thought that the claimant needed to agree the record of the previous meeting in order for the respondent to be able to move to the next stage of the probationary procedure. Mrs Lee did not want to meet the claimant on her own because he had raised his voice at her and walked out of the previous meeting which had made her feel uncomfortable. She said that she would feel more secure knowing that there was third person there who could also hear the conversation. It was on this basis that Mrs Sanghera agreed to attend the meeting.

116. Mrs Sanghera's view was that she was there to support both Mrs Lee and the claimant. She felt that if, during the meeting, she identified anything which had been overlooked or not considered then she would be able to offer her

advice to the claimant. The other reason for Mrs Sanghera's attendance was that Mrs Lee was due to retire the following week so somebody else needed to be present to ensure some degree of continuity. This was also explained to the claimant at the meeting. The meeting was not a formal probationary review meeting. Instead, it was a meeting to give the claimant a further opportunity to sign the paperwork from the previous meeting and to forewarn him that further documentation was due to be sent out to him by HR.

117. The scope of the meeting was relatively limited. In relation to the probationary review document the claimant was asked to take some time to review it over the weekend and then sign it and return it the following week. There was no requirement that he should sign the document then and there or, indeed, at all. He was being given a further opportunity to sign after rereading the document, should he so wish. The Tribunal accepts that Mrs Sanghera was present to provide moral support to the participants and to ensure that there was a witness to what was said in the meeting. Mrs Sanghera was not expecting to take a formal part in the meeting. There was no formal agenda for the meeting because it was not a formal meeting. There was no need for such forewarning or for a formal agenda. The purpose of the meeting was effectively a follow up to the previous probation review which would:
    a. Give the claimant another opportunity to sign the previous meeting notes;
    b. Inform him that a letter was coming out to him from HR.

    The Tribunal is satisfied that there was no need for a formal agenda in those circumstances. We accept that an employer has got to be able to have ad hoc meetings with employees without an agenda on every occasion. We also accept that the respondent was trying to forewarn the claimant about an incoming letter so that it did not come as a surprise. This might not have been welcome from the claimant's point of view but it was, we find, a genuine attempt by the respondent's managers to avoid any unnecessary shock or surprise to the claimant. The Tribunal is not convinced (with the benefit of hindsight) that it was advisable to give the claimant another opportunity to sign the notes in circumstances where he clearly was not going to sign. Instead, it appears that the respondent's actions in holding the meeting were badly received by the claimant. We accept, however, that there was no malign intention on the part of the respondent in arranging the meeting in the way that it did.

118. The only witness who gave really consistent and detailed evidence to the Tribunal about the meeting was Mrs Sanghera. We found her to be a generally credible and reliable witness. Mrs Lee's memory of the meeting was remarkably poor and she gave only limited evidence on the contents of the meeting. The claimant argues that Mrs Sanghera should not have been present at the meeting. We find that she was there in order to provide support to both parties. She was thought to be a good choice because of her previous work in PALS (Patient Advice and Liaison Service). She had relevant experience in supporting people in difficult situations. She did not have any particular knowledge of claimant's circumstances and was not involved in

making the decision to have the meeting. She was supposed to be a neutral third party. In the Tribunal's view there was nothing wrong with this. There was nothing to suggest that she was getting improperly involved in line management of the claimant. Furthermore, we find that there was no specific need to forewarn the claimant that Mrs Sanghera was going to be at the meeting. It was not reasonably foreseeable that he would have any good reason to object to her presence.

119. We do not accept the claimant's assertion that he was forced to sign the document at the meeting. He was merely given another opportunity to do so. This was not well received by the claimant as he had already decided not to sign. However, this does not mean there was any element of coercion present even if the claimant perceived it in that way. The meeting was perhaps as much about forewarning the claimant about the HR letter. The real driver for having this meeting seems to have been the HR advisors but they did not attend the meeting. This meant that the Tribunal was left trying to work out what was going on at this meeting even though none of the witnesses before the Tribunal were actually the people who had set the agenda. The claimant clearly reacted badly to being called to this meeting. On balance, we conclude that the respondent acted reasonably during the course of this meeting. The fact that the claimant reacted as he did does not indicate to us that the respondent's managers did anything wrong. Rather, the claimant's reaction was disproportionate. He was likely to have reacted that way if he was called into another meeting whatever was said to him in the meeting. He had already lost trust in the respondent by this stage and viewed all of the respondent's actions with suspicion and as likely to be backed by malign intent. We have concluded, based on everything that we have seen, heard and read, that the claimant is very volatile and will react unpredictably and disproportionately to the actions of others. In short, the severity of his reaction is generally no guide to the seriousness or severity of the third party's conduct which provokes it.

120. The claimant asserts that during this meeting he was told that he was not performing to the required standards and that this contradicted what Jenni Lee had previously said to him about Professor Gleeson's opinion of his work. We accept that in the first probationary review meeting Professor Gleeson had fed back that he was pleased with the claimant's work. However, that changed over time. Feedback was received from multiple colleagues including Professor Gleeson about areas in which the claimant was not performing. Mrs Lee had to raise these with the claimant as his line manager in order to assist him in passing the probationary period. She did tell the claimant that his performance was below the required standards because this was in line with the feedback she had received from others. He had not met the objectives set at the review. We accept that she would have said the same to any other employee in the same circumstances who was found to be underperforming. The claimant did not tell Mrs Lee during this meeting that he felt unfairly treated in comparison to staff of different ethnicities.

121. We find that Mrs Lee did not misreport the feedback from other people. The reality was that Professor Gleeson's feedback had started out positive as was to be expected in the early stages of a probationary period. Professor

Gleeson focused on social interaction in his early feedback and then started to pick up on accuracy issues or substantive problems with the work done later on in the probationary period. This is consistent with the pattern in probationary reviews. What might be considered acceptable in the early stages of employment is less acceptable several months into the probationary period. There is nothing untoward in what Jenni Lee was doing here. She was just reporting the feedback to the claimant. Clearly the claimant would not be pleased to hear negative feedback but this does not mean that Mrs Lee had invented it or had misrepresented the views of others in her discussion with the claimant.

122. It is the claimant's case that during the 15 June meeting he repeated his assertion that the workload was adversely affecting his health. We do not accept that this formed any part of the meeting. There were only two issues of the agenda. It did not go any further than that. Furthermore, Jenni Lee was due to retire imminently so there would be no point in the claimant repeating these comments to her at this stage. We are not satisfied that the claimant renewed his earlier comments about workload impacting his health adversely. We anticipate that he would have reiterated this in an email at around this time if it had formed part of the discussions at the meeting. He did not. Furthermore, the occupational health report had been requested but had not yet been produced by the date of the meeting. Thus, there was nothing new to discuss in relation this issue at this stage as occupational health had not indicated whether they felt that his workload was affecting his health and, if so, what should be done about it.

123. On 16 June 2017 [615] the claimant sent an email complaining about his manager to recruitmentandcareers@ouh.nhs.uk. He said that the last straw had been the meeting the previous day when he was called into a meeting without a notice or email to say what type of meeting it was. He complained that both managers at the meeting talked about the probationary period and would not allow him to talk. The claimant asserted that he was not prepared for the meeting and the second manager in the meeting does not actually manage him. The claimant also started a period of absence from work with depression [672]

124. On 19 June the claimant sent an email to Toni Hall complaining about Jenni Lee. Unfortunately, it was sent to the wrong email address and so was not received by her [616]. Once again, the claimant complained that he had not been given notice about the meeting or what it was about so that he could prepare. He asserted that he had been told that he had to sign the probationary letter by Monday morning and had not been given a chance to speak or respond. He felt that he was blocked from saying anything. He felt humiliated and disrespected and noted that Mrs Sanghera was not his line manager. He asserted that this was one of many incidents of mistreatment he had been subjected to at the hands of Jenni Lee. He asserted that was not being treated in line with the Trust's values including those of compassion and fairness.

Formal grievance

125. On 21 June the claimant presented his formal grievance [625]. He reiterated his earlier complaints about the way that the meeting on 15 June had been carried out. The majority of the complaints that are set out in the grievance letter related to the claimant's line manager, Jenni Lee. It was part of the claimant's case before this Employment Tribunal that his formal grievance letter constituted a protected act for the purposes of his victimization claim. Having considered the document we cannot see that he makes any complaint of discrimination or that the respondent had acted in contravention of the Equality Act 2010. He does not, for example, make any reference to having been 'less favourably treated' than a comparator. He mainly refers to what he considers to be unfair or unjustified management actions. On that basis, although the claimant was clearly raising a grievance, we are unable to accept that the grievance constituted a protected act within the meaning of the Equality Act 2010.

126. In the agreed list of issues it is contended that the claimant was called into a meeting by Bobbie Sanghera on 22 June 2017 and that this was done without notice and without telling him what it was about. Having heard no evidence about a meeting on 22 June 2017 we are forced to conclude that this part of the list of issues is actually supposed to refer to the meeting on 15 or 16 June which we have already addressed. The reference to 22 June 2017 appears to be an error which gives the impression that there were two meetings within days of each other. We have concluded that there was only a meeting on 15 or 16 June as already discussed. We refer to our findings above in this regard.

127. On 22 June Jenni Lee retired from her employment with the respondent. Prior to the end of her employment she did a handover to Toni Hall, who was due to take over as the claimant's line manager. For the avoidance of doubt, this handover did not just relate to the handover of line management responsibility for Mr Mouti. Rather, it was supposed to deal with the whole range of responsibilities which Jenni Lee was passing on to Toni Hall. As part of this handover Jenni Lee compiled a written document in table format [737]. Only one line within the table referred to the claimant. Likewise, discussions about the claimant formed only part of any oral handover process. There was apparently a meeting in this regard on or about 21 June. In the handover document in relation to the claimant Jenni Lee noted: "Stage 2 completed and outcome letter sent. Ongoing communication regarding return to work. Fit note runs to early November. Currently on zero pay. Jennifer Wright is HR support and is liaising with OH."

128. Upon taking over responsibility for managing the claimant Toni Hall emailed Kay Clayton and Jennifer Wright. She was aware that Jenni Lee had been considering next steps with HR and that the possibility of the claimant not passing his probationary period was being considered. She could see from the documentation that there were significant performance concerns about the claimant but she was not certain in her own mind that there was sufficient evidence at that stage for it to be concluded that the claimant had not passed

his probationary period. As she was due to be taking over responsibility for the process going forward she wanted to make sure that she had seen everything that she needed to. She wanted to be confident as to what had gone before. If the respondent were to go down the route of moving towards terminating employment under the probationary period she wanted to ensure that it was carried out fairly and correctly. She was concerned that the claimant had not been given enough support up to this point and she was aware that she herself did not have any firsthand experience of his underperformance.

129. Toni Hall was sent a copy of the claimant's grievance on 21 June before she had had the opportunity to speak with him or communicate with him as his new line manager.

130. On 28th June Toni Hall emailed the claimant in order to introduce herself [633]. At this stage she was aware of his grievance, she was aware of his sickness absence and she needed to offer suitable support in relation to that. She was also aware of the stage that the claimant had reached in his probationary period and that this would need to be picked up again at a suitable point. The main objective of the email was to introduce herself and arrange an introductory meeting so that she could address the need for any further support to get the claimant back to work from sick leave.

131. The introductory meeting between the claimant and Toni Hall was arranged to take place on 12 July. On 6 July the claimant submitted a further sick note. On that basis the claimant could not return to work whilst he was still signed off on sick leave.

132. Due to the length of his sickness absence the claimant moved onto half pay on 11 July [683].

Meeting on 12 July 2017

133. The meeting took place as scheduled on 12 July. No contemporaneous notes of the meeting were available. Instead, the Tribunal was referred to the letter [at 648] which was a letter dated 13 July from Toni Hall to the claimant which contained a summary of what the respondent said had been discussed at the meeting. The claimant disputed the accuracy of that letter as a record of the meeting.

134. The Tribunal does not accept that this was a sickness review meeting. Rather, we find that it was an introductory meeting as Toni Hall had planned. During the course of the meeting Toni Hall discussed two options to try and get the claimant back to work from sick leave. He was asked to choose between the two options. The first option was for the claimant to return to work in the Radiology directorate but into a Band 3 role in another department, such as the John Radcliffe. The idea behind this option was that it would offer the claimant a fresh start with a new team and the claimant's probation period would begin again. The claimant was given a copy of the Band 3 job description to consider. The second option was that the claimant

could return to his existing role (Band 4) under Toni Hall and Claire Ridgeon's line management. The probationary period would be restarted and there would be structured reviews and clear objectives with an agreed timeframe to assess the claimant's progress and performance in line with the probationary procedure. The claimant had indicated that he wanted to return to his existing role without re-starting the probationary period. Toni Hall's position was that his probationary period had been suspended due to sickness absence and that upon his return she would authorize an extension of the probationary period of at least 3 months and a new assessment would be undertaken taking into account the existing records. It is clear that Toni Hall's goal in this was to ensure that the claimant had a proper fresh start and more fair and objective assessment of his performance.

135. The Tribunal notes that the claimant's job as Research Co-Ordinator was his first NHS role at Band 4. Given the claimant's performance issues up to that point, we consider that it was a sensible option to offer the claimant the chance to step down to a Band 3 role. This would allow him the chance to perform at a level which he was familiar with and would maximise his chances of passing the probation period. It guarded against the possibility that the step up from Band 3 to Band 4 was not achievable for the claimant at that point in time. Once the claimant had established himself within the respondent Trust at a level he was comfortable with, there would always be the future possibility of developing his career further at a slightly higher level pay grade. This would potentially get the claimant back to work and mitigate the other challenges he had faced (e.g. health problems and the potential strain of travelling between his family in London and his work in Oxford).

136. It is important for the Tribunal to note that the choice between the two options was the claimant's. He was not being forced into either role. He was being given time to assess what was best for him and then the respondent would facilitate a return to work on one of those two bases. It was for the claimant to assess his own priorities. If he wanted to get re-established at work relatively quickly then he might choose the Band 3 role even though it would mean a drop in pay. He would then be able to get his employment record 'ticking over' again. If he could not afford the pay cut then he would have to take the risk that he returned to work at Band 4 but was still unable to pass the extended probation period with the end result that his employment with the respondent may be terminated. It was important that the choice was left up to the claimant and neither option was imposed upon him.

137. At this stage it is hard to see what other options the respondent could consider. By this stage there was still no occupational health evidence for the respondent to consider as the claimant had not yet had his occupational health consultation. The respondent could not, therefore, look to occupational health for guidance as to what was reasonably required. It is also important to note that the Band 4 role would be assessed on a mutually agreed time frame. No strict deadline was being imposed. The reference in the letter was to "at least" 3 months and not a "maximum 3 months". It was also important that this extended probationary period would be managed by a new line manager: Toni Hall. The claimant's complaints had focused on Jenni Lee who

had now left the organisation. Above Toni Hall was Claire Ridgeon. The claimant gave clear evidence that he trusted Mrs Ridgeon and got along with her ok. To the extent that there might have been any differences between what was offered to him orally during the course of the meeting and what was offered in writing in the letter of 13 July, the terms of the written offer in the letter must be the definitive version. It was this written offer which was put before the claimant for him to consider and reflect upon. Indeed, he was advised to take the letter with him to his occupational health appointment on 14 July so that it could inform his discussions with the occupational health advise.

138. The Tribunal observes that the tone of the letter is very positive and supportive towards the claimant. It clearly acknowledges the claimant's feelings of grievance and seeks to find a suitable way to draw a line under them and allow the parties to move on by giving the claimant effective control over what happens next.

139. The claimant and Mrs Hall also discussed issues of holiday leave at the meeting. The claimant had told her that he had booked a holiday of about 20 days' duration for August. She referred to the respondent's annual leave policy and noted that, as it was more than 2 weeks' leave, the claimant would need to apply to the Clinical Director for authorization. The claimant was advised that such extended annual leave was unlikely to be granted during the probationary period. That said, he was told how to go about seeking that authorization. The respondent's response to the claimant's annual leave request appears to have been completely reasonable and in line with policy.

140. There was also a discussion during the meeting about the claimant's grievances about Jenni Lee. Given that Jenni Lee had now left her employment with the respondent Toni Hall assured the claimant that if he returned to his existing role he would be under the line management of Toni Hall (supported by Claire Ridgeon) and that any work instructions would come directly from Toni Hall. She confirmed that Mrs Sanghera would not be the claimant's line manager and that any work she wanted the claimant to undertake would have to be approved by Toni Hall. The letter records that following receipt of this assurance the claimant had agreed that his grievance could be considered closed. He was advised that if he had any residual concerns about this he could discuss them further with Toni Hall.

141. The Tribunal considered this aspect of the evidence surrounding the meeting with particular care as the claimant maintained at the Tribunal hearing that he had *not* agreed that his grievance could be considered closed. The Tribunal's view is that the respondent's proposal in relation to this was entirely reasonable. Given that the grievance focused very much on the actions of Jenni Lee we cannot really see what other options were open to the respondent. What other steps could they have taken in relation to the grievance? What could the claimant have asked for as his 'preferred outcome' to the grievance if he did not accept that it could be treated as closed? The Tribunal is unable to think of any other practical outcome that the claimant could have asked for in these circumstances. The Tribunal has

concluded that the claimant *did* agree to treat his grievance as closed during the course of the meeting because he felt that the solution proposed by the respondent was as good as could be achieved in the circumstances at the time. He may have changed his mind about this later on (if he felt that the respondent was not keeping to its side of the bargain) but this does not mean he wasn't on board with it at the conclusion of the meeting. Furthermore, the last paragraph of the letter invites the claimant to confirm if there are any inaccuracies in the letter in comparison to the substance of the meeting/discussion. The claimant did not write back to say that the letter was inaccurate or misrepresented what was said at the meeting. On balance, we have to conclude that it is a fair reflection of what was said. That said, we do acknowledge that it was not a 'note of the meeting' and so cannot be treated as such. It is, at best, a summary of the meeting potentially taken from contemporaneous notes which have since been destroyed. This procedural step has unfortunately introduced a layer of evidential complexity and uncertainty to the process which could have been avoided if standard contemporaneous notes/minutes of the meeting had been retained by the respondent to be agreed between the parties as an accurate record of the meeting in addition to the 'summary' letter which was sent out afterwards.

142. After this meeting Toni Hall emailed HR to suspend the claimant's probationary period because there were only a few days of the original 6 months remaining [646]. The respondent also wanted to await the occupational health report. The Tribunal's view is that at this stage Toni Hall was keeping an open mind whilst the claimant decided which option he wanted to pursue.

143. The agreed list of issues indicates that there was a sickness review meeting on 14 July. However, the evidence we heard indicated that there was no meeting on this date. Once again we think that this was an error with the date. We consider that the claimant is probably referring to the meeting on 12 July about which we have already made our findings of fact above. We do not accept that this was a sickness absence review meeting for the reasons already set out above.

144. On balance the Tribunal is not satisfied that the claimant raised the issue in the 12 July meeting that his workload was adversely affecting his health. He did not respond to the letter [at 649] to point out that they had missed out this crucial point from the summary of the meeting. We have concluded that he would have done this if it had been inaccurately omitted from the record. Furthermore, given the circumstances, we do not think that he would be likely to say that workload was adversely impacting his health at this meeting because it may have meant that he was not offered the opportunity to come back to a fresh start. He would want to maximise his chances of a return to work. Our view is that after the event the claimant has looked back at the whole chronology of meetings and has recollected that at some point during this period he said his workload was adversely affecting his health and, with the benefit of hindsight, he has now concluded that he actually raised this issue at each and every meeting of this kind which took place during the relevant period. The agreed list of issues includes virtually every meeting he

had during the period under consideration and asserts that he said he same thing at each of them. It is a blanket assertion without any real exceptions. This undermines the credibility of the assertion: has he really raised this at *every* meeting and has the respondent removed it from the record *every* time? We do not think that is credible. So, we have made findings of fact about the meetings where we think he *did* raise this issue rather than accepting that he repeated the same assertion at each and every meeting.

Occupational Health

152. 14 July was actually the date of the claimant's occupational health consultation rather than the date of a meeting between the claimant and his managers. The record of the consultation was reproduced within the hearing bundle [1168]. The salient points of the consultation were that the claimant's depression was long standing, of around 5 years. He had been on sertraline for the last 2 years but he suddenly stopped taking it in May and then had to restart it because he felt so bad. The claimant was recorded as being signed off work since 20 June until early August with depression triggered by stress due to the way he feels he has been treated by his manager who has recently retired. In addition to the work-related difficulties, he has felt lonely and quite isolated missing his family who are living in London. In relation to his grievance the occupational health practitioner records: *"New manager is Toni Hall. Has submitted a grievance about the way he was treated and this was discussed at a meeting on Wednesday with Toni and HR to try and find a way forwards. They have suggested that they don't progress the grievance as it was against Jenni Lee and she has retired but instead they will concentrate on finding a way forwards and gave him some options to consider. He has not yet completed his probationary period."* It was also noted that the claimant wanted to get back to Morocco to see his mother because of her declining health. Sarah Chapman recorded that she had advised him against making snap decisions at the moment and that he needed to take some time to settle his symptoms and improve his concentration level somewhat before he returned to work. Following the meeting the claimant had wanted to get his medical certificate reduced with a view to returning to work as soon as possible but Ms Chapman told him of her concerns for him doing this as she did not think he was fit at that moment in time.

153. Sarah Chapman's conclusion was that the claimant was still unfit for work and needed a few weeks to allow him to address his medication and consider what he can do on an ongoing basis. It was noted that he would need a rehab plan to support his return. She advised him to assess his medication with his GP, increase exercise levels and consider counselling. She would follow up with the claimant in 4 weeks' time.

154. We noted that in the middle paragraph [1168] the claimant was not recording the cause of his absence as his workload adversely impacting his health but rather as his relationship with Jenni Lee plus the distance from his family. The Tribunal considers that this further supports our findings that on 12 July the claimant did not tell the respondent, again, that his workload was adversely affecting health. The last paragraph [at 1168] also records

what was happening to the claimant and the fact that the respondent had suggested not to take it further because Jenni Lee had retired. We find that this further indicates that the summary letter of 13 July was broadly accurate in this regard as it is consistent with this occupational health record. He has not said to occupational health that he still wants to pursue the grievance or that the respondent is forcing him to drop the grievance against his wishes.

155. The occupational health advice to the respondent is contained in a letter which is dated 24 July 2017 [1171]. It summarized the current situation thus: *"Adil was able to give me a summary of his current medical position, which he believes has been aggravated by the way he feels he has been treated by his former manager. However, he told me that he has been encouraged by a recent meeting with yourself and that he was intending to see his GP to get his certificate adjusted to allow him to return on this basis."* She goes on to mention the contributory factors of the claimant's mother's poor health and his separation from his children. She noted that the claimant needed to find a better work life balance. She concluded: "*We discussed his current symptoms and concentration levels and whilst he is motivated to return to work, I do not believe he is currently in a position to return to work and sustain it at this time. I will arrange to see Adil again in around 4 weeks, when I hope he might be feeling a little better and able to consider work again."*

156. On 20 July 2017 Toni Hall wrote to the claimant pointing out that due to the length of his sickness absence he was now being managed under the long-term sickness absence procedure and he was being invited to a Stage 1 review meeting on 8 August. She noted that his current GP fit note was due to expire on 6 August and so she expected him to be returning to work on 7 August. She also asked the claimant to confirm which role he would like to return to so that she could make any necessary arrangements. The contents of this letter were entirely reasonable and unobjectionable in this Tribunal's view [651].

157. On 31 July Toni Hall sent a further letter to the claimant chasing a response to her previous letters. In particular, she sought confirmation of which role he wanted to return to, what date he was likely to return work, whether he would be attending the meeting scheduled for 8 August and, if not, why not, so that it could be rescheduled if necessary. Again, the Tribunal views this as an entirely reasonable and unobjectionable piece of correspondence from the respondent.

158. The claimant was not full in agreement with the contents of the occupational health report and contacted Sarah Chapman to express this [1178]. Based on this email correspondence Sarah Chapman produced an addendum to her report which she emailed to the respondent on 1 August 2017 and which stated [1180] "The main important issue which is have triggered the relapse of depression is the mistreatment by my manager, no sympathy no empathy, no passion or companion, and it seems to me there is issue of not willing to deal with staff with mental health needs, excessive work, overworked: on many occasions I have to do till 10 o'clock in the evening

overtime without even giving payment or time in lieu. Other issues which the previous manager failed to deal with my requests have added to the detriment to my health. I felt there is encouragement of old staff to watch out a new staff, constantly been monitoring and watch which I didn't like, felt uncomfortable with and cause me anxiety and stress. I would like you to add these issues because there are part of the problems."

159. On 3 August the claimant sent an email to Toni Hall in which he complained that he felt under pressure to recover from his illness and get back to work [669]. The majority of the email focuses on complaints about the failure to pay the claimant relocation expenses. This is a dispute which no longer forms part of these Tribunal proceedings. The claimant went on to confirm that he had not yet made a decision about which job role he wanted to return to. He indicated that his return to work would be at the end of August after he had had a further consultation with occupational health. He asked for the meeting on 8 August to be rescheduled as a result.

160. Toni Hall replied to the claimant the next day [685]. She reiterated her understanding of their previous discussion which was that the claimant had agreed to consider his grievance closed given that he was now working under fresh line management. She said that if the claimant had other concerns that he wanted to raise with her then she was willing to discuss them with him but wanted to address them separately to the issue of sickness absence management. She reiterated that the long-term sickness absence stage 1 meeting was designed to be supportive and assist the claimant back to work. She noted that the process allowed for one deferment of such a meeting and she could accommodate him on another date. She also recognised that travel from London to Oxford might be difficult for the claimant and so she offered to conduct the meeting over the telephone. The claimant subsequently agreed to have the meeting over the telephone for late afternoon or midday on 8 August.

Stage 1 sickness absence meeting

161. Once again there were no contemporaneous notes of the meeting on 8 August available for the Tribunal to consider. The best available evidence was the summary in the letter sent on 10 August [691]. The Tribunal considered it to be broadly reliable. There was further discussion, amongst other things, of the claimant's sick pay entitlement. Toni Hall reconfirmed that his entitlement was to 1 month of full pay and 1 month of half pay. The claimant questioned whether his previous NHS service should be acknowledged for sick pay purposes. Toni Hall confirmed that for sick pay purposes the claimant's previous service needed to be continuous. As he had had a prolonged break in service prior to starting with the respondent then the one month full one month half entitlement was in fact correct.

162. There is no specific record of the claimant raising the issue that his workload was impacting on his health in this meeting but he may well have done given what had been said in the occupational health correspondence and the

addendum. It was clearly being raised as part of the factual matrix in the discussions between the claimant and the respondent at around this time. Furthermore, Toni Hall does not assert that the claimant definitely did not raise it, just that she does not recall him raising it. On balance the Tribunal is satisfied that he *did* raise this issue again at this meeting.

163. On 31 August Sarah Chapman (occupational health) emailed Toni Hall with an update following her telephone consultation with the claimant. She confirmed that he remained unwell and that it was clear that he was unlikely to make any further medical progress until his work-related concerns had been addressed. He had mentioned to Ms Chapman that he felt that redeployment/a move to another department might be required. Ms Chapman had advised the claimant to make contact with Toni Hall as soon as he felt able in order to discuss this. Later that day Toni Hall replied to Sarah Chapman and the claimant [1184]. She made it clear thar she was happy to discuss any additional concerns that the claimant might have and if he wanted to speak about this on the phone he should let her know and she would call him. She said that she was sending the claimant a letter of invitation to a stage 2 sickness review meeting and that this would help them to discuss the options for his return to work. She asked him to let her know if he had given any consideration to the redeployment options she had previously proposed. Finally, she informed him that she would be leaving the respondent's employment on 6 October and line management of the claimant would pass to Toni Mackay (Operational Service manager). Toni Hall confirmed that she would ensure that Toni Mackay was fully appraised of the claimant's case and the support discussed to facilitate the claimant's return to work.

164. The claimant submitted a further fit note on 31 August 2017 which stated that he was not fit for work from 31 August to 31 October [709].

165. The claimant was invited to the stage 2 meeting by letter dated 31 August [712]. The meeting was to take place on 15 September and Toni Mackay would be in attendance at the meeting along with Toni Hall and Jennifer Wright (because she was due to take over line management of the claimant). This letter was in line with the established sickness absence policy which was operated by the respondent. The claimant subsequently asked that the stage 2 meeting take place by telephone. It appears that it actually took place in person at the John Radcliffe site.

166. On 11 September the claimant exhausted his entitlement to sick pay and moved on to nil pay.

<u>15 September 2017 Stage 2 long term sickness review meeting</u>

167. Once again, there were no contemporaneous notes of the meeting. The only written record of the meeting was the outcome letter [734-735] dated 25 September. The Tribunal has no reason to think that the contents of this

letter are inaccurate. Indeed, the accuracy of the letter was not challenged by the claimant at the time even though the final paragraph gave him the option to challenge the contents of the letter.

168. The claimant had not provided details of the unresolved issues in writing as he had previously promised to do and so they were discussed at the meeting instead. The claimant said that he felt that a member of his team, Diane Pratley, was often watching his work and would report him to managers if he started or finished work late. He also said that he felt he would benefit from a clear understanding of his role and responsibilities and to know that Diane Pratley also had a clear job description. Toni Mackay said that it would certainly be possible to make sure that a copy of his job description was available to him when he returned to work. All those present reassured the claimant that each team member had a clear and specific job description to which they were expected to work and which was reviewed regularly by their line manager.

169. The claimant also said that he had concerns about his workload and that he thought that it had been excessive in the past and that he had often had to stay late. Toni Hall told him that there was no expectation for him to work in excess of his contracted hours and that his workload would be closely monitored by his new line manager. Toni Hall also said that his concerns should all be reviewed under the formal grievance procedure so that they could be fully addressed. Although the letter does not say it in terms, it is evident that at the meeting the claimant was, in substance, saying that the workload was adversely affecting his health. Given the context and the contents of previous discussions it would be unrealistic to suggest that he did not convey this information again at this meeting. It would have an air of unreality about it given that he had now said this on more than one occasion and occupational health had also effectively conveyed that message to the respondent.

170. During the meeting on 15 September those present also discussed the claimant's return to work. The claimant explained that he intended to return to his existing role rather than take up the option of redeployment to a Band 3 role. Toni Hall explained that his probationary period would recommence once had completed any period of phased return to work. This was to ensure that the respondent was able to support him back into his job fully before they began to assess his progress against the objectives and expectations of the role in terms of probation. The respondent intended to get advice from occupational health about his phased return to work.

171. The Tribunal could find nothing to suggest that race was raised as a concern by the claimant at this meeting. Nothing in the surrounding correspondence at this time suggests that race had been put in issue by him. No aspect of the factual scenario implicitly or explicitly raised the issue of race as a factor in the way the claimant was being managed or his experiences at work. There is no factual allegation made at this stage in the chronology from which the claimant can say that he drew the conclusion that race was a problem.

172. On 22 September the claimant sent an email attaching a copy of a medical certificate. In the email the claimant focused on sick pay issues and the unfairness of the way he felt he had been treated in this regard. He complained about the perceived lack of support when he raised complaints. He did not allege race or sex discrimination in the body of this email. This rather suggests that he did not think that this was a particular issue at this point in the chronology. The fit note which the claimant sent to the respondent says that he may be fit for work with a phased return to work and amended duties. The claimant says that now he has been certified as potentially fit for work he should be moved back to full pay.

173. In response Toni Mackay sent an email on 25 September [733]. She said that, given he felt his issues had not been resolved, she felt that it was necessary to hold a formal grievance meeting to ensure that all his issues were properly addressed. She wanted guidance from occupational health as to whether he was fit to participate in management meetings and, if so, she would happily arrange for the grievance hearing to take place prior to the claimant's return to work, if that was what he preferred. She also confirmed that she was looking for further occupational health guidance in relation to his fitness to participate in management meetings and his ability to return to work. She also sought more guidance on what the phased return to work should look like so that the claimant could be supported back into work in the most appropriate manner. She also wanted occupational health to advise on any necessary reasonable adjustments. In the Tribunal's view this email demonstrates that Toni Mackay was taking a responsible and reasonable approach to managing the claimant at this stage. She was clearly trying to establish a fresh start for the claimant by making sure all outstanding issues were dealt with once and for all so that he could return to work without any ongoing impediments resulting from past events.

174. The claimant's occupational health appointment was booked for 29 September but this had to be cancelled as, unfortunately, his mother died and he had to return to Morocco. He notified Toni Mackay of this and she expressed her condolences. She (not unreasonably) asked for details of when he would leave the country and how long he expected to be out of the country. She also wanted confirmation as to whether the occupational health appointment needed to be cancelled. Finally, she asked whether this email address was the most suitable way for her to keep in touch with him whilst he was away.

175. The claimant left the country on 28 September and was still in Morocco by 6 October. He had been intending to return to the UK on 11 October but felt that he needed to remain in Morocco due to the responsibilities he had there. His emails indicate that he wanted to be paid during this period even though his sick pay entitlement had been exhausted by this stage. He asked to use annual leave to cover absence until 26 October. It is apparent that he would be away from work for a month due to the bereavement. The respondent was understandably concerned that if he took this as paid annual leave this would mean that he had no more annual leave left to take

in the leave year. It is clear from the available documents that the claimant wanted to be paid for the time that he was in Morocco. In response the respondent tried to be flexible and find a way for him to be paid despite the fact that many of his pay entitlements had already been exhausted. Initially it was agreed that the pay would come from his holiday pay entitlement. Subsequently, some of it was categorized as paid compassionate leave. The Tribunal is satisfied that the respondent was trying to be as flexible and accommodating as it could in the circumstances. The claimant was not being particularly clear about how long he intended to be out of the country or why he needed to be out of the country for such an extended period of time. We cannot see that the respondent could reasonably have been expected to do anything more during this period to ensure that he received some pay.

176. In October 2017 that Toni Hall left her employment with the respondent and Toni Mackay took over responsibility for line managing the claimant.

Was Toni Mackay considering terminating the claimant's employment in October 2017?

177. The Tribunal finds that Toni Mackay adopted a measured approach to the claimant when she took over line managing him. She was introduced as a new manager and had no motive to try and terminate the claimant's employment as soon as possible. Her main aim appears to have been to provide a fresh start and a clean break from the management of the claimant by Jenni Lee in the past. Hence, she was keen to arrange a formal grievance process so that any residual concerns that the claimant might have could be dealt with in one go thereby providing a fresh start to move forwards from. She was also keen to get occupational health guidance to inform her actions so that she could get him back to work effectively. In the Tribunal's view she was doing all she could reasonably be expected to do to try and facilitate a fresh start. That said, she had to work within the respondent's policies and procedures, including the long-term sickness absence management policy. The claimant's absence levels had triggered the next formal review stage of the policy. She was not in a position to ignore that fact and had to arrange a meeting under the policy for that reason. This does not automatically mean that she was actively considering termination of the claimant's employment at this stage, rather that she was required to hold a particular type of meeting at this point in time. The *substance* of her actions was designed to avoid termination of employment. She cannot be criticised if the claimant's absence levels trigger the next stage of the policy. The overall impression given by the evidence was that she would follow the procedure and if that required her to have a stage 3 meeting at this stage then so be it. This did not mean that she intended to terminate his employment or was actively considering it. Even if the meeting were to take place, termination of employment would not be a foregone conclusion. To a large extent the procedure forced her hand to have the meeting but we find that her actual focus was very much on facilitating a fresh start and a return to work for the claimant rather than imminently terminating his employment.

178. The claimant was invited to the stage 3 meeting by letter dated 1 November 2017 [779] which deferred the date of the meeting to take account of the claimant's bereavement and the fact that the occupational health appointment had been scheduled for 10 November. Toni Mackay wanted to have the most recent occupational health report so that she could understand how best to get the claimant back to work. The meeting was arranged for 17 November. The fact that she deferred the meeting in this way again suggested that she was not intending to 'fast track' the claimant towards dismissal.

Christmas parties/events.

179. One of the matters in the agreed list of issues is the way in which invitations to the various Christmas celebrations were handled and whether the claimant was in some way excluded from them. It appears that there were in fact three Christmas events which could have been relevant to the claimant given his position as Research Co-Ordinator. The first of these was an evening meal for the research part of the radiology team. This was organized by Professor Gleeson most years. He would decide who was invited and pass a list of invitees to Samantha Messenger. She would then make the necessary arrangements and send the email asking the relevant individuals if they wanted to attend. The email invitation for 2017 was sent out on 1 November 2017 [1691]. The claimant was not invited. We heard no direct evidence from Professor Gleeson about the basis of the invitations and why the claimant was not invited. However, Mrs Messenger indicated to us that an invitation would not have been sent to anybody who was off work on sick leave at that point in time. There was some indication that three other individuals might have been invited but were not invited that year: Will Hicks (Data Manager), Brenda Shanahan (scan navigator), Tahrema Matin (Clinical Fellow). By the time this email invitation was sent out the claimant had been continually absent from work for 4 ½ months. Even when he was at work there would have been limits on the amount of contact between the claimant and Professor Gleeson. The claimant would not have been at the forefront of Professor Gleeson's mind in those circumstances. The likely duration and reasons for the claimant's sickness absence would not have been widely discussed amongst the wider department for privacy reasons. It is relatively easy to say, with the benefit of hindsight, that the respondent would have realized that the claimant would be back at work in time to go to the Christmas meal but this would not have been obvious to the respondent at the time. Given what was then known, the respondent was entitled to conclude that the claimant was still likely to be off work when the Christmas meal took place so it was not appropriate to invite him to it. At the time the invitation was sent out they would have had no settled expectation of the claimant's imminent return to work.

180. The claimant's sick notes formed quite a complex chronology from the respondent's point of view. The table below sets out all the sick notes provided by the claimant over the relevant period [1213].

Date sick note issued	Period covered by sick note	Fit/ not fit to work?	Reasons
16 June 2017	16 June to 7 July	Not fit	Depression relapse
28 June 2017	28 June to 6 August	Not fit	Depression relapse
17 July 2017	17 July to 31 August	Not fit	Recurrent depression
31 August 2017	31 August to 31 October	Not fit	Recurrent depression
18 September 2017	18 September to 9 November	May be fit with phased return to work/amended duties	Anxiety and depression
9 November 2017	6 November to 14 November	Not fit	Bereavement, depression
14 November 2017	8 November 2017 to 27 December 2017	May be fit with phased return to work/altered hours	Bereavement, depression
8 December 2017	8 December to 14 January 2018	Not fit	Depression Stress at work

181. In addition to the meal referred to above, each year the Radiology department organized an evening party at an external venue. As there are usually around 100 people in the radiology department in any given year it would not be practical to send out specific invitations. Instead, notices giving details about the party would be put up in common areas around the department, such as on notice boards and in the staff room. They were displayed well in advance (often in the Summer) so that everyone would be able to see them. Those members of staff who wanted to attend had to sign up on the list of attendees. It was up to each individual employee to look at the notice board and sign up. It was not reasonable or practical to expect someone to chase up individual employees to ascertain whether they intended to attend. The claimant was, therefore, treated in the same way as any other member of staff. He could sign up for the party if he wanted to go. The Tribunal has no reason to disbelieve Sam Messenger's evidence about this and we find that her account is genuine and truthful.

182. The third Christmas event was the department Christmas lunch. This was basically a lunchtime buffet in the workplace. It was in no sense a formal event. No booking was required. It usually took place in the week before Christmas. Essentially, staff members used to bring in a dish of food to share with their colleagues as part of the buffet. More recently the Consultants have paid for the food for everybody. In any case, it was not an event which was by invitation only. The claimant could have taken part if he was in the workplace on the appointed day and wanted to participate. He would not have had to tell anybody in advance that he was intending to be there.

183. The claimant attended a further occupational health consultation on 7 November [1205]. The following pertinent points were recorded: *"Adil looked*

well, but was not overly clear about where he's at currently and there seemed to be some confusion about his pay, although he told me that he was fit to be at work and it wasn't his fault that he couldn't have an appointment with me. I advised him to speak to his manager about his pay. Adil believes that he has not been fairly treated and that redeployment might be required. We discussed that his current manager is a new one in the department and that he needs to have a discussion about what has been the issues to see if they can now be addressed so that they can all move forwards. Adil agreed that he was now able to have a meeting with HR and management, and we discussed that I would be happy to support a gradual return to work to help him to rebuild his concentration levels." A note of the claimant's current medication was made and Sarah Chapman sent a further email to the claimant's manager whilst she was in the consultation with the claimant. In that email [789] Ms Chapman confirmed that the claimant was now fit to attend any formal management meetings to discuss his return to work and that he was sufficiently recovered to begin a phased return back to work building up the number of hours worked per day over the weeks.(She suggested an appropriate pattern of hours). She also stated that the job role content needed to be discussed and his issues appropriately addressed in order for this to be facilitated. She concluded that she was unable to support redeployment on medical grounds at that point in time.

184. Toni Mackay then sought to arrange a meeting with the claimant and Jennifer Wright to discuss a phased return to work. She wanted to have the meeting on 9 or 10 November and asked the claimant to get an extension of his sick note to cover that week whilst they developed a return to work plan. The claimant's response to the email indicated that he wanted to be recategorized as not being on sick leave any more for sick pay purposes. The sick note he obtained on 9 November was backdated so it covered absence from 6 to 14 November. He then got a further fit note to cover 8 November to 27 December indicating that he might be fit for work with adjustments.

185. Toni Mackay arranged a meeting on 10 November in order to discuss the claimant's return to work. On the same date Jennifer Wright emailed occupational health to see if the claimant was 'covered by the Equality Act 2010' [803]. The response was that Sarah Chapman did not believe that the Equality Act was likely to apply in this case. No reasons for this conclusion were provided.

<u>10 November 2017 return to work meeting</u>

186. The meeting took place as planned on 10 November and once again the discussions were summarized in a letter [810-811]. The claimant confirmed that before he was absent he felt that the workload was tremendous and too much work for two people to carry out. Toni Mackay confirmed that no issues had been brought to her attention regarding the workload within the team. She confirmed that replacements for Mr Fadina and Mrs Lee had been found and they would be starting work in the near future. The claimant confirmed that he was happy to return to work on that basis. The claimant was to return

on a four-hour day increasing by an hour each week until he was working full time. During the meeting the claimant indicated that he did not want any interaction with Mrs Sanghera. Mrs Mackay indicated that as Mrs Sanghera was based in the same office as the claimant there might be some interaction with him but that she was not part of his line management structure and so this should be limited. The claimant outlined that he felt strongly about this and that how she treated people was a trigger for his depression. The claimant again raised his issue with Diane Pratley monitoring and reporting on him. Again, Toni Mackay indicated that as they were based in the same office there would be some interaction but she was not part of the claimant's line management structure.

187. As far as the Tribunal can see, this meeting was the first time that the claimant suggested that he was being treated differently/less favourably due to his ethnicity/race. However, the respondent asked him to provide an example of when this had happened and he was apparently unable to do so. He provided nothing specific that the respondent could take action on. In the absence of further details of what had actually happened and who had been involved the respondent could do no investigation. In any event, the claimant was advised to raise it immediately if it became an issue again going forwards so that it could be addressed by the respondent. The respondent also sought clarity as to whether the claimant had any outstanding grievances which should be dealt with via the grievance procedure. During the meeting the claimant confirmed that he now considered his issues to be fully addressed and that he was now ready to return to work.

188. During the course of the meeting the claimant confirmed that he would be returning to work on 15 November. He wanted to be paid full pay from the date he had made himself *available* for work rather than from any later date when he actually *returned* to work. It was explained to him that this was not possible in line with the respondent's policies. At this stage the claimant would have known that he would not receive any sick pay if he had any further sickness absence as he had exhausted his sick pay entitlement. Despite this, the email at [801] indicates that if the claimant returned to work on 15 November his pay would actually be backdated to 6 November which was when his most recent fit note expired. It also indicated the respondent's intention to do what was necessary to get him back to work successfully at this point.

189. The Tribunal accepts that the adverse impact of the claimant's workload on his health was probably discussed at this meeting. Workload was certainly discussed and, given the content and context of the earlier discussions, it is unlikely that the claimant would have changed the point he was making about it at this meeting. He had maintained his view that his workload had made his health worse. We find that he *did* repeat this assertion at this meeting.

190. The documents available in the bundle [761, 763 and 764] indicate that the claimant was paid a mixture of compassionate leave and accrued annual leave during the period that he was in Morocco following his mother's death.

The claimant's return to work

191. The claimant returned to work on 15 November, as previously agreed. One of the issues raised as part of the Employment Tribunal claim is that the claimant was required to 'hot desk' on his return to work. He did not think this was appropriate in all the circumstances. Based on the evidence we have heard we conclude that the claimant's login details for the respondent's computer systems had been disabled during his absence. This was due to the length of his absence and not due to any conscious decision to 'lock him out' of the system. Indeed, Claire Ridgeon was similarly locked out of the system after a significant period of absence. It took some time for the claimant to be given access to the system on his computer but when he tried to log back on it became apparent that there was actually a fault with the claimant's computer. This could not be resolved by resetting the claimant's login details. The computer needed to be repaired or replaced. Whilst that was being done the only option available was to ask the claimant to hot desk and log on to other computers at different desks (as long as they were not being used at the time). The claimant asserts that he should have had access to a laptop so that he could work from his own desk and not have to move around in this way. The respondent's position, which we accept, was that there were no spare laptops to facilitate this. Laptops were only supplied as a matter of routine to those employees whose jobs required them to work from more than one location. The claimant was not such an employee and so would not normally qualify for a laptop. Nor was there a spare laptop which he could use for the short to medium term. All the available laptops had been allocated and were in use. This was not an organisation which carried spare 'pool laptops' to be used as and when needed by different members of staff. We also accept that it would have taken time to order a new laptop for the claimant. Given the length of the procurement process it would have taken just as long to order and obtain a laptop for the claimant as it would to arrange repairs to his existing computer or a replacement desktop computer. The hot desking option was therefore the best available solution for the claimant's IT problems at this time. Whilst it was far from ideal for the claimant, it was the best that the respondent could do in the circumstances. Whilst it would have been preferable for this problem to be identified and resolved before the claimant started his return to work, it should be remembered that the claimant only gave notice on 10 November that he was returning to work on 15 November so there was very limited time to prepare. The respondent could not have been expected to make any earlier preparations. They could not order a replacement computer before that time and the claimant would not have accepted any further delay to his return to work whilst the respondent procured a new computer. He wanted to receive his normal wages as soon as possible. The respondent faced something of a Catch 22 dilemma.

192. The claimant returned to work as planned and was then absent from 21 to 23 November. In email correspondence the claimant referred to the difficulties he had had with his computer. Toni Mackay checked the issue with occupational health who indicated that the extra stress caused by desk hopping was not helpful but there was little else that the respondent could do in the circumstances. The IT issue was resolved, as can be seen from the

email on 6 December which indicated that the new computer had now been installed and he was no longer having to move around [1040]. The Tribunal was able to discern from these emails that Toni Mackay was doing her best to be supportive to the claimant.

193. It is apparent that at around this time the claimant had made allegations that other members of staff were coming in late and taking extended breaks and that this was not being dealt with. Toni Mackay indicated that as this was the first time it had been raised with her, she had not been able to address it before. She asked the claimant for details so that she could look into it and deal with it appropriately. The claimant, however, indicated that it was not his place to provide this information. The Tribunal rather wonders what the claimant expected the respondent to do with this information if he was not prepared to provide the necessary specifics for investigation.

194. In the list of issues, it was alleged that Bobbie Sanghera and Karen Olliffe excluded the claimant from weekly and monthly department meetings after he returned to work. However, the claimant did not lead any evidence of this during the Tribunal hearing, either orally or in his written witness statement. During the course of his closing submissions he accepted that, as a result, the Tribunal would not be able to make any findings of fact about the issues at paragraphs 5.12, 19.3, 21.13 and 24.11 in the list of issues. Those aspects of his claim must, therefore, fail.

195. By a letter dated 1 November 2017 the claimant was invited to a stage 3 meeting under the long-term sickness absence policy. It was scheduled to take place on 17 November. However, the meeting never actually took place because Amanda Middleton had to postpone it as the claimant was signed off work on sick leave on the day. He subsequently resigned before the meeting could be rearranged. Had the meeting taken place, it would have been for Amanda Middleton to consider all the available evidence from both the management and the claimant and she would have decided whether to confirm the claimant in post, extend his probationary period or terminate his employment.

<u>23 November 2017 email from Karen Olliffe to claimant copying in other staff.</u>

196. The claimant returned to work on 24 November after sick leave. Karen Olliffe was due to be on annual leave the following week. She was going to forward reference material to the claimant. This was the information which Mr Fadina had compiled about the role of Research Co-Ordinator. She was doing this because the claimant had been absent from work since June (a period of nearly 6 months) and she thought it might be helpful to provide him with a reminder about the role and what it entailed. As she was not going to be in the workplace the following week she needed to make sure that the claimant had everything he needed in her absence. She sent the email with the attached information. She copied Samantha Messenger in to the email as she provided support to the claimant in Karen's absence. Karen Olliffe knew from personal experience that it could be difficult to return to work after

extended sick leave and she was trying to be helpful. She also copied Diane Pratley into the email because the claimant would need to work with her the following week to ensure that there was no duplication of work between them. She also copied it to Toni Mackay because she was the claimant's line manager and she was following up on a previous email she had sent to Mackay indicating that this is what she was going to do. The other reason for copying in others was because Karen knew that the claimant had had some difficulties with his IT and getting access to emails so she wanted to make sure that he could get access to the material in her absence via a third party, if necessary. Indeed, she explains in the body of the email to the claimant that that is why she has copied in Pratley and Messenger.

197. Having reviewed the content of the email the Tribunal finds it to be entirely unobjectionable. It is clearly designed to assist the claimant in reintegrating into a job that he has not been doing for several months. We accept the reasons that Karen Olliffe gives for copying others into the email. They are entirely understandable and practical in the circumstances and could have had no adverse consequences for the claimant. It is not entirely clear to the Tribunal why the claimant was so offended by Miss Olliffe sending this email as she did. If the claimant had had difficulties getting onto the respondent's email system it is sensible to copy someone else in to the message so that they can forward it to him, if necessary in paper format. Also, there is nothing wrong in the claimant's line manager being copied in to the meeting. It is entirely appropriate to give her the full picture of the resources that the claimant has at his disposal. There is nothing in the email to suggest that it was designed to let other staff spy on him. It is unfortunate that Diane Pratley was copied in given the difficult history of the relationship between her and the claimant (from the claimant's point of view). However, when the claimant had agreed to return to work Toni Mackay had pointed out that he would be expected to work alongside Diane Pratley so this sort of contact between them could not be ruled out. The claimant and Diane Pratley had to be able to work alongside each other. The evidence perhaps suggests that despite his assurances to the contrary, the claimant was unable or unwilling to let bygones be bygones regarding Mrs Pratley. It seems that he would regard any action which involved her knowing anything about him and his work with some suspicion. There is nothing to suggest to the Tribunal that Mrs Pratley would have any desire to spy on him or use this information in an inappropriate way. Furthermore, it is entirely possible that Karen Olliffe was unaware of the difficult past history between the claimant and Mrs Pratley and so she would have sent this email entirely in good faith and unaware of the problems it might cause. In her email to Toni Mackay and Samantha Messenger [at 919] we can see Miss Olliffe checking with Toni Mackay that what she is planning to do is ok with Mrs Mackay and also forewarning Mrs Messenger so that she understands what she is about to receive and why.

27 November 2017

198. The claimant asserts that there was a meeting on 27 November. However, the Tribunal finds that it was not a substantive meeting. Rather, the claimant and Toni Mackay met up so that she could hand over a letter to him and explain about the forthcoming meeting. It was not, as far as we could discern from the limited evidence available, a 'sit down' meeting with a discussion, as such. The main evidence we heard about this conversation was that a letter was handed over and the claimant could not understand why the appendices were not handed to him in paper format at the same time as the letter to which they were supposed to be appended. The relevance of this encounter was more that it was a backdrop to his subsequent complaint about documents being sent to his London address rather than a description of a substantive conversation. We are unable to find as a fact that he said anything much at all to Toni Mackay on 27 November. He was just the recipient of a message delivered orally and an accompanying letter. We do not accept that he made any particular disclosure to the respondent during this conversation in the form of a public interest disclosure or otherwise.

<u>Letter and documents sent to claimant's London home address</u>

199. The letter which was sent with the management statement of case was dated 28 November [928]. We accept that at this point in time the claimant had not updated his address and contact details on the respondent's systems. The address which the respondent had for him was, therefore, the London address rather than his flat in Oxford. In these circumstances we cannot see how the respondent can be criticized for sending documents to the only postal address they had for him. Whatever the claimant's view, the documents were still sent to the claimant's address. There was no breach of privacy. There was no risk that it would be received by someone other than the claimant and his family and it difficult to see that there is any detriment to the claimant in this. The respondent could not be held responsible if a member of the claimant's family opened correspondence which was properly addressed to the claimant.

200. The respondent's management statement of case was compiled by Toni Mackay. Having reviewed it the Tribunal takes the view that it is very factual in nature and tone and does not make particularly strong recommendations as to whether the claimant should be dismissed, or not. All it really says is that the claimant comes within the terms of the policy which enables the respondent to consider termination of his employment at this stage. It would have been for Amanda Middleton (and not Toni Mackay) to decide what to do next.

201. We note that on 4 December it was proposed that the claimant be added to the ORRA database alongside several other members of staff [1002- 1004].

202. On 5 December the claimant emailed Amanda Middleton asking her to postpone the hearing until his formal grievance had been dealt with [1028]. Yet we note that he had not taken up Toni Mackay's previous offer to deal with his concerns as a formal grievance in order to get him back to work. The

claimant had not actually raised a formal grievance for the respondent to deal with at this stage. The respondent cannot be criticised for failing to adapt to the claimant's repeated changes in attitude to the prospect of putting forward a grievance.

203. On 6 December 2017 the claimant's probationary period was reinstated as he had completed his phased return to work. A welfare meeting took place on 6 December [1040]. Amanda Middleton notified the claimant that the meeting now listed for 13 December would be going ahead as she was not aware of any outstanding grievance.

204. On 7 December the claimant emailed John Drew [1064] airing his workplace complaints. John Drew responded that he was confident that the claimant's situation was being handled carefully and appropriately and with proper thought and respect. He encouraged the claimant to attend the forthcoming meeting with Amanda Middleton.

8 December exclusion from finance team meeting

205. Mr Fadina had apparently suggested that the claimant and Methilda Wan should visit the Cowley site in order to meet the research finance team. The claimant had only returned to work the previous week. Mrs Sanghera was consulted about this. She felt that the suggestion had been made by Mr Fadina because it would have enabled the claimant to go over and meet the finance team just so that he could 'put faces to names'. However, it was not essential for the claimant's work role at that time and it was not Mr Fadina's responsibility to invite him. Karen Olliffe contacted Mrs Sanghera on 24 November and asked her whether the relevant people in the finance team were aware that the claimant, Methilda Wan and Karen Olliffe would all be going over to meet them. At some point Mrs Sanghera had a conversation with Karen Olliffe and said that it would be preferable for just her (i.e. Olliffe) and Methilda Wan to go to the meeting without the claimant. This was for practical reasons. She did not want every member of the team going off site for a meeting. It was not specific to the claimant. Also, as the claimant had only just returned from extended sickness absence it was questionable what he would be able to add to the substance of the meeting. He would not be able to tell the finance team what had been going on in his absence. Furthermore, it was reasonable for Mrs Sanghera not to want to overload the claimant with meetings when he had only just got back to work. She was not intending to exclude him, rather, she thought that it would be more useful if he went over to Cowley at a later date when it was of greater use to him and to the Finance Department. The Tribunal accepts that there would be future opportunities for the claimant to go over and meet the finance team.

206. The claimant was aggrieved that Mrs Sanghera had got involved in this issue. He felt that she should not have interfered as she was not his line manager. However, we accept that she had good reasons for her decision. We also accept her evidence that the message had not been conveyed to her that she should not make any decisions in relation to the claimant. By getting involved she inadvertently upset the claimant. Perhaps this message could have been

communicated more effectively to the claimant, although the Tribunal queries what manner of communication could have been used which would not have resulted in the claimant being offended. We also bear in mind that the claimant had been complaining about his workload and its impact on his health and had only just done a phased return to work for health reasons. Many people in his situation would not see the decision as detrimental but rather as a good way of managing his workload until he was fully reintegrated into work. Unfortunately, by this stage the claimant struggled to see the respondent's managers' decisions and actions in a positive light.

Events leading to the claimant leaving the workplace on 8 December

207. On 8 December reports came into management of a conversation between Karen Olliffe and the claimant. Apparently, whilst they were having a conversation about work he started swearing, raising his voice, accusing the team of spying on him etc. He asserted that Mrs Sanghera had a vendetta against him. Karen Olliffe was distressed and went to Sam Messenger in tears. This was reported to Toni Mackay who was the most senior person in the directorate who was available. She was called to come over from the John Radcliffe Hospital to the Churchill Hospital to speak to the claimant. Before doing so she consulted with HR and was advised that she should ask the claimant to leave the premises for the time being. They even went through the words that that Toni Mackay should use. The idea was that he should leave the premises to give everybody a chance to calm down whilst management decided what should happen next. It had been reported that the claimant was very angry. Mrs Mackay was advised to have somebody in the room with her when she spoke to the claimant and she was advised where to stand and not to block the doorway. She was advised as to terminology that she should use. There was clearly some concern that the claimant would not react calmly to what she had to say.

208. Mrs Mackay went over to the hospital and asked the claimant to meet her in Sam Messenger's office which was a private room and down the corridor from the other staff. Sam Messenger remained sitting at her desk in her usual seat. Toni Mackay was near Sam Messenger and the claimant was near the door. Toni Mackay explained that, due to his outburst that morning and his inappropriate behaviour, it would be best if he left the premises. He would be put on paid leave to protect him and protect the other staff. The claimant did not react well to this and flung the door back so hard that it hit the wall. Mrs Mackay went with him to get his belongings but he said that he was in the middle of printing some things off and asked if he could finish doing that before he left. She agreed. It soon became clear that this was going to be a lengthy task and it was not just one item that was to be printed. After a while, Toni Mackay said that he needed to stop printing and leave the premises. He gathered his bag and coat and she escorted him out of the premises through a back passage and into the public domain.

209. At the meeting before he was escorted out the claimant said that he thought things were unfair and that he had been discriminated against. He did not mention race or the fact that he was being discriminated against because he

was a man or because of his religion. He said he felt that he had been unfairly treated because he had been off with depression and he did not feel that he had been given support when he came back. He told Toni Mackay that this was not the last she would hear of it and that he was going to bring an Employment Tribunal claim.

210. Toni Mackay asked staff to prepare statements as to what had happened and Diane Pratley and Karen Olliffe duly did so [1081, 1082-1084]. Having heard the evidence from both sides of the dispute in relation to the events of 8 December the Tribunal finds that it was a genuinely difficult confrontation for Karen Olliffe. It led to her being in tears and Toni Mackay being called over to the area to deal with the aftermath. On balance, we prefer the respondent's account of what took place on 8 December. There are a number of reasons for this. Firstly, everything we have seen and heard from the claimant indicates that he is a very volatile personality. It is entirely in keeping with his personality that he should act in such a manner as to make one of his colleagues cry. We accept that Karen Olliffe had been made to cry. She was able to give significant details in the written statement that she gave immediately after the event. That contemporaneous account lends credibility to the allegations she makes. The Tribunal has seen for itself how volatile the claimant is. He has shouted and used foul language during the course of the Tribunal hearing and has subsequently denied having done so. He seems to be entirely unaware how he may come across to others. He apparently has little insight into the impact on others of the way in which he conducts himself. It is also notable that he is giving evidence in relation to a meeting where he was already angry and agitated. Given his state of mind at the time his recollections may not be particularly accurate or reliable. He had been told not to attend the Cowley meeting and he was angry about that. This was then further compounded by his being asked to leave the premises due to the way he had behaved towards his colleagues. He had been taken into a meeting he did not want to have. On the other hand, there are two witnesses for the respondent who were at that meeting who are broadly consistent about what he did and why and how he came across to those present.

211. The Tribunal's view is that the respondent's decision to send the claimant home at this point was objectively reasonable. It provided an opportunity for all concerned to calm down before the matter had the opportunity to escalate further. It was better to deal with the consequences at a later date. We accept Sam Messenger's evidence that Toni Mackay was calm and polite during the meeting and that the claimant himself was calm until Toni Mackay read the statement asking him to leave the premises. We accept the evidence that the claimant was treated with dignity and respect and with a neutral and polite tone. We accept that after the claimant was asked to stop printing and leave the premises he grabbed his stuff and left the office flinging the door open so that hit the wall. We accept her account that he stormed into the corridor and swore Toni Mackay aggressively. He then stormed towards the administration area exit (slamming the door open) and swore again and stormed out across the service corridor, slamming through the service exit into the courtyard and muttering and swearing as he went. We accept that she followed behind Toni Mackay due to the claimant's sudden aggressive

outburst as she was concerned for Mrs Mackay's safety as the claimant's body language was so aggressive. We accept that the claimant has clearly got angry and sworn. He even did this in the hearing in front of us so it is consistent with his temperament as displayed during the relatively formal proceedings of a Tribunal hearing. It is also notable that he was already looking for things to complain about and threatening to resign the day before this occurred (see the email to John Drew referred to above).

212. Toni Mackay intended to send the claimant a letter asking him not to attend work until he came to the scheduled meeting on 14 December which was the following Thursday. She had already authorised leave for him on 11 and 12 December. She drafted a letter to this effect [1085] but decided not to send the letter in light of the sick note which was submitted by Sarah Williams, the claimant's wife [1088 and 1220]. The fit note indicated that he was signed off with depression and stress at work until 14 January 2018. On receipt of this and the sicknote Amanda Middleton took the decision on 11 December to postpone the scheduled meeting which was due to take place on 14 December. It was also decided that Toni Mackay would refer the claimant to occupational health to ensure that he continued to receive appropriate support. Later that day the claimant resigned from his post and copied Toni Mackay into his resignation letter [1102-1104]. The letter contained many complaints although without much specific detail. Toni Mackay replied on 13 December [1116] to say that she was very sorry that he had taken the decision to resign and that she would like to meet with him to discuss what led him to doing so. She invited him to a grievance hearing on 19 December 2017. The claimant replied on 17 December to say that he was not well enough to attend the grievance hearing. In light of that Tony Mackay prepared a response to the resignation letter as best she could without having met the claimant to understand the complaints further. In that letter she specifically noted that his resignation letter was the first time that he had formally raised complaints of unlawful discrimination due to sex, race, ethnicity and religion. She reiterated that at the meeting of 10 November the claimant had alluded to the fact that she he felt his ethnicity was causing colleagues to treat him differently. However, when he was asked to give an example of a time when he felt he had been treated differently he had not been able to do so. The claimant had been reminded that if this was a concern in the future he should raise it immediately with Toni Mackay. He had not done so and his resignation letter did not give Toni Mackay any examples of treatment that he felt amounted to unlawful discrimination. She went on to point out that he had never before mentioned that he believed he had been treated differently because of his sex or religion. She made the very valid point that she could not investigate allegations of discrimination if the claimant did not give her examples of the less favourable treatment he believed he had suffered. In relation to the assertion that he had suffered unlawful discrimination because of a disability Toni Mackay summarised the events up to that point including the references to occupational health and the employee assistance and support programme. She noted that support had been offered through occupational health and at all meetings to ensure that the claimant had the help he needed to return to work. This had included a phased return to work over four weeks, as advised by occupational health. No request had been

made to her to review working hours beyond this. She concluded that if the claimant did have a disability, based on the support which had been offered to him, she did not believe that the respondent had discriminated against him. In relation to the claimant's financial complaints, she did not accept that there had been an unlawful deduction from salary, benefits, relocation expenses, sick pay and holiday entitlement during his employment with the Trust. She set out the respondent's position to date in relation to the sums owed to him in particular, she reiterated that for the purposes of sick pay the claimant's previous NHS employment could not be taken into account as there was a break of more than 12 months prior to the start of his employment with the respondent. Likewise, she indicated that his holiday entitlement had been calculated in line with his contractual entitlements and pointed out that he had been paid his remaining annual leave during his bereavement leave and had also been paid ten days of compassionate leave as specified by the Trust special leave policy. She reiterated the history of the claimant's complaints about management and indicated that all grievances had been dealt with as at the time they were raised. She went on to say that the department had followed the absence management policy procedure during his sickness absence. That procedure detailed the meetings that needed to happen to ensure that his welfare was considered and support provided. She was not aware of any issues relating to isolation from meetings or the failure to provide information to the claimant. She reiterated the reasons for asking him to leave the premises on 8 December and maintained that this was the appropriate response to his actions in all the circumstances. She concluded by expressing the hope that she had responded to all the issues he had raised in his resignation letter. She did not accept that the respondent had breached the implied term of mutual trust and confidence and indicated that she had responded as best she was able to the points raised in the resignation letter in the absence of a further meeting with the claimant to discuss the details of his complaint.

THE APPLICABLE LAW

Constructive unfair dismissal for making a protected disclosure

213. In order to bring a claim of constructive unfair dismissal a claimant must first establish that he was dismissed within the meaning of s95(1)(c) of the Employment Rights Act 1996 ("ERA 1996"). In order to establish a constructive dismissal, the employee must show that:
    a. there was a fundamental breach of contract on the part of the employer;
    b. that the employer's breach caused the employee to resign;
    c. that the employee did not delay too long before resigning thus affirming the contract and losing the right to claim constructive dismissal.

214. The repudiatory or fundamental breach of contract may be a breach of an express or an implied term of the contract. Any breach of the implied term of mutual trust and confidence is regarded as a repudiatory breach of contract (Woods v WM Car Services (Peterborough) Ltd 1981 ICR 666; Morrow v Safeway Stores plc [2002] IRLR 9). Any such breach will go to the root of the contract. The implied term of mutual trust and confidence is the implied term that neither party will, without reasonable and proper cause, conduct itself in a manner which is calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence between employer and employee (see Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606). An employee is not justified in leaving employment and claiming constructive dismissal merely because the employer has acted unreasonably (Western Excavating (ECC) Ltd v Sharp [1978] ICR 221). In order to determine whether there has been a breach of the implied term of mutual trust and confidence it is necessary to look at the circumstances objectively i.e. from the perspective of a reasonable person in the claimant or respondent's position. A breach of the term does not occur simply because the employee subjectively feels that such a breach has occurred, no matter how genuinely that view is held. However, the employer's motive for the conduct in question is generally irrelevant. It makes no difference to the issue of whether there has been a fundamental breach that the employer did not intend to end the contract (Bliss v South East Thames Regional Health Authority [1987] ICR 700). When considering whether a breach of the implied term of mutual trust and confidence has occurred, it is not appropriate to ask whether the employer's actions lay within the band of reasonable responses available to an employer (Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908.)

215. Where there is more than one reason why the employee has resigned, the tribunal must determine whether the employer's repudiatory breach played a part in the resignation. The breach need not be 'the effective cause' of the resignation (Wright v North Ayrshire Council 2014 ICR 77).

216. An employee who is dismissed is to be regarded as unfairly dismissed if the reason or principal reason for dismissal is that the employee made a protected disclosure (s103A Employment Rights Act 1996). Where the employee lacks qualifying service to bring an unfair dismissal claim, the burden is on him to prove that the reason for dismissal was an automatically unfair one: Smith v Hayle Town Council [1978] ICR, 996, CA. In a constructive dismissal case, it is not strictly possible to examine the employer's reason for dismissal because the decision that triggers the dismissal is the employee's resignation. Instead, the question for consideration is whether the protected disclosure was the principal reason that the employer committed the fundamental breach of the employee's contract of employment that precipitated the resignation. If it was, then the dismissal will be automatically unfair.

217. In this case the claimant claims automatically unfair constructive dismissal because he made a protected disclosure. In order to be a protected disclosure three conditions must be satisfied: it must be a 'disclosure of information'; it must be a 'qualifying' disclosure; it must be made in accordance with one of six specified methods of disclosure.

218. In relation to 'qualifying disclosures' the relevant part of section 43B Employment Rights Act ('ERA') 1996 provides that:

> (1) In this Part a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following
>
> (b) that a person has failed, was failing or was likely to fail to comply with any legal obligation to which they were subject,
>
> …
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered

219. A qualifying disclosure is a protected one if made to the worker's employer (s.43C ERA 1996).

220. In order for it to be a qualifying disclosure there must be a disclosure of information. To amount to a disclosure of information, the worker must make a disclosure having sufficient factual content and specificity so as to be capable of tending to show one of the matters in s.43B(1) ERA 1996: Kilraine v London Borough of Wandsworth [2018] ICR 1580 [35]. That said, information and allegation are not mutually exclusive categories of communication. There is no rigid dichotomy between them. Information previously communicated to an employer could be regarded as 'embedded' in a subsequent communication. Two or more communications taken together can amount to a qualifying disclosure even if, taken on their own, each communication would not (Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540.) Whether two communications are to be read together is generally a question of fact (Simpson v Cantor Fitzgerald Europe 2020 EWCA Civ 1601)

221. Section 43B(1) requires that in order for any disclosure to qualify for protection, the disclosure must, in the 'reasonable belief' of the worker be made in the public interest and tend to show that one of the six relevant failures has occurred, is occurring, or is likely to occur. Reasonable belief is therefore relevant to both elements. There is no requirement on a worker to show that the information disclosed led him or her to believe that the relevant failure was established and that that belief was reasonable. Rather, the worker must establish only reasonable belief that the information tended to show the relevant failure. There can be a qualifying disclosure of information even if the worker is wrong (Babula v Waltham Forest College 2007 ICR 1026). However, the determination of the factual accuracy of the disclosure by the tribunal will often be relevant in determining whether the worker held the reasonable belief that the disclosure tended to show a relevant failure. Reasonable belief that the information disclosed tends to show one of the relevant failures has both a subjective and an objective element. The subjective element is that the worker must believe that the information disclosed tends to show one of the relevant failures and the objective element is that that belief must be reasonable (Phoenix House Ltd v Stockman [2017] ICR 84; Korashi v Abertawe Bro Mogannwg University Local Health Board 2012 IRLR 4). The focus on belief establishes a low threshold but the reasonableness test requires the belief to be based on some evidence. If the

worker subjectively believes that the information he or she discloses does tend to show one of the listed matters and the statement or disclosure has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that the worker's belief will be a reasonable belief. Determination of the factual accuracy of the worker's allegations will often be an important tool in helping to determine whether the worker held the reasonable belief that the disclosure in question tended to show a relevant failure. All circumstances must be considered together in determining whether the worker holds the reasonable belief: Darnton v University of Surrey [2003] ICR 615, EAT.

222. A whistleblower is required to show not only that he believed that the information disclosed tended to show the relevant matter for the purposes of s.43B ERA 1996 but also that his belief was an objectively reasonable one. The belief is subject to what a person in their position would reasonably believe to be wrongdoing: Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4, EAT [62].

223. The Tribunal must also consider whether the worker believed at the time of making the disclosure that it was in the public interest and if so, whether that belief was reasonable. The Tribunal is entitled to form its own view of whether the disclosure was in the public interest, but that view is not determinative as there may be more than one reasonable view of whether the disclosure was in the public interest: Chesterton Global Ltd v Nurmohamed [2015] ICR 929, CA [27-28]. In considering whether a disclosure was in the public interest, all the circumstances must be considered. Relevant factors will normally include the numbers in the group whose interests the disclosure served; the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed; the nature of the wrongdoing disclosed and the identity of the alleged wrongdoer: Nurmohamed [34, 39].

224. The scope of the legal obligations covered by s43B(1)(b) is not qualified. Statutory and common law legal obligations can be covered. It can include breaches of the employee's own contract of employment (subject to the public interest qualification). A worker will not be deprived of protection in relation to a disclosure simply because he is wrong about what the law requires.

Section 20/21 Equality Act 2010: reasonable adjustments.

225. Section 20 Equality 2010 (so far as relevant) states:

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2) The duty comprises the following three requirements.
(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
…

226. Section 21 states:

> (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
> (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
> (3) …

227. Paragraph 20, schedule 8 Equality Act 2010 provides that:

> (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—
>
> (b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

228. The correct approach to a claim of unlawful discrimination by way of a failure to make reasonable adjustments remains as set out in Environment Agency v Rowan 2008 ICR 218 and is as follows:

> (a) Identify the PCP applied by or on behalf of the employer,
> (b) Identify comparators (if necessary),
> (c) Identify the nature and extent of the substantial disadvantage suffered by the claimant.

Having considered these matters the Tribunal must identify what step it is that that the employer is said to have failed to take in relation to the disabled employee in order to discharge its duty under s20(3)-(5) (General Dynamics Information Technology Ltd v Carranza [2015] ICR 169.)

229. A provision criterion or practice ("PCP") cannot be derived from every act of unfair treatment of a particular employee. A practice requires some form of continuum or repetition in the sense that this is the way that things generally are or will be done: Ishola v Transport for London [2020] ICR 1204 [36-37]. It must also be applicable to the disabled person and to non-disabled comparators.

230. The identification of the applicable PCP is the first step that the claimant is required to take. If the PCP relates to a procedure, it must apply to others than the claimant. Otherwise, there can be no comparative disadvantage.

231. A 'substantial disadvantage' is one which is 'more than minor or trivial' (s212(1) Equality Act 2010). Identification and consideration of the actual functional effects of the disability is required. A comparative exercise is required to ascertain whether a disabled person is put at a substantial disadvantage.

232. Only once the employment tribunal has gone through the steps in Rowan will it be in a position to assess whether any adjustment is reasonable in the

circumstances of the case, applying the criteria in the EHRC Code of Practice. The test of reasonableness is an objective one. The practical effectiveness of the proposed adjustments is of crucial importance. Reasonable adjustments are limited to those that prevent the PCP from placing a disabled person at a substantial disadvantage in comparison with persons who are not disabled. Thus, if the adjustment does not alleviate the disabled person's substantial disadvantage, it is not a reasonable adjustment. (Salford NHS Primary Care Trust v Smith [2011] EqLR 1119) However, the threshold that is required is that the adjustment has 'a prospect' of alleviating the substantial disadvantage. There is no higher requirement. The adjustment does not have to be a complete solution to the disadvantage. There does not have to be a certainty or even a 'good' or 'real' prospect of an adjustment removing a disadvantage in order for that adjustment to be regarded as a reasonable one. Rather it is sufficient that a tribunal concludes on the evidence that there would have been a prospect of the disadvantage being alleviated. (Leeds Teaching Hospital NHS Trust v Foster [2011] EqLR 1075.

233. Factors which may be relevant to the reasonableness of the proposed adjustment are set out at paragraph 6.28 of the EHRC Employment Code 2011.

234. Where the disability in question means that an employee is unable to work as productively as other colleagues, adjustments to enable him to be more efficient would indeed relate to the substantial disadvantage he would otherwise suffer (Rakova v London Northwest healthcare NHS trust [2020] IRLR 503. It cannot be assumed that a desire to achieve greater efficiency does not reflect the suffering of a substantial disadvantage. The fundamental question is what steps it was reasonable for the respondent to have to take in order to avoid the particular disadvantage not what ought 'reasonably have been offered.'

235. An employer has a defence to a claim for breach of the duty to make reasonable adjustments if it does not know and could not be reasonably be expected to know that the disabled person is disabled and is likely to be placed at a substantial disadvantage by the PCP etc. The question is what objectively the employer could reasonably have known following reasonable enquiry. The relevant knowledge required is knowledge of the disability and also that the claimant's disability is likely to put him or her at a substantial disadvantage in comparison with non-disabled persons. A failure by an employee to cooperate with an employer's reasonable attempts to find out whether he has a disability could lead to a finding that the employer did not know and could not be expected to know that the employee was disabled (Cox v Essex County Fire and Rescue Service EAT 0162/13). Even if an occupational health adviser tells an employer that the employee is not disabled it remains open to a tribunal to find that the employer has constructive knowledge of the disability (Gallop v Newport City Council [2014] IRLR 211). The key question is whether the employer had actual or constructive knowledge of the facts constituting the disability. It may be an error of law for the tribunal to allow the employer to deny relevant knowledge by relying on its unquestioning adoption of occupational health advice. An employer cannot simply 'rubber stamp' an occupational health adviser's opinion. It must make its own factual judgment as to whether the employee is disabled. However, it is also relevant to consider whether the employer has

done all it could reasonably be expected to do to find out about the true nature of the employee's health problems (Donelien v Liberata UK Ltd. 2018 IRLR 535).

236. Even where an employer knows that an employee has a disability it will not be liable for a failure to make reasonable adjustments if it 'does not know and could not reasonably be expected to know' that a PCP would be likely to place that employee at a substantial disadvantage (para 20(1)(b) Schedule 8 Equality Act 2010. See also Wilcox v Birmingham CAB Services Ltd EAT 0293/10).

Direct discrimination

237. Section 13 Equality Act 2010 states:

> (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.

238. Section 23 of the Equality Act 2010 provides:

> (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case…

239. Section 6(3) Equality Act 2020 provides that:

> In relation to the protected characteristic of disability –
>
> (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability

240. Section 136(2)&(3) Equality Act 2010 provide that:

> (1) 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.
>
> (2) But subsection (2) does not apply if A shows that A did not contravene the provision.

241. The initial burden is on the claimant to prove facts which are sufficient to shift the burden of proof to the respondent. The bare fact of a difference in status and a difference in treatment is not sufficient material from which the tribunal could conclude that the respondent had committed an unlawful act of discrimination: Efobi v Royal Mail Group Ltd [2021] 1 WLR 3863, SC [30, 46]. The tribunal in a direct discrimination claim is considering whether there has been less favourable treatment, not whether treatment is unacceptable, inappropriate, bullying or irrational. In deciding whether the burden of proof

shifts, the tribunal must consider whether the treatment involved was less favourable. If it is not less favourable, the burden does not shift: Essex County Council v Jarrett UKEAT/0045/15/MC [11, 20].

242. Unless the treatment complained of is inherently discriminatory, the focus of the tribunal must be on the reason why the claimant was treated as he was. The tribunal is considering why the alleged discriminator acted as he did and what, consciously or unconsciously was his reason for his act.

243. In some cases it may be appropriate to postpone consideration of whether there has been less favourable treatment than of a comparator and decide the reason for the treatment first. Was it because of the protected characteristic? (*Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL; Stockton on Tees Borough Council v Aylott).*

244. The claimant must show that they received the less favourable treatment 'because of' the protected characteristic. In *Nagarajan v London Regional Transport 1999 ICR 877, HL* Lord Nicholls stated: *"a variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds… had a significant influence on the outcome, discrimination is made out'."*

245. The judgment in R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors 2010 IRLR 136, SC summarised the principles that apply in cases of direct discrimination and gave guidance on how to determine the reason for the claimant's treatment. Lord Phillips emphasised that in deciding what were the 'grounds' for discrimination, a court or tribunal is simply required to identify the factual criteria applied by the respondent as the basis for the alleged discrimination. Depending on the form of discrimination at issue, there are two different routes by which to arrive at an answer to this factual inquiry. In some cases, there is no dispute at all about the factual criterion applied by the respondent. It will be obvious why the complainant received the less favourable treatment. If the criterion, or reason, is based on a prohibited ground, direct discrimination will be made out. The decision in such a case is taken on a ground which is inherently discriminatory. The second type of case is one where the reason for the decision or act is not immediately apparent and the act complained of is not inherently discriminatory. The reason for the decision/act may be subjectively discriminatory. In such cases it is necessary to explore the mental processes, conscious or subconscious, of the alleged discriminator to discover what facts operated on his or her mind.

Victimisation

246. Section 27 Equality Act 2010, so far as relevant, provides that:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

(a) B does a protected act…

(2) Each of the following is a protected act –

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

247. A protected act requires that an allegation is raised which, if proved, would amount to a contravention of the Equality Act 2010. No protected act arises merely by making reference to a criticism, grievance or complaint without suggesting that it was in some sense an allegation of discrimination or otherwise a contravention of the Equality Act 2010: Beneviste v Kingston University UKEAT/0393/05/DA [29].

248. The test for detriment has both subjective and objective elements. The situation must be looked at from the claimant's point of view but his perception must be 'reasonable' in the circumstances.

249. The employee must be subjected to the detriment 'because of' the protected act. The same principles apply in considering causation in a victimisation claim as apply in consideration of direct discrimination (see above). The protected act need not be the sole cause of the detriment as long as it has a significant influence in a Nagarajan sense. It need not even have to be the primary cause of the detriment so long as it is a significant factor. Detriment cannot be because of a protected act in circumstances where there is no evidence that the person who allegedly inflicted the detriment knew about the protected act. In the absence of clear circumstances from which such knowledge can be inferred, the claim for victimisation will fail Essex County Council v Jarrett EAT 0045/15.

Burden of Proof

250. Section 136 of the Equality Act 2010 provides that, once there are facts from which an employment tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof "shifts" to the respondent to prove any non-discriminatory explanation. The two-stage shifting burden of proof applies to all forms of discrimination under the Equality Act.

251. The wording of section 136 of the act should remain the touchstone. The relevant principles to be considered have been established in the key cases: Igen Ltd v Wong 2005 ICR 931; Laing v Manchester City Council and another ICR 1519; Madarassy v Nomura International Plc 2007 ICR 867; and Hewage v Grampian Health Board 2012 ICR 1054. The correct approach requires a two-stage analysis. At the first stage the claimant must prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out on the balance of probabilities is the second stage engaged, whereby the burden then "shifts" to the respondent to prove (on the

balance of probabilities) that the treatment in question was "in no sense whatsoever" on the protected ground.

252. The approved guidance in Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205 (as adjusted) can be summarised as:

a) It is for the claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail.
b) In deciding whether there are such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. In many cases the discrimination will not be intentional.
c) The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. The tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination, it merely has to decide what inferences could be drawn.
d) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts. These inferences could include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information. Inferences may also be drawn from any failure to comply with the relevant Code of Practice.
e) When there are facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent. It is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground.
f) Not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment. Since the respondent would generally be in possession of the facts necessary to provide an explanation, the tribunal would normally expect cogent evidence to discharge that burden.

253. The shifting burden of proof rule only applies to the discriminatory element of any claim. The burden remains on the claimant to prove that the alleged discriminatory treatment actually happened and that the respondent was responsible. The statutory burden of proof provisions only play a role where there is room for doubt as to the facts necessary to establish discrimination. In a case where the tribunal is in a position to make positive findings on the evidence one way or another as to whether the claimant was discriminated against on the alleged protected ground, they have no relevance (Hewage). If a tribunal cannot make a positive finding of fact as to whether or not discrimination has taken place it must apply the shifting burden of proof.

254. Where it is alleged that the treatment is inherently discriminatory, an employment tribunal is simply required to identify the factual criterion applied by the respondent and there is no need to inquire into the employer's mental processes. If the reason is clear or the tribunal is able to identify the criteria or reason on the evidence before it, there will be no question of inferring discrimination and thus no need to apply the burden of proof rule. Where the act complained of is not in itself discriminatory and the reason for the less favourable treatment is not immediately apparent, it is necessary to explore the employer's mental processes (conscious or unconscious) to discover the ground or reason behind the act. In this type of case, the tribunal may well need to have recourse to the shifting burden of proof rules to establish an employer's motivation

255. The claimant bears the initial burden of proving a prima facie case of discrimination on the balance of probabilities. The requirement on the claimant is to prove on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an unlawful act of discrimination. The employer's explanation (if any) for the alleged discriminatory treatment should be left out of the equation at the first stage. The tribunal must assume that there is no adequate explanation. The tribunal is required to make an assumption at the first stage which may in fact be contrary to reality. In certain circumstances evidence that is material to the question whether or not a prima facie case has been established may also be relevant to the question whether or not the employer has rebutted that prima facie case.

256. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, with more, sufficient material from which tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination (see Madarassy).

257. If the claimant establishes a prima facie case of discrimination the second stage of the burden of proof is reached and the burden of proof shifts onto the respondent. The respondent must at this stage prove, on balance of probabilities that its treatment of the claimant was in no sense whatsoever based on the protected characteristic.

258. In some instances, it may be appropriate to dispense with the first stage altogether and proceed straight to the second stage (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337.) The employment tribunal should examine whether or not the issue of less favourable treatment is inextricably linked with the reason why such treatment has been meted out to the claimant. If such a link is apparent, the tribunal might first consider whether or not it can make a positive finding as to the reason, in which case it will not need to apply the shifting burden of proof rule. If the tribunal is unable to make a positive finding and finds itself in the situation of being unable to decide the issue of less favourable treatment without examining the reason, it must examine the reason (i.e. conduct the two-stage inquiry) and it should be for the employer to prove that the reason is not discriminatory, failing which the claimant must succeed in the claim.

259. In a claim under S.27(1)(a) it is for the claimant to establish that he or she has done a protected act and has then suffered a detriment at the hands of

the employer. It is unlikely, however, that the mere fact of a protected act and a detriment is sufficient to shift the burden of proof to the employer. Applying the approach set down in Madarassy v Nomura International plc 2007 ICR 867, CA there would seem to be a need for some evidence from which the tribunal infers a causal link between the protected act and the detriment. Examples of such evidence would include the fact that the detriment is suffered shortly after the protected act occurred; the way in which others who had not done a protected act were treated; and the employer's general approach to equality and discrimination matters. One of the essential elements of the prima facie case that the claimant must make out appears to be that the employer actually knew about the protected act on which the claimant bases his or her claim. The Court of Appeal in Scott v London Borough of Hillingdon 2001 EWCA Civ 2005, CA, upheld the EAT's decision that an unsuccessful job applicant had not been victimised for bringing a race discrimination complaint against a former employer. The Court ruled that knowledge of a protected act is a precondition of a finding of victimisation and that as there was no positive evidence that the respondent knew of the claimant's previous complaint, there had been no proper basis for the tribunal to infer that the claimant had been victimised.

260. Where it is alleged that an employer has failed to make reasonable adjustments, the burden of proof only shifts once the claimant has established not only that the duty to make reasonable adjustments had arisen but also that there are facts from which it could reasonably be inferred (absent an explanation) that the duty been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it can be properly inferred that there is a breach of that duty. Rather, there must be evidence of some apparently reasonable adjustment that could have been made. Therefore, the burden is reversed only once a potentially reasonable amendment adjustment has been identified Project Management Institute v Latif [2007] IRLR 579.

Unauthorised deductions from wages

261. Section 13(3) ERA 1996 provides that:

> Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of wages properly payable by him to the worker on that occasion…the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

262. In order for a payment to fall within the definition of wages 'properly payable' there must be some legal entitlement to the sum in question (New Century Cleaning Co Ltd v Church 2000 IRLR 27). Tribunals must decide on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion. Determining what wages are properly payable requires consideration of all the relevant terms of the contract in including any implied terms.

CONCLUSIONS IN THIS CASE

263. Having made our findings of fact and having summarized the applicable law we now return to the agreed list of issues in order to determine the legal claims in this case.

WHISTLEBLOWING

264. In line with our findings of fact above we have concluded that, in the meetings and communications on 30 May, 8 August, 15 September, 10 November, 1 August (to Occupational Health) set out at paragraph 1 of the list of issues, the claimant did indeed complain that his workload was adversely affecting his health. In the absence of a contemporaneous recording we are not able to go further and decide precisely what words the claimant used. The overall gist of his complaint was that his workload was affecting his health.

265. We have concluded that on each of these occasions the claimant was in fact making a disclosure in that he was making a link between his workload and his health. On each occasion the claimant was seeking to make a disclosure that tended to show that:
    a. A person had failed, was failing or was likely to fail to comply with any legal obligation to which they were subject (namely the obligation to provide suitable levels of health and safety at work for employees); and/or
    b. That the health and safety of any individual had been, was being or was likely to be endangered.

    It seems that the main element of the claimant's complaint was that it was not possible to conclude all of his work tasks within his agreed working hours and that, as a result, he was working more hours than he was supposed to in order to keep his work up to date. If that was his experience of doing the job (even if his predecessor had not had the same experience) then he subjectively reasonably believed that his disclosure tended to show a relevant failure (within the meaning of s43B) on the part of the respondent. Furthermore, in such circumstances it was objectively reasonable for the claimant to believe that the information he disclosed tended to show a relevant failure within s43B(1)(b) or(d). He was saying he needed to work too many hours if he was going to complete all his allotted tasks and that this was having a detrimental impact on his health.

266. The bigger legal obstacle to the claimant's disclosures qualifying for protection as public interest disclosures is the absence of the necessary public interest element. Given the nature of the disclosures we are unable to conclude that it was reasonable for the claimant to believe that he was making the disclosure in the public interest in line with the established legal principles outlined above. We have considered the different ways in which the necessary public interest element could have been demonstrated on the facts of this case and have concluded that, unfortunately, none of them

assists the claimant. We have looked at the words used and the context in which each of the disclosures took place. The claimant did not say anything about the impact of his workload on anyone other than himself. He did not suggest that the health and safety of more than one person would be adversely affected by the respondent's actions or failures.

267. We have looked to see if there is a public interest element tied up with the factual scenario when each disclosure was made. We have struggled to find anything intrinsic to the disclosures of a public interest nature. The claimant was complaining about his own personal circumstances, his own workload and his individual health. He was not making disclosures for the benefit of any other employees. He was the only person doing the Research Co-Ordinator role so any complaint he made about the workload could not be of more general application or relevance to other employees. This is not one of those cases where changes to working practices requested by one employee could have an impact on, or lead to a benefit for, several employees or a whole department. His disclosures could not impact on the terms and conditions or working situation of other members of staff. This is not a whole department affected by a change in working practices or problems with health and safety. The evidence suggested that the claimant's predecessor and successor in the post had not had any particular problems with workload. So, he cannot establish that more than one person was affected over a period of time either (i.e. longitudinally). So, to the extent that the case law asks to consider the number of people affected by the disclosure, this claimant's disclosures fail that test. They do not affect more than one person.

268. We looked at the nature of the claimant's work to see if a relevant public interest element could be inferred from that. Part of the work that the claimant was complaining about was the Standard of Care work that he had been given. This related to the sifting of data to find areas where the respondent Trust should have been reclaiming the cost of additional work or procedures which were not covered by the standard care pathway and the standard costs. We considered whether it could be argued that the claimant was making a disclosure which referred to a waste of public funds and whether this could mean that he reasonably considered the disclosures were in the public interest. However, we concluded that this was stretching the link too far. The work that the claimant was being asked to do was to identify areas where money should have been reclaimed and then copy that data into a central record which could then be used by the respondent to claim back any appropriate sums of money. The claimant was actually being asked to find out about a possible waste of public money. He was not being told to ignore it or to cover it up. His work was helping the respondent to further the public interest. It is hard to see how he could therefore reasonably believe that the disclosures he was making about his workload and his own health were actually in the public interest rather than his own, individual, private interest. The respondent had put no particular deadline on the work but that had no 'public interest' relevance. There was no particular urgency to the work as the money in question had already been spent and the clinical procedures had already been carried out. It was not a question of preventing a loss to the public purse. Rather, he was part of recovering extra money. So, the claimant

cannot reasonably have believed that because he was overworked or falling behind in his work money was being lost to the public purse. Factually that was not the position. Nor was it the way in which the claimant put his case before the Tribunal. He did not make this link in this case and there must be a limit to the lengths that this Tribunal can go to in order to make that link on his behalf after the event.

269. We also considered the fact that the claimant was employed in the public sector. It is sometimes argued that the public will have a particular interest in knowing about problems within public sector employment and that this will give disclosures which would otherwise be wholly private in character, the necessary element of public interest. Of course, the claimant was working within the NHS but it is not every such case which will have the necessary public interest element. The most obvious cases where a disclosure about private terms and conditions or health and safety in an employment contract context will reasonably be believed to be in the public interest are those involving clinical practice, clinical safety issues or fitness to practice by members of the medical profession. The claimant's case is not analogous to such cases. His role was an administrative one. The fact that it was carried out within an NHS Trust does not mean that any disclosures about his workload would automatically be thought to be in the public interest. There is, for example, no broader public safety issue tied up with complaints about his workload and his health. Yes, it is an NHS post but there is no specific expectation that if you are employed in the public sector (or in the NHS) all complaints you make about your employment and your own health and safety will be in the public interest. Some will. Some won't. For the reasons we have already said the financial public interest/protecting the public purse element is missing from this case.

270. In light of the above we have concluded that, although the claimant did make some disclosures, the disclosures were not protected disclosures within the meaning of the Employment Rights Act.

271. Even if we had concluded that the claimant made protected disclosures this would not have been sufficient for him to succeed in his claim for automatically unfair constructive dismissal. The Tribunal would have to go on to examine whether there was the necessary causal link between the protected disclosures and the detriments he says he was subjected to as part of his constructive dismissal claim. We would have had to decide whether he was subjected to those detriments because of his protected disclosures.

272. For the sake of clarity and completeness we have gone on to examine the alleged detriments and any relationship between them and the alleged protected disclosures in the paragraphs which follow. (The numbers referred to in the following paragraphs are references to the paragraph numbers in the agreed list of issues.)

273. The allegation at paragraph 5.1 of the list of issues was not proved on the facts (see findings of fact above) so we cannot go further and consider whether it was linked to a protected disclosure. Mrs Ridgeon did not ask for

the claimant's hours of work to be monitored. In any event she would have good reason to want to know whether he was working the correct hours irrespective of any disclosures by the claimant. Any disclosures by the claimant were immaterial.

274. The factual allegation at paragraph 5.2 was withdrawn by the claimant and consequently we have not considered it further.

275. In our findings of fact above we have considered why it was that the claimant was not given access to the ORRA database on 14 June 2017 (allegation 5.3). We have set out the sound business reasons for this decision which clearly have no link to the alleged protected disclosures. The claimant was not the only person who was not given access to the ORRA database until after this date. The necessary causal link is not established. The decision has nothing to do with the alleged protected disclosures.

276. In relation to allegation 5.4, the substance of the complaint is not about who was involved in the invitation to the meeting but rather it was about the lack of warning or agenda for the meeting. We find that that had nothing to do with the claimant's disclosures. Rather, it was due to the nature of the meeting and the matters which were to be discussed at it. The meeting was not of a type which required an agenda. We find that the respondent has to be able to have ad hoc meetings with staff without having to formalize them with an agenda and advance warning. It would be utterly unworkable to have a workplace where every time a line manager wanted to discuss something with an employee they had to pre-warn them that there was to be a meeting and precisely what the agenda for that meeting would be. We do not accept that advance notice and an agenda should be seen as standard practice for every such meeting.

277. In relation to allegation 5.5 we found that Bobbie Sanghera was actually present at this meeting as a support because of the claimant's previous behaviour and volatility, given her particular experience working in PALs and dealing with situations of conflict. This was a reasonable approach for the respondent to take and did not constitute a detriment. It was also intended to provide some degree of continuity in the claimant's case as Jenni Lee was due to retire imminently. It was advisable to have a third party present who would still be available and in work with the respondent after Mrs Lee had retired. We also note that only one of the alleged disclosures had actually been made before the date of this meeting. This detriment could not have been caused by the subsequent disclosures. It should also be noted that the respondent has never asserted that Mrs Sanghera was the claimant's line manager. She was not attending the meeting in that capacity. That does not render her attendance inappropriate. It is not the case that only a line manager can properly be present at a meeting of this sort with the claimant. We have set out above the reasons why she was present at the meeting. They were nothing to do with any alleged protected disclosure and we do not accept that there was the necessary causal link between the disclosure and the act complained of.

278. In relation to allegation 5.6 we do not accept that the claimant's account of what happened at the meeting is correct. The managers did not tell him that he had to sign the document. He was not forced to do this. He was given the opportunity to take it away and consider it again over the weekend. In the end he never did sign the documents. He did not annotate the document and sign it. Nor did he insist on any amendment to the document before he signed it. Furthermore, there was nothing to show any link to a protected disclosure.

279. In relation to allegation 5.7 we found (see above) that there was no discrepancy between what Jenni Lee said to the claimant and what Professor Gleeson had said about the claimant. Given the nature of his work Professor Gleeson would only have seen part of the picture in relation to the claimant's performance. In any event, his view of the claimant's abilities and performance had evidently changed over time. The claimant's performance shortcomings became more apparent to him as time went on. Further, we could find no link between this and any alleged protected disclosure by the claimant. The comments were based on the claimant's performance in his role and not on any disclosure the claimant had made.

280. In relation to allegation 5.8 we have already found that this is not an accurate characterization of what took place. The claimant was not subjected to detrimental treatment of the sort which could form part of a fundamental breach of contract by the respondent. He was given a choice as to how he wanted to return to work. He could go back to his own role or to a Band 3 post. It was for him to choose which he preferred. In any event, the claimant in fact chose to go back to his own role at Band 4. We cannot identify that this was a detriment to the claimant. In fact, it was an effort to assist the claimant and help him get back to work in the way which was most comfortable for him. The Tribunal has concluded that the respondent would have offered these options to the claimant based on his performance and his sick leave whether or not he had made a protected disclosure. The claimant has not established the necessary connection between the alleged protected disclosure and the 'detriment' at paragraph 5.8.

281. In relation to allegation 5.9 we have already set out above that we do not accept that the evidence in this case established that this is what happened. Toni Mackay was attempting to get to grips with where the claimant fell within the respondent's processes and procedures, what support he had received and what evidence there was about his performance. She called the October meeting because she was required to do so by the respondent's procedure. The claimant had hit the trigger point (and had hit the trigger point regardless of any protected disclosures). There is no evidence that she herself was considering terminating his employment at this point. If anything, she was giving the claimant the benefit of the doubt at this stage because she had not been involved in his case previously. She was a new line manager for him. This invitation to the would have gone out to the claimant irrespective of any disclosure made by the claimant. It was sent out because the respondent was following the steps in its written process and procedure. The meeting itself never happened so the Tribunal cannot assess what the outcome would have been if it had taken place. The mere fact that the meeting was due to take

place does not indicate that Toni Mackay was actually considering terminating the claimant's employment at this time or at all.

282. As set out above, we have already stated that there were good practical reasons why the claimant was required to hot desk (allegation 5.10). These reasons would have been present whether or not a protected disclosure was made and we are unable to find that the claimant was required to hot desk during the relevant period because he had made any protected disclosures.

283. Allegation 5.11 relates to Karen Olliffe sending an email to the claimant but copying in Sam Messenger and Toni Mackay. We do not accept that this was actually a detriment or that it could form part of a fundamental breach of contract by the respondent. There was no detriment to the claimant arising from the other employees being made aware of the information that had been sent to him. Indeed, they would be able to offer some assistance by providing him with a copy of that information in the event that he had any further IT difficulties when the author of the email was absent from the workplace. Not only do we find that there was no detriment, but we also find that this was not done because of any protected disclosure the claimant made. We have set out the reasons for this action above and do not repeat them here. We also note that there is nothing to suggest that Karen Olliffe was aware of any of the disclosures relied upon by the claimant at the time she sent the email. It is therefore hard to see, as a matter of fact, how such disclosures could have been the reason for her actions.

284. The allegation at paragraph 5.12 was withdrawn by the claimant and so we make no further finding in relation to it.

285. Allegation 5.13 relates to the claimant not being invited to the Christmas social or celebration events. We have already explained how each of the events was organized, whether individuals were specifically invited and, if so, the basis for determining who should be invited. We find that this detriment had nothing whatsoever to do with any of the alleged protected disclosures relied upon by the claimant.

286. Allegation 5.14 relates to sending the paper documents to the claimant's London home address. For the reasons set out above we find that this has nothing to do with any disclosure by the claimant. Rather, it was the only postal address that the claimant had provided to the respondent. We also query how it could be considered detrimental and how it could form part of a fundamental breach of contract by the respondent.

287. Allegation 5.15 relates to the claimant being excluded from a meeting with the finance team by Mrs Sanghera and Karen Olliffe. The claimant had not made any of the alleged protected disclosures to either of these individuals and so they could not have been acting in this way because of the alleged disclosures. There is no evidence to show that they knew about the disclosures. Furthermore, as set out above, we find that there were sound business reasons for the decision and the decision would have been taken in the same way irrespective of any disclosure by the claimant.

288. Allegation 5.16 relates to Toni Mackay telling the claimant to leave the building on 8 December. We have found as a fact that this instruction was given entirely because of the claimant's inappropriate behaviour towards his colleagues during the course of 8 December and had nothing whatsoever to do with any alleged protected disclosures made by the claimant.

289. As we have set out, the claimant was not subjected to any of the alleged acts because of his alleged protected disclosures. The causal link is not established. As the claimant had less than two years' service with the respondent, the burden was upon him to establish that any fundamental breach of contract on the part of the respondent was because of the protected disclosure. If the causal link between the breach of contract and the automatically unfair reason for dismissal (protected disclosure) is not established then the Tribunal does not have jurisdiction to hear the claim. The claimant does not have sufficient service with the respondent to be able to pursue an 'ordinary' constructive unfair dismissal claim. Furthermore, the claimant was seeking to show that the acts specified at paragraphs 5.1 to 5.16 constituted a breach of the implied term of mutual trust and confidence. We remind ourselves that in order for the respondent's action to be a breach of this implied term, the respondent has to have acted 'without proper cause'. We are not satisfied that the respondent did act without proper cause in relation to any of these allegations. As we have set out in detail above, although the claimant may have perceived the respondent's actions as being detrimental to him, the respondent had good, sound business reasons for acting as it did. The respondent's actions may have been unwanted from the claimant's point of view but this does not automatically mean that the respondent acted 'without proper cause' on each occasion.

290. For the reasons set out above the claimant's claim for automatically unfair constructive dismissal because of protected disclosures fails and is dismissed.

CONSTRUCTIVE WRONGFUL DISMISSAL

291. For the reasons already set out above in relation to the automatically unfair constructive dismissal claim, there was no fundamental breach of contract by the respondent which entitled the claimant to resign and claim that he had been constructively dismissed. The claimant is, therefore, not entitled to resign without notice and then claim one month's notice pay from the respondent. The claim of constructive wrongful dismissal fails and is dismissed.

CLAIM FOR BREACH OF THE DUTY TO MAKE REASONABLE ADJUSTMENTS.

Knowledge of disability

292. The respondent accepts that the claimant was a disabled person by reason of depression between January and December 2017 but denies actual or constructive knowledge of the disability.

293. The claimant completed a pre-employment questionnaire [1160]. In that questionnaire he ticked the 'no' box when asked whether he had a physical or mental health condition which had a substantial effect on his ability to carry out day to day activities and/or work which had lasted or was likely to last for more than 12 months. There was no express declaration of his mental health condition at this stage. The respondent did not know and could not reasonably have been expected to know that the claimant was disabled at the outset of his employment.

294. On or about 10 March 2017 the claimant made the respondent aware of the fact that he had been prescribed antidepressants, albeit in the context of him having stopped taking said medication. At this stage the respondent did not know how long the claimant had been on medication for and did not know any other details of his condition. However, the respondent did not take the opportunity to make an occupational health referral at this point in order to appraise itself of the relevant circumstances. The respondent had been put on notice at this point that there was a potential health issue which was, by definition, not a new condition as the claimant had already been prescribed medication. The respondent could (and arguably should) have taken further steps at this point to find out what it needed to know.

295. The sick note of 16 June 2017 refers to a 'depression *relapse'* (emphasis added) which, by definition, indicated that this was not the first episode the claimant had suffered. The sick note of 17 July 2017 also referred to 'recurrent depression'. Again, sick notes in August and September were for 'recurrent depression' and 'anxiety and depression' respectively. In November 2017 bereavement was added to depression on the sick note. The December sick note referred to depression in addition to stress at work. Depression was therefore a consistent feature of the sick notes the respondent was receiving from the claimant during this period. It is not the case that the claimant's sickness absence was attributable to other or unrelated conditions.

296. The first occupational health referral was made on 30 May 2017. The report was sent to the respondent around 24 July. The addendum was sent, at the claimant's request, on 1 August 2017. The clinical notes indicated that the claimant had disclosed a history of long-standing depression of about 5 years' duration when he saw the occupational health practitioner. It is not clear whether this document was seen by the respondent's manager or formed part of the clinician's confidential working records. However, there is no suggestion from the evidence before us that the claimant would not have answered honestly if asked how long he had suffered from depression. Had the respondent asked the right questions of the claimant and/or occupational health, his full history of depression could have been made clear at a relatively early stage.

297. As of 10 November 2017 the occupational health clinician was saying that she did not believe that the Equality Act was likely to apply in this case [803]. It is entirely unclear how she arrived at this conclusion given that she knew how longstanding his depression had been prior to the commencement of his employment with the respondent. She does not specify which elements of the Equality Act test for disability are not met in the claimant's case. The respondent does not check or ask for clarification. They unquestioningly accept the occupational health opinion on this issue.

298. Taking the available evidence in the round we conclude that the respondent was aware of a pre-existing diagnosis of depression by 10 March 2017. They were aware that either the condition (or the absence of medication) is causing significant cognitive problems for the claimant by way of 'brain fog'. By the end of May/mid-June 2017, the respondent knew that the GP was referring to the problem as recurrent depression in the fit notes. They were concerned enough to refer him to occupational health. However, they did not ask the relevant questions of occupational health about the duration of the problem. When the Equality Act was referred to by occupational health in November 2017 they accepted the conclusion unquestioningly. They should not have. Our conclusion is that the respondent was put on notice of the possibility that the claimant was suffering from a disability as early as 10 March 2017. Once his sick leave continued and the sick notes came in they should have been asking more questions about it. We are of the view that if they had asked the claimant he would have told them that he had been suffering from depression for years, particularly as he disclosed this to occupational health in July 2017.

299. We also note that by 15 June 2017 the claimant has had a significantly lengthy period of sickness absence because of depression. The respondent specifically chose Mrs Sanghera to attend the meeting on 15 June partially because of her previous experience and expertise in dealing with individuals with mental health problems. The facts up to this point mean that by this stage the respondent knew that the claimant had an impairment with substantial adverse effects on his ability to carry out normal day to day activities. They knew it had been having this effect for some time and that medication had been prescribed in the past. Even if they did not know that the history of depression extended over five years (because they did not ask the relevant question) they had enough information to conclude that the condition was 'likely' to continue for at least 12 months within the meaning of section 6 Equality Act 2010 (in the sense of 'it could well happen'). So, either they should have asked the question (in which case they would have found out that it had already lasted for more than 12 months), or they ought to have known that the substantial impairment was likely to last at least 12 months from their own observations and knowledge of the case. We fix the respondent with constructive knowledge of the disability by 15 June 2017 at the latest.

Provision Criterion or Practice: the "PCPs"

300. The respondent concedes that the first PCP contended for ("having a contractual start time of 9am") constitutes a PCP within the meaning of the Act.

301. The second alleged PCP is: "requiring the claimant to do extra tasks over and above his job description." We accept the respondent's contention that this is a complaint about the claimant's personal circumstances and there is no evidence that this was, or would be, applied more widely. We accept that it is not a PCP within the relevant statutory definition. Furthermore, we are not satisfied that the claimant was in fact asked to do extra tasks over and above his job description. We do not accept that the "Standard of Care" work was outside his job description and this was the only specific example that the claimant gave of this. Furthermore, whenever the claimant suggested to the respondent that, in order to do the Standard of Care work, he was working extra hours, the respondent specifically told the claimant *not* to work longer and to just do what he could manage within his normal hours of work. This was a piece of work 'for the claimant to be getting on with' as and when time allowed. We have therefore concluded that this was not a PCP and that, in any event, it was not applied to the claimant by the respondent.

302. The third PCP contended for was: not providing information to staff who were on sick leave. It was not entirely clear from the claimant's evidence what types of information he was referring to. It seemed that the claimant was specifically referring to information about job vacancies/adverts and information about Christmas parties. We can accept that this would be a PCP which was applied by the respondent. However, whether this triggers a duty to make any of the reasonable adjustments for which the claimant contends is a separate matter (see below).

303. The fourth PCP contended for was "not dealing with grievances of staff who are on sick leave". We are not satisfied that this was an approach which was applied across the workforce. Rather, the approach taken depended on the facts and circumstances of each individual employee. We do not accept that it was a PCP in the respondent's organisation. Furthermore, the evidence shows that the respondent *did* try and deal with the claimant's grievance whilst he was on sick leave but the claimant did not assist the respondent in doing so. They did not sit back and do nothing until the claimant returned to work. Rather, they asked for further details of the grievances and asked for confirmation as to whether the grievances were still live or could be considered closed. At various stages the respondent reasonably concluded that the claimant had withdrawn his grievance. Most of the grievance was specific to the behaviour of Jenni Lee and she had left the respondent's organisation and so it was unclear what else the respondent could do to further the claimant's grievances in the absence of further specifics or details from the claimant himself.

304. In light of the above only the first and third PCPs were applicable in this case. In relation to the first PCP we note that a contractual start time of 9am would or could put people with a disability at a substantial disadvantage as compared to those without the disability. It did put the claimant at a

substantial disadvantage because his early morning brain fog made it difficult to start work at 9am.

305. The third PCP (regarding provision of information on sick leave) is said to put disabled people at a substantial disadvantage because they need more support with work and do not have the confidence to ask for help. We are not satisfied that this in fact flows from the PCP. The information that the claimant is saying should have been provided during sick leave (information about job vacancies and Christmas parties) would have no impact on the support the claimant required to carry out his job and would have no relevance to the claimant's confidence or ability to ask for help. In order for the PCP to work in the way alleged in the list of issues, it would have to relate to a very different sort of information. It would have to relate to information that an employee needs during sick leave either to help them get back to work and reintegrate into the workplace, or because it will impact upon them in some work-related way once they return to work. An example of the latter class of information would be details of any proposed restructuring or redundancies which would have an impact on the claimant once they came back to work. Such changes might directly impact upon an employee's job or the fact they were 'kept out of the loop' might undermine their confidence or their trust in the employer thereby undermining the ability to continue at work. The information referred to in the claimant's case was not in that category. The claimant did not need to know about other job opportunities and job vacancies during his sickness absence. He was employed to do the Research Co-Ordinator role and details of job vacancies would not assist him in getting back to work or maintain his confidence whilst in his job role. Nor would the absence of this information make it more difficult for him to ask for help. Indeed, the provision of details of job vacancies during sickness absence could be interpreted as being disadvantageous to the claimant (or a disabled employee in similar circumstances) as it might be interpreted as suggesting that the employee was not welcome or secure in his current post and should be looking to move on elsewhere to a different job. Nor would there be any more disadvantage to a disabled person than to a non-disabled person. Likewise, not providing information about Christmas parties would have no impact on a disabled person's confidence or ability to ask for help. To the extent that the issue is that an employee is offended that information is not provided then this is just as likely to offend the non-disabled person as the disabled person. There is no substantial disadvantage.

306. The third PCP in this case does not place disabled employees at a comparative disadvantage to non-disabled employees. Nor did it put the claimant at such disadvantage.

307. So, of the two surviving PCPS in the claimant's case, only the first (regarding 9am start time) put disabled people (and the claimant in particular) at a substantial disadvantage as compared to the non-disabled. We also find that the respondent in fact knew that the 9am start time put the claimant at a substantial disadvantage because of his disability. This was part and parcel of his discussions with the respondent around 10 March 2017.

308. We have proceeded to consider whether any of the relevant PCPs established in this case triggers a duty to make any of the reasonable adjustments the claimant contends for and whether the respondent breached its duty to make reasonable adjustments.

309. The first adjustment requested is: permitting the claimant to start work at 9am or 10am at his sole discretion. The respondent did in fact make an adjustment to the claimant's working hours to remove the disadvantage caused by starting at 9am. The claimant complained of brain fog with early starts and so the parties agreed that his starting time should be 10am to reduce or remove these difficulties. This was a reasonable adjustment which was targeted to alleviate the disadvantage and was workable within the respondent's workplace/organisation. The later start time should address the concern or problem.

310. The adjustment the claimant requests at paragraph 16.1 of the list of issues is effectively a request for complete discretion and flexibility as to his working hours or start time. If the difficulty faced by the claimant is brain fog in the early mornings then a fixed later start will address the problem. Adding flexibility and discretion so that the claimant can come in to work earlier if he wishes does nothing to alleviate the problem. It just gives the claimant greater discretion to no real beneficial end. How would starting at 9am (or earlier) address the brain fog issue? It would not. A reasonable adjustment should be crafted to help the employee carry out their work duties. This adjustment would not do that. Furthermore, it would put the respondent at an unnecessary disadvantage. The role of Research Co-Ordinator was not a role which was to be carried out on flexi time. The respondent had good reasons for wanting the post holder to be in work during set hours so that he could collaborate with other colleagues effectively when needed. This was not a department where everyone worked flexibly with different start and finish times from day to day at the employee's discretion. If the discretion and flexibility asked for by the claimant did not actually reduce the disadvantage he faced in connection with his disability and the PCP, the respondent could not be expected to redesign the role in that way which would undermine the efficiency of the department to no net gain. The impression given in the evidence we heard was that the claimant actually wanted total flexibility to decide his own start and finish times so long as he did the necessary number of hours in any given week. He wanted to be able to 'bank' enough hours during the week so that he could finish early on a Friday and get back to London and his family. This meant that even though his start time had been changed to 10am the documents show that he was sometimes in work before 8 or 9am and that this was his decision. Not only was this not the agreement he had made with the respondent, but it also rather undermined his argument that his disability meant that he needed a later start time.

311. The adjustment contended for at paragraph 16.2 was "Giving the claimant training; being patient, and providing another person to help with the complex project he was given to do in February 2017". This adjustment is

not linked to either of the PCPs which have been established in this case. The PCPs do not cause the necessary disadvantage to trigger a duty to make such an adjustment. Furthermore, we are not satisfied that the claimant was given a particularly complex project to do in February 2017. He was given adequate training and support for the task. He did not need another person to do it with him because there was no particular deadline by which it had to be completed. We were not convinced that this would have been a reasonable adjustment on the facts as we found them.

312. The adjustment contended for at paragraph 16.3 was : sending the claimant information about the department and about vacancies and training opportunities when he was off sick to raise his confidence and make him feel wanted. We do not accept that the established PCPs in this case triggered a duty to make such an adjustment. Even so, we are not satisfied that this would have been a reasonable adjustment in any event, particularly in the context of a probationary employee. Arguably, sending someone job vacancies during sick leave will make them feel *more* vulnerable and *less* wanted. It might suggest that the respondent wanted him to leave the post he was employed to fill. Likewise, it is not generally appropriate to send information about training opportunities whilst an employee is unfit to work. This could reasonably be seen as applying unnecessary pressure to someone who is supposed to be recuperating. Any discussion of training should generally be left to the point in time where the employee is planning to return to work. It *might* then form part of the discussion about the way the return to work will happen, alongside such measures as a phased return to full hours. There is nothing in the facts of this case to suggest that there was training that the claimant reasonably required in order to be able to return to work which the respondent was refusing to consider.

313. The adjustment contended for at paragraph 16.4 was “dealing with the claimant’s grievance when he was off sick so he would not feel ignored.” The PCPs established in this case would not create the disadvantage required to trigger a duty to make this sort of adjustment. In any event, we have found that the respondent did not ignore the claimant’s grievances. On the contrary, it followed the claimant’s lead as to when/if there was still a live grievance for them to address and what he wanted them to do about it. When the claimant confirmed that his grievance could be considered closed they were entitled to take him at his word and accept that. When he raised new concerns Toni Mackay was keen to look into them but the claimant did not give the details and specifics which would have enabled the respondent to pursue this further. To the extent that the grievance about Jenni Lee was some form of barrier to the claimant’s return from sick leave, it is clear that Jenni Lee had left her employment with the respondent and so there was nothing further the respondent could be expected to do about that grievance.

314. The adjustment contended for at paragraph 16.5 was: “Postponing the meeting with Amanda Middleton on 8 December 2017 to consider termination of the claimant’s employment so that he could have time to prepare and someone to support him.” Such an adjustment is not linked to

either of the PCPs established in this case. There is no relationship between any of the claimed PCPs and the step of postponing the meeting on 14 December (not 8 December 2017). Further, the medical evidence available as of 6 December 2017 was that the claimant was fit to attend formal management meetings. He was also at work. When the claimant went off on sick leave, the meeting was postponed. There was no breach of the duty to make reasonable adjustments in this regard.

315. In light of the above all of the claimant's claims that the respondent breached its duty to make reasonable adjustments fail and are dismissed.

DIRECT DISBLITY DISCRIMINATION

316. The claimant alleged that there were four acts of direct disability discrimination. In relation to factual allegations 17.1 and 17.4 we refer to our previous findings of fact in relation to these incidents. In relation to the factual allegation at paragraph 17.2 we do not accept that any such meeting took place on 22 June. This factual allegation is not proved. Allegation 17.3 is that the letter sent on 12 July falsely claimed that the claimant had said at a sickness review meeting that he was not pursuing his grievance. We do not accept that the letter contained any false claim. It did not misrepresent the claimant's position or what he had said. He *had* agreed that his grievance could be treated as closed.

317. The claimant relied on the following named comparators: Karen Olliffe and Mark (Band 4 employee in the MRI research team). The list of issues makes it clear that the claimant thought both comparators had a mental health disability. The claimant's claim as formulated cannot succeed. This is because a complaint of direct disability discrimination requires that the claimant is treated less favourably than his comparators because he has depression and they do not. A claim that he was treated less favourably than others who also had mental health conditions cannot succeed. The comparators are not suitable within the meaning of section 23 Equality Act and the necessary causal link between the treatment complained of and the protected characteristic of disability cannot be established.

DIRECT RACE DISCRIM

318. The claimant made seventeen separate allegations of acts which he said amounted to direct race discrimination. They were set out at paragraphs 19.1 to 19.17 of the list of issues. Many of the factual allegations overlapped directly with the other heads of claim. We refer to our findings of fact already made about each of the factual allegations relied upon. We will not repeat them here.

319. For the purposes of his direct race discrimination claim the claimant relied upon the following named comparators:
    c. Diane Pratley

d. Jenni Lee
e. Toni Mackay
f. Toni Hall
g. Claire Ridgeon
h. Fergus Gleeson.

We remind ourselves once again that section 23 Equality Act requires the comparators to be truly comparable to the claimant apart from the protected characteristic of race.

320. In relation to paragraph 19.1 for the reasons already set out above we do not accept that the claimant was given a complex project to do when he started in February 2017. None of the comparators relied upon was in a truly comparable situation. None of them did the same job as the claimant with sufficiently similar or comparable expectations in terms of the nature of his work tasks. Of the named comparators Diane Pratley probably had the most similar job to the claimant but it was not at the same level as the claimant's and so not directly comparable. Furthermore, we do not accept that the Standard of Care work was given to the claimant because of his race. We find as a fact that the decision had nothing whatsoever to do with race. The job was given to him because he approached the respondent asking for a further task and the Standard of Care project fitted well with his job description. Nor do we accept, for the reasons already stated, that this was a particularly complex piece of work.

321. At paragraph 19.2 the claimant asserted that Claire Ridgeon asked Diane Pratley to monitor the claimant's hours of work from 14 March 2017. For the reasons already stated we do not accept that this is an accurate reflection of what actually happened. Nor do we accept that this was an incident of less favourable treatment of the claimant than his comparators. When the claimant tried to allege that others were not at work at the correct times he was asked to give further details and specifics so that the respondent could look into it but he refused to do so. This suggests that the respondent intended to approach the matter of timekeeping in the same manner in relation to the claimant as in relation to his colleagues. There was no less favourable treatment. Nor has the claimant demonstrated that any of his comparators was in the same or sufficiently similar circumstances to him if they were treated more favourably than him by the respondent. There is no established less favourable treatment of the claimant than an appropriate comparator. There was nothing within the factual matrix of the case to shift the burden of proof to the respondent to establish a non-racial reason for its actions.

322. The allegation at paragraph 19.3 of the list of issues was dropped by the claimant and no further findings are made by this Tribunal in relation to it.

323. In relation to paragraph 19.4 this is a repetition of the allegations relating to the ORRA database. We have already set out in our findings of fact what happened in relation to this database and the reasons why the respondent acted as it did. We have considered whether the claimant can show less favourable treatment than a suitable comparator in this allegation. We have

found that Claire Ridgeon was treated in the same way as the claimant and was due to be added to the database access list at the same time as the claimant. Diane Pratley was already on the access list because she was responsible for a particular part of the work in relation to the ORRA database and therefore needed access to it. The claimant was not involved in trialing the ORRA database and therefore did not need access to it. Mr Fadina was also already on the list. Although he is not of the same ethnicity as the claimant (he is a black African man) it is apparent that membership of the access list was not restricted to those of white Caucasian ethnicity. Furthermore, Mrs Sanghera, is of Asian/Indian ethnicity. She was also on the database list before the claimant. This suggests that race was not a relevant factor in deciding who would gain access to the ORRA database. Rather, there were sound business reasons connected with the trialing and piloting of the new database which determined who should be added to the list and at what stage of the process. This had nothing whatsoever to do with race. It was a genuine business explanation/reason. Jenni Lee is listed as a comparator and we do not know at what stage she gained access to the ORRA database. However, she was due to leave the respondent's employment relatively soon thereafter and so is not an appropriate comparator. Her circumstances were not sufficiently similar to the claimant's. In reality, none of the comparators relied upon by the claimant is appropriate for the purposes of this allegation because they are all doing different job roles to the claimant. It is not a fair comparison. It is not comparing sufficiently 'like with like'.

324. At paragraph 19.5 the claimant asserts that Bobbie Sanghera called him into a meeting on 15 June without notice or telling him what it was about. We refer to our findings of fact above in relation to this incident. In terms of a suitable comparator, we find that none of the named comparators were ever in the same situation as far as the evidence before us indicated. There was therefore no less favourable treatment than an appropriate comparator. In any event, the reason given for calling him into the meeting, was to give him an opportunity to sign the probation review meeting notes and to forewarn him of a letter which was due to be sent out to him. Neither of these reasons is tainted by the impermissible reason of race. The respondent's actions were not in any way because of the claimant's race.

325. At paragraph 19.6 the claimant complains about Bobbie Sanghera being at the meeting on 15 June. Once again, none of the comparators relied upon by the claimant is in a truly comparable position. We have already found the reasons for the matters complained of. None of them are tainted by race. There were sound reasons for inviting Bobbie Sanghera to witness the meeting given the claimant's volatile nature. This has nothing to do with race. It cannot reasonably be suggested that the claimant was categorised as aggressive because of his race, or that someone of a different race in the same circumstances would not have been seen or characterised as acting aggressively. He was objectively volatile and that volatility rather than race was the reason for having a witness present at the meeting.

326. At paragraph 19.7 the claimant alleges that he was told at the meeting on 15 June that he had to sign a probationary review letter. This is not factually correct for the reasons set out in our findings of fact. He was not forced to sign the letter but was given a further opportunity and time to consider his position. The claimant has failed to prove his factual allegation. In any event there is nothing to suggest that an employee in the same circumstances but of a different race would have been treated any differently or more favourably than the claimant.

327. At paragraph 19.8 the claimant complains about Jenni Lee's report to him of Professor Gleeson's opinion of his work. We have set out our findings of fact in relation to this issue above. Suffice it to say there was no contradiction in what was said about his performance. It was an accurate representation of Professor Gleeson's opinion based on the claimant's development in the post over time. None of the comparators relied upon by the claimant was in sufficiently similar circumstances for the purposes of a direct discrimination claim. He cannot establish the appropriate and necessary less favourable treatment for the claim to succeed. In any event, as we have already found, the assessment of his performance and Jenni Lee's reporting of it to him had nothing to do with the claimant's race and was in fact a genuine assessment and report of his performance in the post.

328. At paragraph 19.9 the claimant complains that he was told he could return to work in a Band 3 role. As previously indicated, this does not accurately reflect the options the claimant was given. He was offered the opportunity to choose what he would prefer to do: come back to work in his pre-existing Band 4 role, or choose to return in a Band 3 role with a fresh start. We cannot accept the claimant's characterization of this as detrimental treatment. Furthermore, the claimant has not shown less favourable treatment compared to a comparator in similar circumstances. None of the comparators relied upon is apt. Furthermore, there were good, non race related reasons for the offer that the respondent made. In any event, the claimant chose to go back into the Band 4 role and the respondent did its best to facilitate that. The requisite elements of a direct discrimination claim are not made out.

329. At paragraph 19.10 the claimant complains that Toni Mackay considered the termination of his employment in October 2017. For the reasons already stated we do not accept that this is in fact what happened. Mrs Mackay was following the relevant stages of the respondent's written procedure. The claimant had reached the appropriate trigger point in that procedure for the meeting to be called and that is what happened in this case. None of the comparators the claimant relies upon found themselves in the same or similar circumstances. There is nothing to show that an appropriate comparator would have been treated any differently from the claimant in the same circumstances. There was no less favourable treatment and the respondent's actions had nothing whatsoever to do with the claimant's race.

330. At paragraph 19.11 the claimant complains about being required to hot desk on his return to work in November 2017. We have heard evidence from Claire Ridgeon that she was in a similar set of circumstances herself when she

returned to work after an absence. She too was locked out of the respondent's systems and had to be readmitted to them. We accept what she says about it taking a lengthy period of time to get her access restored. To that extent there was no difference in treatment between the claimant and Claire Ridgeon. Apart from Claire Ridgeon, there was no comparator in similar circumstances for us to examine. We cannot accept that the claimant has proven less favourable treatment than an appropriate comparator. He has not established a difference in treatment. In light of the evidence we have heard he would also struggle to find a racial explanation for the way that he was treated. This was the best available solution to the practical problem faced by the claimant in having to work on a computer when his own was broken.

331. The claimant complains about the email being sent to him by Karen Olliffe on 24 November being copied in to Sam Messenger and Toni Mackay (paragraph 19.12). We are unable to accept that this was detrimental treatment. It made absolutely no difference that these two employees had visibility of an email which was sent to the claimant. In fact, it was potentially beneficial as the claimant had had difficulties in accessing emails at around that point in time and this was essentially a failsafe to ensure that someone could forward the relevant documents to him in the absence of the email's author. Furthermore, we cannot find that any of the comparators relied upon is an appropriate comparator for these purposes. None of them were treated differently in the same or sufficiently similar circumstances to the claimant. There were good non-racial reasons of practicality for copying in the other employees. This claim must fail.

332. The allegation at paragraph 19.13 was dropped by the claimant and therefore no further findings are made in relation to it.

333. At paragraph 19.14 the claimant complains about not being invited to the Department Christmas party or the Trust Christmas lunch. We have set out our findings of fact in this regard at length above. In relation to the email invitation we find that Diane Pratley and Karen Olliffe were on the list. Jenni Lee had left the business. Claire Ridgeon was not on the list. Nor was Toni Mackay or Toni Hall. The claimant can only establish less favourable treatment than Diane Pratley and Karen Olliffe. However, there was a difference in circumstances between the claimant and those two comparators. Diane Pratley was in work whereas the claimant was off sick. This was a genuine explanation why he was left off the email distribution list and she was not. Karen Olliffe had had a period of sick leave from 6 November to 20 November. This means that when this email was sent out Karen Olliffe was not on sick leave again, this was a material difference between the claimant's circumstances and those of the comparator. The claimant has therefore failed to establish less favourable treatment than an appropriate comparator. Race was not the reason why he was left off the email. The other Christmas festivities were not the subject of specific invitations. We have set out the details of these arrangements in our findings of fact above and suffice it to say that they do not disclose any less favourable

treatment of the claimant than a comparator or that such treatment was because of race.

334. At paragraph 19.15 the claimant complains about documents being sent to his home address in London. We cannot find that any of the named comparators was in a sufficiently similar set of circumstances to be relied upon. Furthermore, we find that there was a good reason why the documents were sent to this address, namely, that he had not provided the respondent with his Oxford address. It cannot be said that this happened because of race. Furthermore, we are unsure how it is said this was detrimental treatment. The claimant clearly received the documents and they were sent to his personal address. There was no risk of any breach of confidentiality whether the documents were sent to his Oxford address or his London address. For some undisclosed reason the claimant was aggrieved that the London address was used on this occasion.

335. At paragraph 19.16 the claimant complains that he was excluded from the meeting with the finance team on 8 December 2017. None of the comparators he was relying upon were in fact asked to go to that meeting. He is therefore unable to show less favourable treatment than a comparator. Furthermore, for the reasons set out in our findings of fact, we find that there was a good business reason for this decision which had nothing whatsoever to do with the claimant's race.

336. At paragraph 19.17 the claimant complains about being told to leave the building by Toni Mackay on 8 December 2017. None of the comparators relied upon was in the same or similar circumstances to the claimant in this regard. He was unable to establish that he was treated less favourably than an appropriate comparator. In any event, for the reasons already stated, we do not accept that the reason he was asked to leave the building had anything to do with race. He was told to leave the building because of the way he had behaved.

337. For the reasons set out above none of the claimant's claims of direct race discrimination succeed. All the claimant's claims of direct race discrimination are therefore dismissed.

DIRECT SEX DISCRIMINATION

338. The claimant set out seventeen separate allegations of sex discrimination at paragraph 21 of the list of issues. Once again, many of the factual allegations overlapped with those made in other areas of the discrimination claim. The claimant relied on a number of named comparators. They were: Diane Pratley; Jenny Lee; Toni Mackay; Toni Hall; Claire Ridgeon; and Bobbie Sanghera. We pause to note that although these individuals are female, none of them was carrying out the same job role as the claimant. Depending on the allegation made by the claimant this would be a material difference in circumstances between the claimant and the comparator such that it is not

an appropriate comparator for the purposes of this claim. We refer to this further below.

339. At paragraph 21.1 the claimant complains about being given a complex project to do when he started work in February 2017 we accept that none of the comparators received this task but none of them had the same job description as the claimant. He also asked for a further task to broaden his experience (see above). The claimant was given the task because of his job description and his own request. There is no less favourable treatment than an appropriate comparator. Nor are we satisfied that the decision was in any way related to the claimant's sex.

340. At paragraph 21.2 the claimant complains that Claire Ridgeon asked Diane Pratley to monitor the claimant's hours of work from 14 March 2017. We have made our findings of fact and found that no such request was in fact made. In any event there is nothing to suggest that any of the female comparators were in the same or similar circumstances to the claimant in this regard. There is nothing to suggest that the female comparators were failing to attend work during their agreed hours. There were no concerns about their timekeeping. Furthermore, we had every reason to conclude that, had concerns been raised about the female employees' timekeeping then the female employees' timekeeping would have been checked too. We also note that at the beginning of every shift Claire Ridgeon went round the workplace to say good morning to her team and, in the course of this, check that they were all present and correct. This demonstrates equality rather than disparity of treatment.

341. The allegation at 21.3 was withdrawn by the claimant and nothing further is said in this regard.

342. Allegation 21.4 reiterates the complaint about access to the ORRA database. We found that Mr Fadina (a male) was given access to the database before the claimant. Not all the female comparators on the list were given access before the claimant. For the reasons already stated the comparators relied upon were not suitable comparators because their different job roles meant that they would be added to the database access list at different stages depending on the needs of the business. Therefore, the claimant has failed to demonstrate less favourable treatment than an appropriate female comparator. The fact that a male colleague was added to the access list before the claimant goes further to suggest that sex was not a relevant consideration in deciding who should be given access to the database. We therefore find that the claimant was not put on the database because of his job role and the need to test the database using a limited number of relevant employees and not because he is a man.

343. At paragraph 21.5 the claimant complains about being called into the meeting on 15 June without notice and forewarning of the subject matter of the meeting. We do not accept that the claimant has established that he was less favourably treated than a suitable comparator. The burden of proof has not

shifted to the respondent and in any event we can discern no sex related reason for the respondent's actions in this regard.

344. At paragraph 21.6 the claimant complains about Mrs Sanghera's attendance at the meeting on 15 June 2017. We find that the claimant has not established that he was less favourably treated than an appropriate comparator. There was no comparator in the same or similar circumstances. The burden of proof has not shifted to the respondent. In any event, in light of our findings above we find that the reason for the respondent's actions was not related to sex.

345. At paragraph 21.7 the claimant complains that he was told at the meeting on 15 June that he had to sign a probationary review letter. For the reasons already set out we do not accept that this accurately reflects what took place on this occasion. He was not forced to sign the letter but was given a further opportunity to do so and further time to consider his position. He has failed to prove the facts on which he bases his allegation of discrimination. Furthermore, he has failed to establish less favourable treatment than an appropriate female comparator and we cannot discern that the treatment was in any way because of sex. The claim fails

346. At paragraph 21.8 the claimant complains about the way Jenni Lee reported Professor Gleeson's opinion of his work. We have set out our findings of fact as to what took place and whether this accurately reflected Professor Gleeson's opinion above. The claimant has failed to establish that he was treated less favourably than a suitable female comparator in the same or sufficiently similar circumstances. Furthermore, for the reasons already stated, we do not accept that Jenni Lee said what she did because the claimant is male or that Professor Gleeson's opinion of the claimant's work was in any way affected by the fact that the claimant is male.

347. At paragraph 21.9 the claimant complains that he was told he could return to work in a Band 3 role at the meeting on 12 July 2017. For the reasons already stated we do not accept that this is an accurate reflection of what took place. The claimant was given a choice between Band 3 and Band 4 and chose to return to work in his pre-existing Band 4 post. There was no detrimental treatment here. Nor was there an appropriate female comparator who was more favourably treated. The burden of proof did not shift to the respondent. In any event we were able to find that there were good non-sex-related reasons for the respondent's actions in this regard.

348. At paragraph 21.10 the claimant complains about Toni Mackay considering termination of his employment in October 2017. We repeat and rely upon our findings of fact in relation to this issue. The respondent followed its procedures and had reached the trigger point for the meeting in relation to the claimant. It was therefore appropriate for them to call the meeting. This did not mean that termination was being actively considered. Furthermore, the claimant has been unable to demonstrate that he was less favourably treated than a suitable female comparator. The burden of proof does not shift to the respondent. In any event, the reasons given by the respondent for its actions are not related to sex and we accept them.

349. Paragraph 21.11 relates to the complaint regarding hot desking. We reiterate our findings of fact in this regard. We reiterate our finding that Claire Ridgeon was in a similar situation to the claimant for a period of time and was treated in a similar way. The claimant has not been able to point to a female comparator in the same or similar circumstances who was treated more favourably than he was. The burden of proof did not shift to the respondent to show the decision was nothing to do with sex. In any event respondent had explained and justified its actions. There were good practical reasons for asking him to hot desk which had nothing whatsoever to do with the claimant's sex.

350. At paragraph 21.12 the claimant complains about Karen Olliffe sending the email to him which was copied to Sam Messenger and Toni Mackay. He has not been able to demonstrate that a female comparator in the same or similar circumstances was treated more favourably than him. Furthermore, we do not accept that this was an instance of detrimental treatment for the reasons previously stated. The burden of proof does not shift to the respondent. In any event there were good practical non-sex-related reasons for the respondent's actions in this instance.

351. The allegation at paragraph 20.13 was withdrawn by the claimant and we make no further findings in this regard.

352. At paragraph 21.14 the claimant complains about not being invited to the department Christmas party or the Trust Christmas lunch. We repeat and rely upon our earlier findings of fact in relation to this matter. We conclude that the claimant has not been able to establish that he was less favourably treated than a suitable female comparator. There were good non-sex-related reasons for him not being added to the email invitation. He was on sick leave at the relevant time. The comparators were not. This claim cannot succeed

353. At paragraph 21.15 the claimant complains again about documents being sent to his London address rather than his Oxford address. We reiterate our findings of fact in this regard. The claimant has not established that any of the female comparators were in the same or similar circumstances to him. He has not shown that he has been less favourably treated than an appropriate comparator. There is nothing within the facts before us to indicate that the respondent's actions were anything to do with the claimant's sex. The burden of proof has not shifted. This aspect of the claim must be dismissed.

354. At paragraph 21.16 the claimant complains about being excluded from the meeting with the finance team on 8 December 2017. Once again, we reiterate and rely upon our earlier findings of fact. In his list of comparators the claimant has not relied on the comparators who actually went to the meeting (i.e. Karen Olliffe and Methilda Wan). Therefore, he has not proved less favourable treatment than a female comparator and the burden of proof does not shift. Even if he had succeeded in doing so, there were good non-sex-related reasons for the decision which we have set out above. This claim fails.

355. At paragraph 21.17 the claimant complains that he was told to leave the building on 8 December 2017. We repeat and rely upon our findings of fact in this regard. The claimant has been unable to point to a suitable female comparator who was more favourably treated than he was. Less favourable treatment is not established and the burden of proof does not shift to the respondent. In any event, for the reasons we have already stated, the respondent's actions were nothing whatsoever to do with sex but rather were because of the claimant's own behaviour on 8 December. This claim fails.

356. For the reasons set out above none of the claimant's complaints of direct sex discrimination succeeds and they are all therefore dismissed.

VICTIMISATION

357. The claimant brings a claim of victimisation relying on three alleged protected acts as set out at paragraph 23 of the list of issues. The claimant alleges that on 10 March and 24 April he did a protected act when he said to Jenni Lee that he felt unfairly treated in comparison with another other non-ethnic staff and the treatment seemed very heavy-handed. In line with our findings of fact there is no evidence of a protected act having taken place on 10 March or 24 April as alleged. The records of both meetings failed to mention it and the claimant has signed those documents as accurate reflections of the discussions which took place. Furthermore, this is so early in the chronology (i.e. the first two review meetings) that there was arguably nothing heavy-handed or discriminatory for him to complain about so as to do a protected act. The alleged protected act at paragraph 23.1 is therefore not established.

358. The claimant relies on his written grievance of 21 June 2017 as a protected act. We repeat our findings of fact in relation to the contents of the grievance and conclude that it does not constitute a protected act for the purposes of section 27 victimisation claim.

359. At paragraph 23.3 the claimant asserts that on 15 September at a meeting with Toni Hall and Toni Mackay he said he felt discriminated against because of his ethnicity. He asserts that this constituted a protected act. In line with our findings of fact we do not accept that this occurred as alleged or that there was in fact a protected act within the meaning of section 27 on this occasion.

360. As we have found that there was no protected act in this case, the section 27 victimisation claim must fail at the first hurdle. In any event, the detriments relied upon as part of the victimisation claim were those set out at paragraphs 24.1 to 24.15. These again overlap with the earlier allegations of race, sex and disability discrimination. In some cases, we have already found that the incidents did not take place as alleged. Where we have accepted that the incident happened we have already dealt exhaustively with the reasons for the respondent's actions earlier in these written reasons. We have clearly concluded that there were good business reasons for those incidents which occurred. Even if there had been a protected act there was no causal link between the protected act and the alleged acts of victimisation detriment.

361. The claimant's claim of victimisation therefore fails and is dismissed.

UNAUTHORISED DEDUCTIONS FROM WAGES.

362. The claimant contends that he was entitled to sick pay equivalent to full pay because his previous employment with another NHS Trust should have been taken into account when calculating his sick pay entitlement.

363. The claimant's employment contract was subject to the Agenda for Change: NHS Terms and Conditions Handbook [1665]. The applicable Agenda for Change handbook was version 37. This included a section on contractual continuity of service (section 12) [1662]. This provides [paragraph 12.5] that where the employee has worked at two NHS employers consecutively and less than 12 months apart, their entitlement to sickness absence at the new employer will include any previous period(s) of NHS service at their former employer. It is apparent that the employee can only count their previous entitlement if there has been a break between the two NHS employers of less than 12 months. The claimant's NHS employment with the Royal Marsden ended on 27 October 2015 [281 and 300, 304]. The claimant started his employment with this respondent on 16 January 2017. As there was more than 12 months between these two periods of NHS employment he was not contractually entitled to rely on his previous NHS service with Royal Marsden when the respondent considered his subsequent entitlement to sickness absence and sick pay in 2017. The claimant was not entitled to any extra sick pay over and above what he has already received from the respondent.

364. The claimant claims (at paragraph 26.2) that he should have received full pay from the point that he made himself available to work but was unable to return while waiting for an appointment with occupational health. In the alternative he claims that he should have received full pay as a suspended staff member.

365. We do not accept that the claimant was entitled to be categorized as a suspended staff member in the manner that he alleges. He was signed off work sick. Once assessed as fit to return to work he would be able to return to work on full pay. There was no disciplinary suspension in the claimant's case. Nor could we identify that any other form of suspension would be available which would allow an employee to receive full pay once his sick pay entitlement was exhausted. We could not identify any contractual power or duty which meant that the respondent had to recategorize the claimant as suspended so as to unlock an entitlement to full pay. The claimant's assertion seems to unreasonably circumvent the contractual provisions setting out the employee's entitlement to sick pay during sick leave so as to get the claimant more sick pay than he was entitled to by the 'back door'.

366. The sick note dated 18 September 2017 [731] was sent to the respondent on 22 September. It confirmed that the claimant *may* be fit for work taking account of the following advice [emphasis added]. The boxes for a phased

return to work and amended duties were ticked. The note then states: "We would be grateful if Adil could return to work. However, his mental health is at risk of deterioration and with this in mind I would be grateful if there was a gradual return to work; incorporating his workload and also allowing for a period of time to settle back into the work environment. If you have any queries please do not hesitate to contact me." Faced with this fit note the respondent was entitled, in accordance with its duty of care to the claimant as its employee, to obtain further guidance from occupational health as to the measures that should be taken to get the claimant back to work safely with appropriate safeguards for his health. This is a core function of occupational health advice. The first available appointment that could be made for the claimant with occupational health was 29 September. A delay of a week is not unreasonable between receipt of the fit note and the occupational health appointment. That occupational health consultation subsequently had to be cancelled because the claimant was in Morocco. The claimant returned to the UK on 24 October. He was paid compassionate leave for his period in Morocco. The next available appointment with occupational health after his return to the UK was on 7 November. Once again, the appointment was arranged to take place quite swiftly. Once the occupational health advice was available the respondent acted within a reasonable period to get him back to work and restore his pay.

367. The next GP fit note after the return to the UK was dated 9 November and signed the claimant unfit to work until 14 November. Then on 14 November there was a further fit note that signed him potentially fit to return on a phased return with altered hours. The claimant returned to work on 15 November 2017. The correspondence at 1206-7 indicates that the respondent wanted to meet the claimant to put in place arrangements for his return to work. The meeting to arrange the return to work took place on 10 November.

368. Given the above chronology we were not able to identify a period in time where the claimant was signed as potentially fit to work where the claimant was unreasonably kept off work on unpaid sick leave because of a delay in getting occupational health advice. The respondent has taken all reasonable steps to get him assessed as soon as possible and, once the advice was available, got him back to work. We accept that the respondent was entitled to get occupational health advice to facilitate a safe return to work where the claimant had a mental health disability. They would have been open to criticism if they had got him back into work without such advice and safeguards. We do not accept that the claimant was legally entitled to pay for the periods when he was awaiting occupational health advice. Nor can we find that there was any substantial delay between the fit note signing him fit and the occupational health advice. Where appointments were cancelled this was because of a change in the claimant's circumstances which was wholly outside the respondent's control. We do not accept that there is a period where it can be said that the claimant was paid less than was 'properly payable' within the meaning of the Employment Rights Act 1996. This part of the claim for unauthorised deductions within the Employment Rights Act 1996 is not made out.

369. The final element of the claim for unauthorised deductions is a claim for unpaid overtime. However, the applicable contractual documents indicate that overtime must be pre-agreed in advance with management. Paragraph 7 of the contract of employment and paragraph 3.4 of Agenda for Change indicate that overtime must be pre agreed with the claimant's manager in order for him to be entitled to additional overtime pay [1666, 1675]. We heard no evidence to indicate that the claimant had received authorization from his manager for any of the overtime hours he claimed. Consequently, we are unable to find that he was entitled to be paid for this overtime.

370. In light of the above all of the claimant's claims for unauthorised deductions from wages fail and are dismissed.

Employment Judge Eeley

Date signed :17 April 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

27 April 2022

FOR EMPLOYMENT TRIBUNALS