



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104783/2020

5 **Heard in Glasgow on 7, 8, 9, 10 and 11 February 2022**

Members' Meeting on 17 March 2022

10 **Employment Judge: L Wiseman**
Tribunal Member: R McPherson
Tribunal Member: R Taggart

Mr Iftikhar Shami

Claimant
Represented by:
Mr A Elesinnla -
Counsel

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BMI Healthcare Ltd

Respondent
Represented by:
Mr D Hay -
Counsel

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The tribunal decided to dismiss the claim.

REASONS

- 25 1. The claimant presented a claim to the Employment Tribunal on the 9 September 2020 alleging he had been discriminated against and harassed and victimised because of race and religion, and that he had been unfairly dismissed. The allegations arose principally from the way in which the respondent investigated the claimant's grievances and the conclusions they reached.
- 30 2. The respondent entered a response in which it denied the allegations of discrimination and denied there had been a breach of the implied duty of trust and confidence entitling the claimant to resign.
3. This hearing was a hybrid hearing. The claimant and Counsel's instructing agent, Ms Sheik, were present at the hearing, as were the respondent's

representative and instructing agent. Mr Elesinnla, Counsel for the claimant, joined the hearing remotely. Mr Elesinnla expressed dissatisfaction with not being able to see the members of the Tribunal. The Employment Judge arranged for a change of room, but this did not improve matters. The
5 Employment Judge referred Mr Elesinnla to the terms of rule 46 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, which provides for hearings by electronic communication and refers to the parties being “able to hear what the Tribunal hears and see any witness as seen by the Tribunal.” The Employment Judge confirmed the
10 arrangements in the hearing room complied with this rule.

4. All witnesses, with the exception of Ms Vyas, attended in person. The Tribunal was due to hear evidence from Ms Tracey Smith, Head of Patient Administration. Ms Smith was to join the hearing remotely from Sri Lanka. We were advised by the respondent’s representative that no contact could be
15 made with Ms Smith on the day in question, and it was believed this was because of tropical storms in the area. This meant we did not hear from Ms Smith, although her witness statement had been provided in advance to the Tribunal and was taken into consideration.

5. The Tribunal heard evidence from:

- 20 • the claimant;
- Mr Prabhjit Jassal, a former employee of the respondent;
- Ms Linda Hodges, Director of Clinical Services at Ross Hall hospital, who carried out the investigation into the claimant’s grievance;
- Ms Syma Shahzad, Senior Clinical Pharmacist, who was interviewed
25 during the grievance investigation and raised a “near miss” incident on the respondent’s Riskman system;
- Ms Helen Vyas, Director of Clinical Services at the Alexander hospital, who heard a grievance raised by the claimant and

- Ms Rosemary Dunlop, Clinical Services Manager for Imaging, Cardiology, and Pharmacy at Ross Hall hospital.
6. We were also referred to a large number of jointly produced documents, which included an Agreed List of Issues.
- 5 7. We, on the basis of the evidence before us, made the following material findings of fact.

Findings of fact

8. The respondent is an independent provider of acute healthcare services in the United Kingdom. It operates four hospitals in Scotland: Ross Hall in Glasgow, Carrick Glen in Ayr, Kings Park in Stirling and the Albyn in Aberdeen.
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9. The claimant is a Scottish Asian man of Pakistani national origin and British nationality. He is a practising Muslim.
10. The claimant qualified as a Clinical Pharmacist in October 2004. He worked predominantly in community pharmacies, prior to taking up employment with the respondent, based at Ross Hall hospital, on the 18 January 2012.
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11. The claimant worked 24 hours per week (Monday to Wednesday) at Ross Hall hospital. He also had another job working at Monklands Pharmacy on Thursday and Saturday.
12. Ms Rosemary Dunlop, Clinical Services Manager, had overall responsibility for the operation of the Pharmacy. Ms Dunlop spoke with the claimant, shortly after he commenced employment, about his religious practices and observing daily prayers. Ms Dunlop ensured a quiet, private space was made available for the claimant to pray.
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13. Ms Syma Shahzad, Senior Clinical Pharmacist, was responsible for the day to day running of the Pharmacy. Ms Carron Wright, Pharmacy Technician, would deputise for Ms Shahzad. The other members of the Pharmacy department were Mr Prabhjit Jassal, Clinical Pharmacist (he worked from 2011 until February/March 2019); Mrs Selina Wan, Clinical Pharmacist (who
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worked only on a Friday); Ms Asirah Akhtar, Clinical Pharmacist (who joined the department in 2018 and became full time when Mr Jassal left in 2019); Ms Georgina Lamont, Pharmacy Technician; Ms Catherine Auld, Pharmacy Technician; Ms Lisa Armstrong, Pharmacy Assistant and Ms Gillian Graham, Pharmacy Assistant.

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14. The respondent's Bullying and Harassment policy was produced at page 139. The policy defined "harassment" and "bullying" and gave examples of conduct which may amount to harassment or bullying. The Grievance policy was produced at page 150 and the Disciplinary policy at page 159. The Equality and Diversity policy was produced at page 174 and set out an explanation of terms such as "discrimination", "direct discrimination" and "harassment".

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15. The respondent's Incident Management policy was produced at page 190 and required all clinical incidents and near misses to be entered into the risk management system by the person discovering it, within 24 hours.

15 16. The respondent requires all staff to undergo mandatory online equality and diversity training (page 843). The training provides details of the various types of discrimination.

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17. The claimant and Ms Wright did not have a good working relationship. Ms Dunlop was aware that Ms Wright found it difficult to manage the claimant. Ms Dunlop, following complaints raised by Ms Wright, had occasion (in or about October 2018) to call Ms Wright, Ms Shahzad, the claimant and Mr Jassal to her office to try to resolve the situation. Ms Dunlop clarified that Ms Shahzad was in charge of the Pharmacy, and Ms Wright deputised in her absence. She also told them all of the need to respect each other and to work together.

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18. Ms Dunlop was subsequently made aware by Ms Shahzad, that the claimant was ignoring the mobile phone policy; and she was made aware in September 2019, that the claimant had been struggling to complete stock checks accurately. Ms Dunlop arranged for the claimant to have one-to-one training with Ms Wright, who is expert on the Peoplesoft system, and she hoped long term both would benefit from this in terms of their relationship.

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19. Ms Wright visited Ms Dunlop's office on the 4 February 2020 and was very upset because the claimant was ignoring her and refusing to do as she asked. Ms Wright was finding it difficult to cope and asked Ms Dunlop to intervene because she was anxious about interacting with the claimant.
- 5 20. Ms Dunlop spoke to Ms Hodges, Director of Clinical Services, about the situation and agreed Ms Hodges would facilitate mediation. This did not happen immediately because of annual leave and sick leave, and was then superseded by the claimant raising a grievance on the 4 March 2020 (page 403).
- 10 21. The claimant had also previously approached Ms Dunlop to complain about Ms Wright's treatment of him. Ms Dunlop had acted to try to resolve the situation which she had put down to a "clash of personalities".
22. The claimant asserted, in his grievance, that he had been subjected to a campaign of racial discrimination by Ms Wright, who had bullied, harassed and victimised him and been condescending towards him. He further asserted
15 Ms Wright had intimidated him, belittled him, and undermined his work as a Pharmacist and had mocked and ostracised him.
23. The claimant's lengthy grievance included reference to the following incidents:-
- 20
- in February 2019 Ms Wright said to Ms Fulton, a Nurse, "*don't ask him, he doesn't have a clue*";
 - in April 2019, Ms Wright commented to a new Resident Medical Officer, Mr Oniga, "*He's only employed here, he's not actually doing any work*";
 - 25 • on the 8 May 2019, when he returned from annual leave (and was observing the fasting of Ramadan), Ms Wright started to loudly express her opinion to other members of staff about the dangers of fasting and that medical professionals who observe such practices are not capable of doing their roles and jobs safely;

- Ms Wright continued to raise the issue of fasting during Ramadan with the claimant every year;
- Ms Wright undermined his point of view in department meetings and turned her face away from him when he was talking;
- 5 • Ms Wright undermined his clinical duties by telling him to do tasks like stock checks;
- on 26 November 2019 Ms Wright mimicked a Chinese accent, which the claimant found offensive and
- Ms Catherine Auld and Ms Gilliam Graham, whom the claimant
10 travelled with to Kings Park hospital, were questioned by Ms Wright about what he did during the car journey.

24. Ms Linda Hodges was appointed to hear the grievance. Ms Hodges contacted BMI Manage, an outsourced service which provides staff with HR support and guidance. Ms Hodges also emailed the claimant on the 5 March (page 420)
15 to enquire whether he wished to proceed with the grievance whilst on two weeks sickness absence. The claimant confirmed he did wish to do so, and a meeting was arranged for the 13 March, and then re-arranged for the 17 March. Ms Hodges provided the claimant with copies of various BMI policies, including the Bullying and Harassment policy (page 139); the Grievance policy
20 (page 150); the Disciplinary policy (page 159) and the Equality and Diversity policy (page 174).

25. The claimant provided an Addendum to his grievance on the 11 March (page 425) which expanded upon his initial complaints and asserted the acts
25 complained of were gender discrimination which had become worse since Mr Jassal had left in March 2019 and the claimant was the only man in the department. The claimant also complained (among other things) that he had been unfairly denied the chance to attend the Independent Prescribers Course, and that Ms Akhtar had gone on the course even though she had only commenced employment in April 2019. The claimant was concerned that
30 Ms Wright had influenced Ms Shahzad's decision in this matter.

26. Ms Hodges was concerned to read the allegations of discrimination because the Pharmacy department was a small department and she would have expected them to have been raised/identified and addressed appropriately.
27. Ms Hodges, accompanied by a note taker, met with the claimant and his trade union representative on the 17 March. The notes of this meeting were produced at page 433 with an amended version at pages 485 – 496. The issues raised by the claimant in the grievance and addendum were discussed and the claimant had an opportunity to raise a number of new issues.
28. Ms Hodges took advice from BMI Manage, and was provided with a suggested list of witnesses to interview. Ms Hodges interviewed Ms Georgina Lamont, Pharmacy Technician (page 464); Ms Rosemary Dunlop (page 546); Ms Syma Shahzad (page 476 – 483, with an amended version at pages 501 – 509); Ms Lisa Armstrong, Pharmacy Assistant, (page 497); Ms Asirah Akhtar, Clinical Pharmacist (page 531); Ms Carron Wright (page 510) and Ms Fulton.
29. Ms Hodges did not interview Mr Dan Oniga. He had worked at Ross Hall hospital for a very short period of time and had left by the time of Ms Hodges' investigation. Ms Hodges further believed him to be out of the country.
30. Ms Hodges commenced each interview with an introduction and then asked the first question "*have you ever witnessed any evidence of racially motivated discrimination within the pharmacy department?*". All witnesses with the exception of Ms Akhtar responded "No". Ms Hodges then went on to ask each witness about discussions regarding religious fasting. All witnesses confirmed such discussions took place every year and that they could become uncomfortable and heated.
31. Ms Lamont told Ms Hodges that discussion regarding religious fasting happened each year and that everyone got involved. The discussion could become fraught because both the claimant and Ms Wright had strong opinions.

32. Ms Dunlop told Ms Hodges that the claimant was supported in his fasting and that she regularly checked on him to see how he was during this time. Ms Dunlop considered there was a culture of being able to talk about things in the department.
- 5 33. Ms Shahzad told Ms Hodges there were discussions about fasting within the department. Ms Shahzad is Muslim but had not fasted for a long time. The discussions were around the length of time of fasting and the lack of fluid which can make a person tired. The discussions took place out of concern rather than in a derogatory manner. The discussions were not aimed at
10 anyone in particular: it was a general discussion which was more inquisitive.
34. Ms Armstrong told Ms Hodges she had not been aware of any discussions regarding religious fasting.
35. Ms Wright told Ms Hodges there had been discussions regarding religious fasting because she had been curious about it. Ms Wright was of the opinion
15 that she would be concerned if anyone went without fluids and food for a long time because it is not good for concentration. She had on occasion noticed the claimant looking tired during Ramadan and Ms Dunlop had raised concern. Ms Wright described the claimant as jumping in with both feet and being quite aggressive in response to these discussions.
- 20 36. Ms Akhtar told Ms Hodges that discussions regarding religious fasting happened often because many people were ill informed about the religion. Ms Akhtar considered the claimant was very observant and had more knowledge of the religion than she did and so he confidently got involved in discussions surrounding religion. She also noted the claimant got frustrated when others
25 did not understand and seemed to use the discussions not to learn but to criticise the religion. The discussions could become heated and uncomfortable for those not heavily involved. Ms Akhtar confirmed Ms Wright felt professional Muslims should not be practising their line of work as they may jeopardise patient safety. Ms Wright was concerned for individuals. It
30 was explained the religious practice does not compromise professionalism, but Ms Wright stood by her view. Ms Akhtar described the discussion as one

that no-one benefitted from, and that there had been a long history of the claimant and Ms Wright not getting on and that it was a deep seated issue.

37. Ms Akhtar also told Ms Hodges that she believed some level of racial discrimination was directed towards the claimant and she understood why he may feel this way. Ms Akhtar referred to Ms Wright maintaining the same line of questioning of disbelief about certain practices of the claimant's religion and making negative comments. Ms Akhtar questioned how repeated discussions could be productive for anyone.
38. Ms Akhtar also referred to the claimant and Ms Wright both being big personalities and whenever there had been arguments between the two, they had generally been initiated by Ms Wright. Ms Akhtar felt they had clearly developed a deep seated dislike for each other and she believed it had now begun to present itself as discrimination: there was some level of religious animosity going on. Ms Akhtar felt the dynamics had changed since Mr Jassal left the department and without his support the claimant was a bit lost.
39. Ms Hodges also asked witnesses about the Chinese mimicry incident and all witnesses agreed Ms Wright had been telling a joke; that it had not been racially motivated; everyone had been laughing at it and Ms Akhtar said the claimant may have misjudged the context of the conversation. Ms Wright was the only person who did not remember the Chinese mimicry incident, but said everyone participated in jokes with no intention to offend.
40. Ms Hodges also put to the witnesses the other allegations the claimant had raised regarding Ms Wright's behaviour. Ms Wright denied all other allegations and although she agreed she would be direct when speaking to the claimant, she denied being rude and unprofessional.
41. Ms Hodges questioned Ms Shahzad about the Independent Prescribers Course and she confirmed that whilst the claimant had expressed an interest in this, he had not submitted the paperwork for approval.
42. The witnesses each volunteered information to Ms Hodges regarding the relationship between the claimant and Ms Wright: for example, Ms Lamont

said there was *"no love lost between these two and they are as bad as each other"*. Ms Shahzad said *"there is a lack of respect from Mr Shami to Ms Wright; he does not like taking instruction from Ms Wright because she is a technician and also female"*. Ms Armstrong said *"he does not like to take direction from Ms Wright"*. Ms Akhtar said Mr Shami and Ms Wright had *"developed a deep seated dislike for each other over the years for many reasons"*.

43. The witnesses also offered their opinion regarding the claimant and the way he behaved and/or performed his job. Ms Armstrong referred to the claimant being *"slow and disorganised although he does get it done eventually"*; Ms Shahzad also referred to the claimant being slow at his work, she said *"he takes his time a 20 minute task takes him 2 hours ... you need to chase him all the time"*. Ms Shahzad also made reference to the claimant leaving the department without telling others where he was going; and to him being *"happy to perform clinical tasks but if he believes the task is not important enough to carry out, he is very reluctant to carry these out, this is the case with regards to stock checks ...he does not seem to understand the importance of stock rotation."* Ms Armstrong made reference to the claimant leaving the department without telling Ms Wright where he was going and not giving Ms Wright her place. Ms Akhtar said she sometimes felt the claimant's performance at work opened up the conversations between the claimant and Ms Wright and instead of talking about the real problem, which was the claimant's performance as Ms Wright regularly raised, aspects of his religion were focussed on instead. Ms Akhtar stated there had been concerns regarding the speed of the claimant's work and she had observed this when Ms Shahzad had been off work and others had had to cover her work. Ms Akhtar noticed the claimant had left tasks unfinished which she had had to complete.

44. The witnesses were each asked to review, agree, sign and date the notes of their interview. The witnesses were permitted to make additions to the notes and some did so, for example, the claimant made two annotations on the notes and Ms Shahzad made a number of annotations. She, for example,

noted *“our role as clinical pharmacists requires 100% concentration and a 14 – 18 hour fast can impair your concentration skills”*; *“ staff members ask questions to help their understanding of the religious practice”*; *“CW has only ever raised a concern [about the claimant leaving the department for prayers] when the department is left without a pharmacist”* and *“IS just doesn’t like the fact CW has authority”*; *“it is usually IS who dis-engages in staff meetings”*.

45. Ms Shahzad then added some details at the end of the notes of the interview in the following terms:

“IS does not take instruction from me, Rosemary or Carron. He disregarded the phone policy (mobile phone not to be used during work) and internet use. I have had to speak to him about his mobile phone in his pocket causing distractions and use of internet whilst doing clinical work.

I also believe IS continues work as a locum pharmacist at Monklands Pharmacy whilst being on sick leave from Ross Hall. This can be verified by checking their Responsible Pharmacist record.

IS has a clear disregard for CW’s role and responsibility. He doesn’t believe a technician can be in charge or tell him what to do. He is very slow at all tasks as is always distracted with personal issues and looks tired all the time. I often question him to ask if he is ok but he never relays any information.”

46. Ms Wright did not annotate the notes of her interview, but she did hand in a statement to Ms Hodges after the interview (page 521) in which she set out in detail the issues she had experienced with the claimant since 2018.

47. Ms Hodges updated the BMI Manage system once she had completed the interviews and entered her conclusion that there were themes running through the statements of all she had spoken to. Ms Hodges considered the relationship between the claimant and Ms Wright had been deteriorating for a long time and that it had not been effectively managed. She felt the overall picture was of two strong individuals who struggled to interact with each other: there was a mutual lack of respect and both needed to change their behaviours. She confirmed her view was that based on the information

available a number of recommendations should be made to individuals regarding professional working going forward.

48. Ms Hodges was not convinced any formal sanctions were required for Ms Wright but she invited views from HR. The HR adviser invited Ms Hodges to reflect whether an improvement notice should be issued to Ms Wright. An improvement notice is an informal action taken in accordance with the respondent's Disciplinary procedure, which sets out the expectations of the employee and the consequences of the employee failing to apply them and which remains on the employee's record for a period of 12 months.
49. Ms Hodges did reflect on this but decided not to impose an improvement notice because both parties felt aggrieved as a result of the impact of their deteriorating relationship. Ms Wright felt she was unable to manage the claimant for fear her concerns would be perceived as being picked on or singled out. Both parties had a responsibility to manage their professional relationship and it was necessary that both parties should have clear expectations set surrounding a mutually agreeable and beneficial resolution to facilitate conciliation.
50. Ms Hodges, prior to issuing her decision regarding the grievance, interviewed Ms Sandra Fulton (page 600) regarding the comment alleged to have been made to her by Ms Wright, but Ms Fulton could not recall the alleged incident.
51. Ms Hodges sent the claimant a grievance outcome letter dated 17 April 2020 (page 570). Ms Hodges categorised the issues raised by the claimant into four headings:
- *1 allegation of racial and religious discrimination;*
 - *2 allegation of systemic bullying and harassment;*
 - *3 allegation of sexual discrimination and*
 - *4 allegation of professional discrimination for being a part time worker.*

52. Ms Hodges explained that in relation to point 1, the witness statements indicated a general consensus that there were no racially motivated comments directed towards the claimant. Ms Hodges went on to say that Ms Akhtar had noted perceptions of racial discrimination may be felt by some and not others, and “hence identified [your] individual sensitivity to some discussions that take place within the department and in particular the way in which these discussions are developed by Carron [Wright]”. Ms Hodges continued that “Carron had been witnessed making negative comments about prayer and her personal views on certain practices of your religion, but it was clear from the witness statements that discussions regarding religious fasting appeared to be from a purely welfare concern perspective, and the desire to gain a greater understanding”.
53. Ms Hodges referred to there being a clash of personalities. She also referred to the Chinese mimicry as being a joke and not racially motivated, and that perhaps the claimant had misjudged the context of the conversation.
54. Ms Hodges partially upheld the first point of the grievance. The second, third and fourth points were not upheld and Ms Hodges provided an explanation why they had not been upheld. The explanation focussed on the information provided in the witness statements.
55. Ms Hodges concluded her letter by confirming the grievance overall had not been upheld. However, the investigation had highlighted the requirement for conciliation, mediation and effective working relations going forward, and to that end Ms Hodges set out six recommendations involving personal reflection regarding their behaviour, mediation and an informal action plan.
56. Ms Hodges, on the 16 April, received an email from Ms Akhtar (page 367) advising her there had been a change in the atmosphere in the department since the start of the investigation. Ms Akhtar stated she had received a threatening text from Ms Wright which warned her not to discuss it with anyone. Ms Akhtar had challenged Ms Wright about the text and Ms Wright had made reference to Ms Akhtar being the only one who could “throw her under the bus”. Ms Wright had also made reference to when she found out

who stabbed her in the back she was going to make their life hell and that her husband would kill them. Ms Wright had then told Ms Akhtar not to come in to work on Monday.

57. Ms Hodges replied to Ms Akhtar's email the following day (page 366) and asked Ms Akhtar to come and speak with her. Ms Hodges expressed concern that Ms Akhtar felt she was being penalised for speaking the truth, when no-one but Ms Akhtar and Ms Hodges would know what had been said during the interview. Ms Hodges said she would need to ascertain whether the integrity of the investigation had been jeopardised. Ms Hodges also cautioned Ms Akhtar about suggesting bullying or witness tampering without any evidence that that was what Ms Wright had done.
58. Ms Hodges met with Ms Akhtar on the 17 April and a note of that discussion was produced at page 564. Ms Akhtar reiterated details of her discussion with Ms Wright and also informed Ms Hodges that Ms Wright had apologised for the text message and had been upset.
59. Ms Hodges asked Ms Akhtar to send her a copy of the text messages, which she did by email of the 17 April (page 566). Ms Akhtar stated in her email that *"I wanted to make it clear that my email to you was purely information I felt was important for the ongoing investigation. This is not a formal complaint against Carron"*.
60. The text message confirmed Ms Wright had texted Ms Akhtar in the following terms: *"Asirah I guess you know now about the situation with me. I hope you got on ok with your interview and havnt caused me to lose my job. Iv struggled with this issue long b4 you joined us. But I don't wanna say too much coz of the situ x"*. Ms Akhtar replied: *"Yeah I know, Carron I wouldn't worry too much. I guess it's unfortunate it's gotten to this stage but you know I love working with you (smiley face emoji x 2)"*. Ms Wright replied *"Btw. Do not discuss this with anyone. I hope I can trust you like you trust me x"*.
61. Ms Hodges decided that having reviewed the text messages she could not see anything which could be described as threatening. The text exchange was between two friends and colleagues who provided each other with

support. Ms Wright had apologised for sending the text and had been upset. Ms Hodges considered the situation was not one of serious threats being made, but more of figures of speech and expressions of frustration. Ms Hodges referred the matter to BMI Manage.

5 62. The claimant could not accept Ms Hodges' grievance outcome because he felt the recommendations implied he was just as responsible as Ms Wright for the matters he had complained of. He considered he had identified incidents of discrimination, bullying and harassment but Ms Hodges had failed to uphold them. The claimant considered Ms Hodges' decision of itself amounted to
10 racial and religious discrimination and victimisation. The claimant sent a grievance appeal letter to Ms Mhairi Jeffries, Executive Director, on the 27 April 2020 (page 586).

15 63. The claimant complained of being unaware who had been interviewed by Ms Hodges and that he had not been provided with a copy of the witness statements. This information was provided to the claimant. The claimant then presented an Addendum to the grievance appeal (page 626) in which he set out extracts from the witness statements which had not been referred to in the grievance outcome letter.

20 64. The thrust of the claimant's grievance was that the account given by Ms Wright and her friends had been preferred to his account of events and the respondent had "white washed" his serious complaints. The claimant alleged the witnesses had colluded in their evidence to the investigation; the investigation had been a sham and performance issues would never have been raised but for the fact he had raised the grievance. The claimant
25 asserted the allegations raised in the grievance had occurred, were discrimination and Ms Hodges' failure to uphold the grievance was also discrimination.

30 65. Ms Tracey Smith, Head of Patient Administration, was asked by Ms Jeffries to deal with the grievance appeal. Ms Smith had access to all of the documents on BMI Manage. Ms Smith invited the claimant to attend a grievance appeal hearing on the 19 May but this was, for a variety of reasons,

rearranged to the 3 June 2020. The notes of the grievance appeal hearing were produced at page 678.

- 5 66. Ms Smith explained the purpose of the appeal was to consider whether the procedure followed by Ms Hodges was fair and in line with the grievance policy, to understand why the claimant believed the outcome was unfair or incorrect and to understand the grounds of appeal. Ms Smith would not deal with any new grievances. Ms Smith confirmed she would make further investigations if required.
- 10 67. The claimant argued a full investigation should have been carried out and appropriate action taken against Ms Wright. The claimant believed he had been discriminated against, but this had been turned into him being attacked for being incompetent. The claimant questioned whether the amendments to the notes had been taken into account by Ms Hodges, and why Ms Hodges had not taken account of what she had been told by Ms Akhtar. He could not understand why witnesses had been allowed to raise performance concerns when these issues had not been raised with him in his performance review.
- 15 68. Ms Smith confirmed to the claimant that the handwritten notes made by Ms Shahzad to her interview notes, would not be taken into account by Ms Smith as part of the appeal process.
- 20 69. The claimant gave Ms Smith the names of four members of staff whom he alleged should be asked about what he was doing. Ms McGregor had left the employment of the respondent, so Ms Smith did not speak to her. She also did not speak to the fourth named person because they were new to Ross Hall. Ms Smith spoke to Ms Catherine Auld and Ms Gillian Graham (page 25 687) regarding whether they had been questioned about the claimant's behaviour during the journey from Ross Hall to Kings Park hospital. Ms Graham recalled that she had been asked if the claimant slept during this journey, but she could not recall who had asked her this. Ms Auld could not remember anything helpful.
- 30 70. Ms Smith sent the claimant the grievance appeal outcome in a letter dated 11 June 2020 (page 719). Ms Smith set out the reasons for the appeal being

5 unsuccessful. Ms Smith decided to uphold the decision made by Ms Hodges in respect of allegation 1, racial and religious discrimination, because no new evidence had been provided at the appeal hearing. Ms Smith acknowledged the claimant felt Ms Wright should have been disciplined, and further
10 acknowledged the claimant believed Ms Akhtar's statement indicated discrimination had occurred, but pointed to the fact Ms Akhtar said she could understand why the claimant may have been offended by Ms Wright's comments, but equally Ms Wright asked many questions around religion and appeared to be uneducated about this. Ms Smith referred to both the claimant and Ms Wright being opinionated and to their relationship not having been in a good place for a long time. Ms Smith considered the decision of Ms Hodges to partially uphold this aspect of the grievance to be reasonable because it recognised Ms Wright's behaviour may have been inappropriate and had caused him offence, but it was not believed to have been discrimination.

15 71. Ms Smith, with regard to the allegations of systemic bullying and harassment, noted that multiple witnesses had referred to concerns regarding the claimant's performance. Ms Smith recognised that whilst the delivery and approach to these issues could be improved, she agreed with the original decision that this did not constitute systemic bullying and harassment
20 because evidence of performance issues was there.

72. Ms Smith concluded the grievance appeal outcome letter by confirming mediation should take place to support the claimant and his colleagues in moving forward.

25 73. The claimant returned to work from paternity leave on the 1 June, and was on annual leave on the 2, 9 and 10 June.

30 74. The pharmacy at Ross Hall hospital provides oncology services to the Albyn hospital in Aberdeen. A Consultant at the Albyn may send a prescription to the pharmacy at Ross Hall, where it will be clinically screened. The medication will then be ordered for the patient, dispensed and packed for transport to the Albyn.

75. The pharmacy at Ross Hall received a prescription for a patient at the Albyn on the 2 June, which Ms Shahzad asked the claimant to screen. The patient required two doses of premedication (Dexamethasone) because of the particular cycle of chemotherapy. Ms Shahzad had noted in the diary that the dexamethasone had been prescribed twice and this was correct.
76. The claimant removed the first prescription for dexamethasone by crossing it out on the prescription. This meant the drug was not dispensed to be sent with the medication to the Albyn.
77. Ms Shahzad checked the Albyn chemotherapy drugs on the 9 June. She noticed the medication bag for the patient had a single set of pre-medication and that this was correct according to the prescription, however Ms Shahzad recalled the patient was to be given two sets of pre-medication. Ms Shahzad rescreened the prescription for the patient and added back in the required second dose of pre-medication for the patient, and this was duly dispensed.
78. Ms Shahzad notified Ms Dunlop and, as the claimant was on holiday on the 9 and 10 June, Ms Shahzad emailed him to explain there had been an error (page 712). The claimant responded saying he did not believe there had been an error and he had had a discussion with the Oncology Nurse at the Albyn and the pre-medication was to come from the Albyn. Ms Shahzad responded to say she was not aware of this and neither was the Oncology Nurse. There had clearly been some confusion and this would be discussed when he returned to work.
79. Ms Shahzad recorded the incident as a Near Miss on the respondent's Incident Management system, Riskman. The purpose of reporting an incident is not to assign blame, but to ensure lessons are learned.
80. The claimant wrote to Ms Dunlop on the 10 June (page 708) in an email entitled "concerns". The claimant wished to "highlight" a few concerns of the behaviours towards him in the pharmacy department. The claimant stated he was being "subjected to a backlash of antagonism at work and allegedly over [his] work performance". The claimant referred to the Albyn issue and asserted Ms Shahzad had made it into a bigger issue than it was, which would

not have happened before he had raised his grievances. The claimant also expressed discomfort at the “constant surveillance” from Ms Wright and Ms Shahzad, which he again asserted was as a result of him having raised his grievances.

5 81. Ms Dunlop responded to the claimant on the 12 June (page 725) stating she needed to understand from him why he perceived Ms Shahzad’s escalation of the incident, which Ms Dunlop understood to be a serious drug related clinical incident, to be antagonism and victimisation. Ms Dunlop noted the claimant was currently on furlough and that further discussions would take
10 place upon his return to work on the 1 July.

82. The claimant sent Ms Dunlop a formal grievance on the 19 June (page 729). The claimant asserted the behaviours about which he had complained were as a result of the grievance he had raised against Ms Wright. The claimant went on to say he believed he was being, and continued to be, discriminated
15 against on the grounds of his religion, race and sex, victimised on the grounds of his religion, race and sex, bullied, harassed and subjected to detriments as a result of having raised protected disclosures. The claimant complained he had not been spoken to about the Albyn incident, and asserted this amounted to bullying and harassment. The claimant went on to give his account of what
20 had happened regarding the Albyn incident.

83. Ms Dunlop was frustrated when she read the claimant’s grievance because she had, for some time, been trying to find a resolution to the issues within the pharmacy and she had not been able to find a long-lasting solution. Ms Dunlop felt overwhelmed at the prospect of having to go through another
25 grievance process in circumstances where Ms Dunlop considered Ms Shahzad had done what was expected of her in her role.

84. Ms Dunlop responded to the claimant on the 24 June (page 746) to say she was disappointed the claimant had taken the decision to raise a second formal grievance, when the allegations raised appeared to be identical to those
30 raised in the first grievance. Ms Dunlop referred to the fact recommendations had been made in the outcome of the first grievance and expressed concern

that there had been no opportunity to discuss the recommendations and agree a plan for mediation and conciliation. Ms Dunlop invited the claimant to engage with this process when scheduled.

5 85. Ms Dunlop noted the claimant's grievance concerned allegations of discrimination and victimisation since he returned to work on the 1 June. Ms Dunlop noted the claimant had been at work on the 1 June (full day) and on the 3 and 8 June (half days). She invited the claimant to provide examples of the discrimination, harassment and/or victimisation about which he was complaining. Ms Dunlop noted there had been reference to the Albyn incident, 10 but as this incident appeared to have been dealt with as expected, she was unclear what other allegations were being made. Ms Dunlop proposed that, as the claimant was on furlough, matters would be discussed further upon his return to work.

15 86. Ms Dunlop advised the claimant that where there was evidence that a grievance was not justified, and was considered frivolous, vexatious or malicious, this could lead to disciplinary action. Ms Dunlop also invited the claimant to engage in constructive discussion so they could review the recommendations set out in the outcome of the first grievance and discuss the drug incident which appeared to have prompted the second grievance.

20 87. The claimant wrote to Ms Dunlop on the 6 July (page 751) because he considered she had failed to progress or to do anything with his grievance. The claimant set out 14 pages explaining his position and the correspondence in relation to the Albyn incident and concluded by requesting his employer investigate his grievance.

25 88. Ms Dunlop passed the letter to the HR Business Partner, who decided to ask Ms Helen Vyas, Director of Clinical Services at the Alexandra Hospital, to investigate the grievance.

30 89. The claimant, by letter of the 13 July to Ms Dunlop (page 766) notified her of his decision to resign. The claimant felt that having endured discrimination, bullying and harassment by Ms Wright for many years, when he did complain about it, the way in which his grievances were dealt with had been

discriminatory; and he had been subjected to victimisation for having raised the grievance.

- 5 90. Ms Vyas was provided with copies of the claimant's letters to Ms Dunlop dated 10 June, 19 June, 6 and 13 July. Ms Vyas wrote to the claimant on the 27 July (page 788) to invite him to a grievance hearing on the 3 August. This meeting did not take place because the claimant's trade union representative could not attend. Ms Vyas confirmed the meeting would be rescheduled, and by letter of the 10 August (page 797) she invited the claimant to attend a grievance hearing on the 19 August.
- 10 91. The claimant, by email of the 18 August (page 798) acknowledged receipt of Ms Vyas' letter of the 10 August and confirmed that as he had resigned, he did not see the need for him to participate in the grievance hearing.
- 15 92. The claimant followed this up with an email on the 19 August (page 799) saying he had reconsidered and would like to attend a grievance hearing but could not attend the hearing arranged for that day.
- 20 93. Ms Vyas emailed the claimant on the 20 August (page 805) saying she would progress the grievance, but she was about to go on holiday for two weeks, and would not return to work until the 14 September. Ms Vyas emailed the claimant on the 25 August (page 807) to invite him to a grievance hearing on the 17 September. The claimant replied on the 10 September (page 808) to say he could not attend on that date.
- 25 94. Ms Vyas wrote to the claimant on the 18 September (page 810) to invite him to a grievance hearing on the 5 October. Ms Vyas suggested that if the claimant preferred not to attend the hearing, she would be happy to send him a list of questions which he could respond to in writing. Ms Vyas informed the claimant that due to the lapse of time, she had commenced preliminary investigations. Ms Vyas asked the claimant to confirm by the 25 September whether he intended to attend. Ms Vyas did not hear from the claimant again.
- 30 95. Ms Vyas concluded her investigation and wrote to the claimant on the 1 October explaining she was not upholding his grievance.

96. The claimant, following the termination of his employment with the respondent, continued to work on a Thursday and Saturday at Monklands Pharmacy. The claimant accepted locum work at Monklands Pharmacy on a Wednesday. The claimant also accepted locum work on a Monday and Tuesday at other locations.
97. The claimant's detailed schedule of loss was produced at pages 1373 – 1386.

Credibility and notes on the evidence

98. The claimant's case was that having raised a grievance regarding alleged discrimination, bullying and harassment, Ms Hodges had failed to investigate it properly and had failed to find the discussions regarding religious fasting and the Chinese mimicry incident to be discrimination. The claimant believed Ms Hodges' failings amounted to discrimination, harassment and victimisation. The same arguments were made in relation to the handling of the grievance appeal. The claimant also believed certain actions had been taken because he had raised the grievance for example, Ms Shahzad had raised the Albyn drug-related incident.
99. We found the claimant to be, at times, a reluctant witness: he very much wanted to tell the Tribunal about the discrimination he believed he had endured but was reluctant to answer many of the questions put to him in cross examination. The claimant, rather than answer questions, would simply repeat the point he wished to make. For example, when asked about locum work the claimant repeated endlessly that it was "unpredictable": that was the point he wished to make rather than answering the questions being put to him.
100. The claimant was also not credible on occasion: for example, the claimant took issue with being put on furlough and maintained he had not been told about it, whereas in fact he had to acknowledge the email informing him of the arrangements had been delayed but had been received by him. Also in relation to the incident noted on Riskman by Ms Shahzad, the claimant's position was, essentially, that no incident had occurred and that he was being blamed for someone else's error. This was not a credible position to adopt in circumstances where, whatever else happened, a misunderstanding or

miscommunication occurred of which the claimant was part, and this amounted to a near miss because if the patient had not received the dexamethasone this could have caused delay to her treatment.

- 5 101. Mr Hay described the claimant's evidence as having been "*distorted through the lens of his opinions, his emotions and his perceptions of his case more generally*" and that was a description with which we agreed.
- 10 102. The Tribunal heard from Mr Prabhjit Jassal, who is a Clinical Pharmacist, and who had worked at Ross Hall hospital from January 2011 to February 2019. Mr Jassal's evidence did not add in any material way to what was said by other witnesses, and he accepted parts of his witness statement recounted what he had been told by the claimant rather than his direct experience or knowledge.
- 15 103. Mr Jassal confirmed Ms Wright would often start conversations with him and the claimant regarding the claimant's religion and about Asian people. He also described the Albyn incident as a "near miss incident", and he confirmed the usual procedure would be to bring any incident to the attention of the person involved and then note it on an Incident Report Form (the precursor to Riskman).
- 20 104. We found Ms Hodges to be, in the main, a credible witness. She was subjected to a very lengthy cross examination which challenged her with exam-type questions regarding the definition of different types of discrimination, identifying types of discrimination from hypotheses posed and knowledge of the respondent's policies. Ms Hodges, in the opinion of the Tribunal, displayed a knowledge of discrimination which one would expect from someone who was not from a legal or HR background and who did not deal with these matters regularly. Ms Hodges broadly understood the different concepts of discrimination: she was not "clueless" as suggested by Mr Elesinnla.
- 25 30 105. Ms Hodges was, at times, hesitant in giving a response and defensive of what she had done. She was also, at times, at a loss to understand what she was being asked or why she was being asked it. She became overwhelmed and

upset and at times was silent rather than risk giving a response of which Mr Elesinnla would be critical.

106. Ms Hodges, as part of her investigation, explored context, motivation and intent: she wanted to understand what was going on in the department and why, particularly against a background of it becoming apparent the relationship between the claimant and Ms Wright was much worse than previously understood. The relationship between the two had, in essence, broken down. We formed the opinion Ms Hodges was distracted in her investigation by this breakdown in the relationship.
107. Ms Shahzad was a very competent, capable witness and she impressed the Tribunal. Ms Shahzad was challenged about two particular points in her evidence. Firstly, she was challenged about the fact that at the end of her interview notes, she added a point which described that the claimant had been off on sickness absence but had continued to work at the Monklands Pharmacy. Ms Shahzad stated she had added this information when she had been asked whether there was anything else she wished to add. Ms Shahzad, having been given this opportunity, took it. Ms Shahzad acknowledged this could have caused problems for the claimant, but she denied this had been the reason for including it. She also denied that she had included this as retaliation for the claimant having raised the grievance. She had, in her words, “merely made the point”. Ms Shahzad acknowledged during her evidence that if she had known the claimant was absent because of stress related to the workplace, she would not have made the comment.
108. The second point Ms Shahzad was challenged about was the Albyn incident. Ms Shahzad rejected Mr Elesinnla’s proposition that there had been no serious drug incident and that Ms Shahzad had exaggerated it because the claimant had complained about Ms Wright. We preferred the evidence of Ms Shahzad regarding this matter. The fact the claimant had set out his position fully in an email to Ms Dunlop and had not been challenged about this was correct, but explained by the fact there had not yet been a discussion with the claimant because he was not at work. Further, as Ms Shahzad stated,

discussing it with the claimant, or challenging his version of events, does not impact on the fact the incident had to be recorded on Riskman.

109. Mr Elesinnla described Ms Shahzad's evidence that the Albyn hospital did not stock/dispense Dexamethasone as a "*fantastic proposition*". We could not accept that submission. We preferred the evidence of Ms Dunlop and Ms Shahzad that the Albyn did not stock Dexamethasone. They told the Tribunal that when the pharmacy at the Albyn was established in 2018, it did not have a pharmacist experienced in oncology, and so the procedure was established that Ross Hall pharmacy would dispense the drugs used in oncology and send them to the Albyn hospital.
110. Mr Elesinnla suggested Dexamethasone was not "an oncology" drug, but an antiemetic. Ms Shahzad and Ms Dunlop agreed, but explained it was a drug used as a premedication when patients are to receive chemotherapy. Accordingly, it would be prescribed by the Consultant Oncologist at the Albyn and dispensed at Ross Hall.
111. Ms Dunlop was a credible and reliable witness. She was also subjected to exam-type questions regarding defining and identifying types of discrimination. Mr Elesinnla described Ms Dunlop as accepting she did not know anything about what was in the training modules and could not identify discrimination or victimisation. We could not accept that accurately described or reflected Ms Dunlop's evidence. Ms Dunlop was, for example, challenged in cross examination about why she felt she needed to talk to the claimant to obtain further information when he had, in his letter to her (page 733) told her he was being victimised. Ms Dunlop responded "it was not clear to me why he felt he was being victimised". Mr Elesinnla questioned Ms Dunlop whether she knew what victimisation was, and she responded that she did. Ms Dunlop's response had to be seen in light of her position that she thought Ms Shahzad had, in the circumstances, acted correctly to record the incident on Riskman because it was a near miss. In those circumstances, it was not clear to her why the claimant thought he was being victimised, because he was challenging something which required to be done. It was not that Ms Dunlop did not understand the concept of victimisation.

112. Mr Elesinnla questioned Ms Dunlop about the near miss incident, and about Dexamethasone being an antiemetic drug and not a cancer drug. Ms Dunlop confirmed she was aware Dexamethasone was an antiemetic, but it is a drug used as a premedication to prevent adverse reactions to chemotherapy. We
5 accepted Ms Dunlop's evidence.
113. Ms Dunlop was also challenged about cautioning the claimant that a frivolous, vexatious or malicious grievance could lead to disciplinary action. Mr Elesinnla asked Ms Dunlop if she agreed it was a "shot across [the claimant's] bows" and Ms Dunlop, at the end of a lengthy response, said "no, it was not
10 a shot across his bows". Ms Dunlop set out her explanation for including the caution in her response, and this was to draw the claimant's attention to the fact it was in the grievance policy, and, more importantly, because there had been no chance to make improvements for the claimant coming back to work and no chance to talk through things before another grievance had been
15 raised. Ms Dunlop wanted the claimant to reflect on whether there was another way to deal with things without the need for another grievance, and this was what she was inviting him to do. We accepted her evidence.
114. We rejected Mr Elesinnla's position that Ms Dunlop had said "shot across his bows", because those were his words and Ms Dunlop had replied "no it was
20 not a shot across his bows".
115. The evidence of Ms Vyas was very short. Ms Vyas was asked about the claimant's request to be emailed correspondence. Ms Vyas confirmed her correspondence to him had been sent recorded delivery, but she could not say for certain whether her secretary had also emailed the correspondence.
25 We could not see the point of these questions in circumstances where there was no dispute regarding the fact the claimant received the correspondence in question.
116. We did not hear from Ms Smith, but we had regard to her witness statement and the relevant correspondence.

Claimant's submissions

117. Mr Elesinnla submitted the claim had been presented in time, having been presented within 3 months of the conclusion of the grievance procedure. The claimant viewed the grievance procedure as a continuing act which ended on or around the 11 June 2020 when Ms Smith sent the grievance appeal outcome letter (*Hale v BSUH UKEAT/0342/16* at paragraphs 41 and 42). In the alternative it was submitted it would be just and equitable to allow the claim to proceed.
118. Mr Elesinnla referred to the case of *Brown v London Borough of Croyden UKEAT/0672/05* as authority for the proposition that in a hypothetical comparator case the burden shifts to the respondent to explain its conduct if the claimant can establish or it is fairly obvious from the facts that the respondent has behaved in an unreasonable or atypical manner.
119. The case of *Law Society v Bahl 2003 IRLR 640* was authority for the proposition that an employment tribunal is entitled to draw the inference of racial and/or religious discrimination from unexplained unreasonable behaviour. Ms Hodges was unable to explain why she acted as she did; she failed to follow the respondent's Equality and Diversity policy and her knowledge of the basic concepts of discrimination were non-existent. Failure to understand and/or take heed of the provisions of the respondent's policies is a matter the Tribunal can consider: *Anya v University of Oxford 2001 IRLR*.
120. Mr Elesinnla described the *Madarassay* case as being the "refuge of scoundrels". He submitted it would not help in this case because there was plenty to establish a prima facie case.
121. Mr Elesinnla submitted there had been nothing controversial about his cross examination of Ms Hodges and the line of cross examination had been perfectly proper. Ms Hodges said in her witness statement that she had received extensive training in equal opportunities and he was entitled to take her at her word. Mr Elesinnla had taken Ms Hodges through the respondent's policies and demonstrated she had "no clue" about diversity or discrimination

concepts. The Employment Judge had challenged him at the start of his cross, but he had stood firm because he had been entitled to put the question. Mr Elesinnla described Ms Hodges as knowing “absolutely nothing” about equal opportunities and this was important because she had been tasked with doing the investigation.

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122. Everyone had agreed on two things: Ms Wright made offensive remarks about fasting: it’s offensive, discriminatory and should not have been said. Ms Hodges should have known that. The Chinese mimicry incident took place and this kind of banter has no place in the workplace.
- 10 123. The investigation was designed to assassinate the claimant’s character. There was no basis upon which a proper investigation could find this happened and was not discrimination: except the respondent had no idea whatsoever.
- 15 124. Ms Hodges had admitted things under pressure. There had been periods of silence when she had not known what to say. Ms Hodges, when asked why she had not done the job she was asked to do, could not give a sensible answer.
- 20 125. Mr Elesinnla submitted it appeared Ms Wright was a privileged person who could do and say as she pleased. She is white, female and not Muslim. Accordingly to Ms Hodges everything depended on context.
- 25 126. The allegations of discrimination were as set out in the agreed list of issues. The claimant believed those matters amounted to acts of racial and religious discrimination. He relied on a hypothetical comparator and contended that a white employee imbued with all the characteristics of the claimant apart from his race and/or religion would not have been treated in the way the claimant was treated.
- 30 127. Ms Hodges failed to investigate the claimant’s complaints properly or at all and instead she focussed on his alleged incompetence. She failed to interview relevant witnesses; failed to agree with the claimant who he wanted to be interviewed; failed to investigate parts of his grievance at all; failed to ask

5 follow up questions of Ms Akhtar; allowed Ms Wright to produce a diary after her interview and took it into account; allowed Ms Shahzad to make irrelevant and professionally damaging allegations about the claimant after her interview and failed to give the claimant an opportunity to respond to what had been said about him.

10 128. Ms Hodges compounded these failings by her conclusions in the outcome letter, when she failed to explain why she had not upheld the claimant's complaints, particularly when the fasting discussions and the Chinese mimicry had occurred. She was unable to explain her reasoning on this point even to the Tribunal. Ms Hodges had focussed on intent: motive was irrelevant and to suggest the fasting discussion had taken place because of welfare issues was astounding.

15 129. Ms Hodges had inferred the claimant was "playing the race/religion card" in his interactions with Ms Wright, which was untrue in and of itself, racially offensive and discriminatory. Mrs Hodges also sought to blame the claimant for the fact that he was being discriminated against. Further, she refused to issue Ms Wright with an improvement notice despite clear evidence of her racially discriminatory behaviour.

20 130. Ms Hodges was unable to explain her decisions apart from relying on the "context". This was her explanation for why she did not conclude that blatantly racially offensive behaviour was made out.

131. Ms Hodges made recommendations which implied the claimant was just as responsible for the racial and/or religious discrimination that he had suffered as Ms Wright was.

25 132. Ms Hodges could not explain why Ms Wright was not subject to the respondent's disciplinary procedure when she sought to interfere with the grievance investigation despite clear instructions not to do so issued by Ms Hodges. This was further compounded by Ms Hodges failure to commence a disciplinary investigation against Ms Wright when she made threats to kill and other disgraceful threats to Ms Akhtar. Mrs Hodges was unable to explain why
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she did not follow the respondent's disciplinary procedure in relation to Ms Wright's alleged misconduct.

- 5 133. Discriminatory conduct cannot be justified and therefore simply arguing that the respondent's response was reasonable and thorough does not address the point. It was submitted that in the absence of any explanation from Ms Hodges and Ms Smith, let alone a reasonable explanation for the unreasonable way in which the claimant's grievance was dealt with and the outcome, the Tribunal was invited to draw an inference of race and/or religious discrimination.
- 10 134. Mr Elesinnla submitted the investigations and conclusions of Ms Hodges and Ms Smith amounted to unwanted conduct which related to the claimant's race and/or religion. Their actions had the effect of creating a degrading, humiliating and intimidating environment for the claimant with approval of Ms Wright's behaviour and went as far as to accuse the claimant of playing the
15 race/religious card to deflect attention from his alleged poor performance.
135. Ms Dunlop's response to the claimant's grievance on the 24 June amounted to harassment. Ms Dunlop asserted falsely that the claimant had not provided evidence of his complaints and went on to threaten him with potential disciplinary action which was unjustified in the circumstances.
- 20 136. The principal claim of victimisation was made against Ms Hodges in respect of his grievance dated 4 March 2020. The claimant, in raising his grievance, did a protected act. The points listed at paragraph 6.1 of the List of Issues were to the claimant's disadvantage and it was reasonable for him to take that
25 view. It was reasonable for the claimant to take the view that Ms Hodges' conclusions were designed to deflect attention away from his legitimate complaints and to forestall any potential litigation. In other words, Ms Hodges did what she did because she believed the claimant would bring litigation in relation to his complaints.
- 30 137. Mr Elesinnla referred the Tribunal to the case of ***Shamoon v Royal Ulster Constabulary 2003 ICR 337*** for the definition of "detriment" and also that

whether or not the claimant suffered a detriment must be examined from the claimant's point of view.

138. It was reasonable for the claimant to take the view that Ms Hodges' conclusion that Chinese mimicry had occurred but was a joke not intended to offend, was a detriment. The intent of the perpetrator is not important. It was difficult to see how such behaviour could be anything other than offensive in the workplace.
139. Ms Hodges sought to mislead the claimant as to the nature and extent of her investigation. She falsely asserted all witnesses had been interviewed when it was clear she had not interviewed several witnesses. The witnesses were said by the claimant to have witnessed acts of bullying and harassment which he contends were racially and religiously motivated. In dismissing the claimant's complaints, without interviewing the witnesses, is indubitably unreasonable and a detriment to the claimant.
140. It was also a detriment to allow Ms Wright and Ms Shahzad to use the investigation of the claimant's grievance to make counter allegations of incompetence and poor performance against him. Ms Hodges failed to investigate why these matters had not been raised through the respondent's procedures. It was submitted that these matters were raised because the claimant had made a grievance. Further, even if the claimant was a useless worker, it did not justify harassment.
141. The criticisms made of Ms Hodges were repeated in respect of the way in which Ms Smith conducted the appeal hearing and her conclusions.
142. Ms Smith had not attended to give evidence. If the Tribunal looked at the grievance appeal outcome letter, it would note Ms Smith did not even refer to the Chinese mimicry incident. There was no reference to policies. She simply re-produced what Ms Hodges had done and accordingly the same criticisms were made of her.
143. Mr Elesinnla submitted Ms Shahzad had given extraordinary evidence. She could not give an explanation why, following the interview, she had added

things which were professionally damaging to the claimant. The reason she had done this was because the claimant had raised a grievance against Ms Wright.

5 144. The claimant gave a full account of his position regarding the near miss incident to Ms Dunlop. This was not challenged: no-one has responded to him. Ms Shahzad's evidence had not been reflected in the ET3. Ms Shahzad failed to follow the normal departmental process used to deal with similar cases, which was to have an informal discussion with the pharmacist involved and resolve the situation. Ms Shahzad did not have a discussion with the claimant and she entered the incident on to Riskman without discussion with the claimant.

10 145. Mr Elesinnla submitted there had been no serious drug incident: it was an exaggeration and all because the claimant had complained about Ms Wright. The claimant said incidents are not routinely recorded and he was not challenged about this.

15 146. Mr Elesinnla described Ms Shahzad's evidence that dexamethasone is not dispensed at the Albyn pharmacy to be a "fantastic proposition", which was dishonest. The medication is not an oncology drug: it is an anti-emetic.

20 147. Mr Elesinnla submitted that having regard to the counter allegations made by Ms Shahzad during the grievance investigation, it was a reasonable inference to draw that she behaved in this way because the claimant had raised his grievance of the 4 March 2020.

25 148. Ms Dunlop was the most decent of the respondent's witnesses because she accepted she did not know anything about what was in the training modules and could not identify discrimination or victimisation. She admitted she wrote to the claimant on the 24 June to dissuade him from continuing with his grievance. That is an act of victimisation and the Tribunal must accept this because of her admission. It was a "shot across his bows". The claimant, it was submitted, was entitled to resign on this basis alone.

149. Mr Elesinnla submitted it was beyond argument that he got home on the harassment complaint. Ms Wright had engaged in a campaign of discrimination against the claimant and this was supported by the witness statement of Ms Akhtar. Ms Wright kept raising the same issue regarding fasting because she was furious with the claimant. He did not want to discuss it, but she persisted. Ms Hodges explanation that it was being raised as a welfare issues is rubbish because Ms Wright did not like the claimant and would not be concerned for his welfare.
150. Mr Elesinnla submitted it was unarguable that a course of conduct which includes direct racial discrimination, harassment and victimisation is not capable of destroying the mutual trust and confidence that must exist for a contract of employment to continue. The claimant contended he was subjected to contraventions of the Equality Act and the respondent failed to deal properly with the grievances. This is sufficient to found a case of constructive dismissal. The claimant resigned because of the respondent's repudiatory breaches.
151. Mr Elesinnla invited the Tribunal to find for the claimant and to make an award of compensation including aggravated damages.

Respondent's submissions

152. Mr Hay in his submission dealt first with the evidence heard by the Tribunal. He described the claimant as an intelligent and articulate man who had started cross examination with the making of a number of concessions, but as cross examination continued the claimant strayed from the question asked and exhibited a keen desire to get his point across. His evidence was unsatisfactory in other respects: for example, he maintained a position that his furlough arrangements had been unexplained to him despite the fact that within the email chain referred to he acknowledged that his furlough arrangements had been delayed in being received by him. He also challenged Ms Shahzad's decision to record the Albyn incident on Riskman whilst at the same time acknowledging it had been a near miss.

153. Mr Hay submitted the claimant had struggled to provide evidence of his responses to matters at the time they occurred, and sought to reference or have taken into account later material. He had, for example, sought in the updated witness statement regarding mitigation, to comment on the witness statements of Ms Shahzad, Ms Hodges and Ms Dunlop.
154. The claimant had also been reluctant to answer questions about locum work beyond saying it was unpredictable, and was reluctant to provide details of the hourly rate of pay for locum work, despite claiming 6 years loss of earnings. The claimant also repeated his assertion that he had been the victim of discrimination and victimisation by, essentially, all members of staff at Ross Hall Pharmacy, and sought to paint his performance in an overly positive light.
155. Mr Hay submitted that whilst the claimant may not have been actively seeking to mislead the Tribunal, it was more than apparent that his evidence was distorted through the lens of his opinions, his emotions and his perceptions of his case more generally. Mr Hay invited the Tribunal to treat his evidence with particular caution where it was not supported by contemporaneous evidence from an independent source (*Wetton v Ahmad and others 2011 EWCA Civ 610* at paragraph 12).
156. Mr Hay invited the Tribunal to find Ms Hodges a credible and reliable witness. She was subjected to extended cross examination that was often terse, confrontational and designed to grind her into submission. The cross examination was an attempt to fashion a line of evidence that culminated in the extraordinary proposition that she was motivated by an animus against the claimant in the handling of his grievance because of his race or religious beliefs. Mr Hay submitted it should not be accepted because:
- the starting gambit was an attempt to lure a legal definition from a non-legally qualified person;
 - it was developed by reference to hypothetical scenarios that were not as fully fleshed out as the claimant's case;

- the value of context for harassment claims is legally correct (*Warby v Wunda Group*);
- it is also correct for direct discrimination claims and the provisions for circumstances of comparators not to be materially different;
- 5 • it proceeded from an unduly and unfairly selective standpoint in law. The Equality Act is not the only statute on the books germane to employment;
- it proceeded from an unduly and unfairly selective standpoint in fact. The claimant sought to focus on certain paragraphs of his grievance, but that was not his position during the grievance;
- 10 • this is important because for the threshold of discriminatory motivation to be reached it must be substantial in the sense of being no more than trivial. The quantitative assessment must be made by reference to the situation Ms Hodges faced at the time and her thought processes as regards it. To exclude a multitude of considerations from that in these proceedings is to distort the factual picture against which those thought processes are to be assessed;
- 15 • the line of examination appeared to suggest Ms Hodges was hide-bound to conclude in the claimant's favour on the basis of his perception alone is not the law and is not a proper construction of the respondent's policies;
- 20 • the line of examination appeared to overlook the fact Ms Hodges did take account of the claimant's perceptions, because she partially upheld his grievance and considered what steps needed to be taken in respect of both the claimant and Ms Wright to attempt to cure the difficulties in their working relationship and
- 25 • the suggestion Ms Hodges fabricated evidence in respect of concerns as to the claimant sleeping in a vehicle were periled on the basis that it was not said by Ms Wright in her interview.

157. Mr Hay submitted the cross examination of Ms Hodges was an unfortunate exercise and should be accorded no weight by the Tribunal.
158. Ms Shahzad gave her evidence in an entirely credible and reliable manner. Ms Shahzad explained why she had raised her concern regarding the claimant working elsewhere whilst off sick from work. She explained she had not been aware the claimant was off work with stress.
159. Ms Shahzad's evidence in respect of the Albyn incident had been clear and comprehensible. Counsel for the claimant had suggested to her that she had been wrong in her assertion that the Albyn pharmacy did not dispense dexamethasone. This was premised on there being no mention of that in the email exchange between Ms Shahzad and the claimant on the 10 June. The brief email exchange was intended to be supplemented by a more detailed discussion upon the claimant's return to work, but this did not happen. Counsel also relied on there being no mention of this in the ET3, but that was a document Ms Shahzad had had no part in preparing. Mr Hay submitted these were the flimsiest of bases upon which to assert the startling proposition that Ms Shahzad had fabricated her evidence in this respect. It was not supported by the very existence of the practice of the respondent to prepare chemotherapy medication for the Albyn, which the claimant himself was actioning. Mr Hay invited the Tribunal to prefer the evidence of Ms Shahzad to that of the claimant in this respect, and to accept her evidence regarding her motivation for recording the incident on Riskman.
160. Ms Vyas' evidence was essentially unchallenged, including her evidence that letters had been sent to the claimant by recorded delivery.
161. Ms Dunlop gave her evidence from a highly experienced standpoint. She corroborated the evidence of Ms Shahzad that the Albyn pharmacy was not equipped with dexamethasone. The point put to Ms Dunlop in cross that dexamethasone was used to treat Covid, was not foreshadowed in the claimant's evidence and did nothing to cast doubt on her evidence that the pharmacy at the Albyn did not possess dexamethasone.

162. Ms Dunlop was also challenged regarding her letter to the claimant where she recited the words of the respondent's grievance procedure to the effect a grievance found to be frivolous/vexatious could be subject to disciplinary proceedings. Ms Dunlop explained her rationale for referring to this as sending a message to the claimant to think about going down the route of another formal investigation when there had not been an opportunity to engage and discuss finding solutions following the previous investigation. Mr Hay submitted this was entirely understandable and the Tribunal should have no hesitation in accepting her explanation.
163. The Tribunal had Ms Smith's witness statement and the correspondence referred to in it demonstrated documents had been gathered and two people interviewed. The Tribunal should accept this evidence.
164. Mr Hay referred the Tribunal to the cases of ***Shamoon v Royal Ulster Constabulary 2003 ICR 337*** regarding the definition of "detriment"; ***Yorkshire Police v Khan 2001 ICR 1065*** where the test of causation in victimisation was said to go to "*the real reason, the core reason, the causa causans, the motive*"; ***Nagarajan v London Regional Transport Ltd 1999 ICR 877*** where it was said the protected act need not be the exclusive or sole reason for the detriment, provided the protected act has a significant influence on the detriment meted out; ***Igen Ltd v Wong 2005 ICR 931***; ***Hewage v Grampian Health Board 2013 SC UKSC 54*** where it was said the provisions of the modified burden of proof only fall for consideration by a Tribunal where the Tribunal considers itself unable to make positive findings in fact for the reason for the detriments or less favourable treatment ; ***Efobi v Royal Mail Group Ltd 2021*** which endorsed the ***Hewage*** decision and was authority for the proposition that the question of drawing inferences and when such inferences may properly be drawn from the evidence (or lack of it) was primarily one of common sense for the Tribunal; ***Madarassy v Nomura International plc 2007 ICR 867*** as authority for the proposition that for the inference to be capable of being drawn, a complainant must do more than simply point to a difference in protected characteristic between him and his

comparator and **Warby** as authority for the proposition that context in a harassment claim was significant.

165. Mr Hay submitted a distinction had to be drawn between motive and motivation. It did not matter if there was good intention if the motive was the protected characteristic. It was not correct to say, as the claimant's counsel had suggested, the Tribunal could discount what Ms Hodges and Ms Shahzad had to say. The Tribunal had to find the facts because from that, motive could be gleaned.
166. Mr Hay submitted the Tribunal could made positive findings from the evidence of the respondent's witnesses regarding motivation.
167. Mr Hay adopted the submissions made by the respondent regarding the jurisdictional issue of timebar (page 75). He submitted the acts of Ms Hodges in respect of her grievance outcome on the 17 April 2020 were, on the face of it, out of time. These were not continuing acts as understood in **Hendricks**. The alleged failings were identifiable as at 17 April 2020 at the latest. Time began from that date and the claim was presented out of time.
168. Mr Hay submitted it would not be just and equitable to extend the time limit in this case. The claimant had provided no explanation for his delay in pursuing the claim. He clearly envisaged Tribunal proceedings from the outset; he had been a trade union representative for 4 years and he was aware of the availability of the Tribunal to ventilate his employment concerns. It was submitted all the claims of discrimination anent the grievance outcome of Ms Hodges should be dismissed as out of time.
169. Mr Hay next addressed each of the issues identified on the Agreed List of Issues. He submitted, in relation to the complaint of direct discrimination at 6.1 on the List:-
- (i) the evidence did not support a factual finding that Ms Hodges failed to investigate the complaints against Ms Wright properly or at all. Ms Hodges had the grievance and addendum and met with the claimant to ascertain the details of his various complaints. The claimant had an

5 opportunity to approve the notes of the meeting and to expand upon his concerns. Ms Hodges interviewed Ms Lamont, Ms Dunlop, Ms Shahzad, Ms Armstrong, Ms Wright and Ms Akhtar. Ms Hodges was satisfied Ms Wright had expressed herself to the claimant in the manner he had described. Her investigation however uncovered substantially more pieces of the jigsaw which disclosed a bigger picture.

- (ii) It is not disputed that Ms Hodges did not interview Mr Oniga, Ms Graham or Ms Auld. Ms Fulton was interviewed.
- 10 (iii) The evidence did not establish Ms Hodges did misrepresent the evidence of Ms Akhtar. The outcome letter summarised a number of aspects of the evidence: this set out Ms Hodges' interpretation of the evidence, it did not misrepresent it.
- 15 (iv) It is not disputed that no formal performance management process was in place in respect of the claimant. This did not however indicate there were no matters of concern regarding the claimant's performance: there were references in the appraisals, Ms Dunlop had had to speak to the claimant regarding mobile phone use and there was an issue with the claimant's familiarity with the Peoplesoft system.
- 20 (v) The evidence does not support the conclusion that the claimant's complaints of Chinese mimicry were not upheld. Ms Hodges accepted the incident had taken place. The claimant, in his grievance, asked the respondent to take all reasonable steps to stop Ms Wright from treating him this way, going forward. Ms Hodges partially upheld complaints of discrimination in her outcome and set out detailed proposals for steps to improve the relationship between the claimant and Mrs Wright. This is what the claimant had asked for in his grievance.
- 25 (vi) Ms Hodges outcome letter did partially fail to explain which aspect of the claimant's grievance she partially upheld and why. The outcome letter is not a judgment or formal deed.
- 30

- (vii) The respondent repeated point (vi) above.
- (viii) On no fair reading of the terms of Ms Hodges' outcome letter, read as a whole, was the claimant being blamed for the conduct of Ms Wright.
- (ix) It was not disputed that Ms Hodges took no disciplinary action against Ms Wright in respect of her conclusions. She did set out a clear plan of action to attempt to improve the working relationships between the claimant and Ms Wright.
- (x) On no fair reading of Ms Hodges' outcome letter, read as a whole, was it implied the claimant was just as responsible for the matters he complained about. Ms Hodges' investigation had uncovered other matters which she sought to convey as part of her conclusions and intended further action.

170. Mr Hay next addressed each of the alleged acts of less favourable treatment arising from Ms Smith's grievance appeal process at 6.2 on the List.

- (i) The respondent adopted its above submission (at point (i)) in respect of Ms Smith's investigation. Ms Smith considered the papers, obtained investigation minutes from Ms Hodges, interviewed Ms Graham and Ms Auld and produced a detailed outcome letter.
- (ii) It was not disputed that Ms Smith did not interview Mr Oniga or Ms Fulton.
- (iii) The evidence supports the conclusion that Ms Smith did resolve the concerns raised by the claimant as to the different statements of Ms Shahzad and Ms Lamont which were explained to the claimant at the appeal hearing and in the outcome letter.
- (iv) In respect of points (iv) to (viii) the respondent adopted its submission at point (iii) above.
- (v) Ms Smith identified which witnesses had been interviewed as part of Ms Hodges' investigation in her email of the 18 May 20 (page 611).

(vi) Ms Smith confirmed Ms Hodges' decision for the reasons which Ms Smith gave in her outcome letter (page 712).

(vii) The respondent adopted its submission made at (xii) above.

5 171. Mr Hay, in relation to the allegations set out at 6.3 and 6.4 of the List, submitted Ms Shahzad had raised what she considered to be a serious near miss in connection with the dispensing of dexamethasone as part of premedication for an oncology patient due to receive chemotherapy at the Albyn hospital. This related to an alteration made to the prescription in respect of dexamethasone and an ambiguous instruction to the oncology nurse at the Albyn to "issue" the drug albeit it had not been dispensed at Ross Hall to be transported to the Albyn with other medication on the prescription. That instruction was not understood by the nurse to be that dexamethasone was to be dispensed by the Albyn pharmacy (email chain at page 712A) The Albyn pharmacy could not have dispensed the medication consistent with the claimant's instruction because it did not hold stock of dexamethasone. The patient could have suffered health consequences had she not received dexamethasone prior to chemotherapy or could have had her treatment delayed. The matter was clearly a near miss, and thus an Incident as defined in the respondent's Incident Policy. Ms Shahzad entered the incident into Riskman in accordance with the policy.

172. There was no evidence of a failure on the part of Ms Shahzad to follow normal departmental process upon discovery of this matter.

173. Mr Hay submitted, in relation to allegations at 6.5 to 6.8, that on no fair reading of Ms Dunlop's email of the 12 June 2020 (page 728) were concerns peremptorily dismissed. The claimant's contention was extravagant and on no view required to be accepted at face value without further enquiry. In any event, Ms Dunlop had suggested, and the claimant had agreed, to defer discussion of these matters until his return to work (page 725 – 727).

174. The evidence did not suggest that Ms Dunlop failed to respond to the claimant's grievances. Those were received after the claimant's agreement to defer discussions until his return to work.

175. On no fair reading of Ms Dunlop's letter of the 24 June, read as a whole, can it be said to contain a threat of disciplinary action. The reference to disciplinary action was expressed in conditional terms. It was a verbatim lift from the respondent's grievance policy. It was immediately preceded in the same paragraph expressing a recommendation that the matters of concern in the claimant's correspondence be first dealt with informally and that Ms Dunlop "sincerely hoped this can be achieved". There was no threat.
176. The respondent adopted its submissions in the above paragraphs anent the agreement to defer discussion of matters until the claimant's return to work. Thereafter Ms Vyas undertook consideration of the grievance in written communications posted to the claimant by recorded delivery.
177. There was no dispute regarding the fact the claimant resigned.
178. Mr Hay noted the pleaded comparator was a hypothetical comparator and not, for example, Ms Wright. He submitted the evidence did not support the conclusion that any of the foregoing matters between paragraphs 6.1 and 6.9 above, amount to less favourable treatment with a non-Asian comparator. The evidence does not support the conclusion that any of the foregoing treatment was because of the claimant's race or religion.
179. Mr Hay submitted, in relation to the claim of harassment, that none of the acts identified by the claimant amounted to unwanted conduct related to the claimant's race or religion. Separately and in the event the acts did amount to such unwanted conduct, on no properly informed view of the evidence did any of the conduct have the purpose or effect of creating a degrading, humiliating and intimidating environment for the claimant.
180. Mr Hay, in respect of the complaint of victimisation, adopted his above submissions made in respect of the claim of direct discrimination.
181. It was submitted that on the evidence of the training provided by the respondent to its staff, as expanded on in the respondent's witness evidence, the statutory defence had been made out.

182. Mr Hay submitted, in relation to the constructive dismissal claim, that on no proper construction of the events relied upon by the claimant as amounting to a material breach of contract had it been established that the respondent conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the claimant and the respondent. The respondent wanted the claimant to remain in employment and had, from the point of Ms Hodges' outcome onwards, sought to take steps to facilitate that. On no view could it be said the respondent indicated to the claimant that it no longer intended to be bound by his contract of employment.
183. Mr Hay invited the Tribunal to dismiss all claims. If the Tribunal was not with him, he noted re-engagement was no longer sought by the claimant. The compensation sought by the claimant was excessive. The claimant had fully mitigated his loss of salary. He made a claim for loss of additional benefits, but these should not be awarded in circumstances where the claimant had failed to disclose his full earnings earned in locum work.
184. The quantification of future loss was extravagant, unexplained and not borne out by the evidence. There was no evidence that locum pharmacy work was and would be for the next few years more precarious and worse earning than employed work.
185. The injury to feelings sought by the claimant, in the high level band of **Vento** was not appropriate, and any award should be in the lower band. Mr Hay submitted there was no concept of aggravated and exemplary damages in Scots law.
186. The respondent had not failed to comply with the ACAS Codes. The claimant had failed to comply with the grievance process in respect of the Albyn incident. This was unreasonable and the compensatory award should be reduced by 25%. The claimant had contributed to his own dismissal in respect of his extraordinary contentions as to the reporting of the near miss, and the compensatory award should be reduced by not less than 75% and up to 100%.

Discussion and decision

187. The claimant brings claims of direct discrimination (section 13 Equality Act) because of the protected characteristic of race and/or religion; harassment (section 26 Equality Act) because of the protected characteristics of race and/or religion; victimisation (section 27 Equality Act) and constructive unfair dismissal (section 96 Employment Rights Act). We deal with each of these complaints in turn and, in doing so, addressed each of the points set out in the Agreed List of Issues.

Timebar

188. Mr Hay referred to a letter dated 2 December 2020 (page 75) in which the respondent's representative had set out their position regarding timebar. In that letter it was said the earliest date that an act could be in time was the 16 May 2020 having regard to the extension of any time limits in accordance with section 207(B)(3) Employment Rights Act. Mr Hay submitted that it followed the acts of Ms Hodges in respect of the grievance outcome on the 17 April 2020 were, on the face of it, out of time. Further, these were not continuing acts.

189. Mr Hay further submitted that it would not be just and equitable to extend time because the claimant had not provided any explanation for the delay in pursuing the claims.

190. Mr Elesinnla submitted the claim had been presented within 3 months of the conclusion of the grievance procedure and accordingly the claim had been presented in time. The claimant viewed the grievance procedure as a continuing act which ended on or around 11 June 2020 when Ms Smith sent the grievance appeal outcome letter (*Hale v BSUH* above).

191. We had regard to section 123 Equality Act which provides that proceedings may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable.

192. The claimant contacted ACAS on the 31 May 2020 and the ACAS early conciliation certificate was issued on the 26 June 2020. The claimant presented his claim to the Employment Tribunal on the 9 September 2020.
193. The claimant raised a grievance on the 4 March. Ms Hodges issued the grievance outcome letter on the 17 April. The claimant raised a grievance appeal on the 27 April and Ms Smith issued the grievance appeal outcome letter on the 11 June.
194. The question for determination is whether the grievance and appeal were one continuing act, in which case the claim will have been presented in time, or whether they are separate acts, in which case the grievance outcome of Ms Hodges would be out of time. We had regard to the case of ***Lyfar v Brighton and Sussex University Hospitals Trust 2006 EWCA Civ 1548*** where the Court of Appeal clarified that the correct test in determining whether there is a continuing act is that set out in ***Hendricks*** (focus should be on the substance of the claimant's allegations that the employer is responsible for an ongoing situation or a continuing state of affairs) and that Tribunals should look at the substance of the complaints in question and determine whether they can be said to be part of one continuing act by the employer.
195. We also had regard to the case of ***Hale v BSUH*** (above) which is authority for the proposition that once a respondent has decided to instigate a process, all the subsequent steps in that process are to be properly characterised as a state of affairs that would continue until the conclusion of the disciplinary process.
196. We noted the grievance outcome and the grievance appeal outcome were decisions taken by different people, and this is a consideration which may be taken into account in considering whether separate incidents form part of an act extending over a period of time (***Aziz v FDA 2010 EWCA Civ 304***).
197. We must have regard to the substance of the complaints. The substance of the complaints brought by the claimant concerned alleged discrimination by Ms Hodges and alleged discrimination by Ms Smith. The alleged discrimination by Ms Hodges and Ms Smith was similar in nature: many of the

allegations made against Ms Hodges were made against Ms Smith. The claimant, in essence, complained the respondent was responsible for an ongoing situation in which those tasked with investigating a grievance or grievance appeal, failed to properly deal with allegations of discrimination. We acknowledged the grievance and grievance outcome were dealt with by different people, but we did not consider this impacted on the situation in this case.

198. We concluded, having had regard to these points, that there was an act extending over a period in this case. The grievance appeal outcome letter was dated 11 June. The claim was presented on the 9 September. The claim was presented in time.

Direct Discrimination

199. Section 13 Equality Act provides that a person discriminates against another if, because of a protected characteristic, the person treats the other less favourably than s/he treats or would treat others.

200. Direct discrimination involves a comparison of the treatment of the claimant and how the employer treats or would treat others. The comparison may be with an actual or hypothetical comparator, but section 23 Equality Act provides that there must be “no material difference” between the circumstances relating to each case. In other words, like must be compared with like. The claimant in this case relied on a hypothetical comparator.

201. The claimant, in his complaint, asserted the following acts were acts of less favourable treatment:- (the numbering used follows, for the sake of clarity, the numbering on the agreed list of issues)

6.1 In respect of the grievance outcome dated 17 April 2020 did the grievance officer, Ms Hodges:-

- (i) fail to investigate the claimant’s complaints against Ms Wright properly or at all:

- (ii) fail to interview Mr Oniga and Ms Fulton or other witnesses named by the claimant and fail to explain why they were not interviewed, despite telling the claimant by way of email dated 9 April 2020 that all of the witnesses had been interviewed;
- 5 (iii) misrepresent the evidence that she was given by Ms Asirah Akhtar in relation to Ms Wright's alleged racial and religious discrimination of the claimant in relation to his Muslim faith;
- (iv) fail to ask Ms Wright or Ms Shahzad why the alleged performance concerns in relation to the claimant had not been raised prior to the claimant's grievance in accordance with the respondent's performance management process
- 10 (v) fail to uphold the claimant's complaints in relation to Chinese accent mimicry;
- (vi) fail to explain which aspect of the claimant's complaint she partially upheld and why;
- 15 (vii) fail to explain why allegedly derogatory statements about the claimant's religion did not amount to racial discrimination;
- (viii) seek to blame the claimant for Ms Wright's alleged racial and religious discrimination;
- 20 (ix) fail to take any or any reasonable disciplinary action against Ms Wright in relation to the partially upheld racial and religious discrimination complaint and
- (x) make recommendations which implied the claimant was just as responsible for the matters he complained about as Ms Wright and warn that if there was evidence of a failure to comply with the requirements of her recommendations, further action would be taken.
- 25

6.2 In respect of the grievance appeal outcome dated 11 June 2020 did the appeal officer, Ms Smith:-

- (i) fail to investigate the claimant's appeal against the outcome of his grievance against Ms Wright properly or at all;
- (ii) fail to interview Mr Oniga and Ms Fulton or other witnesses named by the claimant;
- 5 (iii) fail to deal properly or at all with the claimant's concerns about the different statements and different dates appended to Ms Shahzad's statements and Ms Lamont's statement;
- (iv) not address the claimant's contention that Ms Shahzad's statement dated 28 May 2020 was made in retaliation of his complaints, the claimant says this was not dealt with properly or at
10 all by Ms Smith;
- (v) not address the claimant's contention that Ms Shahzad's statement dated 28 May had been put together after the initial grievance hearing had concluded and she had the advantage of
15 perusing his appeal document prior to its production;
- (vi) not address the claimant's contention that there had been collusion between Ms Shahzad and Ms Wright and this was facilitated by Ms Hodges;
- (vii) fail to clarify which parts of Ms Shahzad's statement would be
20 relied upon in the grievance appeal hearing and which parts would be disregarded;
- (viii) fail to respond to the claimant's request for her to clarify which parts of Ms Shahzad's statement had been relied upon by Ms Hodges and which parts had been disregarded;
- 25 (ix) fail to address the issue of witness statements in relation to which witnesses had been interviewed and which witnesses had not been interviewed as part of Ms Hodges investigation;

- (x) insofar as it was identified that certain witnesses had not been interviewed, Ms Smith did not interview them and did not explain why this was the case;
- (xi) fail to clarify which aspects of the claimant's grievance had been upheld and which aspects had not been upheld by Ms Hodges;
- (xii) confirmed Ms Hodges' decision despite the fact that all the references the claimant made during the appeal process to breaches of the respondent's Equality and Diversity policy, harassment and victimisation and the contention that the claimant raised in relation to the fact that Ms Akhtar's statement had supported his contentions were not dealt with by Ms Smith and
- (xiii) fail to explain why the mimicry of a Chinese person in the workplace did not amount to racial discrimination or harassment.
- 6.3 Ms Shahzad raising a serious drug related incident against the claimant on the 9 June 2020 which the claimant alleged was retaliation against him for the grievance complaint that the claimant had raised against Ms Wright.
- 6.4 Ms Shahzad's failure to follow the normal departmental process in raising the serious drug related clinical incident against the claimant.
- 6.5 In an email dated 12 June 2020 did Ms Dunlop peremptorily dismiss the concerns that the claimant had raised about Ms Shahzad on 10 June 2020;
- 6.6 Did Ms Dunlop fail to adequately respond to the claimant's formal grievances dated 19 June 2020 on 24 June 2020;
- 6.7 Did Ms Dunlop threaten the claimant that he could face disciplinary action for raising his grievances of 10 and 19 June 2020;
- 6.8 Did the respondent fail to engage in the grievance process in a timely manner or at all regarding his grievance of the 6 July 2020 and

6.9 The claimant's resignation on the 13 July 2020.

202. The issues for the Tribunal to address are (a) did the above acts take place; (b) if so, did the respondent treat the claimant less favourably than they would have treated a hypothetical comparator and (c) if so, was the reason for that less favourable treatment because of the claimant's race and/or religion.

Did the acts alleged by the claimant take place

203. We firstly addressed the issue of whether the above alleged acts occurred. So, in respect of the grievance outcome dated 17 April 2020, did the grievance officer Ms Hodges, do what was alleged at 6.1(i) to (x) above?

(i) No, we could not accept, given the investigation carried out by Ms Hodges, that she had failed to investigate the claimant's complaints properly or at all. Ms Hodges had the claimant's written grievance and addendum and she met with him to understand the issues raised and his concerns. Ms Hodges then interviewed a number of staff including Ms Lamont, Ms Shahzad, Ms Armstrong, Ms Wright, Ms Dunlop, Ms Akhtar and Ms Fulton.

The claimant's representative was critical of Ms Hodges for not having specifically put to Ms Wright and other witnesses the allegation that Ms Wright had, on the 8 May 2019, started to loudly express her opinion to other members of staff, but directed at the claimant, about the dangers of fasting and that medical professionals who observe such practices are not capable of doing their roles and jobs safely. Ms Hodges accepted she had not asked that specifically, but she had, in each interview, asked witnesses if they had ever witnessed any evidence of racially motivated discrimination within the pharmacy department, and she did ask each witness about discussions regarding religious fasting. We could not accept the proposition that there had been a failure to properly investigate the allegation in circumstances where Ms Hodges asked questions of each witness about discussions regarding religious fasting, and in circumstances where there was

no dispute these discussions took place and that Ms Wright held, and voiced, her opinions regarding these matters.

5 The claimant's representative was also critical of Ms Hodges for not having interviewed Ms Auld and Ms Graham who were named in the grievance as having been questioned about the claimant's activities whilst travelling to Kings Park hospital. Ms Hodges accepted she had not interviewed Ms Auld or Ms Graham but she had raised this matter with Ms Wright, whom it was suggested had asked Ms Auld and Ms Graham to spy. Ms Wright accepted that
10 when she was in charge of the department she did question what the claimant was doing and she gave her reasons for doing so.

We acknowledged it would have been better had Ms Hodges interviewed Ms Auld and Ms Graham, but we could not accept her failure to do so amounted to not investigating the grievance properly in circumstances where the matter was raised with Ms
15 Wright who confirmed she did question what the claimant was doing.

(ii) Yes. Ms Hodges did not interview Mr Oniga, Ms Auld or Ms Graham and did not explain in the outcome letter why they had not been interviewed.
20 Ms Hodges did interview Ms Fulton. Ms Hodges did state in the outcome letter that all witnesses had been interviewed.

(iii) No. Ms Hodges did not misrepresent the evidence she was given by Ms Akhtar. Ms Hodges, in the grievance outcome letter, stated "*.. I have reviewed the witness statements in full and considered the content
25 therein. I acknowledge that whilst there is a general consensus of opinion amongst witnesses that there are no racially motivated comments directed to you in the department, Asirah identifies that perceptions of racial discrimination can be easily felt by some and not by others in a similar circumstance, hence identifying your individual sensitivity to some discussions that take place within the department and in particular the way
30 some of these discussions are developed by Carron.*"

Ms Akhtar said in her interview with Ms Hodges that *“I do believe that some level of racial discrimination is directed toward [the claimant] and understand why he may feel this way. Feeling racially discriminated can be easily felt by some and not be as clear cut for others...”*

5 We could not accept the suggestion Ms Hodges misrepresented what Ms Akhtar had said. Ms Hodges took the point being made by Ms Akhtar about different perceptions, and wove that in to her findings/conclusions. She did not distort or misrepresent the point being made by Ms Akhtar.

(iv) 10 Yes. Ms Hodges did not ask Ms Wright or Ms Shahzad why the alleged performance concerns in relation to the claimant had not been raised prior to the claimant’s grievance. There was however evidence to suggest concerns had been raised informally with the claimant. The appraisals carried out by Ms Shahzad referred to the need to prioritise workload better, manage his time and animosity and differences amongst
15 colleagues. Ms Dunlop had required to speak to the claimant regarding use of his mobile phone at work contrary to the respondent’s policy and the claimant had required additional training in the software used in connection with stock checks.

(v) 20 Yes. Ms Hodges did fail to uphold the claimant’s complaint in relation to Chinese mimicry. Ms Hodges did find the incident had occurred. There was no real dispute about this in circumstances where those said to have been present when this happened, agreed it had happened. Ms Hodges did not however find this to be an incident of discrimination for the reasons set out in the grievance outcome letter.

25 (vi) Yes. there was a partial failure: Ms Hodges did not adequately explain which aspects of the grievance she partially upheld and why.

(vii) 30 No. Ms Hodges did explain why she concluded the derogatory comments about the claimant’s religion did not amount to race or religious discrimination. Ms Hodges’ explanation lay in the fact she found (a) the consensus of witnesses was that no racially motivated comments had been directed to the claimant; (b) some individuals can be overly sensitive;

(c) discussions regarding religious fasting happened from a welfare perspective and because there was curiosity around the subject; (d) some witnesses saw the discussion regarding religious fasting and the claimant's response to it to be a clash of personalities rather than a deliberate act of racial or religious discrimination; (e) some witnesses suggested Ms Wright's attempts to raise issues of performance were diverted by the claimant into the discussion being raised as a result of aspects of the claimant's race and religion and (f) all but one witness had agreed there was little evidence of any behaviours that could be considered as bullying or harassment.

(viii) No. Ms Hodges did not seek to blame the claimant for Ms Wright's alleged racial and/or religious discrimination. Ms Hodges, as a result of the investigation, found there had, essentially, been a breakdown in the relationship between the claimant and Ms Wright (breakdown in the relationship is the Tribunal's expression). She noted there was evidence of a strained relationship between the claimant and Ms Wright and that both had previously raised issues with Ms Dunlop, who had tried to resolve the issues of concern. Ms Hodges referred to Ms Wright's perception that the claimant found it difficult to take instruction or direction from her and that witnesses had commented that the claimant struggled to accept Ms Wright's leadership role. Ms Hodges also referred to communication between Ms Wright and the claimant being "suboptimal".

We could not accept Ms Hodges was blaming the claimant for the alleged discrimination, but rather she was highlighting what the investigation had exposed and the context in which the claimant's allegations were to be considered

(ix) Yes. Ms Hodges did not take disciplinary action against Ms Wright. Ms Hodges did set out a number of recommendations to improve the working relationship.

(x) No. The recommendations made by Ms Hodges did not imply the claimant was just as responsible for the matters he complained about as Ms Wright. Ms Hodges set out in the grievance outcome letter, her conclusions regarding the four headings of complaint. She, at page 573, stated “*I can confirm that this concludes my investigation into the issues raised within your formal grievance and that your grievance had not been upheld.*” Ms Hodges then went on to explain that her investigation had highlighted the need for conciliation, mediation and effective working relations going forward. Ms Hodges set out some detailed observations and recommendations. It was in the context of going forward that Ms Hodges’ observations and recommendations were made and involved both the claimant and Ms Wright.

Ms Hodges did observe that there appeared to have been a failure by both parties to recognise the contractual requirements of acceptable behaviours within their professional roles, and that it appeared there had been behaviours by both parties which had not been effectively managed and performance concerns which had not been adequately addressed. Both parties were expected to improve behaviour. We did not consider, having had regard to the investigation and information obtained by Ms Hodges, that these recommendations sought to blame the claimant for the alleged discrimination: rather, the recommendations sought to address the relationship between the claimant and Ms Wright in circumstances where both had previously asked for issues to be resolved and in circumstances where they would both be working with each other again when the claimant returned to work.

204. In respect of the grievance appeal outcome dated 11 June 2020, did the appeal officer, Ms Smith, do what was alleged at points 6.2(i) to (xiii) as set out above.

(i) No. Ms Smith did not fail to investigate the claimant’s grievance appeal properly or at all. Ms Smith obtained the claimant’s grievance appeal and addendum, the notes of the interviews conducted by Ms Hodges and the grievance outcome letter. There was a significant amount of

correspondence between Ms Smith and the claimant prior to the appeal hearing, where a number of the issues raised by the claimant were resolved (for example, notes of interviews not being signed by witnesses).

Ms Smith met with the claimant to go through the grounds of appeal. Ms Smith interviewed further witnesses as suggested by the claimant (Ms Graham and Ms Auld), resolved the issues regarding the notes of the interviews and considered each of Ms Hodges' conclusions. It could not be said, having regard to the remit of the appeal and the actions which Ms Smith took, that there had been a failure to investigate the grievance appeal properly or at all.

(ii) Yes. Ms Smith did not interview Mr Oniga for the same reasons Ms Hodges had not interviewed him. He had been a Resident Medical Officer at Ross Hall for a very short period of time and had left prior to these matters being raised by the claimant. Ms Smith did not interview Ms Fulton because she had been interviewed by Ms Hodges, and she did not interview Ms Claire McGregor, because she had left the employment of the respondent and she did not interview one other person named by the claimant because she was new to Ross Hall.

(iii) No. Ms Smith did not fail to deal properly with the claimant's concerns about the different statements and different dates appended to the statements of Ms Shahzad and Ms Lamont. The claimant initially complained that he had not been provided with a note of who had been interviewed and what had been said. Ms Smith addressed this concern by sending the claimant a copy of the interview notes (page 607).

The claimant responded to say that some of the notes which had been sent were unsigned and that he wanted the documents in pdf format rather than word format. Ms Smith responded (page 611) to say the notes were in the format provided be that pdf or word. Ms Smith sent a signed copy of Ms Dunlop's statement and confirmed Ms Shahzad and Ms Lamont could be asked to sign their notes/statements. Ms Smith noted the claimant had referred to others who had not been interviewed by Ms Hodges and

confirmed that if the claimant felt others should be spoken to this could be dealt with as part of the appeal process if appropriate.

The claimant subsequently sent Ms Smith a 9 page addendum to the grievance appeal.

5 Ms Smith sent the claimant (page 652) signed copies of the interview notes with Ms Shahzad and Ms Lamont. The interview notes of Ms Shahzad contained some handwritten amendments made by Ms Shahzad which had not been on the earlier word version of the document. Ms Smith confirmed the amendments would not be considered as part of the appeal
10 unless they were pertinent to it. The claimant replied (page 654) to object to the amendments to Ms Shahzad's notes being used as part of the appeal and he accused the witnesses of colluding and of Ms Hodges having facilitated the collusion.

Ms Smith replied to the claimant (page 661) and addressed each of the
15 points he raised in respect of amendments for example:-

- Ms Lamont had signed her notes on the 27 May, whereas Ms Hodges had signed them on the 10 April, because Ms Lamont had been absent after her interview;
- Ms Shahzad had not been asked to provide a "new statement";
- 20 • the additional handwritten notes on Ms Shahzad's statement would not be relied upon at the appeal;
- the suggestion of collusion was undermined by the fact employees would not have been aware of the fact of the claimant's appeal and
- Ms Hodges would be interviewed as part of the appeal process and
25 she would be asked how the notes came to be annotated.

The issue of the notes was discussed at the grievance appeal meeting Ms Smith held with the claimant (page 681) and dealt with in the grievance appeal outcome letter.

- (iv) No. Ms Smith did deal with this insofar as she confirmed to the claimant that the annotations made by Ms Shahzad on the interview notes would not be taken into account at the appeal hearing.
- (v) No. Ms Smith did address this (see point (iii) above where Ms Smith) confirmed to the claimant that Ms Shahzad would not have been aware of the fact of the claimant's appeal.
- (vi) No. Ms Smith did deal with the claimant's contention there had been collusion (see above).
- (vii) No. Ms Smith did not fail to clarify which parts of Ms Shahzad's statement would be relied upon at the appeal hearing. Ms Smith informed the claimant in writing prior to the appeal hearing, and at the appeal hearing, that the amendments/annotations made to the notes would not be relied upon at the appeal hearing.
- (viii) Yes. Ms Smith explained to the claimant at the grievance appeal hearing that she could not speak for Ms Hodges, but that the issues regarding the statements would be raised with Ms Hodges. Ms Smith did not thereafter clarify for the claimant which parts of Ms Shahzad's notes had been relied upon.
- (ix) No. Ms Smith did not fail to clarify which witnesses had been interviewed as part of Ms Hodges' investigation. The notes of the interviews of those interviewed were provided, together with Ms Hodges having indicated Ms Fulton had been interviewed.
- (x) Yes. Ms Smith did not interview Mr Oniga, but she did interview Ms Auld and Ms Graham. Ms Smith did not explain why she had not interviewed Mr Oniga.
- (xi) No. Ms Smith did not fail to clarify which parts of the claimant's grievance had been upheld/not upheld by Ms Hodges. Ms Smith, in the grievance appeal outcome letter, referred to the racial and religious discrimination allegations being partially upheld because it was recognised that Ms

Wright's behaviour may have been inappropriate and having regard to the claimant's perception of events.

5 (xii) Yes. Ms Smith did uphold the decision of Ms Hodges notwithstanding all of the points raised by the claimant in his grievance appeal and addendum regarding alleged breaches of the respondent's Equality and Diversity policy, harassment and victimisation. Ms Smith did, in the letter of grievance appeal outcome, deal with the claimant's contention that Ms Akhtar's statement had supported his allegations. Ms Smith disagreed with the claimant's position and referred to Ms Akhtar being clear there had been a long-standing clash of personalities which would result in heated exchanges.

10 (xiii) Yes. Ms Smith did not specifically refer to the Chinese mimicry issue, but she did, in the letter of grievance appeal outcome, refer to it being recognised Ms Wright's behaviour may have been inappropriate (see point (xi) above).

15 205. We next asked whether the alleged acts at 6.3 to 6.9 occurred:

- 20 • 6.3 - Yes. Ms Shahzad did raise a serious drug-related clinical incident involving the claimant on the 9 June 2020. This was not done in retaliation for the claimant having raised the grievance against Ms Wright (see below).
- 25 • 6.4 - No. Ms Shahzad did not fail to follow "normal departmental process". There is no reference in the Incident Management policy to having to discuss the matter with the person/s concerned before making an entry on Riskman. The key fact is that "*all incidents that occur on BMI premises .. must be reported on the risk management system. The reporter must enter the incident directly on to the risk management system by the end of their shift on the day it occurred or was discovered*".

30 We preferred the evidence of Ms Shahzad to that of the claimant, and we found there was no departmental practice of discussing an

incident with a colleague before adding it to Riskman. As Ms Shahzad said *“if an incident needs to be recorded on Riskman, it has to be recorded and conversations with colleagues will not change that”*.

5 Ms Shahzad could not, in any event, discuss the incident with the claimant before adding it to Riskman because the claimant was on annual leave on the 9 and 10 June. Ms Shahzad did email the claimant regarding the incident.

10 • 6.5 - No. Ms Dunlop did not, in her email of the 12 June (page 725) peremptorily dismiss the concerns raised by the claimant regarding Ms Shahzad. Ms Dunlop noted the claimant was awaiting the outcome to his grievance appeal and that he was on furlough, and in those circumstances she proposed to “defer further discussions” until he returned to work on the 1 July. Ms Dunlop concluded her response by stating “I will be more than happy to discuss matters upon your return.”

15 • 6.6 - No. Ms Dunlop did not fail to adequately respond to the claimant’s formal grievance dated 19 June. Ms Dunlop and the claimant had agreed to defer discussion of the matters he had raised until his return to work on the 1 July. The claimant’s grievance of the 19 June post-dated that agreement. Further, the claimant did not ask Ms Dunlop to respond to his grievance: he asked that Ms Dunlop acknowledge the grievance and communicate with HR.

20 • 6.7 - No. Ms Dunlop, in the email of the 24 June (page 746) quoted from the Grievance policy that “where there is evidence that a grievance is not justified, and it is considered frivolous, vexatious or malicious, this could lead to disciplinary action”. Ms Dunlop told the tribunal that she had included this in her letter as a supportive measure. In the letter she referred to the claimant having been through the grievance and grievance appeal process and to there having been no opportunity to discuss the recommendations and

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agree a plan for mediation and conciliation. This was viewed by Ms Dunlop as being important because it would provide an opportunity for assurances surrounding professional working relationships and improved ways of working going forward.

5 Ms Dunlop wanted to draw the attention of the claimant to the terms of the Grievance Policy and to invite him to think about whether another grievance was the way forward or whether things could be addressed or “put right” by giving the mediation and conciliation a chance to take place.

10 We concluded, having regard to the evidence of Ms Dunlop and the terms of the letter, that the inclusion of the terms of the grievance policy could not be said to be a “threat”. It was not a “do this or else” situation: it was a please stop and think about whether another grievance is the best way forward or whether there is another way
15 (mediation and conciliation) to deal with things.

- 6.8 - No. Ms Vyas was asked, by Mr Gane, HR Business Partner, on the 9 July to hear the claimant’s grievance dated 6 July. She wrote to the claimant to invite him to attend a grievance meeting on the 3 August. The claimant asked for this meeting to be rescheduled
20 because his trade union representative was unable to attend.

Ms Vyas agreed to reschedule the meeting and wrote to the claimant on the 10 August to invite him to a grievance hearing on the 19 August. The day prior to the grievance hearing the claimant informed Ms Vyas that as his employment had ended he did not wish to take
25 part in a grievance hearing.

The claimant emailed Ms Vyas on the 19 August to say he had changed his mind and did wish to attend a grievance hearing, but his trade union representative was not available for the meeting scheduled for that day.

5 Ms Vyas responded to confirm she was happy to progress the grievance hearing, but she was going on holiday and so the hearing would need to be re-arranged for the 17 September. The claimant advised Ms Vyas he could not attend on that date and he asked for the hearing to be arranged for a Monday or Tuesday.

Ms Vyas wrote to the claimant on the 18 September to invite him to a grievance hearing on the 5 October. Ms Vyas asked the claimant if he would prefer the option of answering written questions instead of attending. Ms Vyas did not hear from the claimant again.

10 The respondent did not fail to engage in the grievance in a timely manner. Ms Vyas offered the claimant 4 chances to attend a grievance hearing (two in August, one in September and one in October) and on each of these occasions the claimant could not attend.

15 The respondent did not fail to engage in the grievance process. Ms Vyas carried out preliminary investigations with Ms Hodges regarding the issues raised about furlough. Ms Hodges did not uphold the claimant's complaint regarding Ms Shahzad because she concluded the matter had been handled in accordance with the respondent's
20 policies. Further, in Ms Vyas' professional view that incident should have been recorded on Riskman because it could have resulted in patient harm. Ms Vyas reached conclusions based on the information she had, and she issued a grievance outcome letter to the claimant.

- 6.9 - Yes. The claimant did resign on the 13 July 2020.

25 206. It is helpful to summarise the acts which the Tribunal have found occurred:

- 6.1 (ii) Ms Hodges did not interview Mr Oniga, Ms Auld and Ms Graham and did not explain to the claimant why they had not been interviewed, despite telling the claimant that all of the witnesses had been interviewed;

- 6.1 (iv) Ms Hodges did not ask Ms Wright or Ms Shahzad why the alleged performance concerns in relation to the claimant had not been raised prior to the claimant's grievance;
- 5 • 6.1 (v) Ms Hodges did fail to uphold the claimant's complaint in relation to Chinese accent mimicry;
- 6.1 (vi) Ms Hodges did not adequately explain which part of the complaint she partially upheld and why;
- 6.1 (ix) Ms Hodges did not take any reasonable disciplinary action against Ms Wright in relation to the partially upheld racial and religious discrimination complaint;
- 10 • 6.2 (ii) Ms Smith did not interview Mr Oniga, Ms McGregor or the new pharmacist;
- 6.2 (viii) Ms Smith did not clarify which parts of Ms Shahzad's statement had been relied upon by Ms Hodges and which parts had been disregarded;
- 15 • 6.2 (x) Ms Smith did not interview Mr Oniga, Ms McGregor or the new pharmacist and did not explain to the claimant why she had not done so;
- 6.2 (xii) Ms Smith did uphold Ms Hodges' decision despite all of the claimant's references to breaches of the respondent's policies and his contention that Ms Ahktar's statement supported his position;
- 20 • 6.2 (xiii) Ms Smith failed to explain why the mimicry of a Chinese person in the workplace did not amount to racial discrimination or harassment;
- 6.3 Ms Shahzad did raise a serious drug related incident against the claimant on the 9 June 2020 and
- 25 • 6.9 the claimant resigned.

Did the respondent treat the claimant less favourably than it would have treated a hypothetical comparator

207. The Tribunal must next ask whether the claimant was treated less favourably in respect of the above points than a comparator would have been, who was
5 in the same, or not materially different, circumstances as the claimant. The claimant relied on a hypothetical comparator. The hypothetical comparator would be a man who was not of the claimant's race (Asian) or religion (Muslim).
208. The hypothetical comparator, in terms of section 23 Equality Act, must be in
10 the same position in all material respects as the claimant, save that he is not a member of the protected class (***Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 37***). The Tribunal understood this does not mean the circumstances of the claimant and the comparator need to be identical, but that the relevant circumstances should not be materially
15 different. This means the circumstances relevant to take into account include those that the alleged discriminator takes into account when deciding to treat the claimant as it did.
209. We considered the hypothetical comparator in this case could be a white man
20 of Christian faith, who had raised a grievance complaining of discrimination, harassment and bullying by his female manager. There was no evidence regarding the way in which the respondent generally conducted its grievance investigations and no evidence of any previous grievance investigations involving allegations of discrimination and how they had been dealt with. The only comment made in evidence about previous hearings was made by Ms
25 Hodges who told the Tribunal that in a previous case involving allegations of disability discrimination, she had upheld the complaint.
210. The Tribunal may draw inferences regarding the likely treatment of a
30 hypothetical comparator, from the surrounding circumstances which may include looking at the treatment of people whose circumstances are not sufficiently similar to warrant their being treated as an actual comparator, but

which are sufficiently relevant for inferences to be drawn from the way they have been treated.

211. Mr Elesinnla invited the Tribunal to draw an inference from Ms Hodges unreasonable and atypical behaviour; her inability to explain the unreasonable behaviour and the failure to follow the respondent's policies. We examined each of these in turn.
212. Mr Elesinnla in relation to the (alleged) unreasonable and atypical behaviour of Ms Hodges, submitted Ms Hodges had not investigated the claimant's complaints, but had instead focussed on his alleged incompetence. We could not accept the submission that Ms Hodges had failed to investigate the claimant's complaints. Ms Hodges put each of the matters raised by the claimant to the witnesses she interviewed. Ms Hodges did not specifically put the allegation regarding Ms Wright voicing her opinion of religious fasting and the ability of those who are fasting to work, but she did ask questions of each witness about this subject matter. It was at least arguable that the approach adopted by Ms Hodges elicited more information than asking the specific question. Furthermore, in circumstances where no-one, including Ms Wright, denied discussions regarding religious fasting took place and Ms Wright held and voiced certain views about this matter, we could not accept there was any disadvantage to the claimant in the method adopted by Ms Hodges.
213. The interview notes demonstrate that those interviewed volunteered information about the claimant and his interactions in the department. We considered it important to stress that no-one suggested the claimant was incompetent. Those interviewed spoke of the poor relationship between the claimant and Ms Wright; of him being slow to perform his duties and of what we would describe as the claimant and Ms Wright winding each other up. For example, the claimant took 15 minutes of his lunch break at another point in the day for prayers. Everyone knew this and it presented no issues. Ms Hodges was told however that the claimant would leave the department without telling Ms Wright, or would leave the department without a pharmacist and this would then be raised as an issue. Equally, Ms Hodges was told Ms Wright would antagonise the claimant.

214. Mr Elesinnla further submitted Ms Hodges failed to interview relevant witnesses and failed to agree with the claimant who was to be interviewed. There was no dispute regarding the fact Ms Hodges did not interview Mr Oniga, Ms Auld and Mr Graham. Ms Hodges explained Mr Oniga had only worked at Ross Hall for a very short period of time and had left. Mr Oniga was not known to Ms Hodges or other witnesses. There was no suggestion that Ms Hodges knew where Mr Oniga had gone to work and could have contacted him. This was the reason she did not interview him.
215. Ms Hodges, when questioned about Ms Auld and Ms Graham, clearly thought she had interviewed Ms Auld, but when referred to Ms Smith's interview notes with Ms Auld, Ms Hodges accepted she must have been mistaken. There was, beyond this, no stated explanation, for why Ms Hodges had not interviewed Ms Auld and Ms Graham. Ms Hodges did, however, put to Ms Wright, the allegation concerning her asking Ms Auld and Ms Graham to spy on the claimant. Ms Wright did not agree she asked them to "spy" on the claimant, but she did agree she asked what the claimant was doing.
216. Ms Hodges did, accordingly, fail to interview potentially relevant witnesses (Mr Oniga, Ms Auld and Ms Graham) but she gave a reasonable explanation for not interviewing Mr Oniga. Ms Hodges was not conducting a criminal investigation: the onus on her was to carry out as much investigation as was reasonable. In the circumstances we considered Ms Hodges had provided a reasonable explanation for not interviewing Mr Oniga.
217. Ms Auld and Ms Graham were interviewed by Ms Smith as part of the grievance appeal. Ms Auld could not think of anything she wished to highlight and simply confirmed people chatted in the car. Ms Graham confirmed she had been asked if the claimant fell asleep in the car, but she hadn't really noticed although he may shut his eyes. Ms Graham said she shut her eyes cause she is not a good traveller. Ms Graham could not remember who had asked her about this. Ms Auld and Ms Graham had little, if anything, to add to the investigation.

218. We concluded, for the reasons set out above, that Ms Hodges' failure to interview Mr Oniga, Ms Auld and Ms Graham was neither unreasonable nor atypical.

5 219. There was no dispute regarding the fact Ms Hodges did not agree with the claimant which witnesses were to be interviewed. She did however meet with the claimant to discuss his grievance and addendum, which named those said to have been involved in, or witnessed, the allegations he made. Ms Hodges accordingly had a list of witnesses from that source. In addition to this Ms Hodges took advice from HR (BMI Manage) regarding the list of witnesses to
10 interview. There was nothing to suggest it would have been reasonable, or usual for Ms Hodges to have agreed witnesses to be interviewed with the person raising the grievance. It is a matter for the person tasked with investigating the grievance to decide who they need to speak to.

15 220. Mr Elesinnla submitted Ms Hodges had failed to ask follow up questions of Ms Akhtar. This related to the comment made by Ms Akhtar that Ms Wright made "negative comments" and "voiced her opinions". Ms Hodges accepted she had not specifically asked what negative comments had been made, but the interview notes record that Ms Akhtar said Ms Wright made negative comments about [the claimant] praying even though he did so in his own time.

20 221. Mr Elesinnla submitted Ms Hodges had allowed Ms Wright to produce a diary and took this into account when deciding the outcome of the grievance. The was no dispute regarding the fact that at the end of each interview, Ms Hodges asked each witness if they had anything to add. Ms Wright responded to this by producing a "diary" (that is, her account) of issues she had had with the
25 claimant.

30 222. Ms Shahzad, in response to the question whether there was anything else she wished to add, made a number of annotations to the interview notes and added two paragraphs at the end of the notes. One of the paragraphs raised an allegation that the claimant had been off on sickness absence from Ross Hall but had continued to work at Monklands Pharmacy. Ms Hodges accepted this was not relevant to the investigation and was not investigated further.

223. There was no dispute regarding the fact Ms Hodges did not speak to the claimant again following the investigation she carried out, to put to him the matters which had been raised about him. In response to the cross examination question that it would have been reasonable to do so, she replied
5 "it could have been".

224. Mr Elesinnla submitted Ms Hodges had failed to explain why she had not upheld the claimant's complaints regarding offensive and discriminatory remarks and Chinese mimicry. We could not accept that submission was entirely correct. The claimant raised a large number of allegations in his grievance and addendum. Ms Hodges, in the grievance outcome letter,
10 grouped the allegations into four broad headings. We noted that in the subsequent grievance appeal the claimant took no issue with the four broad headings and agreed nothing had been omitted. The only point we noted from Ms Hodges' action was that it made it difficult to identify which allegations
15 exactly had been upheld in point 1 which dealt with allegations of racial and religious discrimination.

225. Ms Hodges partially upheld point 1 (allegations of racial and religious discrimination). The allegations relating to discussions about religious fasting and Chinese mimicry were included in this point and specifically referred to
20 by Ms Hodges in the grievance outcome letter. Ms Hodges was satisfied the discussions regarding religious fasting had occurred but went on to say that it was clear they arose in the context of curiosity surrounding the practice of religious fasting, a desire to gain a greater understanding of the practice of different religions and from the perspective of welfare concern. Ms Hodges
25 did not go on to explain her conclusions given all of those factors, although it was clear from the outcome that she did not consider the complaint amounted to discrimination.

226. Ms Hodges also found the Chinese mimicry had occurred but went on to say that all of the witnesses had described it as a joke which was in no way racially
30 motivated. The witnesses all shared in the joke and were laughing. Ms Hodges took from this that it was a joke, it was taken in the spirit of being a joke and that there was no intention to upset or offend. Ms Hodges also made

reference to the claimant perhaps having misjudged the context of the conversation.

227. We stated above that we could not accept it was entirely correct to say there had been a failure to explain why Ms Hodges had not upheld the claimant's complaints. We concluded, having had regard to the above points, that (i) the
5 allegations of racial and religious discrimination, which included the discussions regarding religious fasting and Chinese mimicry, were partially upheld and (ii) Ms Hodges did find those two matters had occurred and (iii) she did give an explanation of the other factors to which she had had regard. We accepted that what Ms Hodges did not do was clearly explain the
10 conclusion she had reached having had regard to those other factors.

228. Mr Elesinnla submitted Ms Hodges failed to explain why she had failed to accurately reflect Ms Akhtar's evidence. Ms Akhtar stated in her interview with Ms Hodges that "*Feeling racially discriminated can be easily felt by some and
15 not be as clear cut for others.*" Ms Hodges, in the outcome letter, stated "*Ashira identifies that perceptions of racial discrimination can be easily felt by some and not by others in a similar circumstances, hence identifying your individual sensitivity to some discussions that take place within the department and in particular the way in which these discussions are
20 developed by Carron.*"

229. We could not accept that Ms Hodges "misrepresented" what Ms Akhtar had said. Ms Akhtar's point was that some people felt racial discrimination more easily than others. Ms Akhtar did not go on to identify individual sensitivity to some discussions, but it was not clear whether Ms Hodges was attributing
25 that to Ms Akhtar or whether that was Ms Hodges' view.

230. Mr Elesinnla invited the Tribunal to draw an inference from the unexplained unreasonable behaviour of Ms Hodges. We, in summary, concluded (above) that Ms Hodges did not ask follow up questions of Ms Akhtar regarding negative comments she said Ms Wright made; Ms Hodges did not give the
30 claimant a chance to respond to the issues raised by others about him and although Ms Hodges partially upheld the allegations of racial and religious

discrimination, she did not clearly explain her decision. We were not prepared, on the basis of these three points, to draw an adverse inference of discrimination because we would not describe Ms Hodges' "failures" as either unreasonable or atypical. We considered that in any investigation process it would be possible to level some criticism about what has been done or the way in which it has been done, but that does not, of itself, mean that what has been done is unreasonable. Ms Hodges did not ask follow up questions of Ms Akhtar, but it was noted the negative comments related to prayers. Ms Hodges did not clearly explain her decision but she included in the outcome letter, details of all the elements she took into account. Ms Hodges did not give the claimant an opportunity to respond to what had been said about him, but if she had done so, the investigation would have moved away from being about the claimant's complaints to focus on performance.

231. Mr Elesinnla next invited the Tribunal to draw an adverse inference of discrimination from Ms Hodges' failure to follow the respondent's Equality and Diversity policy and/or her failure to understand that policy. Mr Elesinnla submitted Ms Hodges had been "clueless" and that her knowledge of the basic concepts of discrimination had been "non-existent", but that was not a submission we could accept. We considered Ms Hodges demonstrated a level of knowledge and understanding expected of a person who was not legally qualified, not HR qualified and who did not deal with issues of discrimination on a regular basis.

232. Ms Hodges was taken to the respondent's policies and questioned about them and confirmed she accepted and understood the definitions of discrimination set out in the policies. Mr Elesinnla tested Ms Hodges on her understanding of discrimination by posing various scenarios and asking Ms Hodges if it was discrimination, and if so, the type of discrimination. Ms Hodges answered those questions but stressed throughout that "context" was important, and context could include intent.

233. The criticism made of Ms Hodges was that having identified that discussions about religious fasting took place and that Ms Wright did voice her opinion about fasting and its impact on ability to perform the job, and in circumstances

where the claimant had complained about this and said he found it “discriminatory, humiliating, demeaning and derogatory”, why did Ms Hodges not find this to be discrimination/harassment. This in turn leads back to the explanation given by Ms Hodges in the grievance outcome letter, which we have said above, was not a clear explanation. Ms Hodges made reference in the grievance outcome letter to information she had gathered from witnesses: for example, discrimination being more easily felt by some and not others; sensitivity to discussions which took place in the department; discussions about religious fasting being from a purely welfare concern perspective; curiosity surrounding the practices of religious fasting; a desire from some members of the team to gain a greater understanding of the practices of different religions and the fact that witnesses had identified that good debate and discussion is useful within the department but they questioned the validity of this when individuals strongly expressed their own personally held opinions. Ms Hodges also referred to there being a view the claimant got very frustrated when other members of the team failed to understand the requirements of observation of his faith, and that he saw this as a personal criticism of the religion rather than a conduit for discussion and learning. This was recognised by some as a clash of personalities between the claimant and Ms Wright rather than any deliberate act or racial or religious discrimination.

234. Ms Hodges, in her witness statement, stated “*based on my investigation I did not think this was a case of racially or religiously motivated discrimination nor did it represent bullying or harassment. However, there were clearly behaviours identified within the investigation that needed to be addressed to improve the working relationship between [Ms Wright] and [the claimant].* Ms Hodges also told the Tribunal that she “partially upheld [the allegation of racial and religious discrimination], not because she felt there had been any actions which had been discriminatory, to the contrary I was comfortable that there were no racially motivated or discriminatory comments aimed at [the claimant], nor was there evidence of discrimination based upon his religion, rather his colleagues had his best interests at heart when considering the impact of observed fasting on his work day. However in cognisance of the comments provided by Asirah, that discrimination on the basis of race can be

5 felt by some and not others, I accepted that [the claimant] perceived that [Ms Wright's] efforts to address issues with his performance as being other than how they were intended, this may be how [the claimant] felt and how he might have reached this conclusion even if the underlying reason for [Ms Wright's] actions was not related to race or religion. Only on this basis, ie [the claimant's] perception of events, I partially upheld this element of the complaint".

10 235. Ms Hodges went on to explain that the claimant and Ms Wright had a poor relationship and Ms Hodges did not believe the claimant respected Ms Wright's authority. Ms Wright had tried to address performance concerns, which Ms Hodges believed were genuine, but her attempts to do so were not well received by the claimant who would divert attention onto race or religion when neither were relevant. Ms Hodges cited an example of this when Ms Wright would get frustrated by not knowing where the claimant was and things had not been done in the department. This turned in to the claimant saying that Ms Wright was unhappy with him going for prayers, when the two things were not related. This in turn affected Ms Wright's ability to raise performance issues with the claimant, because it was perceived by the claimant as being something it was not intended to be.

20 236. Ms Hodges' evidence makes clear that whilst it may have been more obliquely stated in the outcome letter, she did provide an explanation for her decision to partially uphold the allegation. Ms Hodges' decision was challenged by the claimant as being incorrect. We asked ourselves whether (if Ms Hodges' decision was incorrect) an erroneous conclusion amounted to a failure to follow the Equality and Diversity policy. We decided that it did not amount to a failure to follow the policy and we say that because, as per the policy, Ms Hodges treated the matter seriously, carried out an investigation and reached a conclusion in which she partially upheld the complaint.

30 237. There was also criticism of Ms Hodges conclusion regarding the incident of Chinese mimicry. Ms Hodges did provide an explanation for her conclusion which was that although the incident had occurred, it had not been aimed at the claimant, it was not intended to be derogatory and everyone who

witnessed it agreed it was light hearted and they had all laughed. Ms Hodges made reference to the claimant perhaps misjudging the context of the conversation. We make the same observations and conclusions as set out in the paragraph above.

5 238. The Equality and Diversity policy provides that cases of discrimination will be taken seriously and may be considered gross misconduct and subject to summary dismissal. Further, behaviour or action which goes against the essence or letter of the Equality and Diversity policy will normally result in disciplinary action, which may lead to dismissal. There was no dispute
10 regarding the fact that Ms Wright was not subject to disciplinary action. We asked whether this was a failure to follow the policy.

239. Ms Hodges told the Tribunal that she had, acting on the advice of someone from BMI Manage, given consideration to whether an improvement notice should be issued to Ms Wright. Ms Hodges concluded an improvement notice
15 would not be appropriate based upon the findings of her investigation and her conclusion that both parties felt aggrieved as a result of the impact of their deteriorating relationship. Ms Hodges clearly saw the fact of the relationship having broken down as being the cause, or the reason why, the claimant and Ms Wright were having difficulty with each other insofar as Ms Wright felt she
20 was “walking on eggshells” in trying to manage the claimant and things were being misinterpreted by him, whilst the claimant felt Ms Wright was picking on him and that her behaviour was discriminatory. Ms Hodges clearly believed there were behaviours on both sides which had to be addressed and a responsibility on both sides to manage their professional relationship and
25 behaviours, and that if the relationship could be repaired, the issues on both sides would be addressed: that was the thrust and purpose of the recommendations she made at the end of the grievance outcome letter.

240. We concluded, having had regard to the terms of the policy and the above points, that there had not been a failure to follow the policy. We say that
30 principally because the terms of the policy are not prescriptive, and are couched in terms of “may” and “will normally”.

241. We, in conclusion and having regard to all of the above points, were not prepared to draw an adverse inference of discrimination because we were not satisfied there had been a failure to follow the respondent's policies as alleged by the claimant.

5 242. Mr Elesinnla suggested Ms Hodges inferred the claimant was "playing the race card" and that his alleged behaviour/incompetence "justified" discrimination. We were very clear that none of the witnesses suggested the claimant was incompetent and Ms Hodges did not suggest or infer the claimant's behaviour "justified" discrimination; nor did she state or infer the
10 claimant was "playing the race card". We accepted that what Ms Hodges endeavoured to explain was that, as stated above, the breakdown in the relationship between the claimant and Ms Wright lay at the heart of difficulties each was having with the other. Ms Hodges cited, as an example, the fact the claimant used 15 minutes of his lunch break for prayers at some point during
15 the day. Everyone knew the claimant did this; he had been given a quiet private space for prayers and there was no issue with this. Ms Hodges was told the claimant would leave the department without telling Ms Wright, or leave the department uncovered without a pharmacist. Ms Wright would be frustrated with this and raise it with the claimant. The claimant would resent
20 this being raised. The issue would refocus from that to being about prayers. This was not raised as the claimant "playing the race card" or being to blame, but was raised to give an example of the difficulties each faced with the other. The relationship had deteriorated to such an extent that neither could interact with the other.

25 243. We acknowledged Ms Hodges could be challenged for not dealing with the issue of the claimant's allegations and the issue of the relationship separately, but we were satisfied that Ms Hodges found the two were inextricably linked. It was for that reason Ms Hodges proceeded as she did.

30 244. We next considered whether we should draw an inference of discrimination from the way in which Ms Hodges dealt with Ms Akhtar's allegations against Ms Wright. A Tribunal may, in constructing a hypothetical comparator, draw inferences from the surrounding circumstances which may include looking at

the treatment of people whose circumstances are not sufficiently similar to warrant their being treated as an actual comparator, but which are sufficiently relevant for inferences to be drawn from the way they have been treated.

5 245. We firstly noted Ms Wright was not named as an actual comparator, and so we had to consider whether the circumstances were sufficiently relevant for inferences to be drawn. The circumstances were that (i) Ms Akhtar told Ms Hodges that she had been texted by Ms Wright, which she thought was threatening; (ii) she confronted Ms Wright about the text and Ms Wright said she had contacted Ms Akhtar because she was the only person who could
10 throw her under a bus because of her relationship with the claimant; (iii) Ms Wright had publicly said, and directly said to Ms Akhtar, that when she finds out who stabbed her in the back she is going to make their life hell and her husband was going to kill them and (iv) Ms Wright called Ms Akhtar and told her not to come in to work on Monday and to take annual leave, Jen and
15 Gillian were working instead and those were Rosemary's orders.

246. Ms Hodges invited Ms Akhtar to come and speak to her about this. Ms Akhtar told Ms Hodges that she had only brought this to light because she thought Ms Wright was "off" with her because she had found out what she had said at her interview. Ms Hodges commented that no-one could know what had been
20 discussed during Ms Hodges interview with Ms Akhtar. It had been made clear to all parties that confidentiality was of paramount importance and that the content of interviews was not for discussion with others. Ms Hodges also cautioned Ms Akhtar regarding allegations of bullying or witness tampering.

247. Ms Hodges requested and was provided with a copy of the text conversation.
25 She did not agree the texts posed the undertones suggested by Ms Akhtar. She also learned, from Ms Akhtar, that Ms Wright had apologised for sending the text, and the apology had been accepted. Ms Wright had told Ms Akhtar that she had been distressed and felt sick as a result of the investigation. Ms Akhtar told Ms Hodges she was not making a formal complaint against Ms
30 Wright.

248. Ms Hodges did not consider serious threats had been made by Ms Wright but that figures of speech had been used. In the circumstances Ms Hodges consulted BMI Manage and a record of what had occurred was made; thereafter, as no formal complaint was made, the case was closed.

5 249. We noted, on the one hand, the circumstances were similar because it involved Ms Wright, but the similarity ended there because there was no formal complaint against Ms Wright and there were no allegations of discrimination. Ms Hodges posed the question to BMI Manage whether this should be dealt with as a separate investigation but having been provided with the text message and having been told by Ms Akhtar there was no formal
10 complaint against Ms Wright, the matter was closed. We concluded for these reasons that the circumstances were not sufficiently similar for inferences to be drawn from the way they have been treated.

15 250. We set out above that a hypothetical comparator would be a person who did not have the protected characteristics of the claimant. We, in considering how the respondent would have treated the hypothetical comparator (say, a white man with Christian beliefs, who had complained of discrimination by his female supervisor) may draw inferences from the surrounding facts. We were invited to draw adverse inferences from a number of factors, but we decided,
20 for all the reasons set out above, not to draw adverse inferences. We considered that for Ms Hodges, the key factor in all of this was the breakdown of the relationship between the claimant and Ms Wright and her belief that if that was addressed it would resolve the issues that each had with the other. We considered this was evident from the interview notes, the grievance
25 outcome letter and Ms Hodges' evidence. We concluded from this that if faced with a hypothetical comparator, making allegations of discrimination against his female supervisor in circumstances where the relationship had broken down, Ms Hodges would have taken the same action, reached the same conclusions and made the same recommendations. We say this because the
30 breakdown of the relationship and resolving this would have been the same key motivating factor.

251. We next considered whether the claimant had been treated less favourably (by Ms Smith) than a hypothetical comparator would have been in respect of the grievance appeal. We considered that given the remit of the appeal, the fact Ms Smith noted the claimant had not provided her with any new evidence to make her think she needed to alter Ms Hodges' outcome and the fact Ms Smith believed Ms Hodges' process had been thorough, that the outcome of an appeal by a hypothetical comparator would have been the same.
252. We also considered whether Ms Shahzad treated the claimant less favourably than she would have treated a hypothetical comparator when she recorded the drug-related serious incident on Riskman on the 9 June 2020. We were entirely satisfied the claimant was not treated less favourably than a hypothetical comparator would have been in this regard and we say that because the witnesses (including the claimant's own witness Mr Jassal) were clear that a near miss incident has to be recorded on Riskman: there is no discretion. We acknowledged the claimant sought to argue there had not been a serious drug-related incident and that Ms Shahzad had exaggerated the issue. We could not however accept the claimant's position because even if positions are put to one side, there was a miscommunication and/or misunderstanding, the impact of which could have been that a patient did not receive the drugs she required to proceed with her planned chemotherapy: that is a near miss and had to be recorded on Riskman.
253. We decided, for all the reasons set out above, the claimant had not been treated less favourably than a hypothetical comparator would have been in similar circumstances. We decided to dismiss the complaint of direct race discrimination and direct religious discrimination.
254. We should state that if we had found the claimant had been treated less favourably than a hypothetical comparator would have been, we would have to have considered whether this was because of the protected characteristic of his race and/or religion. The cases of **Nagarajan** and **Khan** have made clear that in considering this the focus must be on the "reason why", in factual terms, the employer acted as it did. The question to be asked is "what criterion

operated in the respondent's mind" in terms of conscious and subconscious motive. It is the mental processes of Ms Hodges which are in play.

255. We would, had we been addressing this question, have had to consider all of the above points, and we do not repeat them here. The Tribunal, in answering the question what criterion operated in the mind of the employer, concluded that it was the breakdown in the relationship and the fact the claimant and Ms Wright could no longer interact with each other. We say that because the breakdown in the relationship was the background and the context in which these events occurred and it was the prism through which these events were viewed.

Harassment

256. We had regard to the terms of section 26 Equality Act, which provides that a person harasses another if s/he engages in unwanted conduct related to a protected characteristic, and the conduct has the purpose or effect of violating that other's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. There are three essential elements of a harassment claim, and these are (a) unwanted conduct; (b) that has the proscribed purpose or effect and (c) which relates to a relevant protected characteristic.

257. The complaint of harassment was based on the acts set out above at paragraphs 6.1 to 6.9. The first question for the Tribunal to determine is whether those acts took place. We decided, above, that the following acts did take place:

- 6.1(ii) Ms Hodges failed to interview Mr Oniga, Ms Auld and Ms Graham; did not explain why they had not been interviewed and stated all witnesses had been interviewed;
- 6.1 (iv) Ms Hodges failed to ask Ms Wright and Ms Shahzad why the alleged performance concerns in relation to the claimant had not been raised prior to the grievance;

- 6.1 (v) Ms Hodges failed to uphold the complaint in relation to Chinese accent mimicry;
- 6.1 (vi) Ms Hodges failed to adequately explain which aspect of the complaint she partially upheld and why;
- 5 • 6.1((ix) Ms Hodges failed to take any disciplinary action against Ms Wright;
- 6.2(ii) Ms Smith failed to interview Mr Oniga and Ms McGregor;
- 6.2 (viii) Ms Smith failed to clarify which parts of Ms Shahzad's statement had been relied upon by Ms Hodges;
- 10 • 6.2 (x) Ms Smith did not explain why she had not interviewed these witnesses;
- 6.2 (xii) Ms Smith confirmed the decision of Ms Hodges despite all of the references made by the claimant to breaches of the respondent's policies and Ms Akhtar supporting his contentions;
- 15 • 6.2 (xiii) Ms Smith failed to explain why the mimicry of a Chinese person did not amount to discrimination or harassment;
- 6.3 Ms Shahzad raised a serious drug-related clinical incident against the claimant on the 9 June, which the claimant believed was retaliation for him raising the grievance against Ms Wright and
- 20 • 6.9 the claimant resigned.

258. The next question for the Tribunal to determine is whether the above acts, or failures to act, amount to unwanted conduct. We considered each of the acts or failures to act, with the exception of the failure to take any disciplinary action against Ms Wright, amounted to unwanted conduct. We, in considering the fact Ms Hodges did not take any disciplinary action against Ms Wright, had regard to the fact the claimant did not ever state to Ms Hodges that he wanted Ms Wright to be disciplined. The claimant wanted his grievance to be investigated and upheld. We acknowledged that if the respondent had upheld

the grievance and found Ms Wright had discriminated and/or harassed the claimant, then the claimant may well have wanted Ms Wright to be disciplined, but those were not the circumstances of this case. We concluded that in the circumstances of this case, it could not be said that Ms Hodges' failure to take disciplinary action against Ms Wright was unwanted conduct.

259. We also concluded the claimant's resignation was not unwanted conduct. In the case of *Timothy James Consulting Ltd v Wilton 2015 ICR 764* the EAT held that, as a matter of law, a constructive dismissal does not fall within the meaning of harassment in the Equality Act.

260. We next asked whether the unwanted conduct had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. We, in considering the "purpose" of Ms Hodges' and Ms Smith's actions must consider their intentions, and this may usually involve the drawing of adverse inferences. We have set out above our conclusions on the drawing of adverse inferences, and explained why we were not prepared to draw any adverse inferences.

261. We were satisfied the purpose of Ms Hodges in acting as she did was to carry out a thorough investigation of the grievance and to understand what was happening in the pharmacy department and why. Further, the purpose of Ms Smith, in acting as she did, was to review the appeal, interview additional witnesses, and ensure Ms Hodges' investigation had been thorough and in line with the respondent's policies.

262. We next considered whether the unwanted conduct had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. In considering this, each of the following matters must be taken into account:

- the perception of the claimant;
- the other circumstances of the case and
- whether it is reasonable for the conduct to have that effect.

263. We, in considering the perception of the claimant, accepted that overall he saw the outcome of the grievance investigation as approval for Ms Wright's actions, with him being blamed for what had happened. There was nothing beyond this to explain why it was said each of the above acts of unwanted conduct were, in themselves, said to create an offensive environment, but we were satisfied it was appropriate to look at the cumulative effect as perceived by the claimant.
264. We next considered whether it was reasonable for the conduct to have that effect. We must consider whether it was reasonable for the conduct to have the effect on the claimant, and this is a matter of factual assessment for the Tribunal having regard to all the relevant circumstances, including the context of the conduct in question.
265. We did not consider it reasonable for the failure to interview Mr Oniga, Ms Auld and Ms Graham to have the effect of creating an offensive environment. Ms Hodges interviewed all of the key witnesses and her failure to interview Ms Auld and Ms Graham was offset by the fact (a) she put the allegation to Ms Wright, and (b) they were interviewed by Ms Smith at the appeal stage. We noted Ms Auld and Ms Graham, in any event, had very little to say in relation to the allegation made by the claimant regarding Ms Wright. Furthermore, the allegations made by the claimant were not against Mr Oniga, Ms Auld and Ms Graham and they were not material witnesses. In those circumstances we could not understand the way in which a failure to interview those witnesses could be said to create an offensive environment for the claimant.
266. We did not consider it reasonable for the failure to ask Ms Wright and Ms Shahzad why the alleged performance concerns had not been raised prior to the grievance, to have the effect of creating an offensive environment for the claimant. We, in reaching this conclusion, had regard to the surrounding circumstances which included the fact some concerns had been raised with the claimant (for example, leaving the department without a pharmacist; the reluctance to undertake stock checks and the fact additional training was provided). There was also evidence that Ms Shahzad in previous appraisals

had identified areas for improvement which included some of the issues raised by those interviewed. We had regard to the fact not all performance concerns will not be dealt with formally through the performance management process.

5 267. We did not consider it reasonable for the failure to uphold the Chinese mimicry incident to have the effect of creating an offensive environment for the claimant. We do not know any details about this incident beyond the fact Ms Wright was involved in a situation of Chinese accent mimicry. The situation/joke was not aimed at the claimant. A number of people (including
10 Ms Shahzad and Ms Akhtar) were present when Ms Wright did this: all described it as a light-hearted joke and all were laughing at it. We considered that in the circumstances the claimant was being over-sensitive.

15 268. We next considered whether the failure to explain which aspect of the grievance Ms Hodges partially upheld had the effect of creating an offensive environment. We acknowledged this created a frustration for the claimant and that he was critical of Ms Hodges for the way in which she had approached this, but we struggled to understand how this was said to have created an offensive environment. We say that because we believed it was not the fact Ms Hodges failed to explain which aspect of the grievance she partially upheld
20 which upset the claimant, but the fact she did not uphold the complaint. It was this which angered, upset and frustrated the claimant, and it was this which he could not accept.

25 269. We next considered whether the failure to take any disciplinary action against Ms Wright had the effect of creating an offensive environment for the claimant. Ms Hodges partially upheld the allegations of racial and religious discrimination because she accepted the claimant perceived Ms Wright's efforts to address issues with his performance as being something other than how they were intended. In those circumstances Ms Hodges decided not to take disciplinary action against Ms Wright. We considered that given the
30 conclusions of Ms Hodges (and the fact the claimant had not voiced any desire for Ms Wright to be disciplined) it was not reasonable for that to have the effect of creating an offensive environment.

270. We went on to consider whether the unwanted conduct of Ms Smith created an offensive environment. Ms Smith failed to interview Mr Oniga and Ms McGregor; failed to clarify which parts of Ms Shahzad's statement had been relied upon by Ms Hodges; failed to explain why she had not interviewed these witnesses; confirmed the decision of Ms Hodges despite all of the references made by the claimant to breaches of the respondent's policies and Ms Akhtar supporting his contentions and failed to explain why the mimicry of a Chinese person did not amount to discrimination or harassment.
271. We do not repeat what is set out above regarding the perception of the claimant.
272. Ms Smith failed to interview certain witnesses and did not explain to the claimant why she had not interviewed them. We rely on our comments above, in respect of Ms Hodges, regarding this matter.
273. We did not consider it reasonable for the failure to clarify which parts of Ms Shahzad's statement Ms Hodges relied upon to have the effect of creating an offensive environment. We say that because Ms Smith had already clarified for the claimant all of the questions and issues he raised regarding Ms Shahzad's statement and she had assured him that with regards to the appeal hearing, the additions made by Ms Shahzad would not be taken into account. The request for Ms Smith to clarify which parts of the statement Ms Hodges relied upon was very wide: if the claimant wanted to know whether Ms Hodges had taken the additional paragraphs into account, he could and should have asked that question.
274. We accepted the upholding by Ms Smith of Ms Hodges' decision did have the effect of creating an offensive environment for the claimant. We say that because the claimant believed he had been discriminated against, but the conclusion of Ms Hodges meant he would have to return to a department and work with Ms Wright again and face the colleagues who had raised issues regarding his performance.
275. We did not consider it reasonable for the failure of Ms Smith to explain why the mimicry of a Chinese accent did not amount to discrimination or

harassment to have the effect of creating an offensive environment. We say that because Ms Hodges explained why she had not upheld this allegation. The issue had already been addressed: the claimant knew why the allegation had not been upheld.

5 276. We next considered whether Ms Shahzad raising a serious drug-related
incident against the claimant on the 9 June, which he considered to be
retaliation for raising a grievance against Ms Wright, had the effect of creating
an offensive environment. We acknowledged the claimant was of the opinion
he had done nothing wrong and was being blamed for someone else's
10 mistake. We have set out above the fact that even if the claimant did not do
anything "wrong", there was undeniably a misunderstanding and/or a
miscommunication which could have had an impact on the patient. Those
circumstances amounted to a near miss and had to be recorded on the
Riskman system. We concluded therefore, that whilst the claimant perceived
15 this as unwanted conduct which had the effect of creating an offensive
environment, this was not reasonable. We say that because it was not for Ms
Shahzad to decide whether or not to note the incident on Riskman: she had
a duty to do so.

20 277. We lastly considered whether the claimant's resignation had the effect of
creating an offensive environment. We accepted a resignation could have the
effect insofar as it was action the claimant did not wish to take, but felt he had
to take.

25 278. We next turned to consider whether the conduct in question was related to
the protected characteristic of race and/or religion. We noted that in none of
the instances of unwanted conduct, was direct reference made to the
claimant's protected characteristic/s and neither was the claimant subjected
to overtly racist conduct. We considered, therefore, it was appropriate to
analyse the conduct, together with the context, to establish whether there was
any negative association between the conduct and the claimant's protected
30 characteristics.

279. We first asked whether the failure by Ms Hodges and Ms Smith to interview certain witnesses was related to the protected characteristic of race and/or religion. We noted Ms Hodges and Ms Smith both gave an explanation in their evidence, which we accepted, why certain witnesses had not been interviewed. Mr Oniga and one other witness had left the employment of the respondent and the other witness had commenced employment after these events were said to have taken place. We further noted the claimant did not suggest he knew the whereabouts of Mr Oniga, or how to contact him; and did not, having learned of the reasons for Mr Oniga not being interviewed, suggest they were false.
280. We acknowledged Ms Hodges could not give an explanation why Ms Auld and Ms Graham had not been interviewed. We, in considering whether the failure to interview Ms Auld and Ms Graham was related to the claimant's race or religion, took into account the fact Ms Hodges had interviewed other witnesses; she addressed the issue of employees being asked to spy on the claimant with Ms Wright and Ms Smith interviewed Ms Auld and Ms Graham as part of the grievance appeal process.
281. The claimant did not explain the basis upon which it was said the failure by Ms Hodges and Ms Smith to interview certain witnesses was related to the protected characteristic of race and/or religion. Ms Hodges and Ms Smith, in evidence, gave an explanation for the failure, which was reasonable and in no way connected or influenced by race and/or religion.
282. The next instance of unwanted conduct was Ms Hodges' failure to ask Ms Wright and Ms Shahzad why the alleged performance concerns relating to the claimant had not been raised prior to the grievance in accordance with the respondent's performance management process. We acknowledged Ms Hodges did not ask this specific question of Ms Wright or Ms Shahzad, but this was in the context of Ms Hodges being aware issues had been raised with the claimant prior to the grievance. We considered that in those circumstances, Ms Hodges' failure was explained by the fact she already knew issues had been raised with the claimant prior to the grievance and

accordingly the conduct was not related to the protected characteristics of race or religion.

283. Ms Hodges did not uphold the complaint regarding Chinese mimicry because she concluded it was nothing other than a joke which was in keeping with the general banter and atmosphere in the department. Ms Hodges, in reaching that conclusion, had regard to what she was told by the witnesses she interviewed and who had been present: all of the witnesses viewed the incident as a light hearted joke, and everyone laughed. There was no malice behind what was done, and it had not been directed at the claimant.
284. We asked whether the failure to uphold the complaint was related to the protected characteristic of race and/or religion. We answered that question in the negative. Ms Hodges' failure to uphold the complaint was related to the fact she considered the claimant was being overly-sensitive and/or may have misconstrued what happened. The failure to uphold the complaint was not related to the protected characteristics or race and/or religion. There was no negative association between what happened and the protected characteristics.
285. The next instance of unwanted conduct was Ms Hodges' failure to adequately explain which aspect of the grievance she partially upheld. We acknowledged that contrary to our finding, Ms Hodges believed she had explained which aspects of the complaint she partially upheld and why. The difficulty with Ms Hodges' grievance outcome letter was that it was difficult to understand which aspects of the complaint she had partially upheld and why, although we acknowledge Ms Hodges did expand on this in her evidence.
286. The submissions made regarding the complaint of harassment did not address each alleged act/failure to act at points 6.1 – 6.9 above. The submissions were addressed more generally at the claimant's position that Ms Wright had harassed the claimant; the claimant, when he complained of these matters, was blamed for them and Ms Wright was protected by Ms Hodges. The difficulty with this submission was that when addressing each instance of unwanted conduct, we did not know, in relation to each particular

instance, why the claimant believed the conduct was related to race and/or religion. We accordingly concluded that Ms Hodges did explain which aspect of the grievance she partially upheld, but did not do so clearly; and, any failure to explain clearly was not related to the protected characteristics of race and/or religion, but to the way in which Ms Hodges set out her conclusions.

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287. Ms Hodges failed to take disciplinary action against Ms Wright. We concluded this was not related to the protected characteristics of race and/or religion but to the fact Ms Hodges concluded the breakdown in the relationship of the claimant and Ms Wright was at the heart of the difficulties which had arisen, and there were issues both Ms Wright and the claimant required to address in order to repair their relationship.

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288. Ms Smith failed to clarify which parts of Ms Shahzad's statement Ms Hodges had relied on. We, having had regard to all of the points set out above where we detailed the questions raised by the claimant regarding Ms Shahzad's statement, and the answers provided by Ms Smith, concluded the failure related to an oversight by Ms Smith and not to the protected characteristics of race and/or religion.

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289. Ms Smith did confirm Ms Hodges' decision notwithstanding all of the points raised by the claimant regarding breaches of the respondent's diversity policies. Ms Smith stated in her witness statement at paragraph 3, that when she deals with appeals, her process is to assess whether the investigation has been proper and thorough and to review any new evidence that has come to light since the initial decision was made. Ms Smith addressed each of Ms Hodges' conclusions and (at paragraph 32) noted, with regard to the allegation of racial and religious discrimination, that the claimant had not provided her with any new evidence which made her think she had to alter Ms Hodges's outcome. Ms Smith carefully assessed whether Ms Akhtar's evidence had been overlooked by Ms Hodges, but concluded that had not been the case.

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290. We asked whether the conduct of Ms Smith was related to the protected characteristics of race and/or religion. We concluded it was not. We say that

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because Ms Smith reached her decision to uphold Ms Hodges' decision because she was satisfied Ms Hodges' investigation had been thorough and in line with the respondent's policies, and fair. Ms Smith's decision was related to, and guided by, this.

5 291. Ms Smith did not explain why Chinese mimicry in the workplace did not amount to discrimination or harassment. We were satisfied this conduct did not relate to the protected characteristics of race and/or religion in circumstances where Ms Hodges had explained why she did not uphold this complaint (see above) and Ms Smith adopted this.

10 292. We next considered whether Ms Shahzad's conduct in raising a serious drug-related incident against the claimant on the 9 June (which the claimant alleged was retaliation for him raising a grievance against Ms Wright) was related to the protected characteristics of race and/or religion. We were satisfied the conduct was not related to the protected characteristics of race and/or religion
15 in circumstances where Ms Shahzad was duty bound to record the incident on the Riskman system.

293. We lastly considered whether the claimant's resignation was related to the protected characteristic of race and/or religion. The claimant resigned because he believed the respondent had acted in a discriminatory manner by
20 not upholding his grievance, by rejecting his appeal and by not addressing further concerns regarding Ms Shahzad upon his return to work. We acknowledged that a resignation in response to an employer's discriminatory conduct could give grounds to bring a claim of harassment (***Driscoll v V & P Global and Mr F Varela UKEAT/0009/2021***). We have determined the complaints of discrimination brought by the claimant and concluded, for the
25 reasons set out above (and below) that the claims have been unsuccessful. We therefore concluded the claimant's resignation was not in response to the employer's discriminatory conduct. We further concluded the unwanted conduct was not related to the protected characteristic of race and/or religion.

30 294. We, in conclusion, decided there was unwanted conduct, but, for the reasons set out above, the unwanted conduct (with the exception of Ms Smith

upholding Ms Hodges' decision regarding the grievance) did not have the purpose or effect of creating an offensive environment. We further decided all of the unwanted conduct was not related to the claimant's race or religion. We accordingly decided to dismiss this part of the claim.

5 **Victimisation**

295. We referred to section 27 Equality Act which provides a person victimises another if he subjects the other to a detriment because the other does a protected act.

296. The claimant asserted he had done a protected act when he made complaints of race and religion discrimination:

- the claimant's 4 March 2020 and 11 March 2020 grievances;
- the claimant's appeal documents dated 27 April and 26 May 2020;
- the claimant's complaints and grievances on 10 June, 19 June and 6 July 2020;
- the claimant's resignation on 13 July 2020 (this alleged protected act occurred after the alleged detriments, with the exception of the alleged detriment of his resignation).

297. The first issue for the Tribunal to determine is whether the above complaints amounted to protected acts pursuant to section 27 of the Equality Act. Section 27(2) provides that each of the following is a protected act:

- (a) bringing proceedings under this Act;
- (b) giving evidence or information in connection with proceedings under this Act;
- (c) doing any other thing for the purposes of or in connection with this Act;
- (d) making an allegation (whether or not express) that the alleged victimiser or another person has contravened this Act.

298. The claimant's grievance dated 4 March and the addendum grievance letter of the 11 March both raised issues of alleged discrimination, harassment and bullying. The appeal against the grievance outcome dated 27 April and the addendum dated 26 May also raised issues of alleged discrimination, harassment, bullying and victimisation. The claimant's letter of the 10 June referred to being victimised for raising the formal grievance. The email of the 19 June, attached the claimant's grievance concerning alleged victimisation and the email of the 6 July to Ms Dunlop concerned, primarily, the alleged victimisation. We were satisfied that each of these documents was a protected act in terms of section 27(2) © or (d) of the Equality Act.
299. The claimant, in his letter of resignation, asserted he had no option but to resign because of "religion, race and sex discrimination, bullying and harassment for many years and nothing being done by Syma or you". We were satisfied this was a protected act in terms of section 27(2)© and (d) Equality Act. We have noted above that the only alleged detriment which occurred after this protected act was the claimant's resignation.
300. The next issue for the Tribunal is whether any of the acts set out at 6.1 – 6.9 above amount to a detriment. We had regard to the case of ***Shamoon v Royal Ulster Constabulary*** (above) where it was held that to qualify as a detriment, the Court or Tribunal must find that by reason of the act/s complained of, a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. All of the circumstances must be taken into account. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to detriment.
301. We also had regard to the case of ***Chief Constable of West Yorkshire Police v Khan*** (above) where it was held that the situation must be examined from the claimant's point of view. Also in ***Derbyshire and others v St Helens Metropolitan Borough Council*** where the House of Lords stated the test is not satisfied merely by the claimant showing that he has suffered mental distress: it would have to be objectively reasonable in all the circumstances.

302. The test of detriment has both subjective and objective elements, and the situation must be looked at from the claimant's point of view but his perception must be reasonable in the circumstances. The EHRC Employment Code gives the following guidance regarding the meaning of the term "detriment":
- 5 "*Generally, a detriment is anything which the individual concerned might reasonably consider changes their position for the worse or puts them at a disadvantage ...*"
303. We concluded (above) that of the points set out in 6.1 (i) to (x), only points (ii), (iv), (v), (vi) and (ix) occurred, that is, Ms Hodges did fail to interview Mr Oniga, Ms Auld and Ms Graham; did advise the claimant all witnesses had been
- 10 interviewed; failed to ask Ms Wright and Ms Shahzad why alleged performance concerns in relation to the claimant had not been raised prior to the grievance; failed to uphold the complaint in relation to Chinese mimicry; failed to adequately explain which aspect of the grievance she partially upheld
- 15 and why and failed to take any, or any reasonable, disciplinary action against Ms Wright.
304. We asked whether these acts, or failures to act, amounted to a detriment. The claimant named Mr Oniga as someone to whom, it was alleged, Ms Wright had made a discriminatory or unfavourable comment. We accepted the failure
- 20 to interview Mr Oniga may have disadvantaged the claimant insofar as the opportunity to ask Mr Oniga whether the alleged comment had been made to him by Ms Wright, was lost.
305. Ms Hodges also failed to interview Ms Auld and Ms Graham, and whilst this meant Ms Hodges did not obtain information from those witnesses regarding
- 25 a particular allegation made by the claimant, this had to be balanced against the fact Ms Hodges did put the allegation to Ms Wright. Further, the failure to interview Ms Auld and Ms Graham was remedied on appeal and they had very little to add. In the circumstances, and balancing all of these factors, we concluded the failure to interview Ms Auld and Ms Graham was not a
- 30 detriment to the claimant.

306. We did not consider that Ms Hodges' statement that all witnesses had been interviewed amounted to a detriment. We acknowledged it is a statement open to interpretation: on the one hand, it could mean that all witnesses whom Ms Hodges decided to speak to as part of her investigation had been interviewed, on the other hand, it could be an erroneous statement that all witnesses (whom the claimant had named) had been interviewed. We preferred the former interpretation because it is a correct statement of what happened and Ms Hodges had no reason to make a statement which did not reflect what she had done, particularly when notes had been taken of the interviews and those notes would be produced to the claimant.
307. Ms Hodges failed to ask Ms Wright and Ms Shahzad why the alleged performance concerns in relation to the claimant had not been raised prior to the claimant's grievance in accordance with the respondent's performance management process. We did not consider this was a detriment to the claimant and we say that for two reasons. Firstly, because even if concerns had not been raised in accordance with the formal performance management process, it did not mean concerns did not exist, and it did not prevent Ms Wright and Ms Shahzad (and others) voicing those concerns. Secondly, whilst concerns may not have been raised formally in the performance management process, there was no dispute regarding the fact concerns had been raised with the claimant: for example, he had been spoken to regarding stock takes; he had been asked to undertake additional training on the software related to stock takes; he had been spoken to regarding the mobile phone policy and Ms Wright had made Ms Dunlop aware of difficulties she was having with the claimant.
308. Ms Hodges failed to uphold the complaint regarding Chinese accent mimicry. We acknowledged this was a detriment because the claimant believed the behaviour of Ms Wright amounted to discrimination and/or harassment.
309. Ms Hodges failed to adequately explain which part of the claimant's complaint she partially upheld and why. We, in considering whether this amounted to a detriment, had to balance several factors. We acknowledged that on the face of it, not being able to understand which part of a complaint had been upheld

and why would be a disadvantage, particularly when trying to formulate grounds of appeal. However, we balanced this with the fact the claimant submitted an extensive appeal and addendum and did not appear to be in any way hampered by the failure of Ms Hodges. Further, regardless of any explanation which may have been provided by Ms Hodges, the claimant believed she had preferred Ms Wright's version of events, had "whitewashed" his serious complaints and had reached a decision which not only was wrong but was itself discriminatory. We concluded, having balanced the above factors, that Ms Hodges' failure to explain which part of the complaint had been partially upheld and why, was not of any disadvantage to the claimant.

310. Ms Hodges failed to take any, or any reasonable disciplinary action against Ms Wright. We did not consider this amounted to a detriment given the outcome of the grievance investigation. Ms Hodges considered the outcome of the investigation did not merit disciplinary action and she decided the way in which to deal with the breakdown of the relationship was to make a number of recommendations.

311. We decided, above, that of the points set out at 6.2 (i) to (xiii), only points (ii), (viii), (x), (xii) and (xiii) occurred, that is, Ms Smith failed to interview Mr Oniga and other witnesses named by the claimant; failed to clarify which parts of Ms Shahzad's statement Ms Hodges had relied upon; failed to explain why those witnesses had not been interviewed; confirmed Ms Hodges' decision despite all of the references by the claimant to breaches of the respondent's equality and diversity policies and failed to explain why the mimicry of a Chinese person in the workplace did not amount to racial discrimination or harassment.

312. We concluded, for the reasons set out above and not repeated, that failure to interview Mr Oniga amounted to a detriment. Ms Smith also failed to interview two other witnesses named by the claimant because one had left the employment of the respondent and one had joined after these events. The claimant did not suggest what information the witnesses may have been able to provide, and on that basis we concluded the failure to interview them was not a detriment to the claimant.

313. We also concluded that Ms Smith's failure to explain to the claimant why she had not interviewed them was not a detriment in circumstances where there was no evidence to suggest they would have had anything to add to the information already gathered. This was particularly so in circumstances where they had not been named in respect of the any of the allegations and had not previously been named by the claimant.
314. Ms Smith did not clarify which parts of Ms Shahzad's statement Ms Hodges had relied on. We considered this was a detriment in circumstances where the claimant wished to know whether Ms Hodges had taken into account, or placed any weight on, the additional information provided by Ms Shahzad at the end of her statement.
315. Ms Smith upheld the decision of Ms Hodges despite all the references made by the claimant regarding breaches of the respondent's equality and diversity policies. We acknowledged this was a detriment in circumstances where the claimant believed he had been subjected to discrimination and harassment and believed his concerns had been "whitewashed" and that he had been blamed for what had happened.
316. We found that Ms Smith did not explain why the mimicry of a Chinese person did not amount to racial discrimination or harassment. Ms Smith did however, in the grievance outcome letter, explain why she had not upheld the appeal. Ms Smith stated, in relation to upholding the decision of Ms Hodges regarding allegation 1 (racial and religious discrimination) that "this is because you did not provide further new evidence at the appeal meeting relating to this point". Ms Smith went on to say that she considered partially upholding this part of the grievance was reasonable because it recognised that Ms Wright's behaviour may have been inappropriate and had caused offence to the claimant, but she had not discriminated against him. We concluded that whilst point (x) technically occurred, it did not amount to a detriment because Ms Smith did provide an explanation why she had not upheld the appeal.
317. We concluded in relation to 6.3 (Ms Shahzad raising a serious drug-related clinical incident against the claimant on the 9 June) that this did occur. The

5 claimant clearly perceived this and it being recorded on Riskman as a disadvantage because he felt he had done nothing wrong and that he was being blamed for someone else's error. The fact however remained that whatever else had happened in relation to the Albyn issue, there had been a misunderstanding and/or miscommunication in relation to the drug required by the patient prior to chemotherapy. There was a "near miss" and this had to (our emphasis) be recorded on Riskman. There was no evidence to suggest recording an issue on Riskman was viewed in any way as a disciplinary or punitive matter. The consistent evidence was that recording issues on Riskman was for learning purposes to try to ensure it did not happen again.

10 318. We concluded that whilst the claimant may have felt this was a disadvantage, that was not objectively reasonable in the circumstances. We say that having had regard to the above points and having had regard to the respondent's evidence that entry of such matters on Riskman was not for the purposes of blame or fault.

15 319. There was no dispute regarding the fact the claimant resigned by letter dated 13 July 2020. We acknowledged this was a detriment in circumstances where he had previously had no desire to leave his job.

20 320. We, in conclusion, found the following acts amounted to detriments: Ms Hodges failure to interview Mr Oniga; Ms Hodges failure to uphold the complaint of Chinese accent mimicry; Ms Smith's failure to interview Mr Oniga; Ms Smith's failure to clarify which parts of Ms Shahzad's statement Ms Hodges relied on; Ms Smith's decision to uphold Ms Hodges' decision and the claimant's resignation. We must now ask whether the claimant was subjected to any of these detriments because he had done a protected act/s.

25 321. The Tribunal must identify the "*real reason, the core reason, the causa causans, the motive for the treatment complained of*". (**Chief Constable of West Yorkshire v Khan** above). The House of Lords in **Nagarajan v London Regional Transport 1999 ICR 877** held that it was not necessary for a Tribunal to distinguish between "conscious" and "subconscious" motivation when determining whether a complainant had been victimised. The

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victimisation may be by reason of an earlier protected act if the discriminator subconsciously permitted that act to determine or influence his or her treatment of the complainant.

5 322. We asked ourselves what was the reason why Ms Hodges and Ms Smith did not interview Mr Oniga. We accepted Ms Hodges' evidence when she told the Tribunal that she had not interviewed Mr Oniga because he had left the employment of the respondent. Ms Hodges explained Ms Oniga had only been at Ross Hall for a very short period of time, he had left and she believed he was out of the country. This evidence was not challenged (the claimant did not, for example, suggest he knew how to contact Mr Oniga) and was supported in part by the fact other witnesses did not appear to know of Mr Oniga. We were satisfied this explained the real reason why Ms Hodges and Ms Smith did not interview Mr Oniga.

15 323. Ms Hodges failed to uphold the complaint of Chinese mimicry. The reason why Ms Hodges did not uphold this complaint was because she accepted the evidence of the witnesses she interviewed, who told her it had been a joke and they had all laughed at it. Ms Hodges considered there had been no malice behind it, it had not been aimed at the claimant, it had not been intended to be derogatory and that perhaps the claimant had misconstrued what had occurred. Ms Hodges did not uphold the complaint because she concluded it was not discriminatory and not harassment and perhaps the claimant had been over-sensitive about it.

25 324. Ms Smith failed to clarify which parts of Ms Shahzad's statement had been relied upon by Ms Smith. Ms Smith could not be cross examined regarding the reason why she had failed to do so. There was, however, contemporaneous documentary evidence to which the Tribunal had regard, and which demonstrated that prior to the appeal, Ms Smith clarified and answered the many questions and issues raised by the claimant regarding the statements generally and Ms Shahzad's in particular (see above). We inferred from the documentation that having answered the claimant's questions, and having assured him the additional points raised by Ms Shahzad at the end of her statement would not be relied upon at the appeal

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hearing, it was an oversight by Ms Smith to fail to clarify what Ms Hodges had relied upon.

5 325. Ms Smith upheld Ms Hodges' decision regarding the grievance despite all of the claimant's references to breaches of the equality and diversity policies. We asked ourselves what was the real reason, the core reason, the motive for Ms Smith upholding Ms Hodges' decision. Ms Smith, in her witness statement, stated "*I dismissed his appeal because I felt that Linda's process had been thorough and I agreed with the conclusions that she had reached...*" We accepted this evidence explained the reason why Ms Smith upheld Ms
10 Hodges' decision.

326. The claimant resigned. We concluded this detriment did not occur because the claimant had done a protected act. The resignation occurred because the respondent did not uphold the grievance, or the appeal and did not address further concerns in the way in which the claimant wanted them to.

15 327. We next stood back and considered whether Ms Hodges and Ms Smith had, in their acts and failures to act, subconsciously permitted the fact the claimant had raised a grievance and an appeal making allegations of discrimination because of the protected characteristics of race and/or religion to influence their decision-making. We were satisfied they were not influenced by this and
20 we say that because we formed the very clear impression from Ms Hodges' evidence and the investigation and grievance outcome, that the breakdown in the relationship between the claimant and Ms Wright was the crucial factor. It was clear Ms Hodges formed the opinion that it was the breakdown of the relationship which was at the heart of what had happened between the
25 claimant and Ms Wright: it was the catalyst for what had happened and in many instances it explained what had happened and why. It was the issue which Ms Hodges sought to address, because she believed that if the relationship was repaired, the issues which had arisen would be addressed and would not recur.

30 328. Ms Smith echoed that approach when, in her witness statement, she stated "*I genuinely hoped that mediation could resolve Carron and Iftikhar's issues and*

I was disappointed that Ross Hall did not have the opportunity to put this in place before Iftikhar had resigned”.

329. We decided, for all of the reasons set out above, to dismiss this complaint.

Constructive dismissal

5 330. The claimant sought to argue that his resignation had been caused by the series of acts which (it was alleged) occurred at 6.1 – 6.8 above. The claimant described that having endured discrimination, bullying and harassment by Ms Wright for many years, when he did complain about it, the way in which his grievances had been dealt with had been discriminatory, and he had been
10 subjected to victimisation for having raised a grievance.

331. The claimant must establish that:-

- there was a fundamental breach of contract on the part of the employer;
- the employer’s breach caused the employee to resign and
- 15 • the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

332. The claimant relied on a breach of the implied term of trust and confidence and contended he had been subjected to contraventions of the Equality Act, and that the respondent had failed to deal properly with his grievances. In the
20 case of ***Courtaulds Northern Textiles Ltd v Andrew 1979 IRLR 84*** the EAT held that it was a fundamental breach of contract for the employer, without reasonable and proper cause, to conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties. In ***Woods v WM Car Services (Peterborough) Ltd***
25 ***1981 ICR 666*** the EAT stated it was the Tribunal’s function to look at the employer’s conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it. In the case of ***Malik v Bank of Credit and Commerce International SA 1997 ICR 606*** it was emphasised that there is

a breach only where there is no reasonable and proper cause for the employer's conduct, and then only if the conduct is calculated and likely to destroy or seriously damage the relationship of trust and confidence.

333. The claimant set out, at points 6.1 – 6.8 on the List of Issues, a list of acts or failures said to have occurred during the investigation of his grievance, the grievance appeal and subsequently. We have set out above our findings in relation to whether the alleged acts/failures occurred. We found that:-

- Ms Hodges failed to interview Mr Oniga, Ms Auld and Ms Graham and failed to explain why they had not been interviewed;
- Ms Hodges failed to ask Ms Wright and Ms Shahzad why alleged performance issues in respect of the claimant had not been raised prior to the grievance;
- Ms Hodges failed to uphold the complaint regarding Chinese accent mimicry;
- Ms Hodges failed to explain which part of the complaint she partially upheld and why;
- Ms Hodges failed to take any or any reasonable disciplinary action against Ms Wright;
- Ms Smith failed to interview Mr Oniga, Ms McGregor and one other witness and failed to explain why she had not interviewed these witnesses;
- Ms Smith failed to clarify which parts of Ms Shahzad's statement Ms Hodges had relied on;
- Ms Smith confirmed Ms Hodges' decision despite the claimant's many references to breaches of the equality and diversity policies;
- Ms Smith failed to explain why the mimicry of a Chinese person in the workplace did not amount to racial discrimination or harassment and
- Ms Shahzad raised a serious drug-related clinical incident against the claimant which the claimant alleged was retaliation for him raising a grievance against Ms Wright.

334. We asked whether those acts, or failures, amounted to conduct which, without reasonable or proper cause, was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the claimant and the respondent. We have dealt above with each of these issues and we do not repeat those points. We concluded, above, that Ms Hodges carried out a reasonable investigation of the claimant's grievance insofar as she interviewed a number of people, took a record of the interviews and put to the witnesses the issues raised by the claimant in his grievance and addendum. The fact Ms Hodges did not interview Mr Oniga, Ms Auld and Ms Graham does not detract from that conclusion in circumstances where (a) there was a reasonable explanation why Mr Oniga was not interviewed); (b) Ms Wright was questioned about the allegation of asking others to spy on the claimant and (c) Ms Auld and Ms Graham were interviewed by Ms Smith as part of the grievance appeal.
335. The same points are made in relation to Ms Smith not interviewing Mr Oniga and Ms McGregor.
336. Ms Hodges did not explain to the claimant why she had not interviewed Mr Oniga, Ms Auld and Ms Graham. Ms Smith did not explain why she had not interviewed Mr Oniga or Ms McGregor or the new member of staff. We were not convinced there was any necessity for them to offer an explanation why witnesses had not been interviewed. We say that because it was for Ms Hodges, having been provided with details of the grievance, to decide who to interview as part of the investigation.
337. Ms Hodges did not ask Ms Wright and Ms Shahzad why alleged performance issues had not been raised prior to the grievance. We, as set out above, considered there was no disadvantage to the claimant in circumstances where issues had been noted by Ms Shahzad in the appraisals, Ms Wright had raised issues with Ms Dunlop and the fact the formal performance management process had not been instigated did not mean issues could not be raised. The real issue was why were these matters being raised now, and whether Ms Hodges ought to have let people have their say on these matters. These were issues for Ms Hodges to determine when conducting the

investigation. We acknowledged some employers may have conducted matters differently by addressing performance concerns in another forum. However, the fact Ms Hodges addressed them as part of the investigation into the claimant's complaints was reasonable in circumstances where the relationship between the claimant and Ms Wright was a central issue and colleagues had information regarding that matter, how they treated each other and any difficulties they had witnessed.

338. Ms Hodges did not uphold the complaint of Chinese mimicry. Ms Hodges explained the basis of her conclusion (see above).

339. Ms Hodges did not adequately explain which aspect of the grievance she partially upheld and why. Ms Hodges did, in the letter of outcome, set out an explanation but it was difficult to understand from this which part of the grievance had been partially upheld and why.

340. Ms Hodges did not take any disciplinary action against Ms Wright. We acknowledged the Equality and Diversity policy makes clear that cases of discrimination may be treated as gross misconduct. The assertion by the claimant that Ms Hodges had "failed" to take disciplinary action against Ms Wright was premised on his belief that Ms Wright had discriminated against him. Ms Hodges did not find that Ms Wright had discriminated against the claimant. Accordingly it could not be said that in terms of the policy there had been a "failure" to discipline Ms Wright.

341. We further acknowledged that it would have been open to the respondent to discipline Ms Wright for her inappropriate behaviour in any event. Ms Hodges considered whether an improvement notice should be made in respect of Ms Wright, but decided against it. Ms Hodges made that decision because of the outcome of the grievance. She decided instead to make a number of recommendations aimed at improving the relationship between the claimant and Ms Wright, which, she believed, would address the issues each was having with the other.

342. Ms Smith did not clarify which parts of Ms Shahzad's statement had been relied on by Ms Hodges. We have set out above our conclusion this was an

oversight by Ms Smith in circumstances where she had addressed the numerous points raised by the claimant regarding Ms Shahzad's statement and assured him the additional paragraphs would not be taken into account in the appeal.

5 343. Ms Smith did confirm the decision of Ms Hodges despite the many references made by the claimant to breaches of the respondent's equality and diversity policies. We have set out above why Ms Smith confirmed the decision of Ms Hodges and we do not repeat it here.

10 344. We acknowledged (above) in relation to the Chinese mimicry that Ms Smith did not specifically explain why that did not amount to racial discrimination or harassment. Ms Smith did however explain that she had upheld Ms Hodges decision to partially uphold point 1 of the grievance because the claimant had not submitted any new evidence for consideration. We concluded, accordingly, that Ms Smith did give an explanation for her decision, albeit it
15 did not specifically address certain points in the grievance.

345. The claimant was asked in cross examination what had prompted him to resign, and he responded that it was Ms Dunlop's email of the 13 June 2020. We had regard to this email (page 746) but before doing so, we considered it relevant to have regard to the grievance raised by the claimant (page 730).
20 The claimant, in his grievance, stated he believed *"the following behaviour is a result of the grievances I raised against Carron Wright in March 2020 and the events from then onwards to date. I believe that I am being and continue to be discriminated against on the grounds of my religion, race and sex, victimised on the grounds of my religion, race and sex, bullied and harassed and that I am also being subjected to detriments as a result of having raised
25 protected disclosures of raising grievances all contrary to BMI's policies and Equality Laws."*

346. The claimant went on to set out his version of what happened regarding the Albyn incident and asserted Ms Shahzad had only made the matter into a big
30 issue in order to cause trouble for him because he had raised the grievance against Ms Wright. The claimant stated Ms Shahzad would not have made

this into an issue or reported the matter to Ms Dunlop had he not raised his grievance in March 2020. The claimant believed Ms Shahzad's behaviour to be victimisation and discrimination on the ground of religion, race and sex and to be further acts of bullying and harassment on the ground of his religion, race and sex.

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347. Ms Dunlop, in her response, stated she was disappointed to learn the claimant had taken the decision to raise what appeared to be a second formal grievance, this time against Ms Shahzad, based on allegations which appeared to be identical to those raised in the previous grievance against Ms Wright. Ms Dunlop said she was concerned there had been no opportunity to discuss the recommendations made by Ms Hodges and agree a plan for mediation and conciliation that would provide assurances surrounding professional working relationships between the claimant and Ms Wright, as well as improve ways of working within the pharmacy. Ms Dunlop asked the claimant to engage in this process when it was scheduled.

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348. Ms Dunlop asked the claimant to provide evidence and examples of where Ms Shahzad had demonstrated behaviours consistent with discrimination, victimisation or harassment on the grounds of religion, race and sex in the period since his return to work on the 1 June 2020. Ms Dunlop noted the claimant had provided details relating to Ms Shahzad raising the drug error, which required a reasonable investigation and to which the claimant had responded. Ms Dunlop stated she was unclear what the claimant believed to be commensurate of the allegations of behaviour he had suggested.

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349. Ms Dunlop suggested that as the claimant was on a period of furlough, the content of his grievance should be discussed upon his return to work. Ms Dunlop hoped the grievance could be resolved informally. She advised that where there was evidence that a grievance was not justified, and was considered, frivolous, vexatious or malicious, this could lead to disciplinary action.

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350. Ms Dunlop concluded her email by referring to the respondent's Grievance Policy and encouraging the claimant to "*engage in positive and constructive*

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discussions so that we can firstly review the recommendations as set out following conclusion of your initial grievance and secondly discuss the drug incident which appears to have prompted you to raise a further grievance in order to resolve the concerns. With this in mind I hope you recognise this as a supportive way forward.”

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351. The claimant took two issues with this email: firstly, the fact Ms Dunlop had called for evidence of the behaviours Ms Shahzad had demonstrated and secondly the “threat” made regarding disciplinary action.

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352. Ms Dunlop was questioned in cross examination about why she had asked for evidence when the claimant had told her in the grievance of the issues about which he complained. Ms Dunlop felt the claimant had not provided details and that it was not clear to her why he felt he was being victimised. Ms Dunlop denied she had not understood the concept of victimisation.

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353. We, in considering the criticisms made of Ms Dunlop, had regard firstly to the fact the respondent’s Grievance Procedure provides at paragraph 3.2 (page 153) that where a grievance is raised, the manager will “write to you within a reasonable period to invite you to a meeting to discuss the issue.” The purpose of the meeting will be to “discuss” the grievance. This term is sufficiently wide to encompass gathering information regarding the grievance, understanding exactly the nature of the grievance and what outcome is sought.

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354. The meeting between the claimant and Ms Dunlop was delayed until his return to work from furlough. Ms Dunlop sought further information from the claimant regarding the alleged discrimination and why he felt he was being victimised.

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We acknowledged that on one view it was clear the claimant felt he was being victimised because he had raised the grievance against Ms Wright. However, in circumstances where Ms Dunlop had an initial understanding of the Albyn incident and agreed it had to be raised and recorded on Riskman, she needed to understand why the claimant thought action Ms Shahzad had been required to take, amounted to victimisation. Further, Ms Dunlop had not had an opportunity to discuss the Albyn incident with the claimant.

355. We, in addition to this, had regard to the fact the claimant, in his grievance letter, referred not only to victimisation, but also to discrimination, bullying, harassment and being subjected to detriments on grounds of whistleblowing. We were entirely satisfied that it was reasonable for Ms Dunlop to go back to the claimant to seek further information about the allegations he made.
356. The claimant saw the reference to disciplinary action if the grievance was frivolous, vexatious or malicious as a threat. Ms Dunlop rejected the suggestion it was a threat, and rejected it was a “shot across his bows”. Ms Dunlop agreed she had included that extract from the grievance procedure because she wanted to draw it to the claimant’s attention, and because she wanted him to think about what he was doing in circumstances where there had not been an opportunity to discuss the first grievance outcome or appeal outcome, and no opportunity to explore mediation or to put things right. Ms Dunlop felt it was her duty to do this and to have a chance to talk about improving the workplace. Ms Dunlop felt there should be a chance to talk before embarking on another formal grievance investigation. Ms Dunlop wanted the claimant to feel supported, and she referred to the claimant knowing her management style and the fact he had her support.
357. We accepted the purpose of the clause in the grievance policy is to put down a marker to ensure employees are aware that pursuing frivolous, vexatious or malicious grievances could result in disciplinary action. This is different to a “threat” of disciplinary action being made: the claimant was not threatened by Ms Dunlop that if he pursued the grievance he would be subjected to disciplinary action. The claimant did in any event pursue his grievance and it was dealt with by Ms Vyas.
358. The claimant responded to Ms Dunlop on the 6 July in a 14 page letter regarding his grievance, in which he confirmed the grievance was insisted upon and was not frivolous, vexatious or malicious.
359. We next stood back and reviewed the action taken by the respondent in response to the grievances and grievance appeal raised by the claimant, and we reminded ourselves that the Tribunal’s function is to look at the employer’s

conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it. Further, there is a breach only where there is no reasonable and proper cause for the employer's conduct, and then only if the conduct is calculated and likely to destroy or seriously damage the relationship of trust and confidence.

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360. The respondent carried out a reasonable investigation of the claimant's grievance against Ms Wright. We acknowledged Ms Hodges was criticised for her conclusions and for, essentially, not seeing discrimination where it (allegedly) existed. We however did not find Ms Hodges was "clueless" or that her investigation was "a shambles". Ms Hodges investigated the complaints made by the claimant and endeavoured to understand what had happened and the context in which it had happened. Ms Hodges found inappropriate behaviour by Ms Wright, but not discrimination. That outcome was upheld on appeal.

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361. We (having had regard to all that has been said before) concluded the respondent did not conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence. We acknowledged Ms Hodges and Ms Smith acted, or failed to act, as set out above, but there was a reasonable explanation for those matters, and, looking at the employer's conduct as a whole, and judging it reasonably and sensibly, it could not be said the conduct was such that the claimant could not be expected to put up with it.

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362. The respondent wanted the claimant to remain in employment, and they wanted to repair the relationship between the claimant and Ms Wright. This can be seen from the recommendations made by Ms Hodges and supported by Ms Smith and Ms Dunlop. This was the action Ms Dunlop had asked Ms Hodges to embark upon prior to the grievance being received, because Ms Wright had complained about the claimant (and the claimant had previously complained about Ms Wright) and mediation was seen as being required.

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363. We concluded there was no breach of contract entitling the claimant to resign. We concluded the reason the claimant resigned was because, having made his complaint, he believed there could be only one possible outcome, and he was frustrated, disappointed and angry when the grievance and the grievance appeal were not upheld. The claimant's frustrations grew and this was evidenced by the fact his complaints grew to include not only racial and religious discrimination, but sex discrimination, part time workers discrimination, being subjected to detriments for whistleblowing and victimisation. The list of those said to have been involved also grew to include all the management staff at Ross Hall. The claimant resigned because he believed he was the victim of discrimination and victimisation and he could not accept or countenance any other view. There was no breach of contract entitling the claimant to resign and claim constructive dismissal.

364. We, in conclusion, decided to dismiss the claim in its entirety.

Employment Judge: L Wiseman
Date of Judgment: 10 May 2022
Entered in register: 10 May 2022
and copied to parties