EMPLOYMENT TRIBUNALS

Claimant: Professor Tanweer Ahmed

Respondent: United Lincolnshire Hospitals NHS Trust

Heard at: Nottingham

On: 21 March 2022 - 1 April 2022
In chambers on 11 May 2022

Before: Employment Judge Victoria Butler
Members: Ms L Lowe
Mr K P Chester

Representation
Claimant: Mr P O'Callaghan, Counsel
Respondent: Mr C Breen, Counsel

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is:-

1. The Claimant's claim of direct race discrimination is well-founded and succeeds.

2. The Claimant's claim of victimisation is well-founded and succeeds.

3. The Claimant's claim of unfair dismissal is well-founded and succeeds.

4. The Claimant's claim of harassment is not well-founded and fails.

REASONS

Background

1. The Claimant was employed by the Respondent as its Director of Lincoln Clinical Research Facility and Director of Research Innovation from 1 October 2003 until his summary dismissal on 6 December 2019. He claims;

- unfair dismissal under Section 98 Employment Rights Act 1996 ("ERA");
- direct race discrimination - Section 13 Equality Act 2010 ("EQA");
- harassment - Section 26 EQA; and
- victimisation - Section 27 EQA.

2. The Claimant commenced a period of early conciliation on 10 December 2019, which concluded on the same date. His solicitors presented claim number 26002646/2019 on 29 June 2019 alleging whistleblowing detriment, victimisation and discrimination (religion or belief). This claim was withdrawn on 13 January 2020 and the proceedings were dismissed by way of judgment dated 14 February 2020.

3. The Claimant issued the claim before us on 1 March 2020 alleging unfair dismissal, direct race and religion or belief discrimination, harassment, victimisation and whistleblowing detriment.

4. By this stage, the Claimant was no longer represented by solicitors, albeit he instructed Counsel to represent him at the various hearings.

5. Subsequently, the Claimant requested a reconsideration of the 14 February 2020 judgment, but such reconsideration was refused at a preliminary hearing before Employment Judge Heap. Accordingly, the Claimant was estopped from relying on matters raised in his first claim and he also withdrew the whistleblowing and some of the victimisation detriment claims.

The issues

6. Following two case management discussions, the issues that we were required to determine were agreed as follows:

7. Unfair dismissal

7.1 Can the Respondent demonstrate a potentially fair reason for the Claimant's dismissal in accordance with Section 98(1) ERA 1996 specifically;

(a) was the reason one of conduct?

(b) did the Respondent at the point of the Claimant's dismissal and appeal hold a reasonable belief formed on the basis of a reasonable investigation that the Claimant's actions were in breach of the Respondent's policies and procedures?

7.2 Was the dismissal of the Claimant fair having regard to the reason shown an explanation provided in accordance with Section 98(4) ERA 1996, in particular the ***Burchell*** *test as designed, specifically;*

(a) did the Respondent act reasonably in the circumstances (including but not limited to the size and administrative resources of the Respondent) in

treating the reason as sufficient for dismissing the Claimant or should an alternative sanction, if at all, have been imposed such as dispensation for the Claimant's medical condition or a lesser warning/training.

7.3 If the Respondent can prove that it acted in such a manner as to dismiss the Claimant for a potentially fair reason, did the Respondent act reasonably or unreasonably in treating this as a sufficient reason for dismissal in accordance with the equity and substantial merits of the case under Section 98(4) ERA 1996?

8. Race discrimination

8.1 In dismissing the Claimant has the Respondent treated the Claimant less favourably than it would treat a comparator?

8.2 The Claimant relies on a hypothetical comparator.

8.3 If so, has the Claimant proved primary facts from which the Tribunal can properly and fairly conclude that the difference in treatment was because of his race?

8.4 If so, what is the Respondent's explanation? Does it prove a non-discriminatory reason for the dismissal?

9. Harassment

9.1 Did the Respondent engage in unwanted conduct? The Claimant relies on allegations set out below:

(a) Restricting the number of witnesses that the Claimant was permitted to call during the disciplinary process relating to requests made of the Respondent in October and November 2019.

(b) Refusing to permit the Claimant to have legal representation at his disciplinary hearing.

(c) Ignoring or overlooking clear documentary evidence at the disciplinary hearing that contradicted or severely undermined the corroborated oral testimony of witnesses called to give evidence against the Claimant.

(d) Failing to investigate properly exculpatory evidence or information, including where appropriate questioning witnesses who might provide independent corroborative evidence, such as others who were present at the time of certain disputed events or other team members whom the Claimant line managed, to obtain a balanced view when those matters were raised in October and November 2019.

(e) Treating witnesses giving evidence against the Claimant more favourably than those giving evidence to support him by giving a witness interview questions in advance of the disciplinary hearing against the Claimant and helping the same witness to answer questions during the disciplinary

hearing itself.

(f) The ignoring or overlooking at the disciplinary hearing of clear documentary evidence that contradicted or severely undermined the uncorroborated oral testimony of witnesses called to give evidence against the Claimant.

(g) The manipulation of the disciplinary hearing and disciplinary hearing outcome by senior managers collectively and systematically so as to put the Claimant at a significant disadvantage.

(h) Subjecting the Claimant to a disciplinary hearing.

(i) That the Claimant was dismissed.

9.2 Was the conduct related to the Claimant's race?

9.3 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading or humiliating or offensive environment for the Claimant?

9.4 If not, did the conduct have the effect of violating the Claimant's dignity or create an intimidating, hostile, degrading or humiliating or offensive environment for the Claimant?

9.5 In considering whether the conduct had that effect, the Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

9.6 Are any of the Claimant's claims time barred? (**NB**: this is not a matter that was pursued before us).

10. *Victimisation*

10.1 The Claimant relies on the following protected acts;

(a) Concerns raised by the Claimant about the discrimination of BAME staff as revealed in a recent staff survey result highlighting the fact that a majority of BAME staff (about 80%) within the Respondent claimed to be discriminated against as set out in documentation provided to the Medical Director at the time of the Claimant's appraisal on or about 15 April 2019.

(b) It was further suspected, at least by the Medical Director and/or the Director of Human Resources, who greatly influenced the disciplinary process from the outset, that the Claimant may do a protected act by playing "the race card".

(c) The Claimant's email dated 29 April 2019 addressed to the Deputy Chief Executive and copied to the Medical Director regarding the need to eradicate discrimination and attaching staff survey results showing a high level of discrimination against BAME/Muslims within the Trust.

(d) The Claimant bringing proceedings under the Equality Act 2010 against the Respondent on 26 September 2019.

(e) The Claimant providing documentation to the dismissing officer on or about 4 October 2019 which included information relating to the alleged discrimination of BAME staff and, further, providing the appraisal documentation.

(f) Was the Claimant subjected to detrimental treatment by the Respondent because he had carried out protected acts?

(g) The detriments the Claimant relies upon are;

(i) subjecting him to a disciplinary hearing; and

(ii) dismissing him.

The hearing

11. The case was listed from Monday 21 March 2022 until Friday 1 April 2022 inclusive. The Tribunal reconvened on 11 May 2022 to conclude our deliberations.

12. We were presented with a bundle of documents running to 3,637 pages which was compiled in a confusing manner.

13. We also had typed witness statements, albeit some of the Respondent's statement were missing page numbers and further copies provided. The Claimant's main witness statement was lengthy, running to 404 paragraphs over 76 pages. He provided a supplementary statement in consequence of the Respondent producing very late disclosure of additional documents.

14. Prior to the hearing the parties provided an agreed list of issues, a chronology, agreed bundles and witness statements.

15. References to page numbers in these Reasons are references to the page numbers in the bundles.

The evidence

16. The Tribunal heard evidence from:

On behalf of the Claimant;

- the Claimant;
- Mr Adrian Thompson (HR Contractor)
- Ms Helene Jones (Research Support Officer)
- Ms Simone Seychell (Personal Assistant)
- Mr Christopher Bridle (former Director of the Lincoln Institute for Health)

On behalf of the Respondent;

- Mr Simon Evans (Chief Operating Officer)
- Dr Neil Hepburn (Consultant Dermatologist and Medical Director)
- Ms Yavenushca Lalloo-Padley (Managing Director-Clinical Support Services Division)
- Ms Jennie Negus (Head of Patient Experience)
- Mr Mark Brassington (Regional Director of Performance and Improvement - Midlands for NHS England and Improvement)

17. We are entirely satisfied that the Claimant was an honest and reliable witness. From time-to-time he struggled to provide a concise answer to questions asked but this had no bearing on his credibility.

18. We are also satisfied that all the Respondent's witnesses we heard from were honest, albeit at times we found Ms Negus and Mr Evans to be evasive when challenged – particularly when pressed on how they objectively arrived at their respective conclusions.

19. The Claimant's witness statement contained much additional information relating to his previous withdrawn claims or matters not related to this claim. We have confined our deliberations to the matters in issue in this claim alone.

The facts

The Claimant's employment

20. The Respondent is an NHS Trust which runs hospitals in Louth, Lincolnshire, Lincoln County, Boston and Grantham. It also provides services in Skegness and Gainsborough.

21. The Claimant commenced employment with the Respondent on 1 October 2003 and held the position of Director of Lincolnshire Clinical Research Facility and Director of Research and Innovation. He was also the Intellectual Property Lead and was a Band 9 Director in receipt of a basic annual salary of over £100,000 per annum. In addition, he was the Chair of the Respondent's BAME staff network until circa April 2019. The Claimant's line manager at the time of his dismissal was Dr Neil Hepburn, Consultant Dermatologist and Medical Director.

22. At the time of the Claimant's dismissal, he had sixteen years' service and an unblemished disciplinary record.

23. The Claimant is of Asian and Pakistani racial background and is a Muslim.

24. Outside of his employment, he also holds various positions of standing within the community, including being the Chairman of the Board of Trustees of the Islamic Association of Lincoln and Chair of the Lincolnshire Building Bridges. In addition, he has been a member of the Standing Advisory Council for Religious Education for the Lincolnshire County Council.

Additional background – the Respondent

25. At the material time, the Respondent was under significant pressure generally having been placed into special measures. Its staff turnover was high with consequent vacancies and staff surveys highlighted an elevated perception of internal bullying and discrimination.

<u>The Respondent's policies</u>

26. The Respondent has a comprehensive suite of policies which includes a staff investigation protocol, a disciplinary policy, a capability policy and a dignity at work policy.

Staff Investigation Protocol

27. The protocol is intended to be used by all managers at the Respondent "*who find themselves faced with an allegation towards or about a member of staff which could potentially lead to a disciplinary hearing*" (p.2603). It goes on to state:

> "*However, it should not be assumed that the outcome of an investigation will necessarily be a disciplinary hearing; the purpose of the investigation is to uncover the facts of the allegation or situation. Once the facts are known, it may be appropriate to look at a range of further actions, which may include disciplinary action, but which may include training, performance management or other outcomes. For that reason, the protocol is deliberately not entitled Disciplinary Investigations.*
>
> *However, a disciplinary investigation is key to the process that must be followed prior to carrying out a fair dismissal, as an inadequate investigation may render the dismissal unfair.*
>
> *It is therefore important that where a serious misconduct issue is suspected, a full and reasonable investigation is carried out, although the investigator should remain impartial and should not presume the outcome of the investigation.*
>
> *…*
>
> *The protocol is based on the ACAS code of practice on disciplinary and grievance procedures which, although not legally binding, are taken into account by Employment Tribunals when considering cases.*"

28. Under the heading: "*General Principles*" the policy states that (p.2603-2604):

> "*The rules of natural justice require that the employee should know the nature of the allegation against him or her and should be given the opportunity to state his or her case. …*
>
> *The ACAS code states that it is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In any event it will be necessary for the employer to collect statements from witnesses as soon as practicable before memories fade.*"

29. Under the heading "*Witnesses*", it confirms that the Investigating Officer ("IO")

(P2607):

> "… *should arrange to meet individually with any witnesses to the incident or events giving rise to the investigation. He or she should ask the witnesses to give an account in their own words of what took place. This should be in terms of what they personally witnessed or had involvement with.*"

30. The policy goes on to explain the format of the investigating officer's final report. It says (P2608):

> "*The IO should compile the information gathered during the investigation so that this can be submitted, with the IO's recommendations, where appropriate, to a senior manager. This submission should be made within 10 working days of the conclusion of the investigation.*"

31. Section 8.2 states that (p.2608):

> "*That Manager, in consultation with HR, will decide whether or not disciplinary or any other proceedings should be instigated.*"

32. This contradicts Section 9 which states (page 2609): "…*HR must decide what, if any, action they wish to take.*"

33. The policy is very descriptive of the format of the IO's report and specifically states that the IO must take each allegation in turn, giving a recommendation for each (P2609):

> *"This may include recommendations about reviews of working practices, policies, etc.*
>
> *State the reasons you believe the allegations are proven or not*
>
> *Does a Disciplinary Hearing need to take place?*
>
> *It should not include recommendations as to the possible outcome of any potential hearings.*"

Disciplinary policy

34. The Respondent's disciplinary hearing is comprehensive and provides that it has the right to suspend an employee on full pay where there are reasonable grounds for concern that (P2644):

- "*Serious allegations have been made which, if substantiated, would fundamentally compromise the employment relationship or*
- *The presence of the employee who is subject to investigation is likely to prejudice the investigation or*
- *The way in which the concerns or allegations have arisen has led to a need to protect the interests of patients or other employees pending the*

> *outcome of a full investigation.*
>
> *The decision to suspend should normally be taken by the manager who is commissioning the investigation. …*"

35. The policy provides for the following disciplinary sanctions: written warning, stage 2 written warning, final written warning, action short of dismissal, dismissal and the right of appeal.

36. The "*action short of dismissal*" explains that (p.2648):

> "*In exceptional circumstances it may be appropriate to take action that stops short of dismissal but will involve a contractual change for the employee; for example, downgrading without protection of pay. Cases which result in this sanction will also automatically include a Stage 3 Final Written Warning. In all cases, the employee will receive confirmation in writing of the reason for the level of action being taken, the standards/improvements required and any help or support that may be available and the consequences of not improving.*"

37. It also provides that no disciplinary sanction may be appropriate but may agree other actions such as training (p.2647).

Capability policy

38. The Respondent's capability procedure provides for an informal approach before the formal process is instigated. It explains (p.2679):

> "*Initial identification of an employee's failure to meet the required levels of performance, often arises, through normal performance management meetings i.e. one-to-ones, supervisions, appraisals. However, it could also be instigated by one or a series of incidents that have occurred in the workplace.*
>
> *It is expected that the majority of performance related issues will be resolved promptly at this level, except where there is evidence that such an approach has proved ineffective already. If this is the case the manager should invite the employee to attend an informal Capability Meeting.*

39. The policy also draws a distinction between negligence which '*normally involves a measure of personal blame or wilful behaviour*' where such matters '*are usually matters of conduct that would be more properly addressed under the Disciplinary Policy*' and '*incompetence [which] implies that there is no element of choice in a failure to measure up to the required standard. This may be due to an innate lack of ability, skill or experience, most likely arising from a mismatch between the qualities an employee possesses and the requirements of the post, or to a lack of adequate training, coaching, and/or supervision. In these cases, the capability procedure should be invoked.*" (p.2677)

Dignity at Work policy

40. The policy sets out the Respondent's stance on discrimination, harassment, intimidation, bullying, non-physical assault or any other form of harassment

constituting unacceptable behaviour. It states that:

> *"The Trust is committed to assisting employees to resolve issues informally in the first instance and providing a formal route if the informal approach is not successful"* (p.2613).

41. It goes on to explain the informal approach and that the formal approach:

> *"should only be used if the informal approach has failed to resolve the issue or the complaint is of such a serious nature that a formal approach is warranted"* (p.2617).

<u>Background to the investigation</u>

42. The Claimant was responsible for a team of around 55 employees. His Personal Assistant was Ms Simone Seychell.

43. On 18 February 2018, Dr Hepburn undertook the Claimant's appraisal (P618-623). Prior to the appraisal, the Claimant prepared a substantial document to be used as the basis of their discussions within which he recognised both his strengths and weaknesses. He acknowledged within this document that:

> "*Due to my operational management role and my challenging style, so it is understandable that some members within team will be critical … Certainly, lot of people see my strengths whereas some do not see, is this mean I need to improve my communication skills, I think, certainly I need to improve my writing skills, as sometimes I just write and do not pay attention.*"

44. Within the appraisal itself, Dr Hepburn noted (p.620):

> "*My observations are that you are hardworking, committed and ambitious.*
>
> *You struggle to motivate the Research Team and have been bruised by previous accusations of bullying, which makes you wary. Effective performance management is of course difficult.*
>
> *…*"

45. One of the objectives set and agreed was for the Claimant to (p.621):

> "*Learn how to performance manage staff. This will be achieved by undertaking a formal training programme, coaching and regular feedback from staff and colleagues.*"

46. The Claimant willingly agreed to the coaching sessions which were arranged with an external provider nominated by Dr Hepburn.

<u>Helen Ayre</u>

47. One of the Claimant's direct reports was Ms Helen Ayre, who joined the Claimant's department in March 2013 as Acting Research Governance Manager. During her time in the department, the Claimant supported her in applying for an MSc course,

and was flexible with her working patterns.

48. They had an amicable working relationship, which is evidenced in text messages between them. The Claimant was always happy to assist and support Ms Ayre in all elements of her employment. An example of the nature of their relationship is evidenced in a text message from Ms Ayre to the Claimant on Saturday 11 April 2015 at 7.32pm in which she said:

> "*Hello I hope you had a fab holiday? Can I ask a massive favour?! You should have an email about completing a reference online for my masters course at Sheffield - is there any chance u can complete it by midday tomorrow? I think that's the deadline and I'm not sure whether it's considered a valid application without the references. It's possibly not an issue as I doubt anyone will check them until Monday anyway, but just thought I'd ask! Thanks :)*"

49. The Claimant went into work the next day (Sunday) to complete the reference for her and confirmed the same that day (p.1063-1064).

50. At some point in 2018, Ms Ayre texted the Claimant to ask if he had received a job reference request, to which he replied that he was on leave but would check over the weekend as he had not seen it so far (p.1065-1066). When the Claimant received the reference request, he completed it in favourable terms within four working days, despite being on holiday.

51. Ms Ayre was successful in her application for the post. Accordingly, she resigned on 25 March 2018 and worked her notice period.

52. On 11 June 2018, Ms Ayre requested a meeting with Dr Hepburn during which she alleged that the Claimant had bullied her and other employees, made inappropriate comments and failed to follow the Respondent's policies and procedures (paragraph 8 Dr Hepburn's statement). She described examples and gave names in support.

53. Dr Hepburn asked Ms Ayre to provide her complaint in writing and she sent him a comprehensive and lengthy document by way of email on 11 June 2018.

54. The complaint opened as follows:

> "*Current members of staff have asked me to raise on their behalf two main areas of concern which they feel have the biggest impact upon them within the workplace: inappropriate comments made towards them by TA on a regular basis plus the standard of appraisals conducted by TA.*
>
> *…*
>
> *Ongoing behaviour which constitutes bullying and harassment is perhaps the main concern about TA but unfortunately I am aware that this is a very difficult behaviour to evidence and manage. Awareness of such behaviour appears to exist both within and outside of the department and has done so for a number of years. … There has however been an apparent lack of willingness to address this evidenced by the Trust in the past which has led to staff feeling unable to raise concerns. As highlighted above, there is awareness in the department*

that historically several people have raised concerns to HR about such behaviour and yet nothing appears to have been done to address this. …

Comments I have heard about this include:

A HR temporary staff member who had raised my concerns about a lack of action in a HR meeting and was feeding back to me, said the response given was "He has been left alone because he generates income for the Trust". …

"I can think of at least 8 people over the years that I've worked here who have spoken to HR about him, I don't know why nothing happens" - staff member …

I have personally attempted to raise my concerns. On 10th June 2015 I emailed Dr Kapadia to ask to discuss my concerns. This email and a follow up email (sent 01/07/2015) were never responded to. …

Historically I am aware that a number of staff members have experienced problems with TA's behaviour towards them, and that a number of them have discussed these concerns with HR. For reasons that are unclear, none of these concerns have ever been taken seriously or investigated to my knowledge. I would hope that records exist in HR.

…"

55. Ms Ayre went on to name the following individuals who she said may have further information:

- Maria Tute
- Susie Butler
- Sally-Ann Molsher
- Suzy Otty
- Val Elliot
- Liz Clements
- Janice Wiseman
- Sarah Ford

56. Ms Ayre described some of her own experiences of what she says amounted to bullying and harassment, citing examples in September 2015, May 2016, June 2016 and July 2016. The only recent allegation was her appraisal that year.

57. She also described a specific incident on 18 July 2014 during a meeting with Dr Rinaldi and Dr Graham in which the Claimant allegedly joked: "*I've told Helen she's not allowed to get pregnant*". She said that Dr Rinaldi specifically responded: "*you can't say that, you'll get done for sexual harassment whilst the external member of staff looked on with a shocked/horrified expression*".

58. She went on to address appraisals; an alleged disregard for and non-compliance with the Respondent's policies; complaints about return-to-work interviews; his handling of long-term absence management; stress in the workplace; and issues with annual leave.

59. Dr Hepburn received Ms Ayre's email and replied the next day requesting contact details of the individuals she names because *'it would be helpful to have some others confirm some of those concerns*" (p.2826). She replied confirming that Ms Butler and Ms Tute were happy for Dr Hepburn to contact them (p.2826).

60. Despite Ms Ayre's complaint, at some point after leaving the Claimant's department, she went into the Claimant's office to discuss meeting for lunch and possible collaboration in the future. Their conversation was friendly and positive.

61. On 20 August 2018, the Claimant underwent a 360-degree appraisal in which his average rating was identified as "*strong*" (p.746-755).

62. Some six weeks later, Dr Hepburn emailed Mr Simon Evans (then Director of Operations) to ask him if he could undertake an investigation into the allegations against the Claimant (p.757-758). The delay was due to Dr Hepburn's annual leave and other work commitments.

63. Mr Evans replied a month later saying that he was wary of committing to what might be a substantial matter. Dr Hepburn suggested that they meet, albeit he cannot recall if this meeting ever took place.

64. Ultimately, Mr Evans declined to undertake the investigation. Accordingly, on 11 September 2018, Dr Hepburn contacted Ms Jennie Negus (Deputy Chief Nurse at the time) to ascertain if she could do it.

65. Ms Negus replied on 19 September 2018 confirming that she could help but would not be able to start the investigation until the end of October (p.800).

66. Dr Hepburn replied to this email four weeks later on 15 October 2018 and confirmed that the purpose of the investigation was to ascertain;

    - "*Is there evidence of bullying and harassment by Dr Tanweer Ahmed*
    - *Is this a pattern of behaviour affecting a single member of staff, or a group of staff*
    - *Have appropriate steps been taken to address previously expressed concerns?*
    - *Is there evidence of failure to follow Trust policies relating to sickness absence and workplace stress?* (p.799)

67. By now, four months had passed since Ms Ayre raised her initial complaint.

68. During this time, both the Claimant and Ms Negus were involved in discussion and debate over the provision of a multi-faith prayer room within the Respondent which at times was acrimonious due to competing interests and timescales.

<u>The investigation</u>

69. On 12 November 2018, Dr Hepburn sent the terms of reference for the investigation to

Ms Negus (p.789-790). The letter confirmed:

> "*It should be stressed that the Case Investigators remit is not limited to considering this evidence alone, and it is entirely for the Case Investigator, at their discretion, to determine how best to investigate the concerns set out below.*
>
> *The Case Investigator is required to:*
>
> - *Conduct the investigation in accordance with the standards set out in the Staff Investigation Protocol.*
> - *Produce a report which will enable the Case Manager to reach a judgement as to what, if any, further action is appropriate.*
> - *Ensure the investigation report is completed using the format outlined in paragraph 8.4 of the Trust's Staff Investigation Protocol. However, the Investigating Officer should not make recommendations regarding actions to be taken concerning Professor Ahmed but is asked to recommend any action to address problems with policies or procedures as is appropriate.*
> - *To conclude the investigation and provide and investigation report by no later than 28 December 2018. If this is not possible, to ensure that the Case manager and Professor Ahmed are informed of this, along with reasons for the delay.*
>
>   *…*"

70. Dr Hepburn and Ms Negus met on 27 November 2018 to discuss the terms of reference.

71. The Claimant was not suspended pending or during Ms Negus's investigation and was permitted to continue to work as normal despite the nature of the allegations.

72. In terms of the Claimant's knowledge and understanding of the investigation, Dr Hepburn simply advised him that there had been a complaint of bullying and harassment but did not expand any further. Accordingly, the Claimant continued with his duties not knowing what the allegations against him were.

73. On 10 December 2018, Dr Hepburn sent the terms of reference to the Claimant by email but provided no further information. Accordingly, the Claimant remained unaware of the allegations against him some six months after the complaint was made (p.845).

74. Ms Negus made no contact with the Claimant, which caused him considerable stress. This was despite the terms of reference confirming that the investigation should be complete by 28 December 2018 and, if not, the Claimant should be notified of the same and the reasons for the delay. Accordingly, he emailed Dr Hepburn on 9 January 2019 and said:

> "*I know Helen left nearly 7 months ago (formal last working day was 15th June 2018) and understood that she complaint before she left. I am getting stressed*

from last several months since you told me and disappointed that after long time, no one has provided me any evidence of bullying and still I have not received any email from Jennie to meet with me as suggested in below email to meet and discuss. The letter says that it should be completed by 24th December or alternatively you informed about delay. Considering, no one has notified me so shall I consider that there will not be any investigation.

Dignity at Work Policy states on first page (page 3, summary), "The Trust is committed to assisting employees to resolve issues informally in the first instance, and to providing formal route if the informal approach is unsuccessful". I do not understand if she felt that I am bullying her then why she did not raise with me or with previous Medical Director, HR or yourself to resolve informally.

As you have seen in her last Appraisal document, signed in February 2017, I have noted some poor performance issues. You can see attached emails that there were some other concerns if she is claiming right over time. It was raised with me, this is why I challenged her claim. It was due to lack of support from previous Medical Director, otherwise I may have investigated under fraud investigations. There was justification that claim was not right. This was on going until it was flagged up to me and I challenged her with dignity.

…

As you can see within my attach email, she did involve Stuart (HR Manager) and I did suggest to her that its better that if cases like this should be resolve internally instead of involving HR at first instance. (I did copy email reply to HR as well). But if she like to involve HR or staff side then I have no problem. Things I completely fail to understand are, if she is able to copy email to HR for claiming over time as band 7 manager to put pressure on me why she was not able to raise informally what she feel is bullying. Why she not raised when she was in employment. It could have been addressed better and less stressful. Is this justifiable that people complain when they leave so they don't need to defend inappropriate complaints.

She used to come late (see evidence in attach email of July 2016). I was paying her extra over time but as you have seen that all SoPs and policies were out of date which was her responsibility. If she was coming too late or not coming, she used to text me on my personal mobile. I think I was always reasonable. Though I don't make friends as I always try to challenge and remain loyal to ULH or employer. Even when she found new job after improving her qualification, she asked me (April/May 2018) in very friendly manner that pretty pretty please send my reference over on my annual leave days which I did. To be honest, I supported her always and completely failed to understand what went wrong.

… Your letter point 3 states that "Appropriate steps have been taken to address previously expressed concerns". I am sorry but I can't remember or aware that previously anyone has raised concerns against me and what steps I should take. I spent time thinking but still I can't remember or understand what you mean by referring to point 3.

I know Suneil called me 3 - 5 years ago that Sarah Ford (Previous band 7 manager) complaint against me but I chased several times. Later on Suneil told me that Karen Taylor (HR) will be in touch with me. I spoke to her and wrote at least two emails but she never replied and nothing happened. Later on Suneil told me it was not complaint, it was feedback form she completed after she left. Just so you aware, I started formal capability process about Sarah Ford poor performance and HR and staff side were fully involved. I took advice from HR before starting. As soon as I started, she went on sick leave and after 5 - 6 months she left and moved to band 5 nurse job from band 7.

…" (p.844-845)

75. On 4 January 2019, Ms Negus had a telephone call with David Goodwin (known as Gus) from HR to discuss their initial plan for the investigation. Following this call, Gus recommended that the following individuals were relevant to the investigation, namely Maria Tute, Susie Butler, Suzie Otty, Isobel Thomas, Sally-Ann Molsher, Janice Wiseman and Helen Ayre. He went on to state that once those interviews had been carried out, then Dr Rinaldi, Dr Rowbotham and the Claimant should be interviewed (p.361-365).

76. Thereafter, Ms Negus was left to undertake the investigation in accordance with the terms of reference.

77. She wrote to the Claimant on 14 January 2019 to confirm that she was undertaking the investigation and would meet him on 15 February 2019 to discuss the allegations (p.851-852).

78. On 29 January 2019, the Claimant responded with a number of concerns, in particular the length of time that had passed since Ms Ayre had left the Respondent. He said:

> *"clearly if there are any witnesses then memories goes low so this should have been addressed quickly so that investigation officer can talk to witnesses as appropriate as per protocol. In principle, this should be raised and addressed when she was in employment*" (p.857).

79. On 3 February, the Claimant e-mailed Dr Hepburn expressing his upset about Ms Ayre's complaint and said:

> *"I never thought that people take revenge and forget how accommodating I was. I think, it is vital that the Trust clearly define performance management and bullying. I am sure she is taking revenge because I was managing her poor performance and behaviour. This is why I am putting more emphasis now on developing performance management tool. Jennie told me she is interviewing past and present people, I have no problem but I believe it is important that investigating officer should interview all people I line manage (past and present), and not pick and choose, recommended by Helen"* (p.881)

80. The Claimant attached text message exchanges to his e-mail which Dr Hepburn passed on to Ms Negus who in turn passed them on to Gus Goodwin. Mr Goodwin remarked "*An interesting account of interaction between Tanweer and Helen – looks to me as though he was being courteous, considerate and an extremely flexible*

manager during these periods" (p.881). Ms Negus replied by saying "*absolutely".*

81. The Claimant was keen to ensure a balanced and fair investigation and wrote Ms Negus a lengthy letter on 9 February 2019 setting out the names of individuals he thought should be interviewed, including his PA Ms Simone Seychell and Ms Helen Jones. He also felt that all his direct reports should be interviewed.

82. He also set out some background information about Ms Ayre, more particularly some of the performance and behavioural issues he was dealing which had been formally raised in her 2016 appraisal (p.554). He said:

> "*I do challenge staff members if they are not performing well but I never bullying, in fact, feedback I got in my 360 assessment was that I am too soft and need to adopt tough approach. As you are interviewing selective people, it is vital that you ask for evidence, people do gossip particularly if you are managing performance.*
>
> *I must say, I never put any pressure on her or anyone else and always supported her. When she left, I felt, I have reasonable good relationship, I could friendly, this is why I was shocked and thought how I can trust on human being. After her appraisal, signed in February 2017, she did improve her behaviour but I strongly believe she is taking revenge unless you can find*
>
> *1. Clear documentary evidence of bullying*
>
> *2. Email evidence of bullying or rude*
>
> *3. [text messages]*
>
> *4. Anyone within Lincoln building has witnesses bullying*
>
> *5. Second aspect, any evidence of failure of sickness and work related stress*
>
> *I noted that you raised concerns in Equality, Diversity & Inclusion Operation group meeting held on 6th November 2018 that there may be bullying of white people by BAME members, I respect your views. As chair of the BAME network, and according to ULH WRES data, it is very clear that BAME members are significantly more vulnerable to bullying and harassment. These are published statistics.*
>
> *I support my team members significantly but I come across routinely that if I accept what they say, they are happy but if I challenge them, then they start gossiping. This is experience of lot BAME managers in ULH and across the NHS though I do believe that white managers also come across same situation but BAME members are significantly much more vulnerable according to WRES statistics and ULH staff survey.*
>
> *I will fully cooperate with your investigations but I strongly believe issues related to BAME always escalated and I have no doubt there will be interesting outcome of this investigation if done fairly.*

…" (p.914-916)

83. Ms Negus undertook her investigation in accordance with section 8.4 of the investigation protocol which required her to make recommendations, including whether a disciplinary hearing needed to take place.

84. Ms Negus interviewed the Claimant on 15 February 2019 (p.985-1002). During the interview, the Claimant explained that there were performance/capability issues with Ms Ayre, Ms Ford and Ms Butler. When Ms Negus told him that members of his team were afraid to raise concerns with him, he said he felt "*sad that they feel like that*". He also said that he did not understand why he was being investigated and suggested it was because he was BAME and "*the white person being harsh*". Ms Negus responded by saying that she thought it was an inappropriate comment for him to make.

85. Ms Negus interviewed Ms Ayre on 6 March 2019 who by this time had left the Respondent eight months previously. She explained why she felt that the Claimant had bullied and/or harassed her but denied that any performance issues had been raised with her (p.970).

86. Ms Negus did not ask Ms Ayre if she was retaliating to performance management as suggested by the Claimant. At the end of the interview, Ms Negus also asked Ms Ayre if she thought that any issues '*caused by his English or his culture?* and *"anything around religion? The gender issue?"*

87. Ms Negus also interviewed the following:

    i. Ms Tute

    ii. Ms Butler

    iii. Ms Thomas

    iv. Ms Molsher

    v. Ms Moon

    vi. Ms Wiseman

88. Of these witnesses, Ms Wiseman left the Respondent ten years prior. Ms Tute and Ms Moon left the Claimant's department circa five years prior and Ms Molsher was based in another hospital about forty miles away and was never line-managed by him.

89. Of the three witnesses still in the department, namely Ms Butler, Ms Thomas and Ms Molsher (albeit the Claimant did not line manage Ms Molsher) none of them witnessed the Claimant making inappropriate comments. Ms Butler and Ms Ayre both said that appraisals were difficult but there was no documentary evidence that they were done unprofessionally.

90. Ms Negus formed the view that she would only speak to witnesses who would support the allegations and restricted her investigation to that alone.

91. As above, one of Ms Ayre's complaints was that Ms Ayre said that Dr Rinaldi was present at a meeting in which the Claimant allegedly said: "*I've told Helen she is not allowed to get pregnant*". Dr Rinaldi's recollection of this incident would have been significant by way of corroboration of otherwise, but she failed to interview him (and Dr Rowbotham), despite HR advising her to.

92. Furthermore, she failed to interview any of the witnesses recommended by the Claimant who, in his view, would disprove the allegations against him – including two named by Ms Ayre within her complaint. Nor did she seek out any documentary evidence from the witnesses to corroborate their allegations or ask for precise dates of matters complained to allow further investigation. Consequently, she failed to achieve any balance and acted contrary to the ACAS guide on conducting workplace investigations which provides:

> *Step 4:*
>
> *Gathering evidence*
>
> *When gathering evidence an investigator should remember that their role is to establish the facts of the matter. They should therefore not just consider evidence that supports the allegations but also consider evidence which undermines the allegations. Once collected an investigator should objectively analyse each piece of evidence and consider:*
>
> • *what does the evidence reveal?*
>
> • *are there any doubts over the credibility and reliability of the evidence?*
>
> • *is the evidence supported or contradicted by evidence already collected?*
>
> • *does it suggest any further evidence should be collected?*

93. Ms Negus took some three months to carry out eight interviews and produce her investigation report. In the meantime, the Claimant, in his desperation, compiled extensive documentary evidence which, in his view, undermined the general allegations advanced against him. He was of the view that the allegations were being investigated because of his race.

94. Ms Negus completed her investigation report on 8 April 2019 and sent a copy to Dr Hepburn that day (.1692). However, it was not shared with the Claimant until 5 June 2019.

95. Within the report, Ms Negus acknowledged that the Claimant had been keen that a balanced view of his performance be sought but she felt it was not reasonable to interview everyone. However, limiting the scope of her investigation to those who supported the allegations led to a biased report.

96. Within the report, Ms Negus included the interview transcripts and summarised comments by those interviewed but, notably, she referred to an ex-employee, Sarah Ford, no less than thirteen times. However, Ms Ford was not interviewed. By way of

background, Ms Ford was being formally performance managed by the Claimant with support and advice from HR.

97. Mr Negus also observed of the Claimant:

> *"Not once did I hear from him any regret that he has been perceived in a negative way, any appreciation that this was their experience; in his view their experience was wrong, full stop*"

98. This was despite him saying in his investigatory interview that he felt sad that the individuals felt the way they did.

99. In summary, Ms Negus found that there was evidence of bullying and harassment by the Claimant in the form of "*the unwarranted behaviour, one to another, which is based upon the unwarranted use of authority or power*". She found that there was a pattern of behaviour affecting more than one member of staff. In relation to whether appropriate steps were taken to address previously addressed concerns, she found that the Respondent's processes had '*fallen down'* and that whilst steps had been taken to investigate, concerns were never followed through.

100. Ms Negus also found: "*There is also evidence that staff were afraid to speak out whilst still in the team for fear of repercussion.*"

101. She found no direct evidence that specific policies were not followed. However, she went on to conclude:

> "*I am not convinced that Professor Ahmed's behaviour and leadership style is malicious or that there is a conscious effort to misuse his authority or power; rather I believe this to be a total lack of insight or self-awareness into how he is perceived and his behaviours received. Different priorities, lack of trust and incompatible communication styles can make working life very difficult. Staff interviewed struggled to understand Professor Ahmed's role and universally said he did not understand what he did. When asked about this he said he has a very strategic role; he stated it is a frustration to him that at senior managers meetings he speaks more than the staff. 'I have been vulnerable and protective and I keep all my emails. I think my vulnerability means that I may come across as misunderstood; I am scared of them, not that I am scary'. There appears to be a lack of empathy on his part, an inability to recognise or appreciate the perspective of others and an inflated opinion of his own contribution and performance - this can be hurtful to others without perhaps realising it; it can also translate into taking credit for successes and blaming others for failures; scenarios that witnesses have described.*
>
> *There is a strong sense of paranoia and distrust that is no doubt borne out of life or work experience of discrimination; however there is no evidence at all that the allegations investigated here were malicious or made in a discriminatory manner and Professor Ahmed could not provide specific examples to support these assertions; in essence because he believes himself to be a kind, caring and supportive manager he can see no reason other than his race for why people would raise concerns about him. In my experience*

even when concerns are proven to be unfounded or issues misinterpreted managers and leaders will on the whole be devastated that they have been perceived in that way and show some remorse or regret that this is the impression that they have given.

5. Recommendations

Recommendations have been difficult to consider.

- *At the very core of this investigation is the complete lack of insight or ownership from Professor Ahmed that he has been anything but excellent at his role and unfortunately as previous issues have not been progressed, appraisals and 1:1s have not highlighted any behavioural, managerial or leadership development needs then much of this is news to him. Leadership development has to begin with self-awareness and insight and if this is lacking or absent then it is difficult to recommend further training in this area.*

- *There is an incredibly strong belief by Professor Ahmed that these allegations are racist in nature and as investigating officer I was surprised at the level vehemence with which this was proffered; I was also indirectly accused when reference was made to a comment I had made in the Trust equality and diversity group that was then taken out of context. I found this accusation intimidating and upsetting. There is a real likelihood that any sanctions or actions taken will potentially be seen to be discriminatory notwithstanding Professor Ahmed's high-profile public position within the BAME and Muslim communities.*

Possible ways forward could include;

1. *Commission of full and independent review of the service and consider its processes, systems and ways of working in comparison to other R&D units with particular emphasis on roles and responsibilities of team members.*

2. *Seconding someone to work alongside the research staff to observe practice and procedures.*

3. *Consider a full developmental programme for Professor Ahmed that focuses on self, impact of self and the psychology of power and influence.*

4. *Reconsider the assurance and reporting structure for Professor Ahmed that enables closer day to day scrutiny and sets clear expectations that are monitored. Reporting to the Medical Director is perhaps too remote.*" (p.1694 -1709)

102. To summarise, Ms Negus took the view that disciplinary action was not appropriate, but rather it was a developmental issue. She placed an unusual amount of emphasis

on her perception of the Claimant's lack of empathy without balancing it against the Claimant's view that the interviewees who had alleged bullying were not being truthful and the allegations were unfounded. Furthermore, she only focussed on the negative comments and did not refer to the positive comments or those which might well undermine Ms Ayre's complaints.

103. On 15 April 2019, Dr Hepburn emailed the Claimant to say that he was in receipt of Ms Negus's investigation report but that he had only scanned it but when he had read it, he would share it (p.1717).

104. On 15 April 2019, the Claimant attended his appraisal with Dr Hepburn. Within his preparation for the appraisal and for submission to Dr Hepburn, the Claimant highlighted the outcome of staff survey results which showed that 80% of the Respondent's BAME staff at the University Lincoln Hospital said that they were discriminated against. In addition, 30% - 40% of Muslims felt that they had been discriminated against because of their religion (p.1747).

105. On 15 April 2019, Dr Hepburn emailed the investigation report to Martin Rayson, Director of Human Resources and Organisational Development and Board member. Dr Hepburn's past experience was with medical doctors so was keen to ensure that he dealt with the process in accordance with the Agenda for Change Policy. He said:

> "*With a doctor I would share the report, if insight and his agreement, put together a development programme to address the issue with specific actions and a review. If no insight or agreement I would look to deal with this through a formal process.*
>
> *… I could redact the copy given to him but he could work it out and without the names it would be less powerful.*
>
> *Thoughts?*" (p.1762)

106. Accordingly, Dr Hepburn was not of the view that the matter should progress to a disciplinary hearing at this stage, rather it was a development issue.

107. Dr Hepburn was also concerned that Ms Negus had stepped outside the remit of the terms of reference by making recommendations. However, she was following 8.4 of the protocol which confirms that she should make them.

108. On 20 April 2019, Mr Rayson responded as follows:

> "*I recognise this is a tricky and a potential hot potato. I had a row myself with Tanweer in the car park on Thursday evening because he accused HR staff of bullying him and being racist in the current dialogue they are having around one of his team members. I would be interested in Kevin's view, to ensure I am being balanced in my response.*
>
> *This is one of the best investigation reports I have read and as Jennie points out, this is not a numbers game. If more staff are supportive of Tamweer and do not criticise, it does not mean the issues that some have identified are not acted upon, if those concerns can be triangulated, which I believe Jennie has done.*

The fact that some/many staff will be supportive of Tanweer may perhaps influence the action taken. Nonetheless if the allegations were so serious and were proven, then in themselves and despite others being supportive, action would need to be taken, potentially of the most serious kind.

In the AFC process we do not have scope for a letter of advice and a behavioural agreement. I think this matter has to go to a hearing and the outcome might be a development programme as described. There would appear to be an issue here in the way that Tanweer deals with some staff (how ironic) and that needs to be addressed.

The report is provided to Tanweer as part of the hearing process but may well need to be redacted to protect staff still at the Trust, but we can consider this further.

Tanweer will play the race card I suspect. His reference to the staff survey results (which he raised with me during our Thursday altercation) are irrelevant in this case. It is a matter of concern but has no bearing on this investigation into complaints about the way a manager has dealt with his staff. We should point him in the direction of the broader staff survey results which (unfortunately) show that the perception of bullying and harassment extends beyond the BME group.

The way we would deal with this is consistent with the way in which issues within pharmacy were dealt with, where the manager was white, male, middle aged.

It does feel that a review of research, within the education context, might be timely, but that recommendation is probably beyond the scope of Jennie's actual remit.

Hope this is helpful. Happy to discuss next week". (p.1761 - 1762)

109. Ultimately, it was Mr Rayson who decided that this matter should progress to a disciplinary hearing, albeit in this email recognised that the outcome might be a development programme.

110. On 26 April 2019, Dr Hepburn emailed Ms Karen Taylor, Head of HR Operations again, copying in Mr Rayson explaining who would present the management case. There are two versions of this e-mail - one saying he would present the case and another saying it would be Ms Negus. Dr Hepburn had no explanation for the differing content. We accept his evidence entirely and do not regard the slight difference in content as anything sinister (unnumbered but after p.1799).

111. In response, Karen Taylor said:

> "*I think we need to strongly consider suspending him or moving him out of the department until the hearing takes place in order to protect the staff*" (P1799).

112. On 29 April 2019, the Claimant took the decision to resign from his position as Chair of the BAME network. He said that he had found it difficult to change culture, to promote or make a difference at the Respondent and he wanted to focus on his clinical research. (p.1766 - 1768).

113. He wrote separately to Kevin Turner, Deputy Chief Executive and BAME sponsor. In

his email, he highlighted that 80% of staff at the Respondent from BAME backgrounds believed that they had experienced discrimination. He said:

> "….*This need to embed in the ULH Central plan to eradicate discrimination and I know this can only be achieved if we have strong support from our colleagues from human resources.. First and the most important thing is we accept (particularly colleagues from human resources) that there is serious and chronic problem in ULH which has not been addressed from last several years .. I decided to continue my constructive fight to address this important area where my BAME colleagues have been discriminated. We are keen to work with you and colleagues in ULH to eradicate discrimination and change culture within ULH ……"*. (p.1769-1770).

114. That same day, the Claimant emailed Dr Hepburn chasing a copy of the report and its outcome. He said:

> "*I am keen to learn lesson and so that I can improve if I made mistakes and this should be close to avoid further stress and detrimental impact on my and my family health. It already has impacted on my positive thinking and my feeling about the ULH Trust.*
>
> *As per ULH Policy, these investigations should have collected three types of bullying evidences, two clear and concrete evidences are CCTV evidence (which we don't have as there are no CCTV cameras as far as I am aware) and documentary evidence though third one is witnesses.*
>
> *…*
>
> *I understand Jennie has interviewed 4 - 5 people.*
>
> *Janice Wiseman - Janice left ULH 10 years ago, so I completely failed to understand any relevant to this investigation. Janice and Helen Ayre <u>never worked</u> together in my Department or in ULH.*
>
> *Maria Tute - She left my Department four years ago, so again completely failed to understand any relevance. I know Maria and Helen worked within my Department at same time in 2014/15 for only few months. The ULH Policy says, investigators should speak to witnesses while memory is fresh, Helen left nearly 11 months ago and Maria left 4 years ago.*
>
> *Issy Thomas - Pilgrim CRF Manager, she is based in Pilgrim Hospital so not sure what documentary evidence Issy has or given.*
>
> *Susie Butler, Lincoln, she is only person based in the same building though this was only for few months, before she was based in other building.*
>
> *The Trust has been highlighting that senior managers should performance manage so it is important to understand if senior managers are managing performance fairly and loyally then the Trust should give clear considerations as those poor performing staff members will raise concern or complaint against senior managers.*

> *…*
>
> *Unfortunately, despite my number of requests, as far as I am aware, Jennie has not interviewed most of people who are working in same building as Helen was based. I requested, to interview all those I line managed directly so that she can get a clear picture about my line management style, this did not happen.*
>
> *…*
>
> *I really like to see documentary evidence of bullying, I don't mind if I made mistakes to apologise. Jennie did not inform me allegations against me though the Policy is clear that I should know what are allegations. Jennie told me that she can't tell me but ask questions around allegations. From questions, Jennie asked me, clearly lot of complaints were malicious and I proved that they were not correct. Some other areas were completely twisted and misinterpreted. …"* (p.1781-1782)

115. On receipt, Dr Hepburn forwarded the Claimant's email to Ms Taylor (P1781). Dr Hepburn replied directly to the Claimant the following day just to confirm that he was liaising with HR to ensure that he was following the process correctly (P1783).

<u>The invite to the disciplinary hearing</u>

116. After completion of the investigation report, both Mr Rayson and Ms Taylor were actively involved in managing the process either directly, or at times, by being 'cc'd' into e-mails so they were fully aware of what was happening and gave guidance on the process and witnesses.

117. On 13 May 2019, the Claimant was advised that he was required to undertake project work outside his department until the matter was concluded, but in the same building and on the same floor as Ms Tute (p.1817). He had not received a copy of the investigation report at this point.

118. On 14 May 2019, Dr Hepburn emailed Ms Taylor urging her to release the investigation report. He said:

> "*I don't really understand why you think it should be withheld any longer. However, I do need to get the process rights".*

119. He then quoted from the Dignity of Work Policy which states:

> "*5.3.3. The complainant must be advised in writing of the outcome of the investigation as soon as possible, i.e. if the complaint has been upheld or not.*" (p.1820).

120. On 14 May 2019, the Claimant submitted a medical certificate confirming his absence from work due to stress (p.1823).

121. On 24 May 2019, the Claimant contacted individuals at NHS England to raise a whistleblowing complaint in summary, alleging discrimination against him and BAME staff more generally (p.1839 - 1846).

122. Mr Simon Evans (Director of Operations and Chief Operating Officer and Board member) was appointed to chair the disciplinary panel.

123. On 30 May 2019, the Claimant was invited to attend a disciplinary hearing on 18 June 2019 (p.1847 – 1848). The letter, which did not arrive until 3 June 2019 (p1849), confirmed that the allegations against him were as follows:

    - "*Is there evidence that you presented behaviours of bullying and harassment. If so, is this a pattern of behaviour affecting a single member of staff or a group of staff.*
    - *Have steps been taken to address previously expressed concerns.*
    - *Is there evidence of failure to follow Trust policies relating to sickness absence and workplace stress.*"

124. Surprisingly, the Claimant was advised that he needed to address the allegation whether "*steps had been taken to address previously expressed concerns*", despite it obviously not being a matter for him to answer.

125. The Claimant was also advised that the management side intended to call Ms Butler, Ms Tute and Ms Ayre as witnesses at the hearing and that he should advise if he intended to call any himself (p1847). The Respondent did not call any of the witnesses interviewed by Ms Negus who made positive comments about the Claimant or denied being bullied.

126. At this point, the Claimant had still not received the investigation report which he finally received the following day on 4 June 2019 under cover of letter from Dr Hepburn dated 13 May 2019 (p.1809, 1815). Dr Hepburn confirmed that there was insufficient evidence to support the allegations that he had failed to follow the Respondent's policies in relation to sickness absence and work-related stress. However, the outcome of the investigation was the Claimant had displayed a pattern of bullying, victimisation and inappropriate behaviour.

127. On 4 June 2019, Ms Negus emailed a Ms Alexandra Williamson:

    > "*Have updated following receipt of the invite letter (attached) - as surprised that they have included the allegation about concerns being addressed as I largely found them to be a Trust failing rather than his … but anyway. - I have added that.*" (p.2055)

128. Despite having found that there was no case to answer on the part of the Claimant (rather it was the Respondent's issue) she did not challenge the fact that this allegation would form part of the disciplinary hearing.

129. In preparation for the disciplinary hearing, the Claimant put together a comprehensive paper setting out why he was not "*guilty*" of bullying or harassment. He supplemented it with documentary information which undermined Ms Ayre's complaint and credibility. By way of example, within an internal restructure it was agreed that there would be a period of consultation for 30 days. Ms Ayre had complained to Dr Hepburn that: "*TA did not await my response for the full 30 days …*". The Claimant provided documentary

evidence that this was not true.

130. He also put into context some of Ms Ayre's complaints, evidencing that matters raised were simple line management/operational responsibilities that he was dealing with (p.2161-2176). This document is lengthy and detailed but in the Claimant's view necessary when, in his view, malicious allegations had been made against him by individuals who no longer worked in his department dating back to 2014.

131. The hearing in June was postponed given the Claimant's ill health and rearranged for 11 October 2019 (p.2190). However, the Claimant was signed of work until 24 October 2019 (p.2189)

132. On 23 September 2019, the Claimant's solicitors at the time requested that the Claimant be accompanied at the disciplinary hearing by his lawyer (p.2195-2196). The Respondent refused this request on 26 September 2019 (p.2197). In the end, the Claimant sought the assistance of Mr Adrian Thompson, HR Consultant, to help defend him at the disciplinary hearing.

133. In the meantime, the Claimant was corresponding with the Respondent about witnesses he wished to call at the disciplinary hearing. In a letter dated 30 September 2019, he listed thirty-four witnesses who he believed were relevant to defend his position (p.2199 - 2201). Given the wide nature of the allegations (including that appropriate steps had not been taken to address previous concerns), the Claimant was keen to clear his name.

134. Mr Rayson replied to the Claimant's letter explaining that he was entitled to call witnesses who are relevant to the matters being considered and that it was his responsibility to invite them to the hearing. He also confirmed that a written record of the hearing would be made (p.2204 – 2206).

135. On 9 October 2019, Mr Rayson e-mailed the Claimant with a change of position and confirmed that the Respondent would contact the witnesses he wanted to call on his behalf, thereby removing any control from the Claimant in this regard. (p.2262).

136. The letters sent to the Claimant's witnesses said:

> *"please note this is a personal request on behalf of Professor Ahmed and is not a part of your contract of employment with ULH and therefore there is no requirement for you to attend"* (p.3658)

137. The Claimant wanted to call Ms Wiseman as a witness to the hearing, but she was reluctant to do so because she had left the Respondent ten years earlier and had nothing more to say in addition to her statement. Mr Rayson advised her "*there is no obligation on you to attend. It is your decision. The chair or the Panel is anyway reviewing the relevance of all the witnesses and you may well no longer be on the list*" (p2292). This is in direct contrast to the approach taken in respect of the management witnesses (paragraph 150 below).

138. By letter dated 31 October 2019, Mr Evans advised the Claimant that the disciplinary hearing was re-scheduled for Friday 15 November 2019 and the timing would accommodate his request to attend prayers (p.2259 – 2260). The allegation that the

Claimant had failed to follow the Respondent's policies relating to sickness and absence and workplace stress was removed in this letter.

139. Mr Evans also confirmed under separate cover that the Claimant's witnesses should be relevant to the investigation and allegations and not be invited as character witnesses (p.2261).

140. On 1 November 2019, the Claimant wrote to Mr Rayson listing thirty-three witnesses he wanted to call which included those interviewed by Ms Negus in her investigation (p.2263 – 2265)

141. On 4 November 2019, Mr Rayson wrote to the Claimant asking him to explain the purpose in calling his thirty-three witnesses and that the number may put pressure on the allocated hearing time (p.2270).

142. On 5 November 2019, the Claimant's wife hand delivered six files of the Claimant's evidence for use at the hearing (p.2209). The Claimant also replied to Mr Rayson's letter explaining why the witnesses on his list were relevant and said that the complaint was '*politically motivated'*, '*vexatious*' and based on a '*pre-planned agenda'* (p.2273 – 2275).

143. On 8 November 2019, the Claimant sent further evidence to Mr Evans (p1550-1551). He pointed out in his letter that no-one had previously raised any concerns with him in the past, either formally or informally.

144. On 8 November 2019, Mr Evans wrote to the Claimant explaining again that the witnesses he intended to call should be relevant to the issues and not simply there to provide character references. Within the letter he reintroduced the allegation that there was evidence of failure to follow the Respondent's policies relating to sickness and absence and workplace stress, despite it being previously removed. He confirmed that a second day for the hearing would take place on 25 November 2019. He also agreed to the Claimant calling twelve witnesses including Ms Wiseman, Ms Molsher, Ms Thomas, Ms Seychell and Ms Jones (p.2280-2282).

145. On 12 November 2019, the Claimant wrote to Mr Andrew Morgan (Chief Executive) challenging the decision not to allow him to call witnesses. He said:

> "*Management side is supported by Helen Ayre and two women they interviewed. They have allowed to cross question four other women, Jennie Negus interviewed but Ms Negus report contain only negative points from all six women she interviewed, completely ignoring their positive comments. My hearing date is on Friday 15th November 2019.*
>
> *After investigation, Jennie Negus produced report which I believe is biased and my character was totally assassinated the way the report was produced and by selectively taking information from statements. This is my only opportunity to prove that allegations are either incorrect or routine operational and performance issues and further if I raised any Helen Ayre performance issues, it was because other people had some concerns and it was my managerial responsibility to address. I can prove this only by inviting relevant people.*

…

My major concern once again is that the Trust is not giving me equal opportunity and putting me in a disadvantage position by not allowing me to invite witnesses in my defence. I have been allowed to invite only 2 from my initial list of 30 which I reduced to 20. I could reduce further but in order to have fair hearing, I should be given opportunity.

…

I am greatly worried that six women chosen (3 of them left my department or Trust 4 to 10 years ago), one I never line managed. None of them has witnessed my bullying Helen Ayre but the damaging report was produced without evidence and now I am not confident of impartiality of disciplinary hearing. So those small comments or routine operational/performance issues may be triangulated as before and as described above by Mr Rayson.

…". (p.2284-2285)

146. Mr Morgan replied briefly on 13 November 2019 saying that '*it would be inappropriate for [him] to get involved in this process as that would be outside of the Trust policy'*. He made a general observation that the Claimant was not required to prove his good character and it was not a general enquiry linked to the Claimant's dealing with his whole team. However, Mr Morgan failed to adequately address his point about not being permitted to call witnesses that he maintained were relevant to rebut the allegations against him (p.2286).

The disciplinary hearing

147. The disciplinary panel consisted of Mr Evans, Ms Yavenushca Lalloo (Managing Director of Clinical Services) and Sharon Cook (Employee Relations Manager). The hearing was set up as a quasi-Employment Tribunal in terms of physical layout and procedure.

148. At the outset, the panel confirmed that the Claimant was not required to answer the allegations that he had failed to follow procedures or that the Respondent had failed to deal with earlier complaints. This had not been confirmed to the Claimant with any certainty beforehand and he attended prepared to deal with all four allegations.

149. The management witnesses were Ms Ayre, Ms Butler and Ms Tute, all of whom were white.

150. Ms Tute had initially refused to attend the hearing and declined the request on two occasions. It was only on the third request that she agreed to attend after Ms Negus encouraged her to do so, to the extent of e-mailing her line manager to see if he could provide support. She managed to persuade Ms Tute to attend by suggesting that '*sharing her experience would help her to close the episode and move on'* (para 99 Ms Negus' statement).

151. The Claimant's witnesses who declined to attend were not repeatedly ask to attend – rather they were told that there was no obligation on them to do so

152. Prior to the hearing, Ms Negus met with the management witnesses and provided them with the questions they would be asked during the disciplinary hearing in advance.

153. By way of example, Ms Negus met Helen Ayre on 14 June 2019 and following their meeting emailed her as follows:

> "*Hi Helen*
>
> *Thanks for meeting today and going through the process for next Tuesday's hearing.*
>
> *As promised here are the questions; feel free to scribble down any key points you want to get across as we discussed and to use this as sort of a crib sheet on the day; and remember to make a note of the 3 key things you want to say even if everything else goes out of your head!*
>
> *Any questions/queries/worries then please don't hesitate to give me a shout …*" (p.3637).

154. This email was not disclosed until shortly before this hearing and the panel was not aware that these meetings had taken place when it took the decision to summarily dismiss the Claimant.

155. In the hearing itself, the format was entirely biased in favour of the Respondent's witnesses. Mr Thompson was told that he could not make eye contact with them and had to direct all his questions through Mr Evans first.

156. The panel themselves allowed Ms Negus to do most of the questioning and had very little input themselves.

157. Ms Negus presented the management case first. At one stage in the hearing, Mr Thompson noticed that Ms Negus was assisting Ms Ayre by whispering, pointing to extracts in the paperwork and coaching her in response to questions. Mr Evans also assisted the management witnesses by rephrasing questions for them and preventing Mr Thompson from questioning them fully.

158. During the course of the hearing, an HR representative was in attendance to take minutes. Mr Thompson requested a copy of the minutes at the end of each day, but the Respondent refused to provide them and only disclosed them a matter of weeks before this hearing. Mr Thompson was reliant on his own notes, which were detailed and reliable.

159. Mr Thompson conducted himself professionally throughout the hearing and asked valid questions of the management witnesses. During his questioning, it became apparent that a lot of the matters they complained of were routine management issues related to performance. In conjunction with Mr Thompson's questioning, the Claimant had provided seven lever arch files of documentary evidence which undermined what the witnesses were saying.

160. Mr Thomson questioned Ms Negus and she accepted that she should have interviewed Ms Seychell as part of her investigation.

161. The Claimant did not allege discrimination during the hearing itself following legal advice.

162. The Claimant called Ms Seychell and Ms Jones to give evidence – his other witnesses declined to attend. He was also permitted to submit an additional five witness statements.

163. Under questioning, Ms Seychell said that she found the allegations of bullying and harassment '*laughable'* having worked closely with the Claimant and knowledge of Ms Ayre. Mr Evans for some reason found her use of this word potentially offensive to the management witnesses. However, she was simply giving her opinion. Surprisingly, we noticed that Ms Lalloo-Padley for the Respondent laughed in this Tribunal hearing despite finding the same reaction on Ms Seychell's part offensive.

164. Ultimately, the hearing spanned over three-and-a-half days on 15, 25, 28 November 2019 and the morning of 4 December 2019. The final day was limited because Mr Evans had a pre-arranged meeting that afternoon.

165. On the final morning, Ms Negus had opportunity to give her closing statement in full. Within her submissions she said:

> *"This case has been centred on perception which is the ability to see, hear or become aware of something through the senses. We know from the literature that the way we are perceived influences the way we think, and I believe this has been a major factor in this case……*
>
> *This case has also been centred on empathy which is the capacity to understand or feel what another person is experiencing - the capacity to put yourself in someone else's shoes. So, for example, instead of saying "you aren't going to cry again are you?" we should be saying "tell me why you are upset" or at least wondering why they may be feeling that way.*
>
> *A substantial part of Tanweer's statement of case has been focused on the process of the investigation and drilling down into the minutiae of each incident or example - not once have we heard any acknowledgement of an appreciation of or question of remorse that his staff felt this way . Most staff in this position would welcome a response such as "I am so sorry; I never intended you to feel this way" or "I am so sorry; I can't believe I came over that way".*
>
> *We have seen none of this. No ownership or regret or even recognition of how these staff felt.*
>
> *……….*
>
> *Tanweer, through his defence has explored each and every instance and example cited; he has dismantled the situations challenging whether they constitute bullying. Indeed we heard with Helen in particular being questioned against each with "is that bullying?" We have heard a number of times from Tanweer about the importance of documentary evidence and he has produced a great deal - I do not dispute it's important - however what is also important is the word of the staff and their experience and that many of the issues raised*

cannot be disproven simply by an email or of the document.

This is a case about the overall experience; not just the individual instances raised; it is about how staff feel; the culmination of events and experiences; their experience in the round ...

In conclusion we have heard powerful accounts from the witnesses and within the investigation report. Ultimately this is about the emotional and cognitive impact of their experience working with Tanweer and not the objective experience of what actually happened. The lack of empathy shown for their experiences translates into a lack of respect for them. These were their experiences and we have to acknowledge and respect them……." (p3504-3506).

166. Mr Thompson drafted comprehensive and persuasive submissions setting out rationally why the case against the Claimant was unfair and flawed. However, when he was halfway through them Mr Evans said: "*All you are doing is criticising the panel you have 10 minutes left*". Mr Thompson summarised as best he could from his written statement before Mr Evans called the meeting to a close.

167. Thereafter, Mr Thompson emailed his written submissions to Mr Evans which were only acknowledged at 10:30pm that evening (p.2366).

168. The panel undertook limited deliberation later that afternoon after the conclusion of Mr Evans' meeting and recommenced the following morning.

The decision to dismiss

169. The panel met on 5 December 2020 and commenced further deliberations absent any minutes. They had little regard for the documentary evidence produced by the Claimant or his submissions. The panel acknowledged that the allegations went back over a lengthy period and accepted that there were performance issues with Ms Ayre, Ms Tute and Ms Butler, albeit Ms Ford was on the only individual who was being managed within a formal process.

170. The panel accepted the Claimant's evidence of discussions with them about their performance but, despite documentary evidence to undermine their allegations, the panel wholly accepted their view that the Claimant's approach had: "*been experienced by them as intimidatory and had been both unwanted and unwarranted*" (Para 78 Mr Evans' witness statement). It completely disregarded relevant evidence.

171. The panel also dismissed the witness statements provided by the Claimant from direct reports who confirmed that the Claimant had never bullied them, as '*character witnesses'*.

172. The panel were particularly interested in one email which, in its view, demonstrated the Claimant's bullying behaviour. On 6 March 2015, Ms Tute left work early without authorisation because her dog was poorly and e-mailed the Claimant the next morning to explain. In response, the Claimant said:

"I am aware that you were leaving this job so I am bit sympathetic at this stage

but please treat this notification as last warning, if I found you left earlier without prior agreement preferably or if I am not here without notification, I will start formal disciplinary process.

I have been receiving complaints from other members of the team that why some people leave early. This is ongoing from long time and I cannot allow any more. I will print and keep this email in your personnel file.

Kind regards" (p.341)

173. The panel considered this to be a formal final warning as opposed to its natural reading which is that it is a last warning before he deals with Ms Tute's unauthorised absence under the formal disciplinary procedure. Regardless, the panel attached much weight to it as a without considering it in the context of continued unauthorised absence and the disciplinary procedure which provides that such matters can be dealt with informally in the first instance.

174. The panel also failed to give any weight to the Claimant's length of service and unblemished disciplinary record.

175. Ultimately, the panel concluded that the Claimant's actions amounted to gross misconduct and confirmed the outcome in a letter. The key findings were in the summary as follows:

"*Considering your statement and the evidence that supported it, emails and appraisals, it was clear to see that the three main management witnesses Helen Ayre, Susie Butler and Maria Tute you considered had performance issues that ultimately did not meet your expectations.*

This was a question asked of you by the panel, as to whether you were actively performance managing these staff using the Trust's Performance Capability policy. Either informally or formally. Your response was in line with the evidence in that, there was no formal documented capability protocol but frequent reference in emails including the statement of "final warnings" in emails to Maria Tute as an example. You confirmed the only formal approach you had taken was with another member of staff Sarah Ford who was referenced in the management case but only by proxy through Helen Ayre's statement.

The panel agreed with your statement that active conversations with the three witnesses about performance in appraisals, using 1 to 1 meetings was taking place, but without any formality or in line with the Trust's capability policy. As a result each of these staff started to experience intimidation, that was in their minds both unwanted and unwarranted. Had it been a formal process this may have partially mitigated their feelings of unwarranted behaviour, even if they still had not wanted to be performance managed.

Therefore, by pursuing this line of performance management, not using the Trust's capability policy effectively you created a poor environment for these staff, one that has ultimately led to feelings of intimidation, bullying which was without justification in their eyes. The result of which described by witnesses was staff breaking down and spending their lunch break crying in their car,

fearing meetings with you, and describing feelings of dread prior to appraisals.

…

Of most concern to the panel during the hearing was your lack of empathy, sympathy, or indeed any remorse or insight regarding the way that these three key witnesses felt about your behaviour. At no point did you show any remorse, or regret that your staff felt this way, instead you stood firm in your approach that they were wrong to feel like that and that they should have performed better.

Finally, the panel agreed that if three members of staff had taken the extremely difficult and uncomfortable step of reporting issues with your behaviour, giving statements and then were willing to stand in front of you, your representative and a panel and confirm that they were of such feeling there must be validity to their experience. Evidence of written appraisals and emails do suggest issues of performance for each of the three key management witnesses; however only the staff themselves will be able to describe how your verbal and physical behaviour made them feel.

…" (p.2392-2397).

176. As part of their deliberations, the panel considered, but discounted, a final written warning or some other action short of dismissal and concluded there was no other position that he could be moved to '*as the misconduct was about managing others'* (para 85 of Mr Evans' witness statement).

177. They considered whether demotion was appropriate, but the only available role was at band 4 and Ms Cook (HR) said that the drop was too steep despite consulting with the Claimant himself.

178. However, the panel's main focus was their perception of the Claimant's "*lack of insight/sympathy/empathy or remorse that his behaviours towards staff he directly managed had such hugely negative impact. Without this there was no confidence that he could line manage staff, which would be a feature of any such senior manager in his field or indeed anywhere else in the organisation*" and as such an alternative role was not an option that they could consider (para 85 Mr Evans' witness statement). They failed to consider whether it was reasonable for the Claimant to show remorse or regret.

179. The panel also failed to consider whether the matters in issue were actually a capability and/or training issue as per Ms Negus's recommendations. In fact, they completely disregarded her recommendations.

180. Furthermore, the Respondent failed to consider its own Dignity at Work Policy which provides for an informal approach in the first instance and its capability policy which provides that where there is '*no element of choice in a failure to measure up to the required standard ….. in these cases, the capability procedure should be invoked'*.

181. Additionally, they failed to consider whether an alternative to a disciplinary sanction was appropriate such as training in accordance with its disciplinary procedures.

182. On 18 December 2019, the Claimant submitted a lengthy appeal against the decision to dismiss him. His appeal fell under the following broad headings;

- "*There are concerns over the correct decision based on the evidence that was presented;*
- *There were procedural/policy failings including adherence to the ACAS Code of Practice by the employer;*
- *There was unfairness and bias by the employer's investigator;*
- *The sanction imposed was too severe or disproportionate to the alleged misconduct;*
- *The employer failed to take into account my length of service and exemplary disciplinary record;*
- *The sanction was inconsistent with sanctions imposed on other employees for more serious offences*". (p.2399-2417).

183. Mr Mark Brassington, Chief Operating Officer, was appointed to hear the appeal and an appeal hearing was scheduled for 9 January 2020 (p.2423-2424). He received all the relevant documents in advance of the hearing.

184. The Claimant provided a statement for the appeal which was presented again by Mr Thompson (p.2461-2470). Despite receiving the documents in advance, the panel merely focussed on the oral arguments at the hearing and Mr Brassington did not even read the original investigation report for context – despite one ground of appeal being unfairness and bias on Ms Negus' part.

185. Further, HR had advised Mr Brassington not to examine the inconsistency of treatment point despite being provided with names by the Claimant.

186. The panel upheld the Claimant's appeal in relation to the delays in the disciplinary process, which it found were unacceptable. It also recommended that HR review its policy on refusing to provide minutes.

187. However, ultimately, the decision to dismiss was upheld and the outcome confirmed by way of letter dated 15 January 2020 (p.2479-2482). In respect of the inconsistency of treatment point, Mr Brassington confirmed that:

> "*As stated at the appeal hearing I am not in a position to comment on cases pertaining to other individuals. However, based on the disciplinary panel's decision that your actions constituted gross misconduct as a result of bullying, dismissal is an appropriate outcome …*"

<u>The law</u>

188. Section136(2) EQA provides:

Burden of Proof

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

189. The guidance on the burden of proof set out in *Igen Ltd v Wong [2005] IRLR 258* still applies (all references to sex discrimination apply equally to the protected characteristics):

> (1) Pursuant to section 63A of the Sex Discrimination Act 1975, it is for the Claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination against the Claimant which is unlawful by virtue of Part II or which by virtue of section 41 or 42 of the SDA is to be treated as having been committed against the Claimant. These are referred to below as '*such facts'*.
>
> (2) If the Claimant does not prove such facts he or she will fail.
>
> (3) It is important to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.
>
> (4) In deciding whether the Claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal.
>
> (5) It is important to note the word 'could' in section 63A(2). At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
>
> (6) In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.
>
> (7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the SDA.
>
> (8) Likewise, the Tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining such

facts pursuant to section 56A(10) SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the Claimant has proved facts from which conclusions could be drawn that the Respondent has treated the Claimant less favourably on the ground of sex, then the burden of proof moves to the Respondent.

(10) It is then for the Respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a Tribunal to assess not merely whether the Respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

190. We have had regard to the following other cases: Royal Bank of Scotland v Morris UKEAT/0436/10/MA; Hastings v Kings College NHS Foundation Trust ET 2300394/2016; Nagarajan v London Regional transport [199] IRLR 572; Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285; and James v Eastleigh Borough Council [1990] IRLR 288.

Harassment

191. Section 26(1) of the Equality Act 2010. A person (A) harasses another (B) if:

(a) A engages in unwanted conduct related to a protected characteristic (race in this case); and

(b) the conduct has the purpose or effect of: -

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

192. Section 26(4) provides that whether conduct has the effect referred to in subsection 1(b), each of the following must be taken into account:

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

193. The test contains both subjective and objective elements. The Tribunal is required to take into account the Claimant's perception, the other circumstances of the case, and whether it is conduct which could reasonably be considered as having that effect.

194. We have had regard to Richmond Pharmacology Limited v Dhaliwal [2009] IRLR 366 and Warby v Wunda Group [2012] EQLR 536.

Victimisation

195. Section 27 EQA provides:

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

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

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

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

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

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

…….

196. We have had regard to the following cases: Martin v Devonshire Solicitors [2011] LQLR 108 and Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830.

Unfair dismissal

197. Section s.98 ("ERA") provides:

In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) ……….
(b) relates to the conduct of the employee
………..

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

198. Section 123(6) provides:

"(1) Subject to the provisions of this section and sections 124, the amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

…..

(6) Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding".

199. We have had regard to the following cases: British Home Stores v Burchell [1978] IRLR 379, EAT; Sainsburys Supermarkets Ltd v Hitt [2002]; Midland Bank v Madden [2000] IRLR 288, Post Office v Foley [2000] IRLR 827; and Tykocki v Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust UKEAT/0081/16/ JOJ.

Submissions

200. We had the benefit of written submissions from both Counsel which were

supplemented by oral submissions. Whilst they are not set out in full, we have considered all the points made and all the authorities relied on where appropriate, even when no specific reference is made to them.

201. We refer to relevant parts of those submissions as appropriate below.

CONCLUSIONS

202. As we explain at the outset of this judgment, we have limited our deliberations to the matters set out in the list of issues.

Direct race discrimination

203. The less favourable treatment complained of by the Claimant is his dismissal. We have had full regard to his submissions explaining why he says this was less favourable treatment because of his race.

The Respondent's submissions

204. The Respondent submits the following:

i. That the reason for dismissal was gross misconduct by reason of the disciplinary panel's acceptance of the evidence presented in the round by the ladies concerned and that the same amounted to bullying and harassment and a breach of the dignity at work policy.

ii. This decision clearly had absolutely nothing to do with the Claimant's race and the suggestion that it was is misconceived. We can clearly conclude that the treatment of the Claimant was in no sense whatsoever on grounds of race and had everything to do with his conduct.

iii. The Claimant suggested in his witness statements that there was in effect a conspiracy to dismiss him. The Respondent argues that the disciplinary panel was in no way coerced. The Claimant was given every opportunity to present his case and did so. He was given permission to call evidence from seventeen witnesses and Mr. Thompson was able to cross examine the management witnesses. There was no irregularity with the process and the allegation that the investigation report was biased and influenced by race is misconceived.

iv. The Respondent was entitled to rely upon the investigation reports and the oral evidence that it heard. A reasonable decision was made after considering all the evidence, in particular the witness testimony of the ladies concerned and concluded that acts of misconduct had taken place and that those acts amounted to gross misconduct.

v. Thereafter, a sanction short of dismissal was clearly considered. In respect of the panel's finding that the Claimant did not show remorse or any insight, the Claimant was unable to demonstrate any form of compassion or understanding as to why the allegations might be made.

vi. The fact that the allegations were made within a performance management

setting is irrelevant. In the circumstances, by reason of a lack of insight, when the allegations are found proved the only proportionate sanction was one of dismissal. Consideration was given to action short of dismissal but was not considered appropriate. The fact that the allegations were historic in some respects was relevant and taken into account.

vii. In the circumstances, the Respondent's decision to dismiss was clearly within the band of reasonable responses. The Respondent reminds us that we must not put ourselves in the shoes of the employer. In essence, the Respondent's defence is simply that the Claimant's dismissal and the reasons for it were fair and race had no influence whatsoever.

viii. In respect of Mr Rayson's e-mail, it says the comment concerning the race card was predicated on the argument that he and the Claimant had in the car park and Mr Rayson being accused of being racist. It was Mr Rayson's general perception at the time. He did not influence or collude with anybody to ensure for the Claimant's dismissal. Nor did he persuade Ms Negus to prepare a racially biased investigation report there is simply no evidence of this. The view of Mr Rayson was that the matter should go forward to a disciplinary hearing was correct on the face of the investigation report.

205. The Respondent submits that if the burden of proof does shift, we can clearly conclude that the decision to dismiss was in no sense whatsoever because of the Claimant's race and had everything to do with his conduct.

Our conclusions - prima facie case

206. At this stage, it is appropriate to make findings based on the evidence from both the Claimant and the Respondent, save for any evidence that would constitute evidence of an adequate explanation for the treatment by the Respondent.

207. Having made and considered our primary facts, we find that we cannot make positive findings on the evidence either way as to whether discrimination has occurred, and we explain why below. Accordingly, we have considered the burden of proof as set out in section 136 of the EQA.

208. It is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of any other explanation, that the Respondent has committed an act of discrimination. We are entitled to draw inferences from our findings of fact.

209. We are mindful that it is rare employers will admit discrimination or for there to be overt evidence of the same and it is, therefore, appropriate to consider whether there was any element of unconscious bias in play. There must be '*something more'* than simply a difference in treatment with an appropriate comparator, which in this case is a hypothetical comparator.

210. The Respondent is an NHS Trust with comprehensive policies and procedures and an HR department to support their implementation. The Claimant was employed by the Respondent for sixteen years and had an unblemished disciplinary record. English is not his first language and he was actively involved with BAME organisations both within

the Respondent and in the wider community.

211. The Claimant and his line manager, Dr Hepburn, both recognised that the Claimant required development in the area of performance management.

The complaint and subsequent investigation

212. Ms Ayre raised a complaint about the Claimant to Dr Hepburn in June 2018 after submitting her notice. Within that complaint she relies heavily on hearsay and cites examples of her own experiences of what she says amounted to bullying and harassment which were historical in nature. The only recent allegation related to her appraisal that year and the manner in which it was conducted.

213. Despite the nature of the allegations, the Claimant was not suspended. The Respondent's disciplinary policy provides that it has the right to suspend an employee "*where there are reasonable grounds for concern that serious allegations have been made which, if substantiated, would fundamentally compromise the employment relationship'* or *'the way in which the concerns or allegations have arisen has led to a need to protect the interests of patients or other employees pending the outcome of a full investigation*".

214. The right to suspend is triggered at the point the allegations are made. Dr Hepburn gave an entirely satisfactory explanation during his evidence as to why the Claimant was not suspended initially, albeit his experience in this regard was in relation to doctors and the impact suspension has on their ability to practice (and return to practice after suspension is lifted) and not within the context of Agenda for Change. This is certainly no criticism of Dr Hepburn who simply sought and followed HR advice. However, the Respondent fails to adequately explain why the Claimant was moved to a different department at a *later* date on the direction of Ms Taylor and we deal with this further below.

215. Thereafter, the Respondent took a lackadaisical approach to dealing with the complaint, taking months to finally appoint an investigating officer. Once Ms Negus was appointed, she failed to contact the Claimant in a timely manner and only commenced her investigation in February 2019, eight months after the complaint was raised.

216. In the meantime, the Claimant was completely unaware of the allegations made against him contrary to the staff investigation protocol which states that the rules of natural justice require that the employee should know the nature of the allegation against them.

217. In undertaking her investigation, Ms Negus only interviewed witnesses who supported the allegations made by Ms Ayre and disregarded witnesses suggested by the Claimant – despite him continually asking her to interview a wider pool of people. Whilst we appreciate her reluctance to interview his entire department, interviewing some of the Claimant's direct reports would have provided more balance. Indeed, during the disciplinary hearing itself, Ms Negus conceded that she should have interviewed Ms Seychell. Furthermore, she failed to interview Dr Capaldi as advised by HR and despite him being present when the Claimant allegedly made a discriminatory remark. These failures led to a biased investigation report and we draw

an adverse inference from this.

218. It was always the Claimant's case that Ms Ayre's complaint was retaliatory because of the performance issues he raised with her. He quickly concluded that the Respondent was pursuing those complaints because of his race and expressed this clearly in his interview with Ms Negus on 15 February 2019.

219. Indeed, when the Claimant suggested this to her and said it was the *'white person being harsh'*, she responded that she thought it was an '*inappropriate comment'*. She also recorded in the investigation report that his '*indirect*' accusation of discrimination was '*intimidating and upsetting'*. This negative, reactive response to a genuine belief held by the Claimant does not sit well with her acknowledgement that the Claimant's strong sense of '*paranoia and distrust'* was '*no doubt borne out of life or work experience of discrimination'*. She simply dismissed it out of hand and does not adequately explain why she found no evidence of race discrimination when she appears not to have actively investigated it. Her response was also against the background of previous tensions between them in his capacity as Chair of the BAME staff network regarding the prayer facilities. We draw an adverse inference from the fact that the Claimant's belief he was being discriminated against was recorded as being '*intimidating and upsetting'*.

220. We also note that in the interview with Ms Ayre, Ms Negus asked her if she thought any of the issues were caused by the Claimant's English, culture or religion. In her witness statement she explains this was because of her "*experience of working within multicultural communities and teams and how misunderstandings and lack of understanding can be a factor*". However, we have no doubt that these questions would not have been asked if the Claimant was white and we draw an adverse inference from this.

221. Ms Negus completed her investigation report on 8 April 2019 and within the report she referred to an ex-employee who was not interviewed, Ms Ford, no less than thirteen times. Therefore, heavy reliance was placed on hearsay despite the staff investigation protocol providing that witness evidence '*should be in terms of what they personally witnessed or had involvement with'*.

222. Furthermore, Ms Negus attached much weight to the fact that, in her view, the Claimant had not shown any regret that he had "*been perceived in a negative way, any appreciation that this was their experience; in his view their experience was wrong*." However, the Claimant was of the view that the complainant and the witnesses' perception of his behaviour was simply wrong and unjustified. He is entitled to his opinion, just as the witnesses were entitled to theirs, but the Respondent used it as a factor against him. Furthermore, he expressed in his interview that he felt '*sad*' that they felt the way they did. We are not sure what else the Respondent expected him to say in the face of what he considered to be a malicious complaint.

223. Ms Negus concluded in her investigation that there was evidence of bullying and harassment by the Claimant in the form of "*the unwarranted behaviour, one to another, which is based upon the unwarranted use of authority or power*". However, she found that the Claimant's behaviour and leadership style was not malicious, nor was there a conscious effort to misuse his authority or power. Rather, she felt that there was a total

lack of insight or self-awareness into how he was perceived, and his behaviours received.

224. Ms Negus concluded her report by making recommendations and did not recommend that the case should go forward to a disciplinary hearing (which was a matter she was required to address in accordance with the Staff Investigation Protocol). Rather, her conclusions were that it was a capability/development issue on the Claimant's part which needed addressing.

225. This was also the view shared by Dr Hepburn as evidenced in his email to Mr Rayson where he said with a doctor, he would share the report and, if there was insight and agreement on their part, put together a development programme to address the issue.

Mr Rayson's e-mail

226. However, Mr Rayson's e-mail dated 20 April 2019 took matters on a completely different track and he directed that the Claimant be subject to a disciplinary hearing, despite acknowledging that the outcome might be a development programme. Notably, this change of direction occurred after what he describes as '*a row*' with the Claimant following his allegation of bullying and discrimination by HR. Mr Rayson clearly took exception to this (as did Ms Negus) rather than taking it on board as a valid perception.

227. Mr Rayson says that "*Tanweer will play the race card I suspect*". Surprisingly, the Respondent did not call Mr Rayson to give evidence to 1) explain his choice of words; 2) explain why the Claimant's accusation escalated into a row; and 3) explain why he directed that the matter proceed to a disciplinary hearing when both Ms Negus and Dr Hepburn were not of the same view. We draw an adverse inference from not only his e-mail, but also the failure to call him as a witness.

228. It was only after the investigation report was complete that the Claimant was moved out of his department as an alternative to suspension. It is unclear why HR decided to move the Claimant at this stage when the allegations remained unchanged, but we observe this occurred days after Mr Rayson's argument with the Claimant and his e-mail to Dr Hepburn in which he suspected the Claimant would '*play the race card'*.

229. If the Respondent truly felt that the allegations were so serious that other staff members needed protecting, it begs the question why not suspend him when the complaint was made. The Respondent said that by removing him from line management any risk was removed. Again, this does not address the timing of when HR took the decision to move him when the allegations were unchanged, and we draw an adverse inference from this.

230. The Claimant did not receive a copy of the investigation report until 4 June 2019, nearly a year after the complaint was raised. This was the first time he fully understood the allegations against him.

The disciplinary hearing

231. Prior to the hearing, Ms Negus encouraged the management witnesses to attend the hearing. She also met with them in advance and briefed them by providing them with the questions they would be asked and advised them to make notes. The same

encouragement and briefing were not extended to the Claimant's witnesses. Furthermore, the e-mail confirming that Ms Negus met with witnesses was not disclosed until shortly before this hearing, despite the Claimant submitting a subject access request and disclosure having already taken place. We draw an adverse inference from this.

232. The Respondent was frustrated with the amount of documentary evidence produced by the Claimant and the number of witnesses he wished to call to clear his name. However, we appreciate the Claimant's position. Up until the morning of the disciplinary hearing itself, it was not clear which allegations he was required to answer. There was no consistency in the communication with him and the allegations regarding his alleged failure to follow policies and procedures went in and out. The Claimant was understandably wanting to cover every angle and it was only at the outset of the hearing that the panel confirmed he was only required to answer two allegations.

233. The format of the disciplinary hearing was set up in such a way that indicates the Respondent had already formed the view that the management witnesses were telling the truth. Mr Thomson was not allowed to make eye contact with them or question them directly. Furthermore, both Ms Negus and Mr Evans assisted them in the hearing. Again, the same approach was not extended to the Claimant's witnesses. The playing field was far from even and we draw an adverse inference from this.

234. In terms of the decision to dismiss itself, the panel acknowledged that there were performance issues with the management witnesses which were being addressed informally in appraisals and 1:1 meetings and Sarah Ford was being performance managed formally under the capability procedure.

235. The panel concluded that the Claimant's informal approach meant that the witnesses '*started to experience intimidation, that was* ***in their minds*** *(*our emphasis*) both unwanted and unwarranted. Had it been a formal process this may have partially mitigated their feelings of unwarranted behaviour, even if they still had not wanted to be performance managed*'.

236. The Claimant was in a Catch-22. He was following the capability process by dealing with matters informally, yet his not dealing with them formally was found to have created a poor environment for them, '*one that has ultimately led to feelings of intimidation, bullying which was without justification* ***in their eyes*** (our emphasis)"

237. The panel accepted the witnesses' evidence seemingly without questioning whether the Claimant's view of their performance/conduct was warranted. They were swayed by Ms Negus' submission that, in essence, whether the matters complained of objectively amounted to bullying was not important.

238. The panel also placed an unusual amount of emphasis on the Claimant's '*lack of remorse or regret'*. As above, the Claimant believed that the motive for the complaint in the first place was retaliatory. The panel failed to consider whether it was reasonable for him to demonstrate remorse or regret.

239. The panel also placed much reliance on the fact that the management witnesses' attendance itself at the hearing was conclusive of their truthfulness. Again, in the

context of all three witnesses being performance managed; documentary evidence disproving many of the allegations; and a finding that there the Claimant had not breached the stress and sickness procedures (thereby undermining Ms Ayre's allegations) it is puzzling how they arrived at this conclusion.

240. Furthermore, they discredited Ms Seychell's evidence that the allegations were '*laughable*' and declared her comment to be potentially offensive to the management witnesses. There was simply no balance or objectivity applied given that the Claimant felt that the allegations against him were offensive, but no account was taken of that.

241. At the close of the hearing Ms Negus was afforded opportunity to present the management submission in full whereas Mr Thompson was cut short.

242. During the panel's deliberations, they failed to consider whether training/development was a more appropriate outcome, which had been the initial view of Ms Negus, Dr Hepburn and even Mr Rayson.

243. They also had no regard to the Dignity at Work policy which provides for such matters to be dealt with informally in the first instance. This was despite the fact that most of the allegations were historical, none of the management witnesses remained in the Claimant's department and some of the witnesses interviewed as part of the investigation had left the Claimant's department five to ten years before the complaint was made.

244. Finally, at the appeal stage, Mr Brassington did not even read key documents and failed to investigate the inconsistency of treatment point, albeit on the advice of HR.

245. In light of the above, we conclude that the panel's decision to dismiss was a forgone conclusion and we draw an adverse inference from this.

246. Furthermore, the Respondent disclosed five hundred pages of additional documentation, including the minutes from the disciplinary hearing, only a matter of weeks before the final hearing with no credible explanation as to why they were withheld. We draw an adverse inference from this.

Something more

247. In order for the Claimant to establish, on the balance of probabilities, facts from which we could conclude, in the absence of an adequate explanation, that the Respondent has committed discrimination, there has to be something more than a simple difference in treatment.

248. We are satisfied that there was '*something more'* than a difference in treatment between the Claimant and a hypothetical comparator namely;

i) that the Claimant had raised discrimination as a wider issue within the Respondent in his capacity as chair of the BAME staff network;

ii) that he had already been in conflict with Ms Negus over prayer facilities;

iii) that his allegation of race discrimination within the investigation was recorded

as '*intimidating and upsetting'*;

iv) this his allegation of discrimination to Mr Rayson escalated into a row; and

v) Mr Rayson's reference to the Claimant '*playing the race card'*.

249. Having stepped back and looked at our findings of fact cumulatively and overall, we are satisfied that the Claimant has established a prima facie case of discrimination.

250. The Claimant has discharged his burden of proof, so the Respondent is required to prove, on the balance of probabilities, that his treatment was in *no sense whatsoever* because of his race.

Our conclusions – the Respondent's burden of proof

251. One of the Respondent's primary difficulties is that it did not call Mr Rayson to give evidence, particularly given the contents of his e-mail and his direction that the Claimant be subject to a disciplinary hearing. It leaves many questions unanswered, especially when Ms Negus and Dr Hepburn were of the view that the complaint should be dealt with by way of the Claimant's development and not under the disciplinary procedure.

252. We would have expected Mr Rayson to explain why the decision to direct a disciplinary hearing was not related to race. However, there is no explanation for the leap between the findings of the investigation report to the calling of a disciplinary hearing. Given this, we cannot conclude that race was not a factor in the decision to call the Claimant to a disciplinary hearing in the first place.

253. Furthermore, we would have expected Mr Rayson to explain why the Claimant's accusation of racism escalated into a row and why he used the phrase '*play the race card*'.

254. The Claimant advanced his view that there was a collective attempt on the part of the Respondent to get rid of him, which the Respondent dismissed out of hand and accused him of talking "*nonsense*". We are not satisfied that there was such a collective attempt to dismiss him.

255. However, the Respondent has failed in our view to adequately explain how, based on the evidence, it arrived at the decision to summarily dismissal the Claimant. As we describe above, many of the management witnesses' complaints were disproven thereby undermining their credibility. However, the panel chose to believe their perception of events without applying any objectivity. It agreed with Ms Negus' submission that their '*cognitive*' experiences were valid but an '*objective experience of what actually happened'* was not. The panel failed to consider whether it was reasonable to expect the Claimant to show remorse or regret to those who he believed were making false allegations against him. It also failed to explain why it disregarded the Respondent's Dignity at Work and capability policies which provide for different outcomes.

256. Taking a step back to the investigation, the Respondent has failed to give an adequate explanation as to why the investigation and subsequent report were biased. Again, the Respondent simply submits that it was a reasonable investigation, but we reject that

submission for the reasons we explain earlier.

257. The Respondent has taken what can only be described as an over-confident approach to the burden of proof and has failed to address the matters we record above. It simply relies on the fact of its belief that the Claimant was guilty of gross misconduct and such belief was reasonable without acknowledging the glaring flaws in arriving at that conclusion.

258. The Respondent must prove, on the balance of probabilities, the Claimant's dismissal was in no sense whatsoever, whether consciously, unconsciously, or subconsciously, because of his race. Whilst we appreciate that it is preferable for us to make positive findings as to *why* the Respondent acted as it did, we have simply not been provided with a plausible explanation to allow us to do so.

259. We find ourselves in a position where we reject the Respondent's explanation for the Claimant's dismissal as we cannot see how it legitimately concluded that he was guilty of gross misconduct. We cannot, therefore, conclude on the balance of probabilities that race had nothing whatsoever to do with his dismissal. Accordingly, the Respondent has not discharged its burden of proof and the Claimant's claim of direct race discrimination succeeds.

260. We add for completeness that we do not find that Dr Hepburn had any influence over the decision to dismiss the Claimant or had any motivation to support this as the outcome. At all times, he simply sought and followed advice from HR and his view was that a development plan was an appropriate course of action as opposed to moving to a disciplinary hearing.

Victimisation conclusions

261. Turning to the victimisation claim, the Respondent submits that none of the matters relied on, save the Claimant's first Tribunal claim, amount to protected acts. However, it goes no further than that and does not address why not.

262. We are satisfied that the Claimant did the following protected acts as referred to in the list of issues.

    i. The Claimant raised the staff survey (showing that 80% of the Respondent's BAME staff said they were discriminated against) with Dr Hepburn in his appraisal on 15 April 2019. We are satisfied that this amounts to doing any other thing for the purposes of or in connection with the EQA, particularly given that at the time he was the chair of the Respondent's BAME staff network.

    ii. We are satisfied that the same applies to the Claimant's e-mail to Mr Turner on 29 April 2019. He refers to the findings of the staff survey and commits to fighting discrimination within the Respondent. This is clearly alleging that the Respondent has contravened the EQA and/or amounts to doing any other thing for the purposes of or in connection with the EQA.

    iii. The same rationale applies to raising the same matter with Ms Negus.

    iv. We are satisfied that Mr Rayson suspected that the Claimant may do a

protected act by saying he would '*play the race card'*.

v. The Respondent concedes that the Claimant's first claim to the Tribunal was a protected act.

263. The detriments relied on by the Claimant are subjecting him to a disciplinary hearing and his dismissal. We are entirely satisfied that these amount to detriments and the Respondent does not argue otherwise.

264. In deliberating whether there was a causal link between the protected acts and detriments we have considered why the Respondent subjected the Claimant to a disciplinary hearing and dismissed him. For the same reasons as our findings for direct discrimination, we cannot make a positive finding why the Respondent took the action it did, so we have considered the burden of proof provisions.

265. The Claimant does not need a comparator. Having stepped back and looked at our findings of fact cumulatively and overall, for the same reasons, we find that the Claimant has established a prima facie case of discrimination and, therefore, the burden of proof has shifted to the Respondent.

266. The Respondent submits '*that the Claimant is unable to establish any form of causal connection between the protected act and/or the acts, the dismissal of the convening of a disciplinary hearing'* and the allegations are '*simply outrageous, border on the preposterous and are wholly misconceived'*.

267. It goes no further than a blanket denial and simply relies on the fact that in its view the Claimant was fairly dismissed for gross misconduct. However, we have already found that there are so many flaws in the Respondent's case against the Claimant that it has not satisfied us that race was not the reason why the Claimant was called to a disciplinary hearing in the first instance and dismissed for gross misconduct after an obviously biased hearing.

268. We arrive at the same conclusion to the victimisation claim in that the Respondent has failed to satisfy us that the decision to call him to a disciplinary hearing and then dismiss him was, on the balance of probabilities, in no sense whatsoever linked to him doing protected acts. Accordingly, the Claimant's case must succeed.

Harassment conclusions

269. The Claimant complains of nine acts of harassment as per the list of issues. However, on reviewing the Claimant's evidence he fails to explain why the nine acts had the purpose or effect of either violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

270. The thrust of his evidence is that his treatment was direct race discrimination and victimisation. When he does refer to harassment, it is not in relation to the matters set out in the list of issues.

271. Given that he has not addressed this, it is not our role to make his case for him and as such, the harassment claim must fail.

Unfair dismissal conclusions

The Respondent's submissions

272. The Respondent reminded us that we should not place ourselves in the shoes of the employer and determine how we would have prepared the investigation and whether we would have dismissed. It says the investigation was a reasonable response from a reasonable employer in relation to the issues to be addressed, and the dismissal was a similarly reasonable response on the facts of the case. It says that both the investigation and the dismissal formed part of a reasonable process and the decisions taken into in relation to both and how they were approached was within the band of reasonable responses.

273. *The Claimant's submissions*

274. The Claimant submits that his dismissal was both procedurally and substantively unfair and tainted by unconscious racial bias.

Potentially fair reason for dismissal

275. The Respondent submits that it dismissed the Claimant because of the potentially fair reason of conduct. The Claimant does not advance an alternative reason for his dismissal but, of course, says that it was an act of discrimination.

276. Whilst the Respondent has not persuaded us that the Claimant's dismissal was in no sense whatsoever because of his race, we are satisfied that it dismissed him for the potentially fair reason of conduct following the complaint from Ms Ayre, the investigation and subsequent disciplinary hearing.

The reasonableness of the investigation

277. Ms Ayre made her complaint in June 2018. Despite the nature of the allegations, Dr Hepburn failed to act on them until some six weeks later when he asked Mr Evans if he would undertake an investigation. Mr Evans took a month to respond and declined. Thereafter, Dr Hepburn contacted Ms Negus who agreed to undertake the investigation but explained that she could not start it until the end of October, over four months after the complaint was made.

278. Dr Hepburn sent the terms of reference for the investigation to Ms Negus on 12 November 2018, but she did not start her substantive investigation until early 2019. During this period, the Claimant was unaware of the allegations against him and continued to work. Ms Negus failed to make contact with him despite the terms of reference stating that the investigation should be complete by 28 December 2018, leaving the Claimant to make contact with Ms Negus in January 2019.

279. Already, the Respondent was in breach of its own procedures which state that the rules of natural justice require that the Claimant know the case against him and that investigations should begin without unreasonable delay. Given the size and resources available to the Respondent, it has not advanced a satisfactory reason for the delay.

280. Ms Negus undertook the investigation with a view to only seeking evidence to support

the allegations rather than a more balanced view. She failed to interview relevant witnesses recommended by HR and completely disregarded witnesses suggested by the Claimant thereby leading to a biased report.

281. The Claimant made it clear that he thought the allegations made against him were retaliatory in nature and were being pursued because of his race. However, Ms Negus did not put the Claimant's perspective to the witnesses – she simply accepted what they said at face value without question. She also failed to challenge the witnesses despite documentary evidence provided by the Claimant undermining their allegations. Furthermore, she relied heavily on hearsay.

282. Ms Negus finally produced her report in April 2019, ten months after Ms Ayre's complaint was first raised.

283. Given these factors, we are entirely satisfied that the Respondent failed to follow a reasonable investigation. Rather, it was one-sided and not '*a full and reasonable investigation'*, as required by the Respondent's own investigation protocol. Furthermore, it was in breach of the ACAS Code of Practice (the ACAS Code") which provides "*It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case."* Notably, Mr Brassington at the appeal stage upheld the Claimant's ground of appeal that the delays were unacceptable.

284. The Claimant relies on the case of *Tykocki v Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust* highlighting the importance of a fair and thorough investigation process in disciplinary cases where the allegations are serious and could consequently have career limiting implications for the employee involved. Regardless of whether the Claimant's dismissal was potentially career limiting, we are satisfied that the investigation was wholly inadequate.

The decision to dismiss

285. The investigation report did not recommend disciplinary action and Dr Hepburn shared the view that a development plan was an appropriate response. Mr Rayson directed that the matter proceed to a disciplinary hearing, but was not called to given evidence to explain his decision.

286. The hearing itself took place almost eighteen months after Ms Ayre's initial complaint, again in breach of the ACAS Code which provides "*Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions".*

287. We appreciate that some delays were in consequence of the Claimant's ill-health and the volume of information he provided for consideration. Nevertheless, even if the hearing had taken place on the first suggested date in June 2019, it was still a year after the complaint was made and would have been unreasonable, particularly given the serious nature of the allegations against the Claimant

288. The Claimant was advised that he could call witnesses to the hearing but was not permitted to contact them. The number of witnesses he wanted to call was severely curtailed which was unreasonable given the scope of the allegations against him was

unclear until the first morning of the hearing itself.

289. The management witnesses were encouraged to attend the hearing (Ms Tute was asked three times), whereas no such encouragement was afforded to the Claimant's witnesses who were simply told they were not obliged to attend.

290. Ms Negus met with the management witnesses prior to the disciplinary hearing and briefed them on the questions she would ask them in advance. No such advance preparation was afforded to the Claimant's witnesses.

291. The Respondent refused to provide the Claimant with the minutes of the hearing after each day and only disclosed them a matter of weeks before this hearing, without providing an adequate explanation for withholding them. Mr Thompson was forced to rely on his own minutes which he took whilst presenting the Claimant's case.

292. The hearing itself was set up as a quasi-Employment Tribunal in favour of the management witnesses, who were assisted by Ms Negus under questioning. Mr Thompson for the Claimant was not able to question witnesses directly and his closing submissions were cut short. The panel were not aware that Ms Negus had briefed the management witnesses in advance.

293. The panel took on board Ms Negus' closing submissions that his case was all about perception and empathy. She criticised the Claimant for '*drilling down into the minutiae of each incident or example'* and challenging whether they constituted bullying. In this regard, the panel overlooked clear documentary evidence that undermined the allegations against him thereby discrediting the management witnesses. Despite this evidence, the panel took what they said at face value and used the fact that the Claimant wanted to disprove the allegations against him as further reason to dismiss him.

294. The Claimant's case has always been that the allegations were false and that individuals concerned were lying or fabricating a story that was not true. However, the panel failed to consider whether it was reasonable to expect him to show remorse or regret to those who he believed were making false allegations against him.

295. Furthermore, the panel acknowledged that the Claimant was informally performance managing two of the witnesses but used this as a reason to dismiss him, despite him acting in accordance with the Respondent's capability procedure.

296. The Respondent's capability procedure draws a distinction between negligence and capability/lack of adequate training, coaching, and/or supervision in which case the capability procedure should be invoked. However, the panel failed to consider whether training was an appropriate outcome of the disciplinary hearing, despite Ms Negus' findings that the Claimant's alleged behaviour was not malicious or a conscious effort to misuse his authority – rather it was a total lack of insight or self-awareness into how he was perceived. This was against the background of the Claimant acknowledging that he needed development in performance management and had agreed to undertake coaching in respect of the same.

297. The panel also failed to have regard for its Dignity at Work policy which provides that that Respondent should assist employees in resolving issues informally in the first

instance. The Claimant was not afforded that opportunity.

298. The panel also failed to give appropriate weight to the Claimant's length of service and unblemished disciplinary record.

299. At the appeal stage, Mr Brassington failed to read the investigation report despite it forming the basis of one ground of appeal. Furthermore, he declined to investigate the ground that there had been inconsistent treatment despite it being a reasonable point to raise.

300. Given the factors above, we are satisfied that the procedure followed and decision to dismiss the Claimant were manifestly unfair, particularly given the size and administrative resources available to the Respondent. Accordingly, it fell outside the range of reasonable responses of a reasonable employer and his claim of unfair dismissal succeeds.

Polkey

301. We have considered whether it is appropriate to apply a *Polkey* deduction and we conclude that it is not.

302. The Respondent acknowledges that the delays in the overall procedure but submits that many were attributable to the Claimant's ill health (although does not seek to attach blame for this). It says that this does not render the procedural aspect of the Claimant's dismissal unfair.

303. The Respondent also acknowledges the delay in the Claimant fully understanding the nature of the allegations against him. In this regard it says that he was fully aware of them in good time before the disciplinary hearing.

304. However, given that the Claimant's dismissal followed a biased investigation and disciplinary hearing we reject any submission that the Claimant would have been fairly dismissed in any event.

Contribution

305. We have considered whether there was any contributory fault on the Claimant's part, and we are satisfied that there was not. The Claimant denied the allegations at the outset, maintained that denial and the Respondent failed to carry out any objective assessment of whether he was guilty of gross misconduct. In the absence of that objective assessment, we are satisfied that it is not appropriate to make any finding of contributory fault.

Remedy

306. A remedy hearing will take place on a date to be notified to the parties under separate cover.

Employment Judge Victoria Butler

Date: 28 June 2022

Public access to employment Tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.