EMPLOYMENT TRIBUNALS

Claimant: Dr D Gandecha

Respondent: St Helens & Knowsley Teaching Hospitals NHS Trust

Heard at: Manchester

On: 3 and 4 May 2022
9-13 May 2022
16-20 May 2022
& 17 June 2022

Before: Employment Judge Benson
Ms J K Williamson
Ms E Cadbury

REPRESENTATION:

Claimant: in person
Respondent: Mr J Boyd - counsel

Judgment having been sent to the parties on 23 June 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and Issues

1. The claimant brings complaints of:

    a. Unfair dismissal;

    b. Direct race discrimination;

    c. Direct age discrimination;

d. Victimisation; and

e. Harassment related to the claimant's race.

2. At previous case management hearings, the Employment Judges conducting those hearings had discussed and agreed with the claimant and respondent the claims which were being brought, the basis of the respondent's defence and a schedule of issues. At the last case management hearing, a List of Issues had been attached to the order, which was agreed, however both parties felt that it would be useful for the Tribunal to also consider the schedule of issues which was also agreed, and which was attached to the Case Management Order of Employment Judge Howard. We were therefore assisted by reference to both during the course of the hearing. The factual allegations upon which the claimant relies in respect of each complaint are set out below in italics in our finding of fact and conclusions.

3. Matters arising during the course of the hearing

4. The hearing took place over 13 days.

5. In respect of the direct age discrimination claim, the claimant withdrew the allegation that Dr Meenak had led a smear campaign against the claimant and issued verbal threats.

6. The claim of harassment related to age was withdrawn.

7. Mr Boyd, who represented the respondent, had a note that harassment claims related both to age and race were withdrawn, and in his submissions noted that the claimant's direct race discrimination claim only related to the failure to support his career progression. There was confusion during the claimant's evidence as to the basis upon which he put these claims and the allegations he relied upon. As the Tribunal's note did not reflect formal withdrawal of these allegations, we have continued to make a determination of those claims also.

8. Both parties asked for additional documents to be considered during the course of the hearing, and these were added to the bundle as necessary. It was however apparent that there had not been full disclosure of the statements upon which Dr Barry Lewis' report was prepared and following their disclosure, the claimant was given full opportunity to consider them before the evidence continued.

9. There were also some documents which had been disclosed but which were not included in the bundle which the Tribunal wished to see, these being the full appendices to Judith Watson's report, and an email dated 12 March 2020 which was the last communication from Dr Bassi to the claimant prior to him resigning.

10. On occasions during the hearing Dr Gandecha talked over Mr Boyd, and the Judge and Tribunal members, was unfocussed and did not appear to be listening. Although appreciative of the fact that a Tribunal hearing can be a stressful occasion, particularly for an unrepresented party, this behaviour caused disruption and upset. The Tribunal had reference to the Equal

Treatment Benchbook and sought to assist the claimant by clearly explaining the Tribunal process and the behaviours expected of all those involved in a Tribunal hearing. He was reminded of this throughout the hearing. At times he was dismissive of the Tribunal and angry and argumentative. At other times, the claimant was polite and respectful. It did appear to the Tribunal that he did not appreciate the impact that his behaviour was having upon the conduct of the proceedings and the Tribunal. He made unsubstantiated accusations of blackmail and lying. He did not appear to be able to understand or accept that by others holding a different viewpoint than his, they were not lying but telling their version of events.

Evidence and Submissions

11. The Tribunal heard evidence over eight days from the claimant, and the respondents' witnesses, being:

    a. Anne-Marie Stretch — HR Director and Deputy Chief Executive

    b. Colette Hunt — HR Business Partner (Medical Workforce)

    c. Dr Mike Horner — Clinical Director and Consultant in Medicine for Older People

    d. Dr Sarah Williams — Consultant in Medicine for Older People and Clinical Lead for Parkinson's

    e. Mr John McCabe — Divisional Medical Director and Consultant Urological Surgeon and Chair of the Claimant's Stage 2 Grievance

    f. Dr Ash Bassi — Divisional Medical Director (Medicine) / Consultant Gastroenterology

    g. Dr Andrew Hill — Consultant Stroke Physician / Chief Clinical Informatics Officer

    h. Judy Watson — HR Consultant and Director of Kinvara Consulting Ltd and commissioned to investigate the Claimant's grievance

    i. Dr Barry Lewis — Occupational Psychologist Investigated the working relationships in the DMOP team

    j. Nikhil Khashu — Executive Director of Finance and Information - chair the Claimant's Stage 3 Grievance

    k. Dr Rikki Abernethy — Consultant Rheumatologist Case Manager for the Claimant's Stage 1 Grievance

    l. Dr Jacqui Bussin — Consultant in Medicine for Older People and Responsible Officer

m. Dr Julie Hendry — Former Divisional Director / Consultant in Respiratory

n. Dr Sanjeev Meenak — Former Consultant in the Stroke Unit. Clinical Director from 2013 - 2019

12. Dr Meenak did not attend the hearing as he has left the Trust and is overseas, but we were provided with his statement together with an email from Dr Meenak confirming agreement with its contents. As Dr Meenak was not present, the Tribunal attached such weight as it considered appropriate to his evidence.

13. We were provided with an agreed bundle of documents of almost 1500 pages, together with the additional documents referred to above. Page references in these reasons are to that bundle. Mr Boyd provided written submissions supplemented by his oral comments, and Dr Gandecha provided his oral submissions together with comment upon Mr Boyd's submissions.

Credibility

14. Much of the evidence in this case is disputed. We consider that the claimant's recollection of many events was unreliable. During the Tribunal hearing the claimant continually misinterpreted, mis-remembered or misquoted what was said in evidence by the respondent's witnesses, what was written in documents and what the Tribunal said to him. He made sweeping statements which were not backed up by evidence when challenged and even when he was able to refer us to his handwritten notes, we cannot rely upon these as they were not contemporaneous and for the reasons described above, we cannot accept that they were accurate. Generally, the respondent's witnesses gave clear evidence about the claimant and the impact which his behaviour has had upon them and upon the service which the respondent seeks to provide to its patients and community.

The Law

Constructive dismissal

15. To succeed in a claim of unfair dismissal, the claimant has to establish that he was dismissed by the employer. In a case of constructive dismissal, a claimant has to show that he terminated the contract by resigning, whether with or without notice, but in circumstances in which he was entitled to do so by reason of the employer's conduct.

16. The relevant section of the Employment Rights Act 1996 is section 95(1)(c). The leading case is **Western Excavating (ECC) Limited v Sharp [1978] ICR 221**. In that case the Court of Appeal ruled that for an employer's conduct to give rise to a constructive dismissal, the employee must establish there was a fundamental breach of contract on the part of the employer, that the employer's breach caused the employee to resign, and that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

17. In order to identify a fundamental breach of contract on the part of the employer, it is first necessary to establish what the terms of the contract are. Individual actions by an employer that do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of, for example, undermining the trust and confidence inherent in every contract of employment. A course of conduct can therefore cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a 'last straw' incident.

18. The 'last straw' does not by itself need amount to a breach of contract. **Lewis v Motorworld Garages Ltd 1986 ICR 157, CA**

19. The existence of the implied term of mutual trust and confidence was approved by the House of Lords in **Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL**. There, their Lordships confirmed that the duty is that neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

20. If the claimant establishes that he has been dismissed, the provisions of Section 98 Employment Rights Act 1996 come into play.

Direct Discrimination

21. Race and Age are protected characteristic within section 4 of the Equality Act 2010.

22. Section 13 of the Equality Act 2010 ("EQA") provides that:

    (1) A person (A) discriminates against another (B) if, because of a protected *characteristic, A treats B less favourably that A treats or would treat others.*

    (2) If the protected characteristic is age, A does not discriminate against B, if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

23. Section 23 (1) provides that on a comparison of cases for the purposes of section 13….there must be no material differences between the circumstances relating to each case.

Harassment

24. Section 40(1)(a) of the EQA prohibits harassment of an employee. The definition of harassment appears in section 26, for which race is a relevant protected characteristic, and so far as material reads as follows:

    (1) A person (A) harasses another (B) if -

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of

(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…

(4) In deciding whether conduct has the effect referred to sub-section (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.

25. Chapter 7 of the EHRC Code deals with harassment.

Victimisation

26. Section 27 EQA provides protection against victimisation.

(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.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

27. It is clear from the case law that the tribunal must enquire whether the alleged victimisation arises in any of the prohibited circumstances covered by the Act, if so did the employer subject the claimant to a detriment and if so what that

because the claimant had done a protected act. Knowledge of the protected act is required and without that the detriment cannot be because of a protected act.

Burden of proof

28. Section 136 of EQA 2010 applies to any proceedings relating to a contravention of EQA. Section 136(2) and (3) provide that if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

29. We are reminded by the Supreme Court in **Hewage v. Grampian Health Board [2012] UKSC 37** not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

Findings of Fact

30. The claimant is a specialist doctor in care of the elderly. He has a specific interest in Parkinson's disease. He commenced his employment with the respondent Trust on 6 July 2012. He had an unblemished career with the Trust until his resignation on 16 March 2020. For the majority of his employment, he worked at the Duffy Suite at St Helen's hospital in a non-acute unit. This was a unit which provided care for elderly patients who no longer required acute care but who were not yet ready to be discharged. In most circumstances if a patient required acute care, they would be transferred to Whiston hospital. He describes his race as British Asian of Indian origin. At the time of these events, he was 51 years of age.

31. It was accepted that for the latter period of his time on Duffy Suite he had an excessive workload. This caused him to be absent at various times with stress. In 2017, following a further period of absence, it was agreed that he would move to work in the Department for Elderly People (DMOP) at Whiston hospital.

32. The claimant wished to become a consultant. It was necessary for him to be registered on the specialist register to achieve this aim. There were two routes: a traditional training route; or the CESR route which involved a doctor who considered that he was working at consultant level, passing Royal College of Physicians exams and gathering evidence by way of assessments which were confirmed by more senior doctors, mostly Consultants. The claimant chose this second route. He agreed an interim job plan which provided some of the experience he would need.

33. Job plans were the schedule which doctors worked each week. They were generally agreed between the doctor and the Trust and were reviewed annually. If they could not be agreed there was a process to seek agreement through mediation and if that was not possible, an appeal process which a doctor could use. For a specialist doctor such as the claimant, the primary purpose of the job

plan was to ensure that the service needs of the Trust were met. The Trust had however signed up to support doctors through CESR if they wished to take that route and where possible the job plans took into account the doctor's need to gain experience and expertise to assist with their CESR application. A doctor seeking to make a CESR application was given an Educational Supervisor to assist him or her in the process.

34. Following his move to Whiston, there were a number of incidents about which the claimant was unhappy and claimed amounted to bullying and harassment by the respondent. In January 2018, he was given feedback by Dr Horner his educational supervisor which he was not happy with. That resulted in the claimant seeking to change his Educational Supervisor. In January 2019 the respondent as part of the annual job plan review proposed an altered job plan for the claimant which he was unhappy with. Mediation was unsuccessful and he put the appeal process in train. At various times he discussed his unhappiness with HR and senior colleagues who sought to support him. At that stage he did not wish to make his complaints formal.

35. In March 2019 he decided to bring a formal grievance. That raised issues of bullying and harassment by four of the Consultants within the DMOP, Drs Meenak, Bussin, Horner and Williams. The respondent's Case Manager Dr Abernathy appointed an independent investigator Mrs J Watson. She undertook a detailed investigation and reported on 29 August 2019. She did not uphold the claimant's complaints. Further she was concerned at the level to which relationships within the DMOP team (specifically between the claimant and the Consultants) had broken down and the claimant's lack of insight into the role he played in this. Dr Abernathy with the assistance of HR recommended to the Medical Director Dr A Bassi, that the Trust commission an independent psychological profile of the team with the aim of helping to rebuild the professional working relationship, to inform the Trust about the feasibility of team and individual coaching and/or conflict resolution/mediation. Dr B Lewis – consultant Psychologist was instructed by Dr Bassi to undertake this work.

36. Dr Lewis did some preliminary work in speaking with the claimant and members of the team including four consultant Drs Hill, Bussin, Williams and Horner. His conclusions were set out in his report at p550 together with suggested options for moving forward. A number of people saw the only way to improve the situation was if the claimant was no longer working with them.

37. The report was provided to the claimant and on 29 January 2020 a meeting took place at which the claimant was told about the options available. Dr Bassi considered that as key members of the team would not mediate with the claimant and moving him to another ward would not be sufficient to resolve the issues as the claimant would still come into contact and be managed by his consultant colleagues in DMOP. There were two options remaining. One was that the respondent would seek to find a secondment arrangement for the claimant at another hospital, such that he would have new relationships and could proceed with his CESR application. The other was that the claimant face a panel at which the Trust would have to consider whether the breakdown in relationships was such that his employment should be terminated. The

respondent referred to this as a termination for "some other substantial reason" – using the terminology of a potentially fair reason for dismissal within the Employment Rights Act.

38. Although the claimant was unhappy that the mediation route was not progressed, he agreed that the secondment arrangements should be explored. Before these enquiries were concluded, he resigned. His letter dated 16 March contained the reasons upon which he based his decision. He argued that the respondent's conduct had left him with no option but to resign.

39. Prior to his resignation he had appealed the grievance outcome to a second and third stage. He did not wait for the outcome of the third stage before he resigned.

40. We now go on to our factual findings in relation to each of the specific claims, together with our decision.

Constructive Unfair Dismissal

Findings of Fact – Unfair Dismissal

41. In the list of issues and schedule, the claimant summarised the conduct of the respondent which he says led to him resign and which caused the loss of Trust and confidence. We deal with each of these allegations in turn:

Did the Respondent subject the Claimant to an excessive workload?

42. Towards the latter part of the period 2013 to 2016 when working on the Duffy suite at St Helen's Hospital, the claimant had an excessive workload which caused him to be absent through stress. He raised these issues at the time with Dr Bussin and Dr Meenak, and although various interventions were made to support the claimant and the suite, it was recognised that Duffy was understaffed. Funding was arranged to support a locum doctor but the locum was only available for a 12 month period. The claimant continued to raise concerns and had a further period of absence through stress in 2017. He did not return to the Duffy suite, rather with his agreement he moved to Whiston Hospital, an acute centre, and agreed his interim job plan. This issue was resolved with his move and he did not make any further complaints about any ongoing excessive workload after he left Duffy Suite until he raised the workload issues he had suffered at Duffy Suite as part of his grievance in March 2019.

Did the respondent ignore the claimant's appeals in respect of his job plan on two occasions?

43. The claimant continued to work under his interim job plan throughout his employment. In January 2019 when Dr Horner became the clinical director for the DMOP, he reviewed all job plans and proposed an amended job plan for the claimant. This was put to him in a meeting on 11 January 2019 with Dr Hendry, Dr Horner and Ms Sumner. The proposed job plan benefited the department but also in Dr Horner's view, provided the claimant with additional exposure to acute medicine which would have assisted the claimant in his

CESR application. Dr Horner was of the view that the initial interim job plan only benefited the claimant and he sought to balance both the interests of the claimant with the service needs of the Trust. The claimant resisted this job plan and went through the process of further meetings and ultimately appealed it through the Trust's procedures. It was agreed with the claimant that the appeal would await the outcome of his grievance as part of the grievance related to the job planning process. This is referenced in an email from claimant's representative to him dealing with this and other issues dated 28 August 2019.

44. The claimant suggested in passing during the course of these proceedings that the reason that the respondent had not proceeded with the job plan appeals was because it was concerned that the claimant had sought to include within the appeal panel the national chairman of the SAS doctors' association. This was not something that we had understood to be the claimant's case previously, but in any event our findings and indeed the claimant's acceptance that the appeals were put on hold pending the outcome of the grievance provide a reason for those appeals not proceeding. They were not ignored as the claimant alleges.

Did the respondent ignore the claimant's requests for professional leave?

45. Dr Horner was responsible for approving the claimant's, and others requests for professional leave. This was leave to undertake study and sit professional examinations. On 20 May 2019, Dr Horner was due to leave for holiday and prior to leaving he checked the tray where such requests were left. He cleared the tray and went on holiday. When he returned, he found a request from claimant which he approved. There was some issue with regard to payment for exam and other fees which he made enquiries about and ultimately the claimant was appropriately reimbursed. We note that the claimant's claim relates to this occurring intentionally and on a number of occasions. When pressed upon the point, the claimant confirmed during the hearing that it was only one occasion when he left the forms in Dr Horner's tray for approval, when two or three requests were made at the same time. We accept the evidence of Dr Horner. His recollection was clear whereas the claimant's recollection is less reliable. In any event there was no evidence that Dr Horner had ignored the request. It was approved at the first opportunity.

Did the respondent deter the claimant from taking CESR specialist registration?

46. When the claimant moved from Duffy Suite at St Helens to Whiston Hospital, it was agreed with the respondent that he would be supported in his career progression by way of the CESR route to becoming a consultant. As a staff grade/SAS doctor the claimant's job was primarily to deliver clinical service to patients and the department in which he was employed as his post was not a training post. The Trust had signed up to support SAS doctors who wanted to proceed with the CESR route, but a balance had to be struck so that the patients' and Trust's needs came first.

47. The claimant's Educational Supervisor was Dr Horner. As part of the CESR application the claimant was required to carry out assessments to demonstrate competency in a variety of different areas. These needed to be signed off by

consultants or senior doctors by way of an electronic portfolio. The claimant alleged that Dr Hill had failed to support his career progression by refusing to sign off the assessments. The claimant during the course of his evidence suggested that Dr Hill had failed to do this six or seven times despite him chasing two or three times on each occasion. When documents were produced it was apparent that this was not the case and the claimant had only sought his approval on two occasions. Dr Hill provided a cogent explanation for failing to complete the two assessments, in that he explained that the type of assessment that the claimant had carried out was not his own examination of the patient, but rather observing Dr Hill and Dr Hill's experience was that this would be of limited benefit to him in his CESR application. We do not accept that the respondent by its these actions or otherwise deterred the claimant from pursuing his CESR registration.

Did the respondent subject the claimant to unfavourable treatment for raising concerns of bullying and harassment?

48. The unfavourable treatment which the claimant relies upon was wide ranging and we have addressed some issues which were not strictly part of this allegation as set out in the list of issues, but which are matters which the claimant raised in the schedule and his grievance. Further a number of the allegations predate his complaints (informal and formal) about bullying and harassment, but we have considered these in any event as allegations which the claimant says caused him to resign.

49. Dr Bussin: The claimant alleged that Dr Bussin's behaviour towards him changed from 2015 when he indicated to her that he was seeking to become a consultant through the CESR route. The allegations he made were that during the course of ward rounds Dr Bussin was aggressive towards him and made comments such as 'okay so you want to be a consultant what would you do here' when referring to the management of the patient. Dr Bussin agreed that her treatment of the claimant did change during ward rounds, in that she started asking him questions in the same way as she would with other trainees, whom she was challenging, such that they could demonstrate and improve their skills and experience to achieve their career aspirations. We accept her evidence and that this was the reason that she questioned the claimant in the same way. Any comments were intended to be supportive and constructive.

50. Feedback from Dr Horner: When the claimant returned to work following his period of absence in 2017, Dr Horner was appointed as his Educational Supervisor. The role of an Educational Supervisor was to assist and support the claimant through his CESR application. The claimant returned to work at Whiston on 22 August 2017 and met with Dr Horner to discuss his CESR application. He did not have a formal meeting with Dr Horner in his role as educational supervisor until January 2018, but Dr Horner saw and met him in his normal clinics as part of the normal working environment. On 29 January 2018, Dr Horner met with the claimant to feedback comments collected by Dr Horner from colleagues as part of the normal process in supporting and supervising trainees and those going through the CESR process. In doing so

Dr Horner had obtained views from other members of the team within the Department.

51. Although the discussion with the claimant started in the ward, they moved to a private room for them to continue. Dr Horner told him that he was not currently working at consultant level. It was accepted by the claimant and supported by his own notes that those were the words used by Dr Horner. The claimant's notes say: 'I'm not at consultant level'. Although the claimant may have inferred that Dr Horner was saying that he was not fit to be a consultant that was not what he said or what he meant. It was intended as constructive feedback. Dr Horner could not complete the feedback as the claimant would not listen, he acted improperly and talked over Dr Horner. He was agitated and aggressive. He asserted that Dr Horner had said things he hadn't and would not let him explain. He told Dr Horner that he didn't want to be a consultant anymore, he didn't want Dr Horner to be his Educational Supervisor and he would shut down his portfolio. The discussion had to be ended as the claimant would not allow Dr Horner to speak. We accept Dr Horner's version of this meeting and that he did not tell the claimant that he was not fit to be a Consultant.

52. Offensive language by Dr Horner: On a date the claimant could not recall, he alleges that Dr Horner used offensive language towards him saying "you have no time to fuck about". This was denied by Dr Horner who had no recollection of the incident. The claimant had provided no details as to when this was said, but during his cross-examination of Dr Horner, the claimant referred to it being when cakes had been given to the nurses and Dr Horner was leaving to get back to work. Again, without any detail as to when this took place Dr Horner could not recall the incident. Further this was inconsistent with the allegation of swearing when he raised it in his grievance when he said it related to a patient. We do not accept this occurred.

53. Refusal to change Educational Supervisor: A further meeting took place on 16th March 2018 during which Dr Horner sought to persuade the claimant that he should remain as his educational supervisor. Unfortunately, the claimant was confrontational and was adamant that Dr Horner had said previously that that he was not fit to be a consultant and reiterated that he felt uncomfortable to have him as his educational supervisor.

54. Efforts were made by Dr Hendry to find an alternative Educational Supervisor, but without success and the suggested alternative, Dr Smith was unwilling to assist. He had concerns about the claimant's full disclosure in respect of the success of his exams. Dr Hendry met with the claimant to discuss this issue. The respondent did not refuse to change the claimant's Educational Supervisor, it made efforts but could not find someone who was willing to carry out this function for the claimant.

55. On 17 March 2018 the claimant emailed Anne-Marie Stretch. The heading to the email was 'Cry for help - I am being bullied in DMOP - please intervene'. It made allegations that he was being subjected to bullying and harassment by Dr Horner and consultant colleagues. He alleged that Dr Horner was insisting

upon him being his Educational Supervisor and was acting aggressively towards him.

56. On 23 March 2018 Anne-Marie Stretch, Dr Hendry and Robert Cooper met with the claimant to discuss his email. They had all known each other over a number of years whilst working for the Trust and the claimant at that stage had confidence in them that they would be able to assist. Ms Stretch sought to persuade the claimant to continue with Dr Horner as his supervisor and there was discussion about his job plan. During that meeting the claimant expressed the view that his training needs were above those of the Trust and when he could not get agreement on the point, he became fractious, was very aggressive and accused Dr Horner of swearing at him and made insulting comments about him. The claimant did not wish to raise a formal grievance.

57. Review of Job Plan: The claimant had continued to work under his interim job plan and when Dr Horner became the clinical director for the DMOP, he reviewed all job plans and as part of that process proposed an amended job plan for the claimant. It was appropriate for this to be reviewed and discussed with the claimant. This was put to him in a meeting on 11 January 2019 with Dr Hendry Dr Horner and Ms Sumner. At that meeting, the claimant would not listen to Dr Horner and was very confrontational. We were impressed and accept the evidence of Dr Hendry that having worked with him, in her view the reason for the claimant's behaviours towards colleagues were his view that length of time in service carries equal or indeed more weight than the acquisition of clinical competence experience and/or achievement.

58. Dr Williams: The claimant met with Dr Williams on 2 February 2019 to discuss concerns about a prescription error. It was appropriate to discuss this issue with the claimant. Dr Williams was concerned about how the claimant would react during that meeting and asked Dr Hill to be present as previously the claimant had reacted badly when she had spoken to him. There were no difficulties with the claimant's responses in this meeting and he appeared to accept the feedback

59. By an email of 13 February 2019, the claimant raised issues of bullying and harassment by Dr Horner.

60. In March 2019 the claimant alleged that during a job planning meeting to discuss the new job plan which the claimant was unhappy with, Dr Horner told him that a non-training grade doctor was not required in the Stroke unit. That was the position at that time. As the role could not be filled, it was later advertised as a training role. The claimant did not apply and did not wish to work only in the Stroke unit.

61. Since early 2018 the claimant had been complaining to Dr Hendry, Collette Hunt, Anne Marie Stretch and Anne Marr about matters concerning his treatment within DMOP. Essentially these arose out of matters to do with a change of his job plan and concerns about Dr Horner being his educational supervisor. Each of these individuals, in whom at the time the claimant had confidence sought to resolve the matters, but when it was clear that the claimant was not satisfied, advised him that he either needed to make a formal complaint

which would be investigated through the formal procedures, or he had to just get on with his job. On each occasion the claimant did not want to make matters formal.

Formal Grievance

62. On 25 April 2019 the claimant changed his mind and emailed Collette Hunt to raise a formal grievance and seeking a formal investigation into bullying and harassment.

63. It was agreed with the claimant that the job plan appeal would await the outcome of the grievance, as part of the grievance related to the job planning process.

64. Responsible Officer: The claimant also sought a change in the Responsible Officer. His view was that Dr Bussin who was the Responsible Officer for the Trust was conflicted to the extent that she should be removed as his Responsible Officer during the process. The Trust has just one Responsible Officer who is responsible for the governance in the Trust and evaluating a doctor's fitness to practice. Dr Bussin spoke with the Higher Responsible Officer named David Leavy and reviewed this position but, with advice considered that there was no conflict at that stage.

The Watson Investigation

65. Dr Abernathy was appointed as Case Manager and she instructed Mrs Watson, an independent consultant who was experienced in carrying out investigations to conduct the investigation into the claimant's grievance.

66. Terms of reference were agreed with him in July 2019, after meetings with the claimant.

67. As part of his grievance, the claimant made specific allegations against four consultant colleagues, these were: Dr Meenak, Dr Horner, Dr Bussin, and Dr Williams.

68. The terms of reference for the investigation: When discussing the terms of reference with Mrs Watson, the claimant named some 35 witnesses who he believed should be interviewed. After discussion the number was reduced to 13. Although the terms of reference referred to those being the initial witnesses to be interviewed, Mrs Watson meant that if any other witnesses arose during the course of her investigation that she felt needed to be interviewed, she could approach them. During the course of this hearing, the claimant contended that the process was flawed because he had considered that all 35 witnesses should be interviewed. He considers that by limiting the number of people interviewed, and in his view limiting it to the four consultants and the DMOP team, it was an unfair investigation. We consider that it was agreed that it was only those listed in the terms of reference who would be interviewed. We do not consider that it would have been proportionate for Mrs Watson to have interviewed the number of people that the claimant had put forward. The key people were interviewed together with others who had worked with the

claimant. From consideration of the evidence that was collated, the witness statements included those taken from those not accused by the claimant as being protagonists in the bullying and harassment. All confirm that the difficulties emanated from the claimant and his behaviour, rather than supporting his own allegations of bullying and harassment against the consultants.

69. Mrs Watson reported to Dr Abernathy on 29 August 2019.

70. On 10 September 2019, Dr Abernathy met with the claimant to deliver the outcome of the investigation. She confirmed that a review of the facts had revealed that there was no evidence to substantiate any of the allegations made by the claimant against Dr Meenak, Dr Horner, Dr Bussin and Dr Williams and therefore the individuals would not be subject to any formal disciplinary process. A summary of Mrs Watson's findings were discussed with the claimant, who was disappointed with the outcome. The outcome was confirmed by way of letter dated 12 September but unfortunately that did not provide any real detail.

Did the respondent intentionally delay dealing with his grievance?

71. On 13 September the claimant appealed against the outcome as he was entitled to do under the Trust's procedures. The appeal meeting did not take place until 16 December 2019. An explanation for the delay was provided by Dr Bassi to the BMA – that being that there were initial delays by the respondent concerning a mix of two of the Trust's processes, but thereafter the BMA representative was initially unable to offer any November dates. The claimant asked for a copy of the report in early November which was provided on 23 November. The respondent advised the claimant and his BMA that it required redaction, but Mrs Watson confirmed in her evidence that the report which was at page 400 of the bundle was her unredacted report and the claimant confirmed that the report at page 400 was the report he was provided with. Although it may have been intended that the report might require redaction, it appears therefore that it did not. There was no intentional delay in dealing with the grievance.

Dr Lewis investigation

72. As Case Manager Dr Abernathy was concerned about the breakdown of the working relationship between the claimant and the consultants against whom he had made allegations. On 14 October she wrote to Dr Bassi to update him in respect of the investigation and to confirm that as a result of her review of the independent investigation report and her discussions with the team when feeding back the outcome, she had a number of concerns in relation to the breakdown of working relationships and trust and confidence within the team and the claimant's lack of insight into his role in the problem.

73. She had a number of recommendations that she wished to feedback to Dr Bassi as Divisional Medical Director. These included a recommendation that an independent psychological profile of the team be undertaken with the aim of helping to rebuild the professional working relationship, informing the Trust

about the feasibility of team/ individual coaching and or conflict resolution/mediation.

74. Dr Bassi agreed with this proposal and having discussed the matter with Collette Hunt from HR, asked her to arrange for Dr Barry Lewis, who was a psychologist working with the Trust whom he had used previously to assist with teambuilding and coaching exercises, to be engaged.

75. This was a different assignment for Dr Lewis, as he was being asked to provide a profile of the team initially, with the intention of moving to rebuilding relationships within the team as a potential next stage. Terms of reference were provided to Dr Lewis by Dr Bassi and he was asked to see each of the individuals involved and advise Dr Bassi on the issues which existed, options for addressing these via further intervention by Dr Lewis or otherwise and any observations or advice he considered would be helpful to the Trust in managing the situation. At this stage Dr Bassi was seeking to repair relationships such that the members of the DMOP could rebuild their working relationships.

76. Quote from legal advisor: As part of the disclosure exercise, the claimant has now seen correspondence between Collette Hunt and Barry Lewis. Within that correspondence Ms Hunt quoted from an extract of an email from the Trust's legal advisers with regard to the format of the report and whether any witnesses should have an assurance of anonymity. When considering whether witnesses could remain anonymous, the solicitor states:

"……The Trust needs a report which can, if necessary, be used in a potential dismissal scenario which, by the principles of natural justice, will need to be sufficiently detailed to enable DG to understand the basis of any possible action against him and to respond/challenge such evidence in order to defend his position."

77. We do not consider that the quote referred to by the claimant demonstrates any intent that the respondent intended to dismiss the claimant as he suggests. The quote is one which emanates from the solicitor as opposed to the respondent and is referring to the fact that the report could, if necessary, be used in any future action which could include a potential dismissal situation. This was against a background where Dr Abernathy was already concerned about the serious breakdown in relationships within the team.

78. The claimant was provided with a copy of the Watson report on or around 23 November 2019. Although the claimant suggests that he believed the Barry Lewis meeting was for the purpose of teambuilding, the email from Dr Bassi on 1 November 2019 confirms that the claimant would be meeting Dr Lewis in order that Dr Lewis could understand his views on the working relationships and the issues arising from the investigation into his grievance. The claimant met with Dr Lewis for these purposes.

79. Dr Lewis also met with the four consultant and a number of other members of the department and asked each of them the same questions. The purpose of the exercise was expressed to each of the participants prior to the questions

being asked. They were neutral questions about the team dynamics and relationships.

Dr Lewis' report

80. Dr Lewis provided his report in January 2020. Its conclusions were set out in summary form at page 551 of the bundle but he made the following points: he confirmed that there was a level of consistency in responses but there was no evidence to suggest any form of collusion or pre-meetings taking place; that the claimant's behaviour altered with high levels of defensiveness when challenged; the alleged behaviours exhibited by the claimant were consistent in the interview responses: shouting, finger-pointing and perceived anger and aggression; several members of staff found this behaviour threatening; that the dynamics of the team changed shortly after the claimant joined the acute unit.

81. The vast majority of the team considered that the claimant needed to be moved out of the department, though concern was expressed that this was just moving the problem elsewhere. Even those who weren't sure what steps should be taken, commented that too many bridges had been burned and that it was not fair that staff were off sick because of his behaviour

82. Dr Lewis found that several members of the team found the claimant's behaviour threatening and many said that they did not wish to have any further dealings with him and/or could not continue to work with him. Some members of the team were looking to leave the Trust as a result.

83. Dr Lewis proposed a number of options as to a way forward: he firstly suggested that it should be explored whether relationships could be improved. He suggested mediation may be the appropriate forum but expressed the view that because of the strength of feeling put to him by those interviewed, it was quite possible that mediation would not be feasible and/or would fail. The second option was to move the claimant to another ward, but he identified that there were a number of potential issues with this including whether the problem would still remain as those interviewed had expressed, whether the claimant would still need to be managed by members of DMOP who have said they cannot continue to work with him, and whether there was a role which could meet the claimant's skill set and where there is a service need. The third option was a potential secondment to another Trust and if none of these were possible Dr Lewis identified that the Trust would need to consider any other options available, weighing up the interests of all concerned, the sustainability of the service and quality of patient care. Dr Lewis rounded off his report by expressing that the claimant's behaviours had taken a real toll on the DMOP staff.

84. On 14 January 2020 the claimant was provided with the report.

Did the respondent ignore his requests for mediation/ was mediation bypassed?

85. Upon receipt of the report, Dr Bassi spoke or met with each of the four consultants, Drs Hill Horner, Williams and Bussin to encourage them to enter into mediation. They each explained why they did not consider they could do

it/or that they considered that it would be futile. Their explanations were given to this Tribunal by these witnesses and we consider that in each case the reasons were entirely genuine and an understandable position for each of them to take based upon their experiences with the claimant. There was no evidence that there was any collusion between them as alleged by the claimant. Mediation without the cooperation of the Consultants was not therefore something that the respondent could pursue.

Did the respondent threaten the claimant with an SOSR dismissal?

86. On 23 January 2020 Dr Bassi met with the claimant to discuss the report. The claimant attended with his BMA representative and the options were discussed. At that meeting the claimant was told that mediation was not something that could be pursued as there had been four definite refusals to engage. These were from three of the original consultants against whom claimant had made allegations and Dr Hill. Dr Meekan had by then left the Trust.

87. The claimant's grievance appeal was heard on 16 December 2019 before John McCabe. The outcome was confirmed on 8 January. His appeal was unsuccessful. All of the matters raised were considered in detail.

88. He appealed again on 8 January 2020 to Stage 3.

89. The claimant was requested to notify Dr Bassi by 31 January if he wished to proceed with the option of exploring secondments in other Trusts. If not, then it was suggested that they would need to meet to discuss next steps including the possibility of a fourth option being a potential dismissal on the ground of "some other substantial reason".

90. Correspondence ensued between the respondent and the claimant's BMA representative. The BMA sought to persuade the Trust that mediation should still be an option that should be explored or as an alternative a move to a different ward. The respondent had also discounted that possibility for the reasons previously stated.

91. The Stage 3 Grievance appeal took place on 9 March 2020. It was conducted by Nick Khashu. Stage 3 was for the purpose of reviewing the process followed, however the claimant provided full details of his complaints which were explored with him by Mr Khashu. There was no issue with process. This hearing took place over a number of hours.

Did the respondent try to second the claimant without consent?

92. The claimant and his BMA representative were asked to confirm by 7 February whether he wished the secondment arrangement to be pursued. Although the claimant says that these discussions were continuing without his knowledge, it is clear from the correspondence at that time between him and his representative and between his representative and the respondent that the claimant was aware that enquiries were being made with other Trusts (eg email dated 28 February) and who they were with. It is further apparent that the claimant asked for more details and was then provided with a draft secondment

agreement and associated document drafted by the respondent's solicitors. The enquiries which were being made at that time of other Trusts were no more than enquiries and on 12 March, Dr Bassi wrote to the claimant to ask him to meet to discuss a possible secondment opportunity and a potential visit to meet the Manchester University Foundation hospital.

93. The arrangements for any secondment were not a standard NHS secondment, but rather a bespoke secondment agreement. This proposed that the claimant would be seconded to another trust for the period of 12 months (but increased to 18 months after negotiation with the claimant), during which time the respondent would continue to fund the claimant's salary, but at the end of that period the claimant would agree that his employment with the Trust would terminate. The intention of the respondent was that the claimant would develop a relationship with the new Trust and use the time to complete his CESR such that at the end of that period he would either apply for a consultant role or continue at the new Trust. Either way, it was clear to the respondent and to the claimant that his employment with the Trust would terminate.

94. By his email of 12 March, Dr Bassi also requested that the claimant indicate whether the possibility of a secondment was still of interest to him and asked that he respond to him no later than 16 March 2020. Dr Bassi was due to meet with him on 18 March to see where matters were up to, but on 16th March he received a letter from the claimant resigning from his position with immediate effect.

95. The claimant had spoken to ACAS and he understood that both options which were available to him would lead to his employment with the respondent terminating. As he did not intend accepting the secondment on that basis, and as he did not wish to face a panel where he understood his employment would have been terminated, he resigned.

96. That letter appears page 664 to 667 of the bundle and sets out in detail the reasons for the claimant's resignation. These generally align with the issues raised by the claimant in support of his claim before the Tribunal.

97. Upon receipt letter, Anne-Marie Stretch sought to persuade the claimant to reconsider his decision, but he did not wish to do so.

98. At the date of the claimant's resignation, the outcome of the stage 3 appeal had not been provided, as the appeal had only taken place a few days earlier. It was provided by letter dated 15th April. The appeal was not upheld.

Conclusions and Decision – Unfair Dismissal

99. The starting point in a claim of constructive unfair dismissal is to consider whether the claimant can establish that he was dismissed. To do that he must show that there has been a fundamental breach of contract; that such breach caused him to resign and that he did not delay too long before resigning.

100. As the claimant relies upon the implied term of trust and confidence, in deciding whether there has been a fundamental breach, we must look at the

respondent's conduct which the claimant says caused him to resign. These are the matters listed in our findings of act above in italics. In doing so we must look at each of the allegations:

a. to consider if the respondent did what the claimant says it did; and

b. to consider if either individually or as a whole the respondent had reasonable and proper cause for doing each these things; and

c. If they did not have reasonable and proper cause, then was the conduct calculated or likely to destroy or seriously damage trust and confidence.

101. It is only if the claimant can show that there has been a fundamental breach of that implied term of his contract, we are required to consider the remaining parts of the test and whether any dismissal was unfair.

102. It is necessary to look at the respondent's conduct as found by us to have occurred and consider each proven allegation the test above is met.

103. The claimant has relied upon a number of allegations. For the reasons stated he has not proved on the balance of probabilities: that he was bullied or harassed; that his appeals in respect of his job plan or his requests for professional leave were ignored; that his grievance was intentionally delayed; that he was deterred from taking specialist CESR registration; that his requests for mediation were ignored; or that the respondent tried to second him without his consent.

104. We therefore go on to consider the remaining issues which he says caused him to resign and decide whether both individually and cumulatively they meet the above test.

<u>Excessive workload.</u>

105. The claimant was subjected to an excessive workload during the latter part of the period 2013 to 2017. This was found to be the position by Mrs Watson in her report and is accepted by the respondent. That was a function in part of the Duffy suite being understaffed. This was recognised by Dr Bussin and Dr Goudie, the clinical director of the time and efforts were made to recruit locum doctors to assist. There were no issues with the claimant suffering excessive workloads after he left the Duffy suite in 2017.

106. Did this conduct by itself, breach the implied term of trust and confidence? An employer has a duty to care for the welfare of its staff. Subjecting its staff to an excessive workload over a prolonged period, as has been accepted by the respondent, is likely to seriously damage trust and confidence between an employer and an employee. In this case the respondent sought to find assistance for the claimant on the Duffy suite by way of a locum doctor. The doctor did not remain throughout the period and although efforts were made to reduce the claimant's workload that was unsuccessful. The difficulty that the claimant has with this allegation is that in 2017 with his agreement he was moved to Whiston Hospital and he agreed a new job plan

which continued until his employment ended. From that date he worked without complaint about his workload until he raised the Duffy suite workload issue again in his formal grievance. Even if there was a fundamental breach of contract, the claimant has by his actions in continuing to work, affirmed the contract and further it is our finding that the claimant's excessive workload some 2/3 years before his resignation was not the reason or part of the reason for the claimant's resignation.

Remaining proved allegations

107. The claimant's case is put on the basis that because he raised grievances against his colleagues, he was bullied and harassment and they colluded to have him removed from the organisation by refusing to mediate with him, alleging that they could no longer work with him and intimating that they may leave the Trust. He says that they were by their actions blackmailing the Trust such that it had no alternative but to dismiss the claimant. He says that the Trust itself regularly used the machinery of 'some other substantial reason' as a mechanism to dismiss staff. We have found that the claimant was not bullied or harassed but go on to deal with the remaining allegations which the claimant contends were reasons for his resignation, which we have found occurred or which were factors into the options which were put to the claimant in January 2020.

108. SOSR machinery: There was no evidence that the respondent used the 'some of the substantial reason' dismissal process as a strategy to dismiss staff. The claimant was only able to refer to one claim before the Employment Tribunal in which he put forward that the reason for dismissal was SOSR. He produced no evidence of that claim and none of the Trust's witnesses were aware of it. The respondent's witnesses when it was put to them gave credible evidence that such a mechanism was not used in the organisation. This included evidence from the respondent's deputy chief executive and HR director. As with much of the evidence given by the claimant there was nothing tangible provided to us upon which we could rely to substantiate the allegations which he was making.

109. A failure to Mediation: The claimant alleged that the four consultants who refused to mediate in January 2020 were a gang of four who were intent on forcing his dismissal. We heard evidence from each of those consultants who gave persuasive and reliable evidence, often emotional, to explain the difficulties they had with the claimant during his employment and their reasons for refusing to mediate when Dr Bassi sought to persuade them to do so following the Barry Lewis report. It was clear to us having heard their evidence, that the claimant's behaviour and allegations brought against them during the grievance investigation caused them significant upset, worry, and in Dr Williams's case ill-health and potential damage to her reputation and career. Barry Lewis's report also demonstrated the impact that the claimant's behaviour was having upon other members of the team, including Dr Mason.

110. It is our view having reviewed the documents in this case, having heard evidence from the witnesses, including the claimant, and having observed the

claimant during the course of the hearing, that the claimant was unable to receive feedback without becoming argumentative and unreceptive to comments that were made. During the course of his employment this caused difficulties both in managing him and raised concerns amongst the consultants that there was a potential impact upon patient safety.

111. There was no reliable evidence or indeed any evidence that the claimant put forward which supports his view that there was collusion. Clearly there were four consultants who worked in the same department and had contact with each other, but there was nothing more which gave any indication that the consultants, although having the same view in relation to mediation, discussed it or indeed sought in anyway as alleged by the claimant to blackmail the respondent into removing the claimant out of their sphere.

112. Options: The options put forward by the respondent by way of the meeting with the claimant and letter in January 2020 were the two remaining options which it considered they were in a position to proceed with, following the report of Dr Lewis.

113. Following receipt of the Ms Watson report, the report of Barry Lewis, and facing the refusal by key members of the DMOP consultancy team to mediate, and an indication that some would be looking to move if he remained, Dr Bassi had to decide what action he could take. It was clear from the outcome of the Barry Lewis report that relationships between the claimant and other members of the DMOP team had broken down to the extent that the claimant could no longer be permitted to work within DMOP. As the move to a different ward had been considered by the Trust and was also unfeasible as the claimant would continue to come into contact with the Consultants [and be managed by them], Dr Bassi provided the claimant with the two remaining options. When he put these to the claimant at the meeting on 23rd January and as confirmed in the letter of 30th January, Dr Bassi essentially had little choice.

114. In applying the test in the **Malik** decision, we must consider whether the respondent had reasonable or proper cause for its actions. If it did not then we must consider whether the respondent's actions, individually or cumulatively were calculated or likely to destroy or seriously damage trust and confidence between them. We find that Dr Bassi had reasonable and proper cause for discounting mediation and not moving the claimant to another ward, and for seeking to progress the remaining two options with the claimant. This was the position even though both of the options were likely to have resulted in the claimant's employment with the Trust ultimately terminating. He was in a situation where relationships between key members of staff within the DMOP had broken down to the extent that it was impacting upon the functioning of the department. The cause of that breakdown was the claimant. This needed to be resolved. He had explored ways of seeking to repair relationships, but matters had gone too far and without the agreement of the Consultants to mediate, he looked outside the department. Moving to claimant to a different ward would not have resolved the issue.

115. We conclude that none of the conduct upon which the claimant relies, whether taken individually or cumulatively is sufficient to amount to a fundamental breach of contract such that the claimant was entitled to resign and say that he was dismissed.

116. The claimant was not dismissed. His claim of unfair dismissal fails.

Direct race discrimination (Equality Act 2010 section 13)

117. The claimant made two allegations of less favourable treatment because of his race.

Findings of fact – direct race discrimination

That the Claimant was not supported with career progression

118. Our findings are set out in paragraph 47 above concerning the interactions with Dr Hill and the assessments which the claimant was required to have signed off by his consultant colleagues, which he says demonstrated that the respondent were not supporting his career progressions. Dr Asher was another doctor within the Department who was not a consultant and whom the claimant says was a comparator for his claim. We accept Dr Hill's evidence that Dr Asher did not wish to proceed with a CESR application, and although Dr Hill confirmed that he had suggested to her that was a route she was capable of taking, she declined to do so. He did not therefore carry out any assessments for her. She did not have an Educational Supervisor and no steps were taken for her to progress from being a SAS doctor.

119. In March 2019, the claimant alleged that during a meeting to discuss the new job plan which the claimant was unhappy with, Dr Horner told him that a non-training grade doctor was not required in the Stroke unit. The claimant believed that Dr Horner said this as a justification for taking away his Friday morning sessions in the stroke clinic and was another attempt to hinder his career aspirations. We do not find this to be the case. In 2019 the Department had a requirement for two consultants within the Stroke unit but were unable to recruit. The respondent therefore agreed to advertise for a fixed term two-year speciality doctor post exclusively to work in the Stroke unit. The claimant accepted that he did not want to work exclusively on the Stroke unit. The competencies that he required to achieve his CESR application required a wider variety of experience. Dr Asher applied for the position and was successful. There was no evidence that the role was created for her as the claimant suggests. The role was advertised both internally and externally and although it gave the opportunity for the applicants to proceed with a CESR application, Dr Asher decided not to.

That there was a removal of the Claimant's responsibilities

120. As part of the claimant's interim job plan, he was programmed to attend a frailty clinic on a Friday afternoon and Monday morning. The claimant had a particular interest and expertise in Parkinson's disease, and he would see those patients who had Parkinson's who were admitted to the ward. There were other doctors who had Parkinson's expertise including Dr Mason. Dr Williams was the lead on movement disorders and when she went on sick leave, Dr Mason was asked to attend the frailty clinic and take on some of Dr William's responsibilities. The claimant's responsibilities were not removed nor was his job plan altered. He continued to work in the frailty clinic. Nor were they given to any other doctor including Dr Mason. It would not have been appropriate for the claimant to have taken on Dr Williams' responsibilities as she was the consultant lead and her responsibilities were therefore Consultant level.

Decision and Conclusions - direct race discrimination

121. We must consider whether the claimant has proved facts from which the Tribunal could conclude that in respect of either allegation the Claimant was treated less favourably than someone in the same material circumstances of a different race was or would have been treated? The claimant says his comparators were Dr Asher and Dr Mason. The claimant accepted that Dr Michael Horner was not pursued as a comparator.

122. Dr Asher was not an appropriate comparator. She was not supported on the CESR route as she did not embark upon it. Further the role in the Stroke unit was not created for her as alleged by the claimant to assist her with the CESR route. She did not make a CESR application. It was a widely advertised role which the claimant decided he did not wish to apply for. The claimant was not treated less favourably than Dr Asher in respect of support for career progression.

123. Dr Mason is also not an appropriate comparator. He was a Consultant and when Dr Williams, the Consultant lead, was on sick leave, he took over her Parkinson patients. The claimant continued to carry out his clinics as normal and there was no removal of his responsibilities. The claimant was not treated less favourably that Dr Mason.

124. Further and in any event, no evidence was put forward by the claimant that any of these issues were in any way connected to his race. His only reason for believing this was that he was a BAME doctor and Dr Asher and Dr Mason were white.

125. It is not sufficient for the claimant to simply show a difference in treatment between him and his named white comparators or a hypothetical comparator. He must show how his race may have played a part. From his evidence to the tribunal, the suggestion that any treatment of him might be because of his race came about following discussions with his BMA representative late in his employment. He makes no mention of race playing any part in his treatment in the grievance process. He made one mention of discrimination in his resignation letter when he refers to Dr Asher being of a different background

but it was accepted in cross examination that race was not in his mind as a reason for his treatment at that time.

126. This claim fails.

Direct age discrimination (Equality Act 2010 section 13)

127. The claimant made three allegations of less favourable treatment because of his age.

That Dr Julie Hendry made comments that the Claimant's "issues" were due to his age

That Dr Julie Hendry referred to the Claimant being older than Dr Michael Horner

That Dr Sanjeev Meenak made a comment that the Claimant should retire;

Findings of Fact – direct age discrimination

128. When the claimant received the Judy Watson report in August 2019, he noted that the statement which Dr Hendry had given to Mrs Watson included a comment that in explaining the claimant's behaviour, Dr Hendry thought the claimant considered he was equal or superior to Dr Meenak as they were about the same age. Further that the claimant absolutely refused to give Dr Horner respect as a consultant and Clinical Director because he was younger that the claimant and he knew him when he was a Registrar. She commented that the claimant believed that length of time in service carried equal or more weight than the acquisition of clinical competence or achievement of CCT.

129. The claimant's view is that those comments amounted to direct age discrimination by Dr Hendry, his comparator being Dr Horner or a hypothetical comparator.

130. The claimant alleges that Dr Meenak made comments that he should retire. It was accepted by the claimant that he was told this by another colleague who overheard Dr Meenak but the claimant was unwilling to provide the name of that colleague. Nor did he provide any detail as to when or where this took place. Although we did not hear from Dr Meenak, who has moved abroad, we have a statement from him which denies these allegations. The Tribunal was given evidence that Dr Meenak regularly talked about his own retirement. The claimant's evidence has been unreliable on a number of issues in this case. On the balance of probabilities, we are not satisfied that he has shown this comment was made.

Decision and Conclusions - direct age discrimination

131. For a claim of direct age discrimination claim to be successful the respondent must have treated the claimant less favourably than it would treat a

comparator because of age. We consider that the claimant has misunderstood that legal concept. The comments made by Dr Hendry are her opinion why the claimant may have treated Dr Horner or Dr Meenak in the way that he did. They are not allegations or supportive of less favourable treatment of the claimant, and the claimant has not put forward any treatment of him upon which he relies.

132. This allegation is in the tribunal's view an afterthought. The claimant confirmed in cross examination that it was only after seeing that reference and his discussions with the BMA that it occurred to him that he might have been subjected to age discrimination. There was no other reason. To succeed in his claim, the claimant must show facts from which we could conclude that discrimination could have taken place. He has not discharged that burden.

133. This claim fails.

Victimisation (Equality Act 2010 section 27)

Findings of Fact and Conclusions

134. The claimant relies upon two acts which he says are protected under section 27 of the Equality Act 2010. He says the respondent subjected him to a number of detriments because he had made these complaints and raised these issues. The other alleged protected acts in the List of Issues were withdrawn during the course of these proceedings.

Alleged Protected Act 1: Making a complaint against a list of colleagues in May 2019?

135. This allegation relates to the grievance which the claimant raised. We have seen the grievance and investigation report and outcome. Nowhere does the claimant make any allegation (whether or not express) that there has been any contravention of the Equality Act or anything which would be sufficient to amount to a protected act within section 27. The most that the claimant refers to is discrimination. He has accepted during these proceedings that race or age played little part in this case. It was only when it was suggested by his BMA representative that this occurred to him.

136. This does not amount to a protected act within section 27 of the Equality Act

Alleged Protected Act 2: Raising concerns about a culture of bullying and harassment to the Chief executive & director of HR?

137. On 14 January 2020, the claimant met with Anne Marie Stretch and Ann Marr together with his representative. The claimant sought assistance from them both. Amongst the matters he raised were concerns about institutional bullying and harassment in DMOP. Ms Stretch decided to undertake a cultural survey which although it commenced, was not completed for some time in because of the COVID pandemic. The respondent undertook a staff survey and

quarterly survey of staff which did not reveal any obvious concerns. The claimant has accepted that during that meeting he did not raise race or age discrimination or any complaint that there had been any contravention of the of the Equality Act 2010.

138. This cannot therefore amount to a protected act within section 27.

139. It is not therefore necessary for us to make any findings in respect of the allegations of detrimental treatment.

140. The claim of victimisation fails.

Harassment related to race (Equality Act 2010 section 26) (age withdrawn)

141. The claimant relies upon five allegations of unwanted conduct which he says amounted to harassment.

Findings of fact – harassment

That Dr Sarah Williams admonished the Claimant for correcting a prescribing error

That Dr Williams insisted that the claimant seek her permission to continue his research, thereby undermining him.

142. In February 2019, Dr Williams, the lead for movement disorders noted that the claimant had undertaken a review of a patient who had already been seen by Dr Mason. Dr Mason had decided upon a care plan, including medication, however the claimant determined that the medication was incorrect and changed it. During the course of his evidence the claimant explained that he had with him a specialist nurse who knew the patient and that the nurse believed that Dr Mason often made prescribing errors. At the time of the change Dr Williams raised with the claimant her concern that she understood he did not have a referral and further that he should not have changed a patient's medication without first discussing the matter with Dr Mason. That was an appropriate issue for her to raise with the claimant.

143. In December 2018 it had come to Dr Williams's attention that the claimant had research patients about which she was unaware. As clinical lead Dr Williams had overall responsibility for the patient group so needed to know what was going on and was concerned that she would be held responsible if anything went wrong. She wanted therefore to be involved in discussions relating to patients involved in research. She made enquiries of Dr Kevin Hardy as to the normal process and he confirmed that it was not normal for the clinical lead to be unaware of research being undertaken. In February 2019 the claimant was still undertaking research projects without Dr Williams's knowledge. On 19 February she met with him to inform him that his research

would need to be signed off by her going forward. She asked Dr Hill to be present during the meeting as the claimant had been aggressive towards her previously and she was nervous about speaking to him alone.

144. During the meeting she confirmed to the claimant that any future research proposals would need permission at the time of sign up. Although there was a gap in the operating process, it was both a Trust and professional courtesy to inform consultants of research being undertaken. Dr Williams did nothing to restrict the claimant's research opportunities or to undermine him. That meeting was conducted in a professional manner by all parties. During the meeting, Williams also took the opportunity to raise with the claimant the issue concerning the change of Dr Mason's medication that she had discussed with him previously.

145. There was no admonishment or grilling at any stage by Dr Williams or any threat that she would do so. She continued to support the claimant in research projects.

146. On 19 February Dr Williams confirmed the discussion that had taken place by way of email. That email was entirely appropriate and merely confirmed the discussion that had taken place.

Decision and Conclusions - harassment

147. As with the claims of direct race discrimination, there is nothing which the claimant has put forward in evidence from which we could conclude that Dr Williams' actions were in any way related to his race.

148. Further, although Dr Williams' discussions with the claimant were unwanted and may have made him feel undermined or humiliated, that was not Dr William's intention and nor was it reasonable in all the circumstances, including the claimant's own perceptions, for it to have had that effect upon him.

That the claimant was threatened with an SOSR process.

That the claimant was bullied and harassed on the basis of a false report from Dr Lewis.

That the Trust allowed eight individuals with whom he wished to mediate to undertake a hate campaign against him.

149. The only remaining allegation which the claimant has shown to have happened was that he was given two options in January 2020, one of which as that he could be taken down a process which was likely to result in his employment ending for "some other substantial reason". This amounts to unwanted conduct however the claimant has not shown any facts from which we could conclude the respondent did this because of anything related to his race. As with our findings concerning the claims of direct race discrimination, simply because the claimant is a BAME doctor is not enough to shift the burden to the respondent such that it would have to show that any treatment had nothing whatsoever to do with the claimant's race. Race was not mentioned as

an issue until it was suggested by the BMA. The claimant said in evidence that race played little part in his case. All of the evidence concerning the witnesses' interactions with the claimant focus on his behaviour and in respect of the options given, were because of the breakdown in the working relationships in DMOP.

150. The claims of harassment related to race fail and are dismissed.

_____

Employment Judge Benson

Date: 22 September 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON

23 September 2022

FOR THE TRIBUNAL OFFICE