



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Issac Jeremiah

v

**Chelsea & Westminster Hospital
NHS Foundation Trust**

Heard at: London Central (by video)

On: 1 – 5 August 2022

Before: Employment Judge E Burns
Mr R Baber
Mr S Williams

Representation

For the Claimant: In person

For the Respondent: Connor Kennedy, Counsel

JUDGMENT

The unanimous judgment of the Employment Tribunal is that all of the Claimant's claims fail and are dismissed.

REASONS

INTRODUCTION

1. This was a claim arising out of the Claimant's employment with the Respondent as a bank worker and concerned events that occurred from May 2020 onwards.
2. A list of issues had been prepared prior to the hearing. We discussed it at the start of the hearing and the agreed issues to be determined were as follows:

Direct Race Discrimination

- 2.1 Did the Respondent subject the Claimant to the following treatment:

- (a) Ending the Claimant's assignment within the overseas team on 29 May 2020;
 - (b) Ending the Claimant's assignment within the Assisted Conception Unit on 31 July 2020;
 - (c) Failure to offer the Claimant assignments after July 2020;
 - (d) Failure to explore job retention or redeployment in July 2020.
- 2.2 Did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies upon hypothetical comparators and/or the following actual comparators:
- (a) Nicole Pellat
 - (b) Molly Rutherford
 - (c) David Creasy
 - (d) Sunder Deshai
- 2.3 If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of race?
- 2.4 If so, can the Respondent prove a non-discriminatory reason for any proven treatment?

Victimisation

- 2.5 Did the following amount to a protected act under s. 27 EqA 2010:
- (a) Claimant's email to Caroline Hood dated 01 July 2020;
 - (b) Claimant's discussion with Caroline Hood dated 03 July 2020;
 - (c) Claimant's email to Tom Simons on 23 July 2020;
 - (d) Claimant's meeting with Tom Simons on 30 July 2020;
 - (e) Claimant's formal grievance dated 03 August 2020.
- 2.6 If so, did the Respondent subject the Claimant to the following detriments, because he had done a protected act:
- (a) Ending the Claimant's assignment within the Assisted Conception Unit on 31 July 2020;
 - (b) Failure to offer / consider the Claimant for assignment after his final engagement in July 2020;
 - (c) Failure to explore job retention and redeployment after his final assignment in July 2020;
 - (d) On 25 February 2021, altering the person specification for the assistant service manager job for which the Claimant had applied on 22 February 2021;
 - (e) On 11 March informing the Claimant he had not been shortlisted for the assistant service manager job.

Jurisdiction

- 2.7 Were the Claimant's complaints presented within the normal 3 month time limit in section 123(1)(a) of the Equality Act 2010 ("EQA"), as adjusted for the early conciliation process and where relevant taking into account that section 123(3)(a) says that conduct extending over a period is to be treated as done at the end of the period?

The Claimant initiated the Acas early conciliation process on 31 October with the certificate being issued on 2 November 2020. He presented his claim to the tribunal on 2 December 2022. The claim incorporated all of the allegations with the exception of 2.6 (d) and (e). These were added by way of an amendment application dated 7 June 2021.

- 2.8 If not, were the complaints presented within such other period as the tribunal thinks just and equitable pursuant to section 123(1) (b) of the Equality Act 2020?

THE HEARING

3. The hearing was a remote public hearing. From a technical perspective, there were a few minor connection difficulties from time to time. We monitored these carefully and paused the proceedings when required. The participants were told that it was an offence to record the proceedings.
4. We explained our reasons for various case management decisions carefully as we went along and also our commitment to ensure that the Claimant was not legally disadvantaged because he was unrepresented. We regularly explained the process and visited the issues when discussing the relevance of the evidence. We also assisted him with framing questions during his cross examination of the Respondent's witnesses. We note key case management decisions in this section.
5. The Claimant gave evidence. We also heard evidence on his behalf from the following:
- Sophie Walshe, former Assistant Service Manager of the Assisted Conception Unit; and
 - Derek Mensah, Business Development Manager - Private Care.
6. Mr Mensah had prepared a written witness statement covering a wide range of matters that were not accepted by the Respondent, but which the Respondent chose not to cross exam him on because they raised issues not relevant to the case. We discussed and agreed this approach first and then agreed the specific parts of Mr Mensah's statement on which he would and would not be cross examined with the parties.
7. The Claimant also submitted a written witness statement from Charmaine Robinson, a Tissue Viability Nurse employed by the Respondent. Ms Robinson was not able to attend the hearing. Although the Respondent applied for the statement not to be admitted, we decided it should be admitted. We were careful, however, not to give the untested evidence it contained undue weight when reaching our conclusions.

8. For the Respondent we heard evidence from:
 - George Anastopoulos, Deputy General Manager for Children, Young People & Neonatal Services;
 - Rosie Fegan, Interim Director of Operations for Private Care.
 - Caroline Farrington (née Hood) HR Business Partner for Women's and Children's, Sexual Health and Private Patients
 - Thelma Flammia, Temporary Staffing Manager
 - Kerri-Ann Barnett, former Head of Resourcing for the Recruitment Team in Human Resources
9. The tribunal ensured that each of the witnesses, who were all in different locations, had access to the relevant written materials which were unmarked. We were satisfied that none of the witnesses were being coached or assisted by any unseen third party while giving their evidence.
10. There was an agreed hearing bundle of 334 pages. Thirteen pages of documents were initially missing from the agreed bundle, but were provided to the panel during the course of Ms Fegan's evidence. These had been disclosed by the Respondent to the Claimant in January during the course of an aborted attempt to hold the final hearing. Neither party had noticed that the documents were missing from the bundle. In light of the late realisation, the panel was careful to re-evaluate its perception of some of the evidence given by Mr Mensah as the additional documents corroborated supported some of the answers that he had given.
11. The panel were sent digital recordings of telephone conversations between the Claimant and Tina Lucas, Assistant Services Manager, Overseas Team and Jacques Koame¹ Overseas Patient Liaison Officer recorded in July 2021 to which we listened with the agreement of the respondent. The Tribunal Panel were not told whether Mr Koame was aware that the Claimant had recorded him. It appeared to us that they were undertaken covertly. In light of this and the fact that Mr Koame did not appear as a witness before us (either voluntarily or as a result of an application for a witness order) we gave the recordings no evidential weight at all. In our judgment, the recordings simply contained opinions expressed by Mr Koame to the Claimant privately.
12. We read the evidence in the bundle to which we were referred and refer to the page numbers of key documents that we relied upon when reaching our decision below in brackets.
13. Employment Judge E Burns apologises for the length of time it has taken to send this reserved judgment to the parties.

¹ The Panel did not check the spelling of Mr Koame's name with the parties. We found various different versions of it in the bundle and therefore we apologise to him if he reads this and we have adopted an incorrect version.

FINDINGS OF FACT

14. Having considered all the evidence, we find the following facts on a balance of probabilities.
15. The parties will note that not all the matters that they told us about are recorded in our findings of fact. That is because we have limited them to points that are relevant to the legal issues.

Background

16. The Respondent is a Hospital NHS Foundation Trust. It offers a wide range of specialist and general hospital services at two main hospital sites, Chelsea and Westminster Hospital and West Middlesex University Hospital.
17. The Claimant's case concerns his assignment within the Private Care Directorate which consisted of the following areas:
 - Overseas Patient Services
 - Private Adult Inpatient (The Chelsea Wing)
 - Private Outpatients (The Westminster Wing)
 - The Assisted Conception Unit (ACU)/ The Fertility Centre (Westminster Wing)
 - Private Maternity Unit (The Kensington Wing)
 - Private Paediatric Unit (Saturn and Mercury wards)
 - West Middlesex University Hospital Private Patient services (West Middlesex University Hospital outpatients and day surgery).
18. At the relevant times, the senior managers of the Private Care Directorate were:
 - Paul Goodrich, Managing Director
 - Grant Brown, Head of Operational Management
 - Jason Pettit, Commercial Director
19. Ms Fegan, who gave evidence to the tribunal, was also treated as a senior manager. She held the title of Private Care Service Manager and was tasked with establishing private care services at the Middlesex University Hospital site. Ms Fegan began working as the Interim Head of Operational Management for Private Care in place of Mr Brown from January 2021 (who was working in a clinical role). She was formally appointed to this role in March 2021.
20. Mr Goodrich, Mr Brown, Mr Pettit and Ms Fegan are all white.
21. At the Chelsea and Westminster Hospital site, the different service areas within the Private Care Directorate were managed by Assistant Service Managers (ASMs). For the purposes of this claim, it is relevant to identify the following and their race as follows:
 - Melanie Honour, ASM of the Chelsea Wing Inpatient Ward who is white.

- Tina Lucas, ASM of Overseas Patients Services who is white.
- Sophie Walshe, former ASM of the Assisted Conception Unit who is white.

We note that ASMs are engaged at Band 5.

22. The Claimant describes himself as being of Black Afro Caribbean heritage. He was born in the UK and has lived in the UK all his life. He has a degree in Business Administration & Finance (1st class) from West London university. Prior to starting the role with which the Tribunal was concerned, he had worked in other administrative roles as an NHS bank worker and had spent time traveling and working abroad in Australia.
23. The Claimant worked in the role of Overseas Officer in the Overseas Patients Services Unit in the Private Care Directorate. The Claimant undertook this role as a member of the Respondent's bank staff from August 2018 to 20 May 2020. He was originally engaged on a level 3 banding, but was advanced to level 4 while in the post. The Claimant reported to Ms Lucas, but was also supervised by Jacques Koame, Overseas Patient Liaison Officer (a Band 5 role).
24. The team was therefore made up of three people, two of whom were permanent members of staff and one, the Claimant, who was a bank worker. The Claimant had been hoping for a significant period of time that his role would be made permanent. Ms Lucas had shared with him that she also wanted this to happen, but that it was not within her power to decide this.
25. Mr Mensah, who gave evidence on behalf of the Claimant continued, at the date of the hearing, to be employed by the Respondent in the same role of Business Development Manager in the Private Care Directorate. This was a permanent substantive role at Band 6 reporting to the Commercial Director. Mr Mensah describes himself as being of Black African and Black Afro Caribbean descent. He was the vice-chair of the Respondent's BAME Network and the health and well-being lead for the Private Care Directorate.

Bank Staff

26. Because he was a member of Bank Staff, the Claimant was employed under the terms and conditions contained in the Respondents' Staffbank Members Handbook (221-237).
27. The introduction to the Handbook explains that the Staffbank is a group of temporary staff who do not have permanent contracts, but who can be called upon to undertake assignments in different wards or departments in accordance with staffing needs. Bank Staff are said to be an extremely valuable and flexible staffing resource.
28. The Respondent is under no obligation to offer assignments to Bank Staff, who in turn are under no obligation to accept them. Staff bank members can be called upon to undertake assignments at short notice. Existing assignments can also be terminated, by either side, on very short notice.

The period of two hours before a shift starts is mentioned in sections 13.2 and 13.3 of the Handbook (226).

29. There are two routes through which a person on the Respondent's books as a member of Bank Staff can be given a temporary assignment.
30. Under the first route, where a manager has a vacancy for any reason, that manager will contact the team responsible for managing Bank Staff and ask them to find suitable candidates. This is the Temporary Staffing Team which is different to the Team which recruits for permanent positions. A member of the Temporary Staffing team will search the Staffbank to identify suitable candidates for the role and then suggest these to the recruiting manager. The final decision on selection is taken by the recruiting manager, based on a review of the relevant CVs and possibly some sort of informal interview process.
31. Under the second route, the recruiting manager with a vacancy will contact the Temporary Staffing Team and tell them they want to recruit a particular named individual. The Temporary Staffing Team will then process the request. The named individual is often someone that the recruiting manager knows because they have previously worked for them in the same role. The advantage is that asking for a specific person ensures that the recruiting manager will be assigned someone that they already know has experience and is competent in the role.
32. When a bank assignment comes to an end, the member of Bank Staff remains on the Staffbank. It is common for Bank Staff to be proactive and to inform the Temporary Staffing Team that they are looking for an assignment to a new vacancy. In addition, they will often remain in contact with their previous hiring managers.
33. As is common with many other bank arrangements operated by NHS Hospital Foundation Trusts, the Respondent's Staffbank is large. Many permanent members of staff also offer themselves for bank work. In addition, recruitment to the Staffbank is often by word of mouth through people with connections with the hospital. This means that the Staffbank includes friends and family members of current members of staff and other bank workers. There is no restriction on this.

Pandemic

34. The COVID-19 pandemic had a dramatic impact on the Respondent. The situation was unprecedented in terms of its breadth and urgency. There was a significantly increased demand within the Intensive Care Units (ICU) of both of the Respondent's hospitals caused by patients suffering from coronavirus disease. The Respondent needed to deploy all available resources to deal with this and therefore closed or significantly reduced its other services, including to outpatients.
35. The priority was treating patients with the COVID-19 and urgent non-COVID-19 cases. Normal activity in most outpatient clinics reduced and, in

some cases, stopped completely. Mass testing arrangements also had to be put in place for staff.

36. There was also a significant disruption of normal staffing arrangements for two reasons. First there were high levels of absence due to staff either catching COVID-19 themselves or having to self-isolate due to exposure. Second, the change in activities meant that there was an urgent need to redeploy staff where they were most needed. A priority was releasing clinical staff from non-clinical roles, some of which needed to be backfilled.
37. The reduced outpatients service meant that there was a reduced need for administrative support in outpatients departments. Where possible administrative staff were redeployed into other roles.
38. The situation was extremely fluid and reactive. A great deal of the redeployment activity was ad hoc. There was also a need to try and manage resources as the Respondent was having to significantly increase spend on locum nurses and doctors and overtime in order to service the ICU activity.
39. One area of possible savings that was identified was a reduction in the use of bank and agency staff. Unlike permanent members of staff, the Respondent was not obliged to maintain their employment. It therefore made good commercial sense to reduce the numbers of bank staff and, if necessary, assign their activities to permanent members of staff that were not being fully utilised. Unlike private sector businesses, the Respondent was not eligible to apply for furlough payments. In addition, at the time, there was a flurry of people volunteering to work for the NHS for free to help with the pandemic response. Across the Respondent, managers were expected to examine their use of bank and agency staff and not to use them unless there was a good business case for doing so.
40. As far as the Private Care Directorate where the Claimant worked was concerned, business as normal ceased. Some of the services offered in the Private Care department continued such as maternity services, but all general outpatient services stopped.
41. The work of the Overseas Department within the Private Care Department dramatically reduced due to the fact that many countries closed their borders to limit the spread of the virus. This resulted in the UK receiving reduced numbers of international travellers. The number of overseas patients being treated also reduced dramatically because the services offered in the hospital had reduced.
42. The treatment of urgent non-COVID-19 patients was made possible as a result of arrangements that were agreed with private providers to transfer urgent non-COVID-19 cases to them. Within the Private Care Department, there was some existing experience of arranging for private patients to receive treatment from other private providers. The Respondent sought to benefit from this and use the same people and IT systems to co-ordinate the more voluminous transfer of urgent NHS cases to private providers. The project was led by Jason Pettit.

Claimant's Termination

43. Against this backdrop, the Respondent decided to terminate the Claimant's bank assignment in the Overseas Department.
44. Ms Lucas, the Claimant's line manager, emailed the Claimant on 15 May 2020 asking him to attend a meeting with her that day (66). At the meeting she informed him that his assignment was to be terminated at the end of the month. She told him that this was not her decision, but that it had arisen because a decision had been taken at a trust-wide level to get rid of all bank staff in order to save money.
45. The Claimant spoke to Mr Mensah about this matter. On 18 May 2020, Mr Mensah sent a lengthy email (67 – 70) to Thomas Simons, then Director HR and Ms Kerri-Ann Barnett, Head of Resourcing. He raised concerns in his email that there seemed to be some inconsistency in relation to some of the decision-making concerning bank staff. In particular, he suggested that some bank workers who were white and related to or known to their line managers socially appeared to be being redeployed, but others such as the Claimant, who was black, were being let go.
46. Although Mr Mensah did not name any names in his letter, we now know that he was referring to the Claimant and others who are named as comparators in this case, namely Molly Rutherford, Nicole Pellat and David Creasy. Ms Rutherford, Ms Pellat and Mr Creasy are all white.
47. At this time, Ms Rutherford was a student at the University of West London doing a BA (Hons) in fashion, branding & marketing. She completed her studies at some point in the summer of 2020 (322). While studying she joined the Staffbank. She did this in August 2019. She was appointed to a placement in September 2019 as a Grade 4 Management PA to Paul Goodrich, Grant Brown and Jason Pettit. Molly Rutherford was known to one of the ASMs, Ms Honours. She was the sister of Ms Honours' daughter's boyfriend.
48. Ms Rutherford's bank assignment was not ended at the same time as the Claimant's but her days and hours of work were significantly reduced. Rather than working a full day every day, she was working slightly shorter days every other day.
49. Ms Pellat had joined the Staffbank in December 2019 as a Band 4 Admin. She was friends with Ms Rutherford. We were told that she was also a student, although neither side was able to confirm this. In her Bank role, Ms Pellat reported to Ms Honours and worked on patient bookings for the Chelsea Wing. Her bank position was also not terminated at the same time as the Claimant's position, but she had significantly reduced hours introduced with effect from 1 June 2020. Rather than working full days she worked mornings only. She continued in the role doing reduced hours until 22 July 2020 when her bank assignment came to an end.

50. The Respondent told us that the reason for keeping Ms Rutherford and Ms Pellat in their roles was to support the work being done to transfer urgent non-COVID-19 cases out of the Respondent's hospitals to private hospitals. The booking system that Ms Pellat used for her role was being used for this. As Mr Pettit was managing this project, he had an ongoing need for PA services from Ms Rutherford. The Claimant did not present any evidence that this was not accurate.
51. In May 2020, Mr Creasy was a member of the Staffbank and was assigned to the Chelsea Wing where he worked as a Band 3 receptionist. His assignment was terminated before the Claimant's and came to an end on 14 May 2020. He was briefly reassigned to work as a Porter in radiology, however. He did six shifts there between 2 and 10 June 2020. Mr Mensah told us that he believed that Mr Creasy had a personal connection to Mr Brown, but we saw no evidence that this was the case.
52. A fourth comparator who was not referred to in Mr Mensah's letter, but who was cited in the claim was Sunder Deshai. We were told that Mr Deshai was Asian. He had a bank assignment as a grade 4 Admin in the Accounts department for private patients and reported to Ms Honours in this role. His bank position was terminated on 27 May 2020 at around the same time as the Claimant's assignment was ended. The Respondent told us that the role was no longer required because when the Chelsea Wing closed, there ceased to be a need to process invoices for private patients. It is relevant to note that Mr Deshai was married to a permanent member of staff within the Private Care Directorate.
53. The Claimant emailed Ms Lucas on 19 May 2022 to ask her to reconsider the decision to terminate his assignment. His email in full said:

"I have had a small amount of time of recess to reflect upon our meeting on Wednesday as you can imagine I do not think it's just. I fully understand your position and that the decision is out of your hands. However, I wonder whether you may be able to schedule a meeting with you, myself and [Mr Goodrich, the Directorate's MD] in regards to [the] final decision on me being laid off due to this coronavirus situation.

As you know I have put a tremendous amount of effort into this position and I feel I am a great addition to our team, the information I have attained on regulation and my experience in case dealings has equipped me for this position + my previous experience that you are aware of. I know I am a bank worker on paper but I see myself as anybody else in this office. I do feel it would be a waste if this position is terminated + whilst I know overseas is not overflowing with patients now, it will pick back up and we both know we will need to pull together to build processes that can help and I feel my credentials will aid that along with yours and [Mr Koame's].

If the situation is that overseas cannot use me at this moment my experience could aid in recalibrating within the surrounding areas of our department, whilst overseas regenerates this could be another option. I recall [Mr Goodrich] coming to our office and we discussed this. There are many areas

I can contribute to in order to display value and help get the trust running back to its full capacity.

*I do not want my time here to be futile so I would appreciate if we could discuss /negotiate a situation that may be beneficial for [Mr Goodrich]/ trust/execs and me. I am capable of finding a new position as I feel I am a strong candidate for any department when I am applying myself and doing things, I have a passion for as I have been. To drop the ball here would be imprudent especially in this current climate I feel this is very unfair and feel that some sort of concession can be made giving my commitment to this position. Now I know you yourself have thought for me and I am extremely thankful for all you do, you are a phenomenal manager so I want to make you aware I have no issue at all with you I think your brilliant you have been so good to me especially with my situation with my mum. But this situation is really s*** and I feel if we come together and communicate something may be able to be done. Please let me know.” (71)*

54. We consider that in his email the Claimant accepted that he was engaged as a bank worker and that the Respondent could lawfully terminate his engagement. He also accepted that the Respondent’s genuine reason for terminating his assignment was due to the COVID-19 pandemic and acknowledged that the work in the Overseas Department had reduced. We interpret his letter as a plea to the Respondent to reconsider his position, notwithstanding the circumstances. The Claimant told us when giving his evidence to the Tribunal that at first, he did think there was nothing underhand about the proposed termination of his assignment, but his view about that changed later as explained below.

55. While Ms Lucas was considering the Claimant’s letter, it was suggested that Mr Mensah might be able to provide some assistance to the Overseas Department as his normal activities had been curtailed. On 19 May 2020, Mr Pettit emailed Mr Brown cc’ing Mr Mensah saying:

“Spoken with [Mr Mensah] to do some cross training & awareness in [Ms Lucas]’ world – [Mr Koame], [the Claimant] etc.

[Mr Mensah] is happy to support - maybe some training with [Mr Koame] will be best if [the Claimant] is feeling a little sore(??) about the reduction/ removal of his hours - just want to be sensitive to how he might be feeling, that’s all.

Will leave you to liaise with [Ms Lucas] on way forward here.” (72)

56. Ms Lucas replied to the Claimant’s email on 20 May 2020 to say she would revert back to him. She did this verbally on 22 May 2020 and told him that although she had fought to keep him, his assignment would be terminated as previously indicated.

57. She also emailed Mr Mensah directly that day saying:

“Hi Derek

Following on from [Mr Brown's] & Mr Pettit's] email regarding you supporting the overseas team which most welcome.

I have not informed [Mr Koame] of this development also due the fact that you would potentially replace [the Claimant].

Until [the Claimant] finishes which is next Friday I think it may be wise to wait until after the Claimant] has finished.

I have tried relentlessly to keep [the Claimant] but to no avail, all bank staff must finish.

So by all means absorb information from [Mr Koame] but it might be the case that [the Claimant] will need to hand over to you and me his workload.

The above is to stay confidential between you and I for the time being.

BW

Tina" (74)

58. The Claimant has invited us to find that the emails to Mr Mensah demonstrate that the Overseas Patients Team still had enough work to keep three people busy and that the Respondent wanted to hide this fact from him by asking Mr Mensah to keep quiet about this. We do not interpret them this way. It made sense to consider redeploying Mr Mensah, a permanent member of staff who was at that time being underutilised, to assist the remaining members of the Overseas Team. Although the Team's work had reduced, they still had some work and it made sense to try and find Mr Mensah something productive to do. We find that the reason Mr Mensah was asked to keep the matter confidential was to avoid upsetting the Claimant, given that everyone involved was aware that the Claimant was understandably upset about his situation.
59. A BAME network meeting took place on 29 May 2020. It was attended by the Claimant, Mr Mensah and Mr Simons. Mr Simons was asked to clarify whether there was an initiative to dismiss all bank staff across the Respondent as the people present told him that there had been inconsistent messages across the trust. Mr Simons sought to clarify that terminating bank staff assignments was one of several options put to managers during the recovery plan and that decisions were being taken by individual teams/ departments on case by case basis.
60. The Claimant joined Unison on 29 May 2020.

ACU Post

61. The Claimant's assignment came to an end as planned on 20 May 2020. On 19 June 2020, he was contacted by Sophie Walshe, the Assistant Service Manager of the Assisted Conception Unit (ACU) in the Private Care Directorate. She asked him if he would be interested in working within the

ACU. He replied confirming he would. On the 22 June 2020 she confirmed that she had agreed that the Claimant could work 4 days per week in the ACU with Mr Brown. The Claimant's start date was to be 30 June 2020 (80).

62. Although the Covid pandemic meant that the ACU was offering a reduced service, a considerable backlog of administrative work existed. As there were staff shortages in the department due to long term sickness, Ms Walsh wanted to use the Claimant to assist with this. She was aware that his assignment as a bank staff worker had been terminated and thought of him as she knew him and that he had positive work ethic. This was because the Overseas team had worked in the same office and the ACU administrative team.
63. When Ms Lucas found out that the Claimant was returning, she sought Ms Walsh's agreement that, on an ad hoc basis, he would also be available to assist with work for the Overseas Patients Team. This was agreed between them informally and the Claimant took up the assignment on 30 June 2020.
64. The Claimant says that it was when he returned to the Department that he began to become suspicious that he was being treated differently to others. He could see that Ms Rutherford and Ms Pellat were continuing in their roles. He made a note on his mobile phone on his first day back on the officer which said:

"Today I started my post in ACU working alongside Ellen and Aaron and Sophie as my manager. I've done an induction and I am doing mostly scanning of confidential patient info on an application called track, molly and Nicole rumours of them being kept are still circulating. I know I'm not secure here I can tell some people (grant) may not want me here, he keeps coming in and checking our office. Its stressful but I have to stick it out as I have outgoings and a lot going on outside of this place. Tina and Sophie talked about sharing my tasks as overseas still has many patients and other work to do, I don't understand why they got rid off me in the first place if work can be done in overseas. Tina said senior management say theres no work to do in overseas but that's obviously not the case as Tina has asked to share my tasks with Sophie." (82)

65. On 1 July 2020 the Claimant emailed Caroline Farrington (née Hood), HR Business Partner to raise his concerns about the termination of his engagement in the Overseas Private Care team (88 – 89).

"In the first instance of being told of my lay off I was angry but I felt like it was understandable and that the trust getting rid of all bank staff was fair because of the contextual reasoning behind it, so despite the disparities, I went on my way.

At the same time rumours were circulating that bare-faced nepotism was taking place within our department and to my surprise, some other bank staff where being kept on due to what I/ and many others feel was family connections, favouritism and discrimination. I stayed quiet so that I didn't let emotions override my judgement even with all that on my radar.

Furthermore, I also stayed quiet because I was intrigued to see if the rumours were in fact facts.

After being off for near to a month I came back yesterday within a different role but in the same department. It has been confirmed from what I and many others can see that all the above is in indeed correct, I do not expect anybody to step forward as I have, as many feel they have a lot to lose and I do to, but the fact remains many are not ok with how they are being treated or how I was treated and this is just in one instance that applies to me.

I do believe I was not treated equally in comparison to some of my (white) counterparts, I was told by my management that all bank staff would be laid off on the 29th of May 2020 but yet on the Monday 01/07/2020 I was laid off, but family connected bank staff that have not been here nearly as long as I have or have my credentials been back in working, and ironically these individuals have managerial connections i.e. family in the department.” (88)

66. Ms Farrington replied to arrange to speak to the Claimant. She informed him that she would keep the details of his email confidential. They spoke via telephone on 3 July 2020. Neither can fully recall the conversation, but based on the context and the follow-up email Ms Farrington sent to the Claimant after the call, we find that the Claimant explained that he felt he had been subjected to discrimination and was being treated less favourably in comparison to his white counterparts in the Private Care Department.
67. Following their telephone conversation, Ms Farrington emailed the Claimant copies of the Grievance Policy and Freedom to Speak Up Policy, under which the Claimant was able to raise his concerns. The Claimant had informed Ms Farrington that he was a member of Unison and she advised him to get support and guidance from a trade union representative. He was also directed to the Employee Relations team (85).
68. We find that Ms Farrington did not share any details of the Claimant's email or the discussion with anyone at this stage.
69. The Claimant continued with his work within the ACU. While there he witnessed that Mr Koame, his former supervisor in Overseas Patients, was being kept busy. He told the tribunal that Mr Koame told him that he was buried in paperwork and that he thought it was silly for the Claimant to be working within ACU when Overseas had work to complete.
70. On the morning of 14 July 2020, Ms Walshe spoke to the Claimant to inform him that management (i.e. Mr Brown) had said he would need to finish at the end of that month.
71. Ms Walshe subsequently spoke to senior management again to ask them to reconsider, because the ACU still need assistance with the administrative backlog. They they did not change their minds. In response to that decision, Ms Walshe resigned. Her GP signed her off as unfit for work due to stress on 21 July 2020 and she spent the remainder of her notice period on sick leave.

72. Ms Walshe told us that although she was not given a reason for the termination of the Claimant's assignment, she understood it was either because management did not appreciate the degree of backlog in ACU, or did appreciate it, but did not want to prioritise clearing it and instead prioritised cutting costs. She resigned because she felt her manager was not listening properly to her concerns about the lack of ACU resources and did not appreciate the stress that she was in trying to deal with the situation. She did not resign because she thought the Claimant was being subjected to direct race discrimination.

Claimant's Grievance

73. On 23 July 2020, having had his new assignment terminated and been advised by his union to contact the Respondent's Director of HR about his situation, the Claimant emailed Mr Simons copying in Ms Farrington. In his email, he essentially raised the same concerns as he had raised to Ms Farrington, but added that his concern also included the fact that his new assignment had been terminated (88). He included the email chain between him and Ms Farrington.
74. Mr Simons responded the next day to offer to meet the Claimant along with Ms Hood to discuss his concerns in more detail.
75. A meeting took place on 30 July 2020 between the three of them which lasted around 30 minutes. Mr Simons told the Claimant that the Trust would treat his concerns as a formal grievance. He asked that the Claimant complete a formal Employee Conflict Resolution Letter setting out his desired resolution. The Claimant submitted this by email on 3 August 2020 (96 – 98). The Claimant provided Mr Simons and Ms Farrington with his personal email address, home address and a contact telephone number.
76. In his resolution letter dated 3 August 2020 the Claimant included the following:

"1. I have outlined many of my concerns prior to sending you this form but will enclose the same email in letter form below for transparency. As we only had 30 mins I did not get to touch on some other issues I feel are also significant. However, I feel the subjects we did touch on where the most specific and also the most pressing in regard to discrimination, nepotism and mistreatment.

2. The way I was treated has had a vast effect on my trust in the private department as a place of work and has also made me question my confidence in the trust as a place of employment going forward especially given the fact that my loyalty to the trust and my department was unquestionable. However, I am working with yourselves through the process and hope that this can be resolved in a succinct manner as this is obviously quite uncomfortable for all involved, but even still needs to be addressed.

3. I have listed remedies below I believe need to be addressed in order for this resolution to have a concrete effect. The list in my view will help the trust

as a whole better align themselves so that these problems do not arise in future.

- **(Grant Brown) – (Operational Manager Private Department): File and prior employment to be investigated and file to be looked at and inspected** I feel as a manager the way he has conducted himself is absolutely disgusting. I do believe he may need to attend training in management and communications as his behaviour is absolutely atrocious. The actions he has taken against me has led me to believe he has a specific problem with myself a black man and also other black men working within the private department. I feel HR need to address this with him thoroughly and immediately & this process should be mandatory for all operational management as diversity is something that needs to be accepted without question by any management.
- **Reimbursement of pay for the hours** that I lost due to the nepotism/discrimination that I experienced. As you know I was off for a month and had to find other means to keep me afloat and I feel that it is unlawful that managerial connections kept other workers in, whilst I was deposited without remorse despite my longer duration of time and service to the department and educational/experience credentials.
- **A new role for me in a different department** on a part-time basis, but will consider full time. I have expertise in business strategy, finance, human resource and many other areas. I would consider joining one of the current posts available here at Chelsea or at Harbour yard. As discussed in the meeting I really did enjoy my prior position but I feel that given the circumstance I will not be able to work in the private department going forward as I am treated differently and in retrospect after speaking to you guys quite frankly I will not allow myself to ever be treated like again by anybody in that department.
- I want to know why I and others were singled out whilst other connected staff were kept in working despite our department being told that all bank staff would be let go. Only to find that when I returned selected staff were kept on due to connections. I also have witnesses that will attest to this as they attended the meetings physically and heard grant say all bank staff where to be let go. **What steps are going to be taken to make people aware that this cannot be done as it is unlawful and also to make sure this does not happen to anybody again.**

I have some other issues with Grant that feel need to be addressed but I have been advised by my legal advisor not to address them yet so I will digress here. I am aware these resolutions may seem like a targeted attack but I do believe the points I have raised are feasible and also that in a place of employment your title, status, or network should not put you above reproach.” (96 – 97 original emphasis).

77. We note that this letter refers to the Claimant receiving advice from a legal adviser. He confirmed to us that he first sought some initial legal advice in July 2020, but this did not cover employment tribunal time limits.

78. Following the meeting with the Claimant, Ms Farrington had tried to clarify the Claimant's employment status, as this had been something that had been discussed at the meeting. She spoke to Ms Lucas to verify the information the Claimant had given to her and sought legal advice externally. Ms Farrington did not tell Ms Lucas that the Claimant had submitted a grievance.
79. Ms Farrington forwarded the Claimant's emails to the Employee Relations team on 3 August 2020 and asked them to progress the grievance. In her email to the team, she mentioned that she would let Mr Goodrich, Managing Director of the Private Care Directorate, know that a grievance had been submitted (100). She did this, but not until 17 August 2020. She was able to confirm this date precisely because she made an appointment to speak to him and sent him an email briefly summarising the grievance on the same date (304). She explained that the slight delay was due to periods of annual leave, which we considered to be fully plausible in view of the time of year.
80. We were not presented with any documentary evidence that Mr Goodrich spoke to anyone else in the Private Care Directorate about the grievance. The Claimant believes that the fact that he had submitted a grievance became common knowledge. He relies on the written witness statement of Ms Robinson who did not appear as a witness. In her witness statement she refers to a conversation with Ms Lucas in mid-August where she asked Ms Lucas about the Claimant and was told that there was a situation going on with him, but that she could not go into detail. We note that this evidence was untested through cross examination, but so was the Respondent's assertion that Ms Lucas did not know about the grievance, as she also did not attend the hearing to give evidence and did not even prepare a witness statement.
81. Our finding, on the balance of probabilities, was that Mr Goodrich told Ms Lucas that the Claimant had submitted a grievance. She was the Claimant's line manager and so it is likely that Mr Goodrich thought that she ought to be told about it.
82. We do not, however, find that knowledge of the grievance was widespread and in particular we find that it did not reach Ms Fegan. She did not step into Mr Brown's role until January 2021 by which time the grievance process was concluded. At the time the Claimant was working in the Overseas Patients Team and when he raised his grievance she was based at a different site. She told us, and we accepted, that grievances are treated confidentially and she would have had no reason to be informed of it because she had had no involvement with the Claimant. She only found out about it in September 2021, when she became involved in the litigation.
83. Ms Farrington also emailed the Claimant on 3 August 2020 to tell him that his grievance was now being dealt with by the Employee Relations Team and to say:

“As you have had a number of different assignments on Bank within the Organisation, this wouldn’t be viewed as continuous service and so you would not have rights to a permanent post within the organisation. However, we recognise your contribution to the organisation, and want to highlight current vacancies across the Trust to you to be able to apply for these. Please let me know if you will be interested in this and I can ensure these are sent to your personal email address.” (303)

84. The Claimant did not respond to Ms Farrington’s email, but had, on 24 July 2020, emailed the Trust’s Contracts Manager to ask about openings in Procurement. She put him in touch with the Head of Operational Procurement who advised him to look out for positions via NHS Jobs and to consider getting qualified (93 – 95).
85. On 20 August 2020, the Employee Relations team appointed George Anastopoulos, Deputy General Manager for Children, Young People & Neonatal Services, to consider the Claimant’s grievance. He was from a different directorate and had had no previous dealings with the Claimant. As a Band 8b, he was much more senior than the Claimant and the people about whom the Claimant was complaining. He had not, however, had training in investigating grievances and had not dealt with a grievance previously.
86. The Claimant emailed Mr Simons and Ms Farrington asking for an update on 24 August 2020 (103). They did not reply.
87. Instead, Mr Anastopoulos emailed the Claimant on 28 August 2020 to introduce himself as an impartial manager and to acknowledge receipt of the complaint. (104) The Claimant told us he did not see or read the email because it went, unbeknownst to him into his junk folder. We accepted this evidence on this point.
88. On 7 September 2020 Mr Anastopoulos emailed the Claimant again to update him on the investigation and to arrange a meeting with him. Mr Anastopoulos explained in his email that a meeting was not mandatory (because the Claimant was a bank worker) but he felt it would be an opportunity for the Claimant to provide any further information and to have a general discussion about his concerns and expectations. Mr Anastopoulos asked the Claimant to provide his availability for a meeting (105). This email also went to the Claimant’s junk folder meaning he did not see, read nor respond to it.
89. As Mr Anastopoulos had not received a response from the Claimant, he continued his investigations based on the material the Claimant had previously provided. Mr Anastopoulos interviewed Mr Brown and Mr Goodrich on 18 September and 29 September 2020 respectively. The interviews were undertaken separately. Mr Anastopoulos did not prepare interview notes, but incorporated what they said to him into a table which provided a summary of his findings and outcomes.
90. Mr Anastopoulos concluded that the Claimant’s concerns about discriminatory practice and nepotism were not substantiated. He found no

evidence that managers within the Private Patients department had worked outside the scope of the relevant recruitment selection processes, which promoted equality and diversity in the workplace. In reaching this conclusion he relied heavily on what Mr Brown and Mr Goodrich told him. He told us that he had no reason to doubt what they told him based on their seniority.

91. On 14 October 2020 Mr Anastopoulos emailed the Claimant with the table to inform him that he had completed his investigation. Mr Anastopoulos indicated that he hoped that the Claimant would be reassured that he had concluded that no discriminatory action had taken place. He apologised for the Claimant's negative experiences and encouraged him to continue to search and apply for vacancies within the Trust (117 – 124). This email again went into the Claimant's junk email folder meaning he did not see or read it.
92. The Claimant told us that throughout this period, he tried to call the HR Department to chase progress with his grievance, but was unable to get through. He attributed this to the impact of Covid. When cross examined on this point, he said that he thought he had rung between three and seven times, but was not able to confirm dates or times of his calls or produce any evidence of them. He says he also contacted the Respondent's Temporary Staffing Team to ask about jobs during this period and was told none were available. He did not produce any documentary evidence of such calls, however. Our finding is that the Claimant made two or three calls at most in total to the HR Department and the Temporary Staffing team.
93. On 27 October 2020. Mr Koame sent the Claimant a WhatsApp message asking him if anyone from the work team had been in touch with him lately and telling him that everyone else had been brought back except him. The Claimant replied to say that no-one had been in touch, but it was ok because he was doing fine. Mr Koame replied, *"This is racial discrimination, i hate this place. Only God knows how badly i am desperate to leave here,"* to which the Claimant responded saying *"I know I'm going to do wat I need to do"* (126).
94. From September 2020 onwards, the Respondent had begun to try and get back to normal and reintroduce some of its services. This led to some of the bank workers that had been terminated being reinstated.
95. Ms Rutherford had continued to be employed on reduced hours in the Management PA throughout the period from May to the end of September 2020. At the end of September 2020, she left her role to take up employment elsewhere. Ms Pellat's bank assignment had ended on 22 July 2020 and she did not work for the Respondent at any point during the Summer. She returned, however, on 26 October 2020. The role she was doing was Management PA Admin Band 4. We consider it more likely than not that this was the same role that Ms Rutherford had been doing and that Ms Pellat became aware of the vacancy as a result of her friendship with Ms Rutherford.

96. Mr Deshai returned to his role between 26 October 2020 and 8 January 2021. Mr Creasy returned to his role as a Band 3 Receptionist between 16 November and 21 December 2020. He did a few shifts in January 2021 and did not then work again in the Private Cares department until 23 May 2021.
97. Ms Fegan was not able to tell us anything about the circumstances of Mr Creasy's return, but she believed that Mr Deshai, via his wife, had remained in touch with matters in the Private Care Directorate throughout and so as soon as things began to open up again ensured that he got in touch with the relevant managers to ask about his old role.
98. No-one was recruited into the Overseas Patients department at this time, either as a permanent or temporary appointment. Although there was an attempt to get back to normality within the Respondent, overseas travel continued to be heavily restricted at this time.
99. Prompted by the WhatsApp exchange with Mr Koame, the Claimant tried to contact the Respondent about his grievance. On 30 October 2020, after speaking to an individual in the Employee Relations Team, the Claimant obtained Mr Anastopoulos 's email address and emailed him directly (130).
100. The Claimant had initiated the Acas early conciliation procedure on 31 October 2020. He was issued with a certificate on 2 November 2020 (1).
101. When he had not received a response from Mr Anastopoulos by 5 November 2020, the Claimant forwarded the email he had sent him to Ms Farrington and Mr Simons (copying in his trade union representative, Sandra Busby) on 5 November 2020. Ms Farrington replied on the same day to explain that Mr Simons had left the Respondent and she had forwarded the email to Employee Relations. A member of that team then replied, the same day, following which Mr Anastopoulos contacted the Claimant by email of 6 November 2020.
102. Mr Anastopoulos emailed the Claimant with the emails he had previously sent (136 – 137) and offered to discuss the matter further over the telephone or in person. The Claimant received the emails, having adjusted his junk mail settings and agreed to a call. The ensuing telephone conversation took place on 13 November 2020. The Claimant recorded the meeting with the consent of Mr Anastopoulos and a transcript was contained in the bundle (138 – 149). The Claimant was able to explain his concerns to Mr Anastopoulos in full. It is relevant to note that one of his key grievances was that he had never been offered a permanent contract while working in the Overseas Patients Team and that he also told Mr Anastopoulos that he did not want to return to the Private Care Directorate.
103. On 27 November 2020, the Claimant emailed Mr Anastopoulos asking for an update. The Claimant told Mr Anastopoulos that he needed an outcome in a reasonable timeframe so that he could look into pursuing the case legally (154). Prompted by the email, Mr Anastopoulos sent his response that same day.

104. Mr Anastopoulos did not undertake any further investigations as a result of his conversation with the Claimant. He confirmed the final position in a letter which he sent to the Claimant on 27 November 2020 (155-157). He made no changes to his original summary table explaining in his cover letter that:

“Following the meeting and me investigating the matter, I would like to offer you with the following resolutions:

- 1. For additional bank shifts, I would encourage you to remain in our Trust Bank and ensure your availability for future shifts. I cannot recommend compensation for ‘lost’ hours on shifts that were not booked. The Trust has no obligation to offer any shifts to members who register with the Bank. Shifts are allocated to individuals when the experience and the overall skill set of the individual matches the requirements of the job.*
- 2. For the permanent position, I would encourage you to monitor the Trust vacancies and apply when a position of interest becomes available. Our vacancies are widely advertised on various platforms, with the most commonly accessible being the NHS Jobs website (www.jobs.nhs.uk). All new potential candidates for employment are required to follow this process, in order to secure employment within the Trust.*
- 3. As regards to knowledge, I can offer you my assurance that I have discussed your concerns with all the relevant leads in the Private Patient directorate. Whilst, I have found no evidence of discrimination against yourself, or any other of our Bank members, and I have found no evidence of misconduct from the management within Private Patients management team, I appreciate the time you took to raise your concerns. In relation to the whistle blower service, please kindly be advised that there is the ability for all staff to raise any concerns they may have, as per the Trust’s relevant Whistleblowing Policy.” (156-157)*

105. On receipt of the letter from Mr Anastopoulos, the Claimant took legal advice from North Kensington Law Centre that day (27 November 2020). He went to the Law Centre because on 18 November 2020 Ms Busby had emailed the Claimant to tell him that the union would not be able to assist him with a claim because he had only joined on the same day his initial assignment was terminated (271).

106. Although the letter from Mr Anastopoulos informed the Claimant that he had 10 days within which to raise an appeal in writing, the Claimant did not submit an appeal. He told us that the reason he did not submit an appeal was because he had lost trust in the Respondent’s processes.

107. The Claimant presented his claim to the Employment Tribunal on 2 December 2020.

Molly Rutherford’s Fixed Term Job

108. On 2 December 2020, Ms Fegan emailed all staff in the Private Care Directorate to let them know that a Band 4 Administrator role would soon be advertised. The role was to be fixed term for 12 months and had the job title

Private Patient Liaison Officer based at West Middlesex Hospital. Mr Mensah forwarded the email to the Claimant.

109. The role was advertised internally and externally. The Claimant told us that he looked for the advert but was unable to find it and so did not apply, although the role was one which he felt he could perform.
110. Ms Rutherford was successful in getting the role. In order to do so, however, she had to go through a full recruitment process competing against internal and external candidates. The decision to appointment her was made by recruitment panel. She commenced the role in February 2021.

Assistant Service Manager

111. On 15 February 2021 the Respondent advertised for a full-time, permanent ASM within the ACU. The role was advertised as an Administrative & Clerical Pay Band 6 role. A job description, which included a person specification, accompanied the job advert. The person specification attached, however, was incorrect and was more suited to a much lower level job.
112. The Claimant submitted an application for the post on 22 February 2021. (173 -175). The Claimant listed his previous roles, but did not mention that he had experience of working in the ACU.
113. The application form contained a section called "Supporting Information" in respect of which applicants were told:

"In this section you need to demonstrate that you have read the published person specification and how you meet the essential and (where relevant) desirable criteria for this particular post, if this has not been fully covered in the previous sections.

Please include your reasons for applying and take the opportunity to highlight your particular talents and strengths, (what you feel you can personally offer - what is unique to you -what sets you apart from your peers)."

All that the Claimant said in this section was:

"I match the essential criteria in terms of education and experience. I also have experience in a finance setting similar to the same setting as this role." (175)

He provided no examples to support this assertion. He told us that he expected the Respondent to realise that he had the relevant skills based on his experience elsewhere. This was notwithstanding that he had not worked as a Band 6 ASM.

114. On 23 February 2021 Ms Busby contacted Ms Barnett, Head of Resourcing for the Recruitment Team in Human Resources, by email to raise concerns about the person specification attached to the advert. Mr Mensah told us

that he alerted Ms Busby to the fact that the person specification appeared to be incorrect.

115. It was agreed between Ms Barnett and Ms Busby that the person specification was incorrect, but that the recruitment process for the role should not be put on hold. The correct job description was added to the existing advert on Trac, the Respondent's recruitment management system, and to the NHS Jobs website and the Respondent contacted everyone, including the Claimant, who had submitted applications as at that date (25 February 2021) to inform them that the wrong job description / person specification had initially been uploaded due to an administrative error, but this had now been remedied (192 - 193). Applicants were invited to review their applications and consider whether they wished to continue. The Claimant took no steps as a result of receiving this email.
116. Following the closing date for applications, Ms Fegan undertook the exercise of short-listing applicants for interview. This was undertaken on an anonymised basis, although we note that it would have been possible for Ms Fegan to work out that the Claimant was one of the applicants from the description of his work experience.
117. Ms Fegan considered the Claimant's application but considered that he had not met the criteria set out in the job description and updated person specification and therefore did not shortlist him for the next stage of the recruitment process, an interview. She made a note of the decision on Trac on 8 March 2021 (194) and the Claimant was informed by email on 11 March 2021 (195). The email sent to him was a generic email sent to all applicants who were not shortlisted.
118. Having reviewed the Claimant's application against the essential criteria, our finding is that he did not meet the essential criteria for the role and that Ms Fegan's assessment was correct.

THE LAW

Direct Race Discrimination

119. Race is one of the protected characteristics identified in section 4 of the Equality Act 2010. Section 9(1) of the Equality Act 2010 says race as includes colour, nationality and ethnic or national origins.
120. Section 39(2) of the Equality Act 2010 prohibits an employer discriminating against one of its employees by dismissing him or by subjecting the employee to a detriment. This includes direct discrimination because of a protected characteristic as defined in section 13.
121. Section 13 of the Equality Act 2010 provides that '*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*'.

122. Under section 23(1), where a comparison is made, there must be no material difference between the circumstances relating to each case. It is possible to compare with an actual or hypothetical comparator.
123. In order to find discrimination has occurred, there must be some evidential basis on which we can infer that the Claimant's protected characteristic is the cause of the less favourable treatment. We can take into account a number of factors including an examination of circumstantial evidence.
124. We must consider whether the fact that the Claimant had the relevant protected characteristic had a significant (or more than trivial) influence on the mind of the decision maker. The influence can be conscious or unconscious. It need not be the main or sole reason, but must have a significant (i.e. not trivial) influence and so amount to an effective reason for the cause of the treatment.
125. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the Claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the Claimant was treated as she was.
126. Section 136 of the Equality Act sets out the relevant burden of proof that must be applied. A two-stage process is followed. Initially it is for the Claimant to prove, on the balance of probabilities, primary facts from which we could conclude, in the absence of an adequate explanation from the Respondent, that the Respondent committed an act of unlawful discrimination.
127. At the second stage, discrimination is presumed to have occurred, unless the Respondent can show otherwise. The standard of proof is again on the balance of probabilities. In order to discharge that burden of proof, the Respondent must adduce cogent evidence that the treatment was in no sense whatsoever because of the Claimant's race. The Respondent does not have to show that its conduct was reasonable or sensible for this purpose, merely that its explanation for acting the way that it did was non-discriminatory.
128. Guidelines on the burden of proof were set out by the Court of Appeal in *Igen Ltd v Wong* [2005] EWCA Civ 142; [2005] IRLR 258 and we have followed those as well as the direction of the court of appeal in the *Madarassy* case. The decision of the Court of Appeal in *Efobi v Royal Mail Group Ltd* [2019] ICR 750 confirms the guidance in these cases applies under the Equality Act 2010.
129. The Court of Appeal in *Madarassy*, states:

'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient

material from which a tribunal ‘could conclude’ that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.’ (56)

130. It may be appropriate on occasion, for the tribunal to take into account the respondent’s explanation for the alleged discrimination in determining whether the Claimant has established a prima facie case so as to shift the burden of proof. (*Laing v Manchester City Council and others* [2006] IRLR 748; *Madarassy v Nomura International plc* [2007] IRLR 246, CA.) It may also be appropriate for the tribunal to go straight to the second stage, where for example the employer asserts that it has a non-discriminatory explanation for the alleged discrimination. An employee is not prejudiced by such an approach since it effectively assumes in his favour that the burden at the first stage has been discharged (*Efobi v Royal Mail Group Ltd* [2019] ICR 750, para 13).
131. In addition, there may be times, as noted in the cases of *Hewage v GHB* [2012] ICR 1054 and *Martin v Devonshires Solicitors* [2011] ICR 352, where we are in a position to make positive findings on the evidence one way or the other and the burden of proof provisions are not particularly helpful. When we adopt such an approach, it is important that we remind ourselves not to fall into the error of looking only for the principal reason for the treatment, but instead ensure we properly analyse whether discrimination was to any extent an effective cause of the reason for the treatment.
132. Allegations of discrimination should be looked at as a whole and not simply on the basis of a fragmented approach *Qureshi v London Borough of Newham* [1991] IRLR 264, EAT. We must “see both the wood and the trees”: *Fraser v University of Leicester* UKEAT/0155/13 at paragraph 79.
133. Our focus “*must at all times be the question whether or not they can properly and fairly infer... discrimination.*”: *Laing v Manchester City Council*, EAT at paragraph 75.

Victimisation

134. Section 39(4)(d) of the Equality Act 2010 provides that an employer must not victimise its employees. The definition of victimisation is contained in section 27 of the Act.
135. Section 27(1) of the Act provides that:

‘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.’
136. The definition of a protected act is found in section 27(2) and includes:
 - (a) bringing proceedings under the Equality Act 2010;
 - (b) giving evidence or information in connection with proceedings under the Equality Act 2010;

- (c) doing any other thing for the purposes of or in connection with the Equality Act 2010; and
 - (d) making an allegation (whether or not express) that an employer or another person has contravened the Equality Act 2010
137. A grievance can amount to a protected act under section 27(2)(d) without referring to the Equality Act 2010 and without using the correct legal language. It must however contain a complaint about something that is capable of amounting to a breach under the Equality Act 2010 (*Beneviste v Kingston University* EAT 0393/05).
138. If the tribunal is satisfied that the Claimant did a protected act, the next step is for the Claimant to prove that any detriments occurred because of the protected act.
139. The analysis the tribunal must undertake is in the following stages:
- (a) we must first ask ourselves what actually happened;
 - (b) we must then ask ourselves if the treatment found constitutes unfavourable treatment;
 - (c) finally, we must ask ourselves, was that treatment because of the Claimant's protected act.
140. A detriment can encompass a range of treatment from general hostility to dismissal. It does not necessarily entail financial loss, loss of an opportunity or even a very specific form of disadvantage.
141. The test for detriment was formulated in the case of *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11 where it was said that it arises where a reasonable worker would or might take the view that they had, as a result of the treatment complained of, been disadvantaged in the circumstances in which they had to work.
142. The EHRC Employment Code, drawing on this case law, says: '*Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage..... However, an unjustified sense of grievance alone would not be enough to establish detriment.*' (paragraphs 9.8 and 9.9). Accordingly, the test of detriment has both subjective and objective elements.
143. The essential question in determining the reason for the Claimant's treatment is what, consciously or subconsciously, motivated the Respondent to subject the Claimant to the detriment? This is not a simple "*but for*" causation test, but requires a more nuanced inquiry into the mental processes of the Respondent to establish the underlying "core" reason for the treatment. In overt cases, there may be an obvious conscious attempt

to punish the Claimant or dissuade them from containing with a protected act. In other cases, the Respondent may subconsciously treat the Claimant badly because of the protected act. A close analysis of the facts is required.

144. It is only if the necessary link between the detriment suffered/dismissal and the protected act can be established, the claim of victimisation will succeed. The protected act need only be one of the reasons. It need not be the only reason (EHRC Employment Code paragraph 9.10).
145. The shifting burden of proof found in section 136 of the Equality Act sets applies. Initially it is for the Claimant to prove, on the balance of probabilities, primary facts from which we could conclude, in the absence of an adequate explanation from the respondent, that the reason for any unfavourable treatment was because of the Claimant's protected act. If the Claimant succeeds, discrimination is presumed to have occurred, unless the Respondent can show otherwise.

Time Limits

146. The relevant time-limit is at section 123 Equality Act 2010. According to section 123(1)(a) the tribunal has jurisdiction where a claim is presented within three months of the act to which the complaint relates.
147. The normal three-month time limit needs to be adjusted to take into account the early conciliation process and any extensions provided for in section 140B Equality Act.
148. By subsection 123(3)(b), a failure to do something is treated as occurring when the person in question decided on it. In the absence of evidence to the contrary. A person is taken to decide on a failure to do something when that person does an act which is inconsistent with doing it or, in the absence of such an inconsistent act, on the expiry of the period on which that person might reasonably have been expected to do it.
149. By subsection 123(3)(a), conduct extending over a period is to be treated as done at the end of the period.
150. In *Hendricks v Metropolitan Police Commissioner* [2002] EWCA Civ 1686, the Court of Appeal stated that the test to determine whether a complaint was part of an act extending over a period was whether there was an ongoing situation or a continuing state of affairs in which the employee was treated less favourably. An example is found in the case of *Hale v Brighton and Sussex University Hospitals NHS Trust* UKEAT/0342/17 where it was determined that the respondent's decision to instigate disciplinary proceedings against the employee created a state of affairs that continued until the conclusion of the disciplinary process.
151. It is not necessary to take an all-or-nothing approach to continuing acts. The tribunal can decide that some acts should be grouped into a continuing act, while others remain unconnected (*Lyfar v Brighton and Sussex University Hospitals Trust* [2006] EWCA Civ 1548; The tribunal in *Lyfar* grouped the 17

alleged individual acts of discrimination into four continuing acts, only one of which was in time.

152. A distinction needs to be drawn between a continuing act and a one-off act that has continuing consequences (*Barclays Bank plc v Kapur and others* [1992] ICR 208;). This distinction will depend on the facts in each case. (*Sougrin v Haringey Health Authority* [1992] IRLR 416, CA)
153. Alternatively, the tribunal may still have jurisdiction if the claim was brought within such other period as the employment tribunal thinks just and equitable as provided for in section 123(1)(b).
154. The tribunal has a wide discretion to extend time on a just and equitable basis. As confirmed by the Court of Appeal in *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23, the best approach is for the tribunal to *assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time. This will include the length of and reasons for the delay, but might, depending on the circumstances, include some or all of the suggested list from the case of British Coal Corporation v Keeble* [1997] IRLR 36 set out below, as well as other potentially relevant factors:
 - The extent to which the cogency of the evidence is likely to be affected by the delay.
 - The extent to which the party sued had co-operated with any requests for information.
 - The promptness with which the Claimant acted once they knew of the possibility of taking action.
 - The steps taken by the Claimant to obtain appropriate professional advice once they knew of the possibility of taking action.
155. It is for the Claimant to show that it would be just and equitable to extend time. The exercise of discretion should be the exception, not the rule (*Bexley Community Centre (t/a Leisure Link) v Robertson* [2003] EWCA Civ 576).
156. Where the reason for the delay is because an employee has waited for the outcome of his or her employer's internal grievance procedures before making a claim, the tribunal may take this into account (*Apelogun-Gabriels v London Borough of Lambeth and anor* 2002 ICR 713, CA). Each case should be determined on its own facts, however, including considering the length of time waited to present a claim after receiving the grievance outcome.

ANALYSIS AND CONCLUSIONS

Did the Claimant do a Protected Act?

157. We first considered whether the Claimant did any protected act and if so, when and who was aware of them.
158. The Claimant relied on five protected acts as follows:

- (a) his email to Caroline Hood dated 01 July 2020;
- (b) his discussion with Caroline Hood dated 03 July 2020;
- (c) his email to Tom Simons on 23 July 2020;
- (d) his meeting with Tom Simons on 30 July 2020; and
- (e) his formal grievance dated 03 August 2020.

159. We consider that each one of the above constituted a Protected Act for the purposes of Section 27 of the Equality Act 2010. It was clear from what the Claimant said in the written materials and, according to our findings, repeated verbally, that he believed that he had been the subject of race discrimination by the Respondent. Although he refers in his correspondence to nepotism (i.e. favouritism and family connections), he also refers expressly to race discrimination.
160. We have found that until 23 July 2020 the only person who was aware of the Claimant's protected acts at (a) and (b) above was Ms Farrington. On 23 July 2020. Mr Simons also became aware because the Claimant emailed him with a fresh email and forwarded him the chain of correspondence with Ms Farrington. Knowledge was limited to Ms Farrington and Mr Simons until 3 August 2022 when, at the Claimant's request, Ms Farrington forwarded the relevant correspondence to the Employment Relations Team. Our finding was that she did not tell anyone else about the grievance until she informed Mr Goodrich on 17 August 2020.
161. We found on the balance of probabilities that Mr Goodrich informed Ms Lucas about the grievance at this time. Mr Brown knew about it grievance by 18 September 2020 as he was interviewed by Mr Anastopoulos about it then.
162. Ms Fegan was not aware of any of the grievance until September 2021.

The Treatment of the Claimant by the Respondent

163. We next considered whether the treatment alleged to have occurred by the Claimant did occur and the extent to which this constituted a detriment. We did this with the intention of then moving on to consider the reason why the treatment occurred and if it constituted less favourable treatment than the actual and hypothetical comparators because of race and/or was because the Claimant had done any Protected Acts. In adopting this approach, we were conscious that it can also be helpful to leave the question of detriment last. We decided against this, but kept in our minds the importance of keeping an overview of the relevant provisions (section 13 and section 27 of the Equality Act 2010) as a whole throughout our consideration.
164. Of the alleged treatment the tribunal was required to consider, it was not in dispute that the Claimant's assignments were terminated (allegations 2.1(a) and (b) and 2.6 (a)) and he was not retained or offered or considered for any other bank assignments (or indeed job roles) after July 2020 (allegations 2.1(c) and (d) in part and 2.6(b) and (c) in part). It was also not in dispute that the person specification for the ASM was changed (allegation 2.6(d)) and that the Claimant was not short listed for this role (allegation 2.6(e)).

165. The only disputed treatment on the facts was whether the Respondent had failed to explore redeployment with the Claimant after his assignment with the ACU finished in July 2020 (allegations 2.1(d) and 2.6(c) in part).
166. The Respondent submitted that the allegations that the Claimant was not offered any assignments after July 2020 and the Respondent failed to offer explore job retention or redeployment with him (2.1(c) and (d) and 2.6(b) and (c)) were misconceived and there was no detriment to him. This was because, by virtue of him being a bank worker, the Respondent was under no obligation to offer the Claimant any further assignments or to explore job retention or redeployment with him. It also argued that there was no detriment to the Claimant as a result of the change of person specification (allegation 2.6 (d)).
167. The undisputed facts are that the Claimant was not offered any assignments after July 2020 and was not retained after this date. This was to his detriment. It is not irrelevant that the Respondent was under no duty to offer the Claimant any future assignments. However, the critical matter for us is why this occurred, particularly when others, who were not black and who had not done Protected Acts, were retained and/or offered assignments after July 2020. This is considered further in the section below.
168. Turning to the allegation that the Respondent failed to explore redeployment with the Claimant after July 2020, our conclusion is that this was not made out on the facts. It is relevant that the Respondent was under no obligation to do this because the Claimant was a bank worker. Nevertheless, the Respondent encouraged the Claimant to keep in touch with the Temporary Staffing Agency and use the external NHS jobs service to identify jobs he was interested in. This was done by Ms Farrington, Mr Simons and, in particular, by Mr Anastopoulos in his grievance outcome letter. In our judgment this amounted to the Respondent exploring redeployment with the Claimant. Unfortunately, there were very few administrative roles available in the Summer of 2020 and by the Autumn, the Claimant had stopped engaging with the Respondent's recruitment processes.
169. Finally, in this section, we turn to the change of job specification. The Claimant presented no evidence that this caused him any detriment whatsoever. We add that there was no evidence that this was done deliberately to thwart the Claimant as he appeared to believe, and was anything other than a genuine error. In any event, he was informed at the same time as all other candidates of the error and had he wished to do so, could have sought to submit an updated application to respond to the change.

The Reason for the Treatment

170. We first considered the allegations of victimisation. For the reasons set out below, we ruled out the possibility of all but one of the allegations of victimisation succeeding very quickly.

171. It followed from our findings with regard to the Respondent's knowledge of the Claimant's protected acts, that our decision on allegation 2.6(b) was that it failed. The decision was taken on 14 July 2020. As at this date, only Ms Farrington was aware of his Protected Act.
172. Similarly, given that Ms Fegan, the key person relevant to allegations 2.6 (d) and (e) did not know about the Claimant's grievance until September 2021, our conclusion is that it cannot have had any influence on her actions in relation to the incorrect job specification or decision not to short-list the Claimant for the ASM role.
173. We add in relation to these two latter allegations, that we considered that there was no evidence before us that the error in relation to the job specification was done deliberately to thwart the Claimant as he appeared to believe. In our judgment, it was a genuine error which affected all potential candidates for the role equally. There was also no evidence that Ms Fegan's decision not to short-list the Claimant for the ASM role was made other than on valid grounds based on the information in his job application. The application was extremely poor and it is unsurprising that Ms Fegan was unimpressed with it and concluded that the Claimant did not meet the essential requirements for the role.
174. The only remaining "live" allegation of victimisation at this point of our analysis was therefore allegation 2.6(b) which was also argued in the alternative to be an allegation of direct race discrimination. We therefore turned to the race allegations.
175. The Respondent did not call any of the people involved in making the decision to terminate the Claimant's assignments in the Overseas Patients Team or ACU. We conclude that the decision with regard to the Overseas Patients Unit was not taken by Ms Lucas, as she was keen to retain the Claimant. It was instead taken by the senior managers in the department, who were no longer employed by the Trust.
176. In our judgment, the explanation for the decision given by the Respondent via Ms Fegan was entirely plausible. Although there was still work to be done in the Overseas Patients team, that work must have reduced. Cost saving was a concern and it made sense to end the contract of the bank worker in the team and retain the two permanent members of staff. It also made sense to consider redeploying Mr Mensah, a permanent member of staff, to help the teams that had lost bank worker hours as needed, as his 'business as usual' role was reduced. The evidence of Ms Walshe, who appeared on behalf of the Claimant, reinforced that the decisions taken at the time were made on commercial grounds.
177. The Claimant argued that he was treated differently to other bank workers because they were not terminated or, if they were, they came back later. When analysing his situation, we considered it was important not to treat the allegations regarding the termination of his assignments in isolation, but to take an overview of what occurred between May 2020 and January 2021.

178. The Claimant was not treated materially differently in May 2020 to Mr Creasy or Mr Deshai. The bank assignments of all three men were ended at this time. In fact, Mr Creasy and Mr Deshai were given less notice than the Claimant. Although Mr Creasy did six shifts as a porter, there was no evidence presented to us that this resulted in him being in a better position than the Claimant, who benefited from a whole extra month of work in the ACU unit in July.
179. Ms Rutherford and Ms Pellat were retained, but with much reduced hours. There was a rationale for retaining them which did not exist for the Claimant's role because of the project to transfer urgent non-COVID-19 patients to private hospitals. In Ms Pellat's case, however, the benefit was short-lived and her bank assignment was terminated on 22 July 2020. Given that the Claimant returned for the whole of July 2020, we do consider that Ms Pellat was treated materially differently to the Claimant. The only person who was in a materially better position than the Claimant was Ms Rutherford.
180. With regard to which of the comparators returned, this was Mr Creasy, Mr Deshai and slightly later and into the role vacated by Ms Rutherford when she left to work somewhere else entirely, Ms Pellat. This was different to the Claimant who did not return.
181. The Claimant blamed nepotism as well as his race for the difference in his treatment. On this, our view is that Respondent's system of engaging bank workers does, in our view, lend itself to allegations of nepotism. It certainly encourages managers to offer bank assignments to the same people and/or people known to them. We were not required, however, to consider whether this was indirectly discriminatory on the grounds of race as this was not an issue in the case. We were also not provided with any statistical evidence to support such a contention. It is notable that the Claimant himself benefited from this system when brought back to work in the ACU unit because he was known to the hiring manager, but failed to acknowledge this.
182. We consider that nepotism, or at least familiarity, likely have played a role in ensuring that Mr Creasy and Mr Deshai were brought back into their former bank roles. The need for people to do the roles returned, albeit as it is transpired temporarily, in the Autumn of 2020 and they were rehired. We do not know if this was because Ms Honours, the hiring manager, contacted them or they contacted her. We consider it most likely that they had remained in touch with her throughout the period they were not working and that once she had approval to re-hire them, they simply slotted back into position. The ending of their assignments and re-hiring happened again as a result of the early 2021 lockdown.
183. We consider that familiarity also worked to Ms Pellat's advantage in relation to her engagement as a Management PA in October 2020 as set out in our findings of facts. Ms Rutherford returned, in the Spring of 2021, but this was an entirely different situation because she applied for a fixed term role as an external candidate and went through a full recruitment process.

184. Our decision is that the Claimant's allegations of race discrimination and victimisation fail. We primarily considered this was a case where we were able to make positive findings in favour of the Respondent on the evidence before us, rather than apply the Equality Act burden of proof provisions.
185. We did, however, to be as fair to the Claimant as possible, ask ourselves whether we considered that the Claimant had established primary facts from which we could conclude, in the absence of an adequate explanation from the Respondent, that it had committed an act of unlawful discrimination such as to shift the burden on to the Respondent. Our conclusion was that he had not.
186. We say this because the key fact upon which the Claimant relied to prove his case was that the difference in treatment between himself and his comparators was that he was black and they were not. He did not establish that they were in the same material circumstances as him, and so genuine actual comparators. In addition, their value as evidential comparators was limited because he did not establish that they were treated more favourably than him in relation to the termination of their assignments in the Summer of 2020.
187. There was however a difference in treatment in the Autumn of 2020 when the Claimant was not offered an opportunity to return to his former role. In relation to this allegation, some of the comparators were, on the fact of it, treated more favourably than him. Although the Claimant produced no further evidence that suggested the reason for this difference in treatment was race or the fact that he had submitted a grievance complaining of race discrimination one question gave us pause for thought. This was whether the Claimant's grievance had any influence on the Claimant not returning to the Overseas Team, based on our finding of fact that Ms Lucas and Mr Brown were aware of the grievance.
188. Our conclusion was that it was not a factor. Unlike Ms Pellat and Mr Deshai who had stayed in touch with Ms Honours throughout the pandemic, the Claimant had not remained in touch with Ms Lucas nor been proactive in trying to find out when his role might be required again. From 3 August 2020, as set out in his grievance letter, he had decided that he never wanted to work in the Private Care Directorate again. He said the same to Mr Anastopoulos when he interviewed him.
189. However, even if he had remained in contact with Ms Lucas and been proactive about seeking to return, this would not have led to his return. The situation in the Overseas Patients Team was different to that in the rest of the Private Care Department. While the other departments were trying to reopen in the Autumn of 2020, the ongoing strict limits on overseas travel remained such that there continued to be reduced work in that team. No-one was recruited into the Overseas Team in the Autumn of 2020 or even in the late Spring of 2021. We do not consider this was done because of concerns about the Claimant's employment tribunal litigation, but because there was genuinely insufficient work for a third person in that team.

190. Even if we were wrong about the burden of proof not having shifted to the Respondent, we were satisfied that the Respondent had met that burden. In our judgment, the Respondent adduced cogent evidence that the Claimant's treatment was in no sense whatsoever because of his race or his protected acts. The decisions to terminate the bank workers assignments and re-engage them were dictated solely by the circumstances created by the pandemic and driven by commercial concerns that focused on the need for the particular roles. For this reason, all of the Claimant's claims fail.
191. The final point we wish to make is that we have not been influenced in our decision making by the outcome reached by Mr Anastopoulos. We do not consider he applied sufficient rigour or open-mindedness to the investigation of the Claimant's grievance to ensure a robust conclusion.

Time Limits

192. Based on the date the Claimant first contacted Acas, any allegation in his claim form that predates 1 August 2020 is potentially out of time. This applies to the allegations numbered 2.1(a) and (b) and 2.6(a). Although we have not upheld these allegations, we have for the sake of completeness considered the time issue in relation to them.
193. Having not upheld the allegations, we cannot find that they form part of a continuing act. However, we have decided to grant the Claimant an extension of time on just and equitable grounds such that the allegations were presented in time. The reason we have allowed the extension is because the Claimant waited until the outcome of his grievance before obtaining legal advice and presenting a claim. Although this will not always justify a claim being presented late, we are satisfied that it does in this case. The delay was not a long one and did not have an adverse impact on the cogency of the evidence presented. The delay had no impact in relation to the people that the Respondent did not call as witnesses. They did not leave until after the Claimant presented his claim.
194. Based on the date of his amendment application (7 June 2021), the allegation relating to the person specification (2.6(d)) was presented out of time. This is because anything that occurred prior to 8 March 2021 is potentially out of time. Having not upheld the allegation, we cannot find that it formed part of a continuing act. We have decided not to grant the Claimant an extension of time on just and equitable grounds in relation to this allegation. This is because the Claimant was fully aware of the time limits for employment tribunal claims at the time he learned about the change in person specification. He provided no justification for why he did not seek to either make a fresh claim or amend his existing claim within three months of this date.

**Employment Judge E Burns
6 March 2023**

Sent to the parties on:

Case Number: 2207426/2020

06/03/2023

For the Tribunals Office