EMPLOYMENT TRIBUNALS

Claimant: Dr Olaleye Oginni
Respondent: Greenbrook Healthcare (Hounslow) Ltd

Heard at: Watford
On: 13,14,15 February and 10 March 2023 (panel only on 10 March)

Before: Employment Judge Dick
Mr A Scott
Ms J Fiddler

Representation
Claimant: In person
Respondent: Mr A Roberts (counsel)

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that:

1. The claimant's claim of discrimination within the meaning of section 13 of the Equality Act 2010 because of his race, contrary to section 39 of that Act, does not succeed and is dismissed.

REASONS

Key to references:

[x] = page of agreed bundle;

{x} = paragraph number in the witness statement of the witness being referred to.

INTRODUCTION

1. The respondent company provides urgent care services to the NHS. The claimant is a medical doctor and identifies his race as black African. He worked for the respondent in two roles and was suspended on 17 June 2020 pending a disciplinary investigation into allegations which we set out in detail below. The investigation found that the claimant had no disciplinary case to answer, and he returned to work on 3 August 2020. The claimant

takes issue with four particular aspects of the respondent's handling of the suspension (see below), which he says amounted to direct discrimination because of his race.

CLAIMS AND ISSUES

2. The claims were brought by a claim form presented on 14 October 2020. It was not in dispute, taking into account the dates of the ACAS conciliation process, that the claim was in time so far as any acts of the respondent on or after the date of the claimant's suspension were concerned. Nor was it disputed that in both his roles the claimant was an employee of the respondent within the meaning of s 83 Equality Act 2010 ("EqA").

3. The factual and legal issues for us to decide were, as the parties agreed, unchanged from the list of issues set out in the Case Management Summaries prepared by Employment Judges ("EJs") Reed and Ord following preliminary hearings on 6 May 2021 and 11 February 2022 respectively. The claimant's complaint about the respondent's treatment of him related to the following four issues:

    1. The fact that he was suspended. The claimant's case was that in all the circumstances it was not reasonable for the respondent to have suspended him.
    2. The manner in which his suspension was carried out, i.e that it was done by WhatsApp call without any prior discussion with him.
    3. The length of the suspension, which the claimant said was unreasonably long.
    4. Breach of confidentiality. The claimant's case was (a) that the respondent wrongly closed/blocked his email account during the suspension and that (b) details of his suspension and the reasons for it were wrongly discussed with "the other clinical director".

4. For each issue, we would have to consider whether the treatment was "less favourable ", i.e. did the respondent treat the claimant less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? If so, was this because of the claimant's race and/or because of the protected characteristic of race more generally?

PROCEDURE, EVIDENCE etc.

5. At the preliminary hearing before EJ Ord, the claimant had applied to amend his claim to add a claim of detriment for having made protected disclosures ("whistleblowing"). That application was refused. We therefore indicated at the outset that we would take no account of the evidence relating to that

allegation, save where it was necessary to put any of the evidence relating to the discrimination claims into context.

6. Before the evidence was called we explained to the parties that we would read the witness statements but they should be sure to refer us to any documents of relevance in the agreed bundle. The respondent did not object to an addendum to the claimant's witness statement, dated 9 February 2023, being admitted into evidence.

7. After taking time to read the statements, we heard evidence from the witnesses. In each case the usual procedure was adopted, i.e. their written statements stood as their evidence-in-chief and they were then cross-examined. The claimant gave evidence and also called Mary Adeagbo-Smith. The respondent called Neil White, Linda Madeley and Kristofer Walker.

8. At the conclusion of the evidence we heard oral submissions from both parties. Those submissions concluded on 15 February. We were unable to complete our deliberations that day and so indicated that we would give a reserved judgment. The Tribunal re-convened in the absence of the parties on 10 March to complete our deliberations.

FACT FINDINGS

9. We find the following facts on the balance of probabilities. Where facts were in dispute, we give reasons for our conclusions. We have not resolved every disputed fact, but we have resolved all of those which were necessary for us to decide upon the agreed issues.

The claimant's roles

10. The claimant began his employment with the respondent on 5 January 2015. At the time we are concerned with, his principal role was Clinical Director South East, based at Queen Elizabeth Hospital ("QEH"). He was responsible for Urgent Treatment Centres run by the respondent at QEH and three other sites. He also worked for the respondent in a second role, as a self-employed "bank" contractor for the respondent's out-of-hours service. For the first role, he was paid a monthly salary. For the second, he was paid upon submission of invoices.

Events prior to the suspension

11. We were presented with some evidence that around May 2020 (i.e. shortly before he was suspended) the claimant raised some concerns with the respondent about his rate of pay. It was not suggested by either party that this had anything to do with his suspension. The reason the respondent said the evidence was relevant was that it was a relevant "backdrop" to the fraud investigation/allegation. Given that the respondent's own investigation did

not appear to us to have taken any account of it, we did not find the evidence of any assistance in coming to our conclusions.

12. At the time we are concerned with, Linda Madeley was HR Manager for the respondent. In June 2020, Ms Madeley was asked for some advice about the claimant by Dr Jon Craig, the respondent's Medical Director and the claimant's line manager. Miss Madeley therefore had some knowledge of the material events and so was able to tell us the following, which is also apparent from emails at [122 to 127]. On 8 June 2020, the claimant informed Dr Craig that he would be taking sick leave. On 10 June 2020 Dr Craig emailed the claimant noting that in their discussion that day the claimant had said he had work related stress. The same day, Dr Craig asked the claimant to explain why he had worked on 8 June, conducting interviews with potential employees, despite being on sick leave. In response the claimant explained that he had felt physically and mentally able to conduct the interviews and did not wish to cause inconvenience to the candidates and the other interviewers. The claimant remained on sick leave until he was suspended.

The decision to suspend

13. Around 12 June 2020, Liz Davies, Urgent Care Service Director, spoke to Ms Madeley about concerns she (Ms Davies) had about the claimant. Ms Davies had noticed that in one month the claimant had claimed around £ 10,000 for working bank hours; she was concerned that it would not have been possible for the claimant to have worked sufficient hours (in addition to his contracted employment) to have been able to claim so much. She had also looked on Adastra, the respondent's patient administration system, and noted that the claimant appeared, over the preceding months, to have conducted roughly 70 fewer home visits then he had claimed and been paid for as part of his bank work. Around the same time, Ms Davies had spoken to Aarika Scott, the respondent's Senior Resource Manager. On 15 June, Ms Scott noted that the claimant seemed to have worked shifts during his period of sick leave. Later the same day she noted that those shifts had been removed from RotaMaster, the respondent's roster management system.

14. On 16 and 17 June Ms Madeley discussed the situation with Ms Scott and Dr Greg Edwards (Interim Deputy Medical Director); Dr Craig was on leave. A decision was taken to suspend the claimant.

15. On 17 June 2020 the claimant received a voice call on WhatsApp from Dr Edwards and Ms Davies, during which he was told that he was suspended with immediate effect, while allegations against him were investigated. We were taken to minutes of this call [133]. The claimant was told of the respondent's concerns regarding: (i) "discrepancies between what [was] recorded on RotaMaster and [his] contractual working hours" (ii) "discrepancies for out of hours home visiting compared to Adastra data" and

(iii) working on sick leave. We refer to these as concerns (i) to (iii) from heron. The claimant was also told that the reasons for the suspension were "to prevent the loss, destruction or concealment of evidence" and/or to "prevent the continuation of the offence". At that point the allegations were not set out in detail, although the claimant did give a detailed response to them. He was told that part of the investigation may involve asking for a statement from him once the detail of the allegations had been looked at. The same day, 17 June 2020, Dr Edwards wrote to the claimant in similar terms to what had been explained to the claimant orally earlier that day.

16. Chapter 13 of the respondent's disciplinary policy, dealing with suspension [108], so far as is relevant, said the following:

> There may be instances where suspension with pay is necessary while investigations are carried out and/or pending a hearing. Greenbrook Healthcare has the right to suspend with pay where there are reasonable grounds for concern that evidence may be tampered with, destroyed or… if there is a potential risk… to the organisation (including reputation)… in allowing the employee to remain at work.
>
> Suspension is a neutral act and not in itself disciplinary action.
>
> Before making a decision to suspend, managers should consider whether temporary alternatives, such as changes to the employee's working pattern, modification of duties, working under supervision, change of location or redeployment may be appropriate.

17. On the evidence it is clear to us that the decision to suspend was made by Dr Edwards, albeit with input/assistance from Ms Madeley. While we had some concern that we had not heard evidence from the decision-maker, we were able to make findings about the decision on the basis of Ms Madeley's evidence and the documentary evidence. Having heard from Ms Madeley, we accept that the decision to suspend was made principally on the basis of the concerns (i) to (iii) relayed to the claimant as set out in the preceding paragraph. We say "principally" as it was not made clear at that point to the claimant that the respondent had also, as Ms Madeley told us and we accept, taken into account that the sick-leave shifts which were the subject of (iii) had been deleted by one of two others suspended at the same time as the claimant (see below). The respondent (i.e. through Ms Madeley, as she told us in her oral evidence) was also aware that, although the claimant had not personally entered the records of the out-of-hours shifts which were the subject of (ii), the majority had been entered by the same person who had deleted the shifts referred to above. Also, the respondent took the view that it was necessary to restrict the claimant's access to their computer systems during the course of the investigation. This would prevent him from performing his duties, meaning that a suspension was necessary in the respondent's view.

18. Another factor which the respondent said led to the claimant's suspension was that he and two colleagues were also the subject of an internal fraud investigation, which was not dealt with by Miss Madeley. Though we were not provided with any detailed evidence about that investigation, it appears that so far as the claimant was concerned this related to the same conduct that was the subject of the disciplinary investigation with which Ms Madeley was involved. Most importantly, it should be noted here that, following their investigations, the respondent makes no suggestion that the claimant actually committed fraud. For the purposes of this case we are dealing only with concerns which were the subject of the disciplinary investigation, which, as will become apparent, also found no wrongdoing on the part of the claimant.

19. We find that the apparent payment for roughly 70 shifts which on the face of it had not been completed (i.e. concern (ii) above) was on its own sufficient to justify suspension for the reasons given by the respondent. If the allegation had been made out (which, we stress, ultimately it was not) it would have amounted to serious wrongdoing. Although the claimant had not personally entered the information into the system, he was responsible for providing the information that was entered. The seriousness with which the respondent treated it is reflected by the referral (in accordance with Chapter 11 of the respondent's policy [106]) to the local counter fraud specialist. We are not persuaded that concern (i) would, *on its own*, have been sufficient to justify suspension (for the detail, see below, but it is apparent that on a relatively rudimentary investigation the concern was found to be groundless on the basis that the respondent's own management had largely approved of or at least been aware of the situation). The same might well apply in our judgment to concern (iii). However, taking the concerns cumulatively and taking also into account the apparent deletion of evidence by another of those also suspended, we find that there were good grounds objectively for the decision to suspend the claimant.

20. Since there were good grounds to suspend, there was no evidence in our judgment to support the conclusion that anybody else in the same situation as the claimant (and in particular anybody of a different race) would have been treated any differently. Our conclusions in this regard are fortified somewhat by the evidence from the respondent that at around the same time two British Pakistani employees had been suspended, the first employee on suspicion that he had worked a shift whilst also being paid for being on call and the second employee on suspicion that she had altered RotaMaster records to have the first employee paid for breaks for which he was not entitled to be paid. While the cases had no connection to the claimant's, and are different in some material respects, they demonstrate a propensity on the respondent's part to treat allegations of financial impropriety seriously, and in particular to suspend in those circumstances pending an investigation.

21. We note that the decision to suspend (and the subsequent investigation) did not deal with Ms Davies' initial concern that the claimant had claimed for more bank hours in one month that it was possible to work. The

respondent's evidence did not directly address why this might have been, but it appears to us that the reason was likely to be that it would very easily have been established, as the claimant told us, that it was in fact possible for him to have worked – as he in fact did work – the number of bank hours that he had claimed, albeit that it is clear that his line manager had concerns about him working so many hours. We also note that it was not clear from Ms Madeley's evidence how concern (i) above had arisen, albeit that it was raised at the outset with the claimant.

22. The claimant took further issue with the decision to suspend him having been made before anyone has spoken to him; all of the respondent's concerns, he said, could have been dealt with simply if anyone had asked him for an explanation. He drew our attention to a document headed "Recommendations & Learnings from Greenbrook Investigations". Nobody was able to tell us who drafted the document, but its relevance was that the author had recommended that in future an initial investigation meeting should take place (i.e. with the employee present and able to make representations) and the meeting should be adjourned for consideration of suspension whilst the employee was still present. The respondent's case, through the evidence of Ms Madeley, was that although the suspension and investigation should perhaps have been handled better, even had the claimant been spoken to before the decision to suspend was taken, in these circumstances a suspension would still have been necessary in light of the need to investigate the claimant's account and to preserve evidence, in particular given that the respondent was aware that potential evidence (i.e. the records of the shifts) had been deleted by one of the other people under investigation. We accept the respondent's case on this point. The concession made in the recommendations that in future there might be a better way to deal with such a situation is far from saying that the claimant was treated unequally. Having considered the investigation report, it is evident to us that inquiries were necessary beyond simply speaking to the claimant. For example, regarding concern (ii), the investigators considered data analysis provided to them concerning the home visits, conducted their own examination of the audit history of each booked shift and considered emails in which the claimant had been told that there were to be fixed payments rather than hourly rates for each visit (which is what turned out to have been a source of confusion; see below). Ultimately, while we agree that it might have been better for the respondent to have considered a brief explanation from the claimant before making the decision to suspend, as suggested in the "learnings" document, we do not find that the outcome would have been any different – the claimant would still, in our judgment, have been suspended pending an investigation. Further, we can see no reason to conclude that any other employee in similar circumstances would have been treated any differently to the claimant.

23. The claimant also relied upon the fact that the other two people suspended at the same time he was were also black. He was told, he said in his statement, at the meeting of 27 July, that it had been "convenient" to suspend him alongside the other two. However, in the claimant's oral evidence it became clear to us that the word "convenient" was his own

characterisation rather than something that was said by anybody on behalf of the respondent. We accept that the respondent was entitled to, as it did, take account of the actions of the other suspended person to the extent detailed above in making the decision to suspend the claimant. We conclude that the respondent did not simply lump the three together and did not therefore suspend the claimant for no good reason; it was not, as the claimant asserted, merely a matter of guilt by association. We were not presented with any evidence to suggest that the respondent was wrong to suspend the other two. We did hear evidence from one of those people, Mary Adeagbo-Smith. Much of her evidence related to the whistleblowing claim, with which were not concerned. She claimed that a number of the findings of the investigation were "not factual" due to the deliberate attempts by two employees of the respondent to hide the truth. This allegation formed no part of the claimant's case and we were presented with no evidence to substantiate it; we do not accept it.

Comparators and the decision to suspend

24. It was the claimant's case that two other white employees of the respondent were treated differently to him, i.e. were not suspended, despite there being irregularities in respect of their pay. The first was a Ms Mulligan. The claimant's case was that it was discovered around January 2020 that she had been "paying herself" at a higher rate than she was entitled to be paid, "in conjunction with a white service manager"; neither were suspended. In her statement Mrs Adeagbo-Smith said that in January it was discovered that an (unnamed) white nurse had been paying herself at the rate a doctor would be expected to earn "in conjunction with" a white service manager. (In her oral evidence it was made clear that she was referring to Ms Mulligan.) Neither were suspended, but instead they were given the opportunity to explain their actions. Mrs Adeagbo-Smith said that she had subsequently discovered that the nurse had amended her rates on RotaMaster; she had evidence of this in the form of screenshots. She provided this screenshot to the claimant and it was in evidence.

25. The respondent's case, established through the evidence of Ms Madeley, was that Ms Mulligan, a lead practitioner (nurse), had received a higher rate of pay than she should have done for five bank shifts. This, said Ms Mulligan, had occurred due to a mistake on the part of an administrative manager, who had called the HR coordinator to check the enhancement rates paid to nurses for bank shifts but had not said that her query related to Ms Mulligan, who was in fact not entitled to receive that rate for bank work. Ms Madeley was aware of this as she had been sat next to the HR coordinator when the conversation took place and the HR coordinator had discussed it with her. Ms Mulligan's manager (Mrs Adeagbo-Smith) was aware of the error and had told the Director of Nursing, Matthew Parks, about it. Because there was never any suggestion of misconduct on Ms Mulligan's part, the respondent said, there was never any question of her being suspended. Mr Parkes had raised the issue with her and a repayment plan was arranged to account for the overpayments.

26. Broadly, there were two disputed areas of fact between the parties relating to Ms Mulligan. The first was whether, in her conversations with Matthew Parkes, Mrs Adeagbo-Smith had accepted that Ms Mulligan's overpayments had been due to a genuine mistake. Ms Madeley was under the impression that Mrs Adeagobo-Smith had accepted that, though of course we did not hear from Mr Parkes on the point. We accept Ms Adeagbo-Smith's evidence that, while she did raise it with him, she never agreed it was a genuine mistake. However she did accept in her oral evidence that she had left it to Mr Parkes and had never heard anything more about it. Perhaps more significantly, we accept the evidence of Ms Madeley to the effect that the incorrect pay had come about as a result of a genuine administrative error in the circumstances which she set out. This conclusion follows from our consideration of what was the second and more substantial issue between the parties on this point, which we deal with now.

27. It was the claimant's case, both through his own evidence and that of Mrs Adeagbo-Smith, that the screenshot we have referred to, taken from RotaMaster, showed that Ms Mulligan had (a) assigned herself to bank shifts and (b) had changed the rate of pay for them on the system so as to be paid more than what she was entitled to be paid. The respondent called evidence from Neil White on this point. As to (a), we accept Mr White's evidence that while it was not best practice, there are circumstances where it is necessary for someone in Ms Mulligan's position to assign themselves onto a shift. As to (b), Mr White has years of experience in operating and analysing workforce management systems including conducting investigations relating to over- and under-payment of workers. Throughout the course of his evidence he demonstrated to us a detailed knowledge of the respondent's systems and we accept that he was in a position to give expert evidence on the operation of RotaMaster, having used it daily since 2016. In contrast, though the claimant (and Mrs Adeagbo-Smith) were regular users of the system, that does not make them experts on its inner workings. We reject the claimant's contention that the evidence Mr White gave was in any way dishonest or inaccurate. We also reject the claimant's contention that, because Mr White did not work for the respondent in 2020, he was not in a position to give evidence relating to users' access rights at that time; Mr White told us, and we accept, that the system kept records and had a "look back" feature which he had used in conducting test exercises (which were set out in his statement) using the system rules and amounts that were applicable in 2020. Mr White took us through the meaning of each entry on the screenshot in some detail and we accept his evidence that the screenshot simply does not prove what the claimant and Ms Adeagbo-Smith believe it to prove (however forthright and genuine that belief may be). The nature of Ms Mulligan's user account was such that she did not have the permissions necessary to be able to amend shifts retrospectively nor to amend rates of pay. Further, as Ms Adeagbo-Smith herself agreed, the minimum length of a shift was six hours and the screenshot we were shown showed pay of £ 201.60 for the shift, i.e. a rate of (at most) £ 33.60 per hour, a rate which Ms Adeagbo-Smith herself agreed was a rate to which Ms Mulligan was entitled. So not only did this particular screenshot not show that Ms Mulligan altered pay rates, it did not even show that she was being

paid more than she should have been. To be clear, we were presented with no evidence that came close to supporting the suggestion that Ms Mulligan had done anything illegal or wrong and we accept the respondent's case on this point.

28. We do not accept in any case that Ms Mulligan was in a comparable situation to the claimant. In contrast to the claimant's case, once the error in payments was noted it was immediately apparent to the respondent that Ms Mulligan was not responsible for the error. The respondent simply never had any reasonable grounds to suspect, nor did it suspect, that there had been any wrongdoing. There was therefore never any question of suspension. (Nor was there, as we have found, in fact any wrongdoing.) We also note that Ms Mulligan was in a different, more junior, role to the claimant and that the person responsible for making the decisions about this issue was not the same person who made the decisions about the claimant's case.

29. The claimant's second comparator was another lead nurse. The claimant's case was that she had been in similar circumstances as Ms Mulligan and had also not been suspended. Another screenshot in evidence showed, he said, that she had been booking herself into shifts taking advantage of an error in the system. The respondent's case was that in the summer of 2018 the respondent noticed that she had been receiving unsocial hours payments though as it turned out her contract did not provide for these payments. Ms Madeley's evidence was that the respondent's system had been set up to make these payments as a result of an error on the part of an administrative employee; the payments had not been set up by the lead nurse herself, who did not have the necessary system access to do so (as Mr White confirmed to us). She was not suspended, said the respondent, as there had never been any question of potential misconduct on her part. The respondent realised that there were differences between the terms and conditions of different lead nurses, meaning some were contractually entitled to unsocial hours payments and others were not, due to the way some had joined the business by way of "TUPE transfer" from the NHS or other companies. The respondent took the view that this difference was unfair and decided that all lead nurses would receive the payments in future and retrospectively; the lead nurse was therefore not required to make any repayments. It was clear to us that this case was different to the claimant's in that in this case the respondent never suspected any wrongdoing on the part of their employee; the allegation made by the claimant – that she was deliberately booking herself onto shifts to take advantage of the administrative error – was not one that was ever raised with the respondent, let alone investigated. We therefore did not need to make any findings on whether the lead nurse did actually do what the claimant accused her of doing; nor would we have been a position to do so given the paucity of evidence on the point. For similar reasons to those given above, we also find that this lead nurse was not in a comparable situation to the claimant.

30. With regard to both "comparators", then, the claimant's assertion in his witness statement that there were "proven fraud" allegations against them

is plainly not correct. Another point of contention was the lack of records in relation to the overpayments; the respondent had checked both employees' HR files and found no relevant records. The claimant asserted that this was, at best, suspicious. Ms Madeley's evidence was that at the material time the respondent did not have a formal centralised HR filing system. Files were kept locally by managers and the records kept could, therefore, vary from manager to manager and site to site and so the lack of records was in her view not necessarily surprising. We accept that, particularly in light of the fact that, as we have found, there was not in fact ever any disciplinary investigation nor any question of wrongdoing on the part of either employee.

Conveying the decision to suspend

31. The respondent's case was that the claimant had to be informed of his suspension by a call, rather than in person, as he was off sick at the time. We accept that this was a perfectly reasonable view for the respondent to have taken; indeed the claimant did not take any particular issue with this. His complaint was that the call had taken place over WhatsApp, rather than over a conventional telephone line. We were not provided with any particular reason why the call had taken place over WhatsApp as opposed to a normal phone line. Equally we were not provided with any reason why the call should not have taken place over WhatsApp, save for the claimant's assertion that this was less professional or official. We do not accept this assertion. In all the circumstances we can see no discernible distinction between the two. Nor do we find any reason to conclude that the respondent's choice of WhatsApp rather than a phone line would have been any different for any other employee. Indeed, in cross-examination the claimant conceded that he did not attribute the decision to make the call on WhatsApp to his race.

The claimant's email account

32. The letter of 17 June also informed the claimant that his NHS email account would be suspended, though he could access it "through supervision". The claimant described his NHS email as a "personal" account. We do not accept this characterisation; it was clearly an account provided for the purposes of his work and his employers were in our judgment entitled to perform administrative actions upon it. We were presented with no evidence to support the claimant's assertions that it was inappropriate for the respondent to have suspended his access; on the contrary, we consider it was perfectly reasonable in all the circumstances. We do not accept the claimant's assertion that the respondent needed his permission to suspend his access. Nor were we presented with any evidence in support of the claimant's assertions that this was done to gain access (unlawfully or otherwise) to the claimant's emails – we were presented with no evidence, beyond bare assertion, that even suggested that anybody had accessed the claimant's emails and we accept the evidence of Kristofer Walker that this did not in fact happen. Mr Walker, the respondent's Head of Information, had been asked by Dr Edwards on 17 June 2020 to disable the claimant's email account. At that time, the claimant's email was linked to Bromley CCG

because the claimant had previously been employed by Bromley (and still did some work there). Because of this, Mr Walker had to request "migration" of the claimant's account from Bromley to Greenbrook before he could disable it, which he eventually did do on 22 June 2020. We accept Mr Walker's evidence that this was done in accordance with the respondent's usual procedures; again, the Claimant provided nothing beyond a bare assertion to suggest otherwise. The claimant suggested that the use of the terms "leaver" and "joiner" by Mr Walker in the emails which he sent to effect the suspension was somehow deceptive as he was neither a leaver of Bromley nor had he recently joined Greenbrook. We do not agree. We accept Mr Walker's evidence that there was nothing untoward in the use of the terms as they are standard terms in relation to the administration of NHS email accounts and relate to the technical process of migrating email accounts.

33. The parties agreed that the claimant requested that his access to emails be restored as it meant he was unable to book shifts for other work (i.e. not for the respondent) that he was also doing at the time. Mr Walker believed that he had restored access within a day of being requested to do so on the evening of 22 June 2020. The claimant's evidence was that it had taken longer – about a week – for access actually to be restored; we accept the claimant's evidence on this point; we do not consider that he could be mistaken about whether he lost access for one day or for a week, nor do we believe he lied to us about that; we also recognise that it is not uncommon for IT problems sometimes to persist even though they have apparently been fixed. Ms Madeley's recollection, which we accept is accurate, was that he certainly had access to his emails at the investigation meeting of 10 July (see below). We therefore find that the claimant's email account was disabled for approximately one week. In the circumstances we do not consider this to have been an unreasonable length of time; while the respondent reasonably responded to the claimant's request to restore access, it might also reasonably have declined the request during the course of the investigation. We see no evidence that could lead us to the conclusion that any other employee in the claimant's circumstances would have been treated any differently.

The investigation

34. On 20 June 2020 the claimant provided a detailed written response to the allegations as he understood them (though, as we have said, he had at that point been provided with very little detail).

35. On 22 June 2020 Rishi Patel, a Development Director at the respondent, wrote to the claimant to explain that he had been appointed to investigate the concerns on behalf of the respondent. It was later decided that the investigation should be conducted instead by Debbie Cuthbert, whom the respondent viewed as "external" (she was an HR Business Partner of Totally, of which the respondent is a subsidiary), albeit still with support from Mr Patel, who had some knowledge of the RotaMaster and Adastra

systems. The change appears to have been, as the respondent conceded, a response to representations made by Ms Adeagbo-Smith.

36. The investigation was completed on 21 July 2020. The findings were set out in an Investigation Report, which was which was in evidence at [156]. The report took account of the claimant's written response, as well as interviews conducted with him and the other suspended person referred to above.

37. The report dealt with the following issues:
    a. *Discrepancies between what was recorded on RotaMaster and the claimant's contracted hours.* In his principal role, the claimant was contracted to work for 30 hours doing management work and for 6 hours doing clinical work. The allegation was that the claimant had not done the required 6 hours' clinical work. However the investigation established that on almost every relevant occasion the claimant's clinical hours had been substituted for further management hours, with the agreement of management. This did not apply to two occasions, but on those occasions it appeared that the claimant had been on holiday or doing management work. There was therefore no case for the claimant to answer.
    b. *Discrepancies in out-of-hours work.* The investigation found that from January 2019, 376 home visits were recorded on RotaMaster for the claimant (and he had accordingly been paid for them as part of his bank work) whereas Adastra showed only 306 of those had taken place. The investigation found that the discrepancy arose due to confusion about whether visits that lasted for over an hour should be recorded per visit or per hour. While an email sent to the claimant on 5 April had made clear it would be the former, the claimant said he did not recall this. The investigation further found that the visits on RotaMaster had not been recorded by the claimant himself, and although the claimant had not verified the RotaMaster entries before payment was made, nor had other GPs working for the respondent. The investigators found that this was a "capability" rather than "misconduct" issue so far as the claimant was concerned and made recommendations for changes to the respondent's procedures around the issue.
    c. *Working on sick leave.* The report found that that during the sick leave we have referred to above, as part of his salaried role he took part in the interviews for the reasons recorded above and also answered urgent emails. He also worked out-of-hours bank shifts (on 9 June and twice after that) but appeared to have taken the view that he could do that as the stress he was experiencing was as a result of "things happening with work during during the day". He "offered not to be paid" for those shifts and was removed from the rota by his colleague. The report does not explicitly say so, but implicitly accepts that there was no misconduct on the claimant's part. The report recommended "clear expectations" around work undertaken on sick leave.

38. The report's overall conclusion was that the claimant's suspension should be lifted. The report was not, however, as the claimant would have it, a total vindication. Whilst it is worth repeating that the claimant was not guilty of fraud or anything close to it, nevertheless "capability issues" were identified.

The end of the investigation; the length of the investigation

39. The investigation report was passed to Dr Craig on 21 July 2020; Ms Madeley's evidence (which the claimant did not dispute and we accept) was that it was also sent to the claimant that day. A meeting took place on 27 July 2020 (i.e. four working days later) in which Dr Craig, the claimant and Ms Madeley discussed the investigation, the claimant's sick leave and his return to work; the claimant raised concerns he had about the investigation. On 31 July Dr Craig wrote to the claimant with a summary of the 27 July meeting [185]. The claimant returned to work on 3 August 2020. There was no dispute that, his suspension having been lifted, he chose to return to work on 3 August rather than 27 July. We therefore find that the claimant's suspension ran from 17 June 2020 to 27 July 2020, a period of just under six weeks.

40. On 29 July, the claimant sent a message to Debbie Cuthbert [171] in which he thanked her for a very thorough report and said that he appreciated her professionalism and efficiency in conducting the investigation and bringing it to a closure. In his evidence, the claimant conceded that he made no suggestion of discrimination once Ms Cuthbert was in charge. As Mr Roberts for the respondent points out, in effect then, the claimant only took issue with the period of his suspension between 17 June and 6 July (Ms Cuthbert took over on the 7th) and also between 22 July and 27 July, a total of 16 working days. It may be that this is a slightly artificial way to treat the issue, however, so we consider the whole of the period of almost six weeks, while taking into account that some short delay during that time was caused by the respondent reasonably responding to a request from one of those being investigated to change the investigator. We consider that it was perfectly reasonable for the respondent to have taken just under six weeks to properly investigate allegations which were so serious that, had they been substantiated, would likely have been career-ending for the claimant, and then to prepare a detailed report. While some of the respondent's concerns could have been dealt with by rudimentary enquiries, that was not the case for all the concerns. We can see no reason to conclude that any other employee in the same situation would have been treated any differently.

41. The claimant also criticised the lack of contact from the respondent during the course of the investigation, but we consider that it would have been unusual for the respondent to have offered the claimant a running commentary on the process.

Confidentiality of the investigation

42. In his written evidence the claimant complained that following the investigation, rumours had spread about what (all parties agreed) should

have remained a confidential investigation. In his further and better particulars he said, a little more specifically, that details had been shared with "the other clinical director", whom he did not name. Although the respondent complained about the lack of specificity, in our judgment the respondent was able to adequately address the point when the claimant made clear in his oral evidence that he was referring to Dr Sivanthi Sivakumar. The claimant said that he had been told by Dr Sivakumar that she had been told about the situation by Dr Craig. Given Dr Sivakumar's position and given the claimant's absence from the organisation for almost six weeks, if Dr Sivakumar had been so informed, we cannot see any reason to conclude that that was unreasonable. Further, given that there were two others suspended, as a matter of logic the investigators and directors were not the only possible source of any "leaks" which may have led to rumours; equally, members of staff were unlikely not to have noticed that three people had simultaneously and spontaneously stopped attending work for six weeks. Ultimately we saw no evidence that could have led us to the conclusion that the respondent was responsible for any breach of the investigation's confidentiality. Nor was there any evidence that could lead us to the conclusion that any other employee in the claimant's situation would have been treated any differently.

Further findings

43. As will be clear from the conclusions above, there was in our judgment no evidence to support the claimant's contention that he was the victim of a conspiracy or plot to besmirch his character. We do not accept that contention, nor do we accept that any of the respondent's witnesses were dishonest in their evidence.

44. Nor do we accept the respondent's contention that the claimant was dishonest in his evidence. His views were in our judgment genuinely held, albeit that we have not accepted that they were correct. We also wish to record here that, as well as it being clear following the respondent's investigation that the claimant was not guilty of fraud or anything close to it, there was also never any question (in the decision to suspend, nor in the investigation, nor during these proceedings) about the quality of his work as a doctor.

LAW

Direct discrimination because of race

45. S 39 EqA says that an employer must not discriminate against an employee by (amongst other things) dismissing them or by subjecting them to any other detriment. There was no dispute here that the claimant was the respondent's employee within the meaning the Act. Nor was there any dispute that the respondent would be liable under s 109 for any contraventions of the Act done by other employees. Under s 13(1) EqA read

with s 9, direct discrimination takes place where because of race a person treats the claimant less favourably than that person treats or would treat others.

46. By s 23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case. The circumstances need not be precisely the same, provided they are close enough to enable an effective comparison: *Hewage* v *Grampian Health Board* [2012] UKSC 37. 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 a protected characteristic (in this case, 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 they were (*Shamoon* v *Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11; [2003] IRLR 285).

47. The protected characteristic need not be the only reason for the treatment, provided it had a significant influence on the outcome (*Nagarajan* v *London Regional Transport* [1999] IRLR 572, HL). The case law recognises that very little discrimination today is overt or even deliberate; people can be unconsciously prejudiced. A person's motive is irrelevant, as even a well-meaning employer may directly discriminate.

48. S 136 of the EqA makes provisions about the burden of proof. If there are facts from which the Tribunal could decide, in the absence of any other explanation, that there was a contravention of the Act, the Tribunal must hold that there was a contravention, unless the respondent proves that that there was not a contravention. S 136 requires careful attention where there is room for doubt as to the facts necessary to establish discrimination, but has nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another (*Hewage* above). The burden of proof does not shift where there is no evidence to suggest the possibility of discrimination (*Field* v *Steve Pye and Co (KL) Ltd* [2022] EAT 68). Guidelines on the application of s 136 were set out by the Court of Appeal in *Igen Ltd* v *Wong* [2005] EWCA Civ 142 and the importance of these was recently restated by the Employment Appeal Tribunal in *Field* v *Steve Pye and Co (KL) Ltd* [2022] EAT 68. We do not reproduce the thirteen steps of the guidance here, but we took account of all steps. One important point to note is that the question is whether there are facts from which a Tribunal *could* decide… It is not sufficient for the employee merely to prove a difference in protected characteristic and a difference in treatment. Something more is required (*Madarassy* v *Nomura International Plc* [2007] EWCA Civ 33). Unfair or unreasonable treatment on its own is not enough (*Glasgow City Council* v *Zafar* [1998] IRLR 36). If the burden of proof does shift, under the *Igen* guidance the employer must prove that the less favourable treatment was "in no sense whatsoever" because of the protected characteristic. Because the evidence in support of the explanation

will usually be in the possession of the employer, tribunals should expect "cogent evidence" for the employer's burden to be discharged.

CONCLUSIONS

Issue 1 – The decision to suspend

49. We have no doubt that the period of the suspension was an extremely unpleasant time for the claimant, who had never before faced accusations of any misconduct. However, as the respondent's disciplinary policy has it, suspension is a neutral act. The claimant was suspended on full pay and at the conclusion of the investigation was restored to his original roles. For the reasons given above, we find that the decision to suspend the claimant was reasonable, proportionate, and in accordance with the respondent's policy.

Issue 2 – The manner in which the suspension was carried out

50. For the reasons given above, we find that the respondent conveying the decision to suspend the claimant by means of a WhatsApp call was entirely unobjectionable.

Issue 3 – The period of the suspension

51. For the reasons given above, we find that the length of the claimant's suspension was not unreasonable.

Issue 4(a) – Breach of confidentiality

52. For the reasons given above, we find that there was no breach of confidentiality relating to the claimant's email account. We also find that there was no breach of the confidentiality of the investigation by informing the other clinical director of the circumstances and that the respondent was not responsible for any rumours which may have circulated about the claimant's suspension.

Direct discrimination because of race

53. As regards all four issues, we therefore find that the respondent did not subject the claimant to less favourable treatment, i.e. it did not treat the claimant less favourably than it treated or would have treated others in not materially different circumstance.

54. As such, it is not formally necessary for us to decide the issue whether the treatment was because of the claimant's race. We do however record that having heard the evidence we are satisfied that none of the people acting

on behalf of the respondent treated the claimant the way they did because of his race.

55. The claim for direct discrimination is therefore dismissed.

56. In coming to our conclusions, we considered s 136 EqA. There were in our judgment no facts on which a Tribunal could decide, in the absence of any other explanation, that there was racial discrimination. This was not a case where there was more than a difference in protected characteristic (race) and a difference in treatment; indeed, in this case there was no difference in treatment. Even had the burden shifted under s 136, given our factual findings, our conclusion would have been that the respondent's treatment of the claimant was in no sense whatsoever because of his race. We also kept in mind throughout that that discrimination can be unconscious or subconscious.

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Employment Judge **Dick**

Date: 5 June 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

6 June 2023

GDJ
FOR THE TRIBUNAL OFFICE