EMPLOYMENT TRIBUNALS

Claimant: **Mr J. Bishweka**

Respondent: **Lifeway Community Care Ltd**

Heard at: **Birmingham** **On: 11-13 August 2021**
16-20 August 2021
3 September 2021(Chambers)
7 September 2021(Oral Reasons)

Before: Employment Judge Hughes
Sitting with Mr R.S. Virdee and Mr M.Z Khan

Representation

Claimant: Dr R. Ibakakombo, Lay Representative
Respondent: Ms. L. Amartey, Counsel

JUDGMENT having been sent to the parties on 9 September 2021, and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, (for Judgment see Appendix A), the following Reasons are provided:

REASONS

Background

1 The Hearing was a live Hearing although we had a CVP link so that people who were not giving evidence could observe remotely.

2 We were hearing three combined claims, these are case reference numbers 1302101/2019, 1302291/2020 and 1301008/2020.

3 There was a bundle – R1 consisting of 668 pages – and references in square brackets are to pages in the bundle unless otherwise stated.

Issues

Claim 1

4 The case has a complex Case Management history which is best summarised by reference to an Order made by Employment Judge Self on the 28 July 2020, a document which we have referred to as T1 because it was a document which the Tribunal had extracted from the bundle for ease of reference.

5 Prior to making the Case Management Order, Judge Self dealt with a Preliminary Hearing, which amongst other things determined that the Response could be accepted out of time. He also decided that some allegations could not proceed because they were too old and/or because they had not been particularised and/or had been withdrawn by the Claimant's representative. He noted there had been four hearings by that point and that the Claimant still didn't have a specific list of allegations for the period between 2014 and 2018 identifying dates and alleged perpetrators. He observed that although Dr. Ibakakombo is a Lay Representative, who says he is not acting for profit, he has regularly represented Claimants in similar cases including one in front of himself. He said he was satisfied that Dr. Ibakakombo knows how things work and had made a conscious decision at the previous Hearing not to particularise the claims and he assumed he had done so on instructions. He said the Claimant had been afforded a substantial amount of latitude and went on to say, "there is a time when, in my view, enough is enough." He said it would not be just, equitable, or fair to hold another hearing to attempt to further define the issues because it would cause prejudice and cost to the Respondent.

6 Consequently the Judge decided that allegations of detrimental treatment/discrimination between 2014 and 2018 could not proceed. He observed that any allegations in 2018 which pre-dated 12 November 2018 were out of time, subject to the question of whether there was a continuing course of conduct. He recorded that the Claimant relied on two protected acts for the purposes of the victimisation allegations - an alleged oral disclosure to Ms Sue Salis in 2014, and an oral disclosure to Mrs York on 20 November 2018. In attempt to capture the scale of the task of case management, we shall record that by 27 October 2020, which was when the final case management in respect of the first two claims took place, the documents ran to 229 pages. We are indebted to Judge Self for the time and effort he put in to ensure the allegations had been clearly defined, and to making it very clear which allegations could proceed. We used his Order which we extracted from the bundle and called T1 as our guide.

7 It is important to note the above history because it is fair to say that many attempts were made in the hearing before us to resurrect those allegations. We were quite clear that we were not prepared to do so - the Judge's decision had been made some twelve months before and case management had taken place at that point. Put another way, the case we had to determine was in respect of the allegations which Judge Self *had*

allowed to proceed. However, the evidence before us also related to allegations we did not have to determine, because they were said to be "background".

8 Judge Self recorded that the Claimant asserted that he had been directly discriminated against and/or harassed by reason of his national origin which is Rwandan and that he had been victimised for complaining about discrimination. The fact that the Claimant is French-speaking African, also featured in the case before us which appeared to be an allegation of harassment or direct discrimination.

9 It was recorded that for the purposes of the victimisation claim, the Claimant relied upon two protected acts. Firstly, an alleged verbal complaint to a manager called Sue Salis in 2014 that a work colleague, Mr Mulugeta, was making racist comments. The Respondent denies that a complaint of racism was made. Ms Salis no longer works for the Respondent and did not give evidence. The Respondent's case is that no one who dealt with the Claimant at the time of the allegations that we have to deal with, knew of a complaint of race discrimination in 2014. Secondly, there is a verbal disclosure about alleged race discrimination made to Ms Nyeshia York, on 20 November 2018. The dispute is not about whether a conversation took place, but whether, having made the allegation, the Claimant then retracted it.

10 Judge Self proceeded to record the acts of alleged harassment or direct race discrimination or victimisation that had been contained in the first Claim Form, and we shall return to that in due course because we are using paragraph 4 of the Order as part of a Schedule of allegations we had to determine. We have called the Order T1, because we extracted it from R1 for ease of reference [T1 is at 224-229].

Claim 2

11 Judge Self then dealt with the second claim where again the Claimant was alleging direct discrimination because of his national origin (Rwandan) and victimisation. In addition, Judge Self recorded there was an age discrimination claim. This was that Mr Mulugeta had directly discriminated against the Claimant by asking him to transfer his role of Team Leader to a person called Mr Alan Chikosi. The Order stated that the Claimant specified his age group as being in his fiftieth year, and Mr Chikosi as being between 35 and 38 years old. In fact, this proved not to be correct. Mr Chikosi was 42 or 43 at the relevant time.

12 Directions were made for the case to be listed for a Hearing.

Claim 3

13 A third claim was presented 31 March 2021 in respect of the Claimant being dismissed. He claimed unfair dismissal, wrongful dismissal and that his dismissal was an act of victimisation.

14 As noted above, attempts were made in the Hearing before us to reintroduce the claims dismissed by Judge Self under the guise of this being background information. We did have to resolve some issues around whether the Claimant made allegations of race discrimination in 2014 and/or 2015 (the first alleged protected act relied on for the purposes of the victimisation claim) To be clear, we were not deciding the allegations ruled out by Judge Self, simply whether a protected act was made at that time. Eventually, during a lengthy grievance process, the Respondent attempted to investigate specific allegations against the Claimant's Manager Mr Mulugeta, which he said were reported in 2014 and 2015. The Respondent concluded there was no evidence to support the proposition that the Claimant had made those allegations at that particular time. During the Hearing before us, it became was clear that the Claimant was pursuing an argument that Mr Mulugeta was racially discriminatory against people from African countries who (because of colonialism) are French-speaking rather than English-speaking. It is not clear that allegations of discrimination based on language spoken were included in any of the Claim Forms, so we have treated that issue with some caution.

15 He also argued that Mr Mulugeta had made an alleged racist comment by referring to him as "the man from Timbuctoo". There was an evidential dispute as to whether those words were said and, if so, when they were allegedly said. This was not an allegation before us, although attempts were made to make it so. It went to the question of the first protected act i.e. did the claimant complain about it.

16 There was also a dispute about whether, prior to Mr Mulugeta having management responsibility for the Claimant, they had a good relationship in work and outside work. Mr Mulugeta's evidence was that they had a friendship outside work and knew each other's families, but that the dynamic of the relationship changed when he became responsible for managing the Claimant who did not like being managed by him. The Claimant denied that they had a previously good relationship, rather unconvincingly in our view - Mr Mulugeta provided examples of things which they had done outside of work together which we accepted to have taken place. We concluded that what really was the heart of the complaints made by the Claimant about Mr Mulugeta, was the fact he did not like his management style. We shall return to that later.

17 We thought it noteworthy that most allegations were made against people who had responsibility at various points for investigating complaints and grievances brought by the Claimant. His case was they were involved in a conspiracy to protect Mr Mulugeta. On the Claimant's analysis, this was because Mr Mulugeta was a black African man who was keeping other black African care workers under control. The Claimant argued this was akin to him i.e. Mr Mulugeta being a black overseer on a slave plantation. Frankly that was not a helpful way to argue his case because it was extreme and fanciful, and was entirely based on opinion unsupported by evidence.

18 Oral Reasons for our Judgment were given on 9 September. Written Reasons were requested by Dr Ibakakombo.

19 The hearing took place over ten days and had to be extended by two further days. It was heard on the following dates 11-13 August 2021 and 16-20 August 2021. We met in Chambers on 3 September 2021 and oral reasons were given on 7 September 2021, and promulgated shortly afterwards.

21 The hearing was a live hearing although we had a CVP link so people who were not giving evidence could observe remotely.

Documents

22 R1 was the Hearing bundle and contained at least 700 pages given that some had alphabetical suffixes e.g. 354A. References in square brackets in these reasons are to pages in R1 unless otherwise stated. The list of allegations was contained in T1 (Judge Self's Order) in which he summarised the live allegations. The Respondent provided: a Cast List – R2; a Chronology (not agreed) – R3; and written submissions – R5. The Claimant provided: emails not contained in the bundle and a small bundle relating to another person's case - C1 (That person was Mr Adognon who was called as a witness by the Claimant); a copy of the Respondent's Supervision Policy – C3; a Chronology (also not agreed) – C4; and written submissions – C5.

Witness statements

23 The Claimant gave evidence in support of his case. His witness statement was 112 pages long and mainly dealt with the matters that Judge Self had decided were not allegations that we had to consider. He called Mr Adognon as a witness. We were grateful to Mr Adognon for attending the court to give evidence, but his evidence could not be considered because his claim had been compromised by a COT3 agreement. Mr Adognon accepted that this was the case, but it was not accepted/acknowledged by the Claimant.

24 The Respondent called the witnesses set out below. It should be noted that only Mr Mulugeta was alleged to have made racially abusive comments amounting to harassment or direct discrimination. The remaining witnesses dealt with grievances raised by the Claimant and were alleged to have covered up for Mulugeta. The witnesses were:

a. Mr Mekonen Mulugeta sometimes referred to as Mac, who was a Service Manager and the Claimant's line manager from 2014 to 2019 (the alleged discriminator);

b. Miss Victoria Everett who was a former Area Manager. She investigated concerns about a service user (who we shall refer to as X) in February 2019;

c. Mrs Natasha Silwood who was a Registered Manager who line managed Mr Mulugeta (the alleged discriminator);

d. Mrs Nyeshia York, Area Manager for the Respondent, who oversaw an earlier complaint which has been referred to as the September grievance (September 2018);

e. Miss Maxine Mountford, who was Regional HR Manager for the Respondent and oversaw a grievance in November 2018 arising out of the September grievance, up to the point when a complaint was made about her by the Claimant ("the February grievance");

f. Mrs Michelle Heath, who works in HR and was a former Regional Director for the Respondent. She dealt with a grievance brought by the Claimant that has been referred to throughout as the February grievance (made in February 2019). She attempted to investigated the 2014/15 allegations although earlier managers who dealt with the grievance had decided not to because they should have been raised at the time. Mrs Heath also gave evidence about the fact that the Claimant applied for, and was eventually granted, a period of absence from work on what was essentially a sabbatical although it lasted much longer than envisaged by the Respondent's policy;

g. Mrs Wendy Salt, who was a Regional Director based in a different area, and was responsible for dealing with the Claimant's appeal against the February 2019 grievance outcome.

Disputed Documents

25 The next matter we had to deal with relates to disputed documents. These documents emerged during disclosure for these proceedings, which was in or around December 2019. A number of documents were disclosed by the Claimant which the Respondent argued were fabricated for the purpose of use in these proceedings. That is a serious allegation and we examined it with great caution. The disputed documents were as follows:

a. A formal grievance dated 10 January 2015 addressed to Ms Dalvinder Kaur [589];

b. A letter dated 28 January 2015 addressed to Ms Dalvinder Kaur [page 590];

c. A grievance dated 18 December 2015 addressed to Ms Liz Harrison [593];

d. A letter dated 10 February 2016 addressed to Ms Liz Harrison. [636];

e. A letter dated 28 June 2017 addressed to Ms Liz Harrison [637];

f. A formal grievance dated 7 July 2017 addressed to Ms Liz Harrison [638];

g. A letter dated 18 March 2018 addressed to Mrs Natasha Silwood [639-653].

26 We had heard all the evidence and submissions before we made findings on the disputed documents. However, we decided that when giving our Reasons, it was important to deal with these documents now, to avoid confusion about which documents in the bundle were genuine. Ms Harrison and Ms Kaur do not work for the Respondent anymore and did not give evidence. The one person we did hear evidence from about the disputed documents was Mrs Natasha Silwood, who told us she did not see the letter allegedly addressed to her (18 March 2018) until after disclosure in these proceedings. It is the Respondent's case that in the course of investigating grievances the Claimant made about Mr Mulugeta and others, Mrs York, Miss Mountford and Mrs Heath all reviewed the Claimant's personnel file and did not find any of the disputed documents.

27 There came a point when the Claimant asked Mrs Heath (who dealt with the February grievance), for amongst other things, a copy of his personnel file [474C]. She replied by email on 21 August 2019, saying: "records provided are those reviewed as part of the investigation process. Due to the volume of documentation on the file, you are welcome to attend the office and go through the documentation under supervision, we will then copy any information [you require]. If you could confirm a date suitable if this is your preferred option." The Claimant failed to take up that offer. If he had done, he would have found out whether the disputed documents were truly on his file. We thought it significant that he did not.

28 In the Respondent's submissions, it was highlighted that the Claimant was asked during a meeting with Mrs Heath how many previous grievances he had raised, and he said two [457]. As the Respondent pointed out this was fewer than the disputed documents would suggest (four).

29 The Respondent's submissions also made the point that the Claimant had not produced any email correspondence demonstrating the disputed grievances were sent. The Claimant did produce an email exchange between himself and his Trade Union representative, which was couched in general terms and did not refer to making a grievance or to discrimination. He relied in this as evidence that a grievance was made to Mrs Silwood in March 2018. The Respondent's representative wanted to check out the provenance of this document. We were not told the outcome of that, but the short point is that all it confirmed was that he communicated with a Union representative, possibly about a proposed grievance. It did not establish that a grievance was made at that point in time.

30 As already stated, we had to deal with a bold and serious allegation by the Respondent that these documents were fabricated to bolster the Claimant's case. The one email the Respondent did accept was sent contemporaneously, was an exchange of emails between the Claimant and Ms Kaur [pages 591-592]. He met with her to talk about work and had raised concerns about Mr Mulugeta being his line manager, as well as other

issues. Her reply was to thank him for his email and his comments. She said: "I would like to think I am very fair, but also very firm with my management style and I can assure you that when there is a problem, I look to resolve it. I can see there is tension between you and Mac (i.e. Mr Mulugeta.) This is hindering both your and his route towards progression". She said she would be speaking to Mr Mulugeta about it. This exchange was on 2 February 2015. It did seem to us that if the Claimant was at this point vociferously claiming that Mr Mulugeta was a racist, which is what is suggested in the disputed documents, it would be extraordinary that Ms Kaur made no reference to it in her email. Indeed, it was plain that her main concern was to resolve working relationships. We concluded no allegation of racism was made to her.

31 Consequently, and with disappointment, because we would like to believe that such things do not happen in the Employment Tribunal, we concluded the Respondent was right to say the disputed documents were fabricated in order to bolster this claim. This does the Claimant and his representative no credit whatsoever.

Evaluation of witnesses

32 As with the above, we had heard all of the evidence and submissions before we evaluated the witnesses evidence. Having explained our conclusion on the disputed documents, we decided it would be helpful to then set out our evaluation of the witnesses. This was because these conclusions arose from our decisions about the many disputed findings of fact, which are set out later.

a. We shall start with the Claimant. His credibility was damaged by our finding that the disputed documents were fabricated. Furthermore, when giving oral evidence, the Claimant frequently chose not to answer the questions. Sometimes he completely tied himself in knots, such as over the issue of working unsafe hours (see findings of fact below). The Claimant's evidence was illogical and/or unreasonable on some matters. By way of example, he was offered a position on his return from a career break/sabbatical that was two and a half miles from his home. He asserted this was an unreasonable distance to be expected to travel (again, see findings of fact below). We found this assertion quite extraordinary - the population in general clearly would not agree - many people travel further on public transport to work. In summary, we did not find the Claimant to be a reliable or credible witness.

b. We shall move on to Mr Adognon. I have already said that we were grateful to him for coming, but he could not assist us because he was bound by a comprise agreement settled through ACAS, a point that he accepted. I pointed out to the Claimant's representative, Dr. Ibakakombo that he ought to be familiar with compromise agreements made through ACAS using COT3s. He told me that he had entered into ACAS settlements on behalf of 70 or more clients. That being so, and although he is a lay representative, clearly he

must know that trying to adduce evidence from someone whose case has been compromised is not permissible, except (possibly) in specific circumstances, which were not applicable here. No application had been made to go behind the COT3.

c. We next turn to Mr Mulugeta, because he is the person who the Claimant alleges was racist, and ultimately responsible for these proceedings. Mr Mulugeta denied that he had described the Claimant as: "The man from Timbuctoo" [the one allegation of a racist remark dating back to 2015]. His account was that the Claimant was less than happy with him once he took over as manager, and that things became worse in August or September 2018, because at that point he was trying to performance manage the Claimant. He said this was where things started to go downhill. He told us that when he googled Timbuctoo (as a result of this claim), there is a phrase in Africa that suggests it is an unreachable place, somewhere in the middle of nowhere. This concept, by the way, features in a poem by Alfred Lord Tennison called "Timbuctoo". Mr Mulugeta said he did not say the Claimant was from Timbuctoo, because he knew he was not; and that he did not know where it was, or the phrase referred to above, until his google research.

   In these proceedings, as we have already pointed out, the Claimant and his representative portrayed Mr Mulugeta in an extreme fashion. Their case against the witnesses (other than Mr Mulugeta) who were alleged to have been discriminatory and/or to have harassed the Claimant and/or victimised him, was that the Respondent's managers allowed him to mistreat his staff in order to keep black African staff in line. We did not accept that proposition, and concluded it had no merit.

   Furthermore, Mr Mulugeta's manner when giving evidence was not consistent with the suggestion that he browbeats other people - he was softly spoken and thoughtful. He acknowledged that there have been other grievances against him made by staff he manages. He explained these have been made by people who were unhappy that he was seeking to manage their performance. He said that in his experience the response to performance management frequently can be to raise a grievance, which is unfortunate but not, in our collective experience as an industrial jury, unusual. He told us that he has carried on doing his job without fear, even though it is not nice to be on the receiving end of grievances. Mr Mulugeta also explained that in the care profession, it is important that records are properly kept, and regulatory standards met. Miss Mountford told us that none of the grievances made against Mr Mulugeta by staff members he managed, were upheld.

   In summary, we found him to be a measured and credible witness.

d. We shall deal briefly with the remainder of the Respondent's witnesses. The case for the Claimant is that they were part of some

cover-up/conspiracy which, for the reasons above (and later in our fact finding and conclusions), we did not accept. Mrs Natasha Silwood was the Walsall Area Manager and Registered Manager for the area from June 2016 to September 2018. She managed a number of properties, and the Claimant worked in some of them. She line-managed Mr Mulugeta. We have already referred to an alleged grievance letter dated 18 March 2018, which we found to be fabricated. We accepted her evidence that she was completely unaware of it, or of the issues it referred to, before disclosure in these proceedings. Her evidence was that if she had received it, she would have investigated it and we accepted that. She was a credible witness.

e. Mrs Nyeshia York took over as Area Manager and Registered Manager in September 2018. She dealt with a complaint the Claimant made about Mr Mulugeta on the 18 September 2018. There was a dispute over whether the complaint was formal or informal, but she understood it to be an informal complaint. She looked into it, held a fact finding, and summarised the outcome on 18 October 2018 [340]. Her evidence was that the Claimant alleged (to her) that Mr Mulugeta was a racist, but then withdrew the allegation and told her he shouldn't have said it. She was then asked by the Claimant to attend a supervision meeting with Mr Mulugeta as a witness. She recorded that it was a difficult meeting because the Claimant kept raising his voice. There was a dispute as to whether the Claimant resigned from employment during the meeting or instead said he was going to step down as a Team Leader. Mr Mulugeta and Mrs York understood that he wanted to step down as a Team Leader. They accepted his decision during the meeting. Mrs York told us that, with the benefit of hindsight, they should not have done so immediately and should have allowed the Claimant to consider his position, because he was clearly worked up at the time. In her witness statement [paragraph 7], she dealt with the fact that the Claimant then brought a grievance against her as follows: "When I was first told the Claimant had raised a race discrimination allegation against me, I was not surprised, not because I am, or ever have held racist beliefs or demonstrated racist behaviours, but because I had previously witnessed firsthand the Claimant making unsubstantiated claims of discrimination when he felt frustrated. For example, the Claimant had previously claimed to me that Mac (i.e. Mr Mulugeta) had discriminated against him when he was unhappy about Mac's management of him, however, he could not explain or provide evidence to substantiate these complaints and very quickly retracted the comment".

   It is fair to say that the theme of grievances being raised by the Claimant against people who took decisions that he didn't agree with was a theme in this case. Mrs York's evidence about the Claimant withdrawing the race allegation was explored with him in detail during cross-examination, and it became clear to us that he had told her he did not want to pursue it.

f. Miss Maxine Mountford, the Regional HR Manager, dealt with the grievance against Mrs York. Her remit also encompassed a grievance about Mr Mulugeta Her evidence was the grievance related specifically to issues around September 2018 and whether the Claimant had stepped down or resigned, but that he wanted to introduce historical grievances dated back to 2014. Understandably, she told the Claimant that she wanted to focus on the actual complaint letter, rather than the historical issues. Her evidence was that then he did not engage with the grievance investigation. He then brought a grievance against her, which meant she could no longer deal with the investigation. We found her to be a credible witness who really tried her best to investigate the matter.

g. The investigation was then passed to Mrs Michelle Heath, a former Regional Director who worked in HR. We found her to be an impressive witness. We noted specifically something she said in evidence in relation to the proposition that was put in crossexamination that she was covering up for Mr Mulugeta. She said "I have been in HR for 34 years. I have never once covered up, I never would, I do not accept that. It is untrue". She was then asked if she accepted that the way she had handled the complaint was victimisation, she said "absolutely not, no victimisation, no race discrimination. The purpose of the meetings including one on 6 February 2019 was to talk about the grievance letter and [the Claimant] didn't want to talk about the letter". Our conclusion was that Mrs Heath looked into the Claimant's grievances very thoroughly, but did not uphold them. As noted previously, Mrs Heath looked for evidence that the Claimant had contemporaneously alleged racist comments in 2014 or 2015 by Mr Mulugeta. Like Miss Mountford and Mrs York, she found nothing on the Claimant's personnel file. She made the offer for the Claimant to view his personnel file under supervision and take copies of anything he required (see above).

   The other thing Mrs Heath was trying to achieve was to get the Claimant back to work following a career break, which was eventually agreed to be for a year and was later extended. Towards the career break coming to an end, she made offers of places where the Claimant could return to work as a Team Leader, which were declined for a variety of reasons (see findings of fact). She eventually concluded (in line with the Respondent's policy on career breaks) that the Claimant had ceased to work for the Respondent because he had not returned to work when he was supposed to.

h. Miss Victoria Everett, an Area Manager/Registered Manager from September 2017 to 21 June 2021, investigated a concern that had been raised about a service user losing weight in a house where the Claimant was Team Leader (i.e. before his career break). After investigating, she concluded that the Claimant had done nothing wrong. Actually, and bizarrely, one of the allegations against her is that she failed to investigate the concern. That was incorrect because

she must have investigated in order to conclude the Claimant had done nothing wrong. This is just one example of the illogicality of the Claimant's case. The Claimant's argument was that Mr Mulugeta engineered the complaint about the service user, but that was wrong because all he did was report to Miss Everett (as he was required to) that the service user had lost a lot of weight over a very short period of time. This led to her investigation. Put another way, Mr Mulugeta had no involvement other than to report the concern. The Claimant (as Team Leader) was responsible for ensuring that the care staff who worked with the service user ("X") were recording X's weight frequently and regularly. We accepted that Miss Everett was a truthful witness.

i. Finally, we heard from Mrs Wendy Salt, Regional Director of the Southeast Region, who dealt with grievance appeal. It is fair to say that her evidence was hardly challenged at all. She did not uphold the appeal.

Findings of Fact

38 Although our reasoning will be pretty clear from the preceding paragraphs, we are required to set out our findings of fact relevant to the issues to be determined.

39 On the 18 October 2010, the Claimant commenced employment with the Respondent as a Support Worker [293].

40 The Respondent provides support services to vulnerable adults so that they can live in the community with support. It is common ground that some service users are pretty independent and may simply need support with things like going shopping e.g. because of mobility disabilities. Oher service users have very complex needs and require a great deal more support. The Respondent is regulated by the Care Quality Commission ("CQC"). By way of background, Mrs Heath told us that the Claimant had a very good skill set and was capable of dealing with service users with more complex needs, unlike some other Support Workers and Team Leaders, who could only deal with people whose support needs were less complicated.

41 Mr Mulugeta became a Team Leader and was responsible for the team the Claimant worked in. Team leaders do not have managerial responsibilities, but do have administrative responsibilities such as checking that records are kept by their staff on matters like medication, weight (if required by the care plan) etc. These records are inspected by the CQC. Team Leaders also produce staff rotas, and verify timesheets. Part of the reason for the latter is to ensure people do not work excessive hours because this could be detrimental to their health and safety and that of service users. There is some time, although the Claimant says insufficient time, built in for administrative duties in relation to the Team Leader role.

42 We have already dealt with the conflict of evidence as to whether there was a good working relationship between the Claimant and Mr Mulugeta. Mr Mulugeta told us that they got on well until he became an acting Service Manager (and later a Service Manager) when he became responsible for line managing the Claimant and other Team Leaders. We find as a fact that they got on very well until Mr Mulugeta's promotion in 2014. Mr Mulugeta encouraged the Claimant and other members of the team to apply to be Team leader when he became acting Service Manager. The Service Manager role is a responsible role. The Claimant did become a Team Leader. Their working relationship significantly worsened in August/ September 2018 when Mr Mulugeta had to address some performance issues with the Claimant.

43 The Service Manager reports to the Area Manager who is also a Registered Manager. The Registered Manager has legal responsibility for noncompliance issues. Mr Mulugeta told us that because Service Managers have delegated responsibilities from the Registered Manager, he considered it to be very important to adhere to regulatory standards because of the potential implications for the Registered Manager and for the Respondent's business if the CQC makes an adverse report. One thing which led to difficulties between him and the Claimant was that he was concerned that the Claimant was working excessive hours which was not acceptable to the Respondent and would not be acceptable to the CQC. Although the Claimant accepted that point, he argued he should have been allowed to work all available hours, despite the potential health and safety implications for him and service users of working too many hours. The proposal to ensure the Claimant did not work excessive hours caused him to complain about Mr Mulugeta.

44 As we have already noted, the Claimant alleged that in 2014, Mr Mulugeta referred to him as "the man from Timbuctoo". He also alleged that Me Mulugeta described French-speaking African people and/or Rwandans as "arrogant". Despite the considerable efforts of Employment Judge Self, these allegations were pursued before us as potentially relevant background. None of this was recorded at the time, nor did the Claimant bring a grievance or a claim. We concluded that the documentation that appeared in December 2019 was fabricated to bolster the claim before us. We concluded that Mr Mulugeta did not say those words. Our conclusion is supported by the email exchange between The Claimant and with Ms. Kaur referred to above. At risk of repetition, the exchange made reference to tensions in the working relationship but did not refer to the allegation of racism. It demonstrated the Claimant was unhappy about having Mr Mulugeta as a manager and nothing more.

45 Following the tensions in 2014, nothing noteworthy occurred until August 2018. On 10 August 2018, there was a supervision meeting between Mr Mulugeta and the Claimant. Mr Mulugeta recorded key points on a form which comes in a pad that managers use to note supervisions [490 onwards]. Some managers prefer to produce a typewritten record instead of completing the form (we include that information because it becomes relevant later in the chronology).

46 The record showed that Mr Mulugeta told the Claimant that he was concerned there seemed to be a communication problem - he was sending emails to the Claimant asking him to cascade information to staff in the house but that did not seem to be happening. The Claimant said he would rectify this. An action plan was produced [491]. It was signed up to by the Claimant and Mr Mulugeta. The first point was the communication issue. The action second action point concerned training. The third dealt with the Claimant's proposed staffing rota, which envisaged the Claimant working very long hours. Mr Mulugeta raised health and safety concerns about the hours. In the hearing before us, there was an allegation that there were no timescales in the action plan. That was inaccurate. The plan was to be reviewed in supervision the following month. We were told (and had no reason to suppose it was not the case) that in 2016, Mr Mulugeta had warned Team Leaders to ensure staff did not continue to work excessive hours. Since that was an historical warning, we did not think much turned on it. However, and pertinently for these purposes, at the supervision meeting scheduled for the 12 September 2019, Mr Mulugeta decided to invite another Service Manager (Ms Raj Sandhu) who was his mentor/buddy. He wanted her to be present at the supervision to support him because he knew there would be a difficult conversation with the Claimant about working excessive hours. He sent an email 3 September notifying the Claimant that Ms Sandhu would be attending and would be a note taker [322].

47 The Claimant replied the following day. He said, "thank you for your invitation, however I don't like a third party to attend my supervision, and I was wondering if there was any particular reason for Raj to take part in my supervision?!". Mr Mulugeta replied that he had explained previously that Ms Sandhu was attending to assist with notetaking. He said that she was a senior manager, and that it was nothing to worry about. In summary, the Claimant had been informed in advance that another manager would be present at the meeting and had queried the reason. A reply was sent before the meeting. The Claimant chose to attend. It was argued before us that having another Service Manager present during a supervision meeting was a breach of confidentiality. We did not accept that proposition. It was an internal process, akin to having a notetaker at a disciplinary or grievance hearing. We noted that the Claimant had not raised the alleged confidentiality issue in the email chain or during the meeting itself.

48 Notes of that meeting recorded that there was further discussion around communication; working excessive hours; and the need to deliver safe support and working practices [493-495]. Mr Mulugeta said that the Claimant had worked excessive hours on the 4 and 18 June. The Claimant said that he would work excessive hours in an emergency, but Mr Mulugeta pointed out it was not due to an emergency – the hours were on the staff rota and were planned. He said that it was a very unsafe practice and would reflect on the quality of the service provided to users. He added that he had observed a pattern of the Claimant working excessive hours and said that because of the severity of the potential consequences of working repeated excessive hours, the Claimant would be issued with a twelve-month verbal

warning, to be confirmed in writing. The action plan was modified to include an objective about health and safety/working hours.

49 At a later stage, when Mr Mulugeta was questioned by Mrs Heath as part of her investigation into the February grievance and the Timbuctoo allegation, she asked why Ms Sandhu had been asked to attend that supervision meeting. He replied that meetings with the Claimant were always difficult, and that he misquoted him and made him feel insecure, so Ms Sandhu was asked by him to be a notetaker and witness [499A]. He told Mrs Heath that he knew he had some difficult issues to discuss during that meeting, and went on to say, "I don't mind staff doing overtime because it saves on agency costs and I can't be covering everything, but I check staff are working the correct hours and that they are not working too many hours". When (during the same investigation) Ms Sandhu was questioned about what she observed during the meeting, she said the Claimant had been talking over Mr Mulugeta who been calm [458]. She was asked why she was present, and replied that she thought that Mr Mulugeta thought it might be a negative meeting, was concerned because the Claimant could be intimidating, and wanted a manager present for support. She was asked to describe the interaction, and replied that there was tension between the Claimant and Mr Mulugeta and if the Claimant didn't like what Mr Mulugeta was saying, for example when Mr Mulugeta was trying go through the action plan and/or when he said he had had evidence to support his concern over working excessive hours. She described the Claimant talking over Mr Mulugeta, raising his voice, and claiming that he was lying. Ms Sandhu said she had to intervene to ask the Claimant to listen to Mr Mulugeta because what he was saying was important and the information was valid. She went on to say at times the Claimant was silent and did not reply to questions.

50 The verbal warning was confirmed by Mr Mulugeta in writing on the 14 September 2018 [497A & 497B]. It referred to the Claimant showing no improvement in maintaining a flow of communication; not completing tasks within a reasonable timescale; and, instead of leading by example, continuing to work unsafe shift patterns - sometimes up to 18 hours on 3 consecutive days. It stated that such work practices are counterproductive; that Mr Mulugeta strongly believed it had a detrimental impact on the Claimant's health; and, "Equally important, it has a huge impact on the quality of care that we provide to the person that we support". The written confirmation of the verbal warning made it clear that Mr Mulugeta did not think formal disciplinary action was necessary, but that there would be regular "bite-size" action plans, and an expectation that they would be completed within the timeframes set. It made it clear that shift patterns must be rearranged to acceptable levels i.e. no more than 12 hours a day, with an 8-hour break between shifts, in compliance with the Working Time Directive. Mr Mulugeta concluded by saying he hoped the Claimant would view this as an opportunity to improve. He confirmed that the warning would stay on file for year. There was no right of appeal against an informal warning.

51 During cross-examination, a slightly confusing proposition that was put on behalf of the Claimant. This was that in some way this warning issued on

the 14 September related to the action plan that had been signed off on the 12 September 2018 - that was clearly incorrect. What was clear was that the issue of excessive working hours had been discussed in the meeting and the Claimant was told there was going to be a warning. The communication issue had been discussed in the previous meeting in August and there was no improvement.

52 When the Claimant was asked why he wanted to work excessive hours, his evidence was contradictory. He accepted that it was a health and safety risk and could be dangerous for service users, but maintained he should be allowed to do so. He said that Mr Mulugeta allowed other people to do it. In fact, this was subsequently investigated by the Respondent and found not to be the case. One example of the data that was available to Mr Mulugeta at the time was that on 3 September (i.e. after the August meeting) the Claimant worked 21 hours [323].

53 We really did not accept that it could be inappropriate for a manager to take action to tackle the issue of working excessive hours, particularly in the care profession which is strictly regulated by the CQC. We concluded that one trigger for bringing these proceedings was the Claimant's reaction to being told he must reduce his hours to comply with the law. We reached that conclusion because his actions and reactions thereafter were disproportionate.

54 After receiving the warning, the Claimant sent a letter to the Registered Manager (at this point Mrs York) on 18 September 2018, which concerned the supervision meeting on 12 September. He said he needed help in resolving a problem at work that was causing him some concern, and had been unable to do so without bringing it to her attention. He said, "I hope we can deal with the issue quickly and amicably". He complained about: Ms Sandhu being invited to the meeting; his shock at being issued with the written warning in September; and his concern at being given a firm instruction not to work more than 12 hours in a shift. He said that this instruction appeared to be solely directed at him because other Team Leader under Mr Mulugeta's supervision had been given such an instruction. He said, "I enjoy my work I do not understand why Mr Mac's [Mulugeta's] attitude towards me is always negative. Two years ago I was so worried and upset by his handling of a matter relating to me, that I had to go to my GP for a medical checkup, which resulted in signing me off sick for two weeks due to high levels of stress" [324].

55 When Mrs York received the letter, she did not treat it as a formal grievance, which was unsurprising given the Claimant's reference to dealing with the issue "quickly and amicably". The claimant's case before us was that this was a formal grievance. That proposition was clearly wrong.

56 On 12 October 2018, Mr Mulugeta told the Claimant that a rota he had submitted required amendment because he had put himself down to work a 17-hour shift [334]. We thought this was very telling because despite the verbal warning, the Claimant was determined to continue working excessive hours, and had no intention of following Mr Mulugeta's instructions.

57 Mrs York investigated the Claimant's allegations. She replied on 18 October 2018 [340-342]. She stated that when she met the Claimant on the 5 October, he confirmed that his complaints should be dealt with informally. Her findings were: that Ms Sandhu's presence at the supervision meeting was not a breach of the respondent's Supervision Policy; that the Claimant was informed Ms Sandhu would be attending; and that he had agreed that there could be future meetings with notetakers present. She then dealt with a complaint about timeframes not being made clear in the action plan. She said there was a clear and detailed action plan with timescales. She said that despite the warning, the Claimant had continued to work excessive and unsafe hours. Mrs York reiterated that he must not exceed the limit on hours that had been set, otherwise he could face disciplinary action. She said there was no right of appeal against an informal warning under the Respondent's policy. She went on to say that the Claimant had asked her to attend the next supervision as an observer and that she would do so. She concluded by saying that the Claimant had agreed that his written complaint needed no further action.

58 She went on to discuss what she described as "discrimination and unfair practices against you". She said, "You raised concerns that your line manager is not treating you in the same way as the other Team Leaders working in the area. I reminded you that you have no evidence to make a claim that you are being treated differently and you do not have access to the other Team Leaders' supervision notes. The other Team Leaders are not working excess and unsafe hours, however there is clear evidence that you are working unsafe hours and your line manager has and continues to take responsible steps to support you to reduce your hours to keep you and the people you support, safe. We reviewed electronic communications between you and your line manager as well as your supervision records and we could see no evidence of discrimination. You confirmed the conversations you had with your manager which were followed up by an email and that the email was a true reflection of the conversations." She then said, "I reminded you of the procedure to follow should you still, or in the future, feel discriminated against". She provided him with a copy of the grievance policy. Mrs York concluded by saying, "I strongly advise that when you make a claim of discrimination, that you present facts to back up your claim. You agreed this was an unfair complaint. We agreed that this complaint needs no further action".

59 In summary, and despite the arguments made on behalf of the Claimant during the hearing before us, it was clear that Mrs York did not deal with a formal grievance, and the Claimant did not ask for his concern to be dealt with formally. The issues were resolved at the time and the Claimant agreed his complaints should not be taken further. He specifically chose not to pursue a discrimination claim about unequal treatment by comparison to other Team Leaders.

60 There was a supervision meeting on 21 November 2018 which was attended by Mrs York, as requested by the Claimant. That meeting was referred to in some of the allegations we had to determine.

61 There was an allegation that notes were typed, rather than being handwritten using the pad referred to above. Mr Mulugeta explained that in advance of the meeting he had prepared a typed agenda which he filled in by typing the matters that were discussed under each item. Mrs York confirmed that evidence. The Claimant appeared to suggest that the meeting did not take place in the way described in the minutes, but we did not accept that and preferred the evidence of Mr Mulugeta, Mrs York and the typed record [344A-C].

62 The first point discussed was that the Claimant had not addressed the communication issue and was not using the respondent's email system to forward information to his team. He said he would respond the next day if an email was sent to him using that email account. Next, Mr Mulugeta raised concerns about rota management and the Claimant's shift patterns, pointing out that he had set a limit of 12 hours for a shift, and that the total working week should not be in excess of 48 hours. The Claimant disputed that and said it should be a 60-hour week. Mrs York said that the cap was being put on the Claimant's overtime because he had not complied with what had been set up for him by Mr Mulugeta in the last meeting. The Claimant asked why this only applied to him, and Mr Mulugeta replied that this was because his shift patterns were not safe. He also said that because the Claimant was a Team Leader, he should not work night shifts Monday to Friday and should instead work on day shifts. There was then a discussion around various issues involving one of the properties the Claimant worked at (it was not material for these purposes). Towards the end of the meeting the Claimant said he felt that he had not been treated fairly and asked what was being done about his complaint. Mrs York responded by saying she had looked into the complaint and could not find any evidence, so there would be no further action. It was recorded in the minutes that the Claimant then said, "I really can't cope with all this stress, I think I need to step down". Mr Mulugeta replied that he accepted the Claimant's verbal resignation, but that he seemed to be emotional and needed to go home and reflect on the discussions that had been had that day". When the Claimant returned home and told his wife what had happened during the meeting, she urged him to withdraw his verbal resignation/stepping down.

63 One dispute we had to determine was whether the Claimant verbally resigned from employment altogether, or stepped down from being a Team Leader. We concluded that the latter was more likely because of the use of "step down" in the minutes. Either way, ultimately, he was never required to return to the position of Support Worker and remained a Team Leader. Also, following further investigation (see below) it was decided that the claimant's verbal reaction in the meeting should not have been accepted at the time because it happened during the heat of the moment. This was a point which both Mr Mulugeta and Mrs York acknowledged when they gave evidence to us. It is, of course, good employment practice, to allow an employee time to properly consider their position.

64 The matters described above were the subject of a formal grievance which was investigated by Mrs Heath – the "February grievance". We shall

interpose part of that investigation because it sheds light on Mrs York's perspective as an observer of the meeting. In a note made by Mrs Heath during her investigation meeting with Mrs York, Mrs York confirmed she was made aware that the Claimant was working excessive hours by Mr Mulugeta, and that she had reinforced the need to adhere to Mr Mulugeta's instructions when she spoke to the Claimant. She was asked about what had taken place during the supervision meeting. She replied that the Claimant seemed annoyed from the beginning and that Mr Mulugeta did not respond to that (we took this to mean that his behaviour did not escalate the situation). Mrs York said the Claimant was shouting at times, and that she had asked him to be quieter because they were in the home of a service user. She said the Claimant was very defensive. She said that the Claimant had alleged Mr Mulugeta was racist and Mr Mulugeta had asked him to explain, but that the Claimant did not do so. She then asked him to explain, but he did not. She said that he sat quietly for a time and then said he wanted to "step down" [460-461].

65 We shall now return to the aftermath of the meeting. Mr Mulugeta sent an email to the Claimant that day (21 November 2018) saying he accepted the verbal resignation to step down from the position as Team Leader. He said that as from 1 December 2018, the Claimant would be working as a Team Leader based at a different address and reporting to Mr A. Chikosi.

66 One of the allegations refers to Mr Chikosi. We shall find facts about it at this point, although it interrupts the chain of correspondence. We record the following facts. Firstly, Mr Chikosi was not a Team Leader, he was a Support Worker at the address Mr Mulugeta said the Claimant should transfer to as a Support Worker. Secondly, Mr Chikosi was not asked to act up as a Team Leader - he was a member of staff who Mr Mulugeta had asked to be a point of contact during that period of time because there was no Team Leader due to the Claimant's stepping down (as he saw it). Thirdly, Mr Mulugeta had accepted the Claimant's statement about stepping down, which caused him to send the email referred to in paragraph 65. Finally, Mr Chikosi was about ten years younger than the Claimant. There was a claim of direct age discrimination in relation to the suggestion that the Claimant should report to Mr Chikosi. We had some difficulty understanding the age discrimination complaint. In his evidence, the Claimant said he believed in Mr Mulugeta was suggesting that at his age he was not able to do the role of Team Leader whereas Mr Chikosi (who was younger) could. As we have already noted, Mr Chikosi was not a Team Leader and ultimately the Claimant was not required to work as a Support Worker or demoted to that position.

67 We shall now return to the correspondence which followed the supervision meeting. The Claimant replied to Mr Mulugeta (see paragraph 59) saying that Mrs York had given him a week to think about his decision [345]. On the 22 November, Mrs York became involved in the email chain, saying that she had not mentioned anything about being given a week to think about stepping down, but had asked him to think about the discussions that had taken place. She stated, "Your verbal request to step down was accepted during this meeting by Mr Mulugeta" [346].

68 The Claimant sent a letter to Mrs York on 26 November 2018 stating that the reason he told them that he was thinking of resigning during the meeting, because he was not getting management support and/or that she was failing to stop Mr Mulugeta's abuse. He stated that he wanted to formally retract his verbal intention to resign. He also said he had been approached by Mr Mulugeta to ask him to transfer to being a Support Worker. He stated that he wanted to formally retract his verbal intention to resign [347].

69 The Claimant then made reference to a contravention of his rights under Section 13 of the Equality Act 2010. He said that if he received formal confirmation that she would not be able to provide management assistance, he would seek legal advice. He referred to being bullied, harassed, and unfairly treated by Mr Mulugeta throughout his employment. He said he had been racially discriminated against on grounds of his National/Ethnic origin which he described as "Rundian". He referred to other sections of the Equality Act [347].

70 Mrs York replied the same day, saying that the verbal resignation had been accepted and confirmed in an email by Mr Mulugeta, and that the retraction was not accepted. She attached a copy of the grievance policy saying that if the Claimant wanted to make claims that Mr Mulugeta was abusive and racist or that he was being bullied and harassed, he would need to raise a formal grievance [348].

71 Also on the 26 November 2018, the Claimant wrote to Mrs York accusing her of victimising him by refusing to allow him to retract his resignation. He alleged that she was not prepared to provide management support to stop what he described as, "Mr Mulugeta's racial abuse on the grounds of [the Claimant's] national origin" [349].

72 At that point, Mrs York decided she could have no further involvement in the matter because it appeared that there was a grievance against her.

73 On 27 November 2018 the Claimant wrote to what he described as "the Lifeways Area Manager" saying that he wanted to lodge a formal grievance under the Grievance Policy. He raised numerous issues. Firstly, he requested an explanation about why the words he said in the supervision meeting had been interpreted as a resignation. His account (in the letter) was that he had "said [he] was thinking of resigning from employment if he did not get management support from Mrs York and/or or she failed or refused to stop Mr Mulugeta racially abusing [him] because of [his] national origin". Secondly, he asked for the reason why the retraction was refused, alleging that Mrs York and Mr Mulugeta had pushed him to resign from the business; and that Mrs York had not taken reasonable steps to provide management support, or stop racial abuse of him. Thirdly, he asked why Mrs York had not considered the content of his letter of 18 September 2018 (which he now described as a grievance letter). Fourthly, he alleged that he had not been given a grievance outcome. Finally, he stated that he wanted to continue as a Team Leader. So, at this point, it was completely clear that there was now a grievance against Mrs York as well as Mr Mulugeta. This became the "February grievance" [349]. For the reasons set out in the

preceding paragraphs, we did not accept the Claimant's account of the meeting, or his description of the letter dated 18 September 2018 as a "formal grievance", were accurate.

74 We shall now turn to a discrete point in the chronology, because it was the subject of some allegations. On 1 February 2019, Mr Mulugeta was informed by a member of staff in the Claimant's team, that there was a safeguarding issue in connection with a service user (referred to in these reasons as "X") who had lost quite a substantial amount of weight over a short period of time. His evidence was that he immediately went to the property to investigate this. He inspected the relevant weight chart and recorded a weight for X that day [371E]. He emailed the Claimant (copied to Mrs York), stating that the Claimant had visited X on 28 January and checked their weight on the monitoring chart and that it was recorded to be 58 kg. He said the weight on 1 February was 53.9 kg and that, "Either the record is not right, or X has dropped nearly 5 kg over four days. The bottom line is his support plan states that [X] should be supported to consume highly nutritious foods" [371B]. The weight chart showed X's weight on 1 February 2019 as being 53.9 kg which, by reference to the chart, was a loss of about 5 kg. The chart had signatures against the weights, some of which were those of the Claimant and the Support Workers in the house where X lived. The signature for the weight on 1 February was that of Mr Mulugeta. This issue resulted in an investigation (see below).

75 During cross-examination, the Claimant's representative highlighted the first two entries on the chart dated 26 September and 9 October 2018. Mr Mulugeta was asked who was responsible for the fact that there was almost a two-week gap in the records. Mr Mulugeta explained that that it was the Claimant's responsibility as Team Leader to check that the weights were being monitored more regularly than that, and that he only became involved when a concern was brought to his attention. It was not clear how this line of questioning assisted the Claimant's case.

76 Mr Mulugeta said he had no choice but to report the issue because it was a potential safeguarding concern, but that he had no further dealings with it. The investigation was carried out by Miss Victoria Everett (a manager). She invited the Claimant to an investigatory meeting, but he refused to do attend in person. The Claimant was suspended on full pay until the investigation was concluded. The Claimant made written representations to Miss Everett [380-381]. He alleged that he was being unfairly and unreasonably treated for raising grievances of race discrimination, and that this was what had led to his suspension. He put forward various points about the difficulties in weighing X. He said that as a committed Christian with a disabled wife, that he would not neglect a vulnerable person. He took issue with the description of his refusal to attend the investigation meeting being described in the suspension letter as insubordination, and stated that he knew the difference between a reasonable management request and an unreasonable management request. After concluding her investigation into X's weight loss, Miss Everett concluded that the Claimant had no case to answer.

77 The Claimant was informed of the outcome, He was told the suspension was lifted and that he could return to work, but he did not do so then, or at all.

78 One of the allegations before us was that Mr Mulugeta had caused the investigation to happen. We concluded that it was evident that this was not the case. He behaved as expected, given the safeguarding concern. This was a point which the Claimant appeared to accept when being crossexamined. However, the allegation was not withdrawn.

79 We shall now return to the grievance referred to in paragraph 73 ("the November grievance"). As already stated, it was by letter sent 28 November 2018 [354]. It was acknowledged by Mrs York on 28 November [354A]. She said an independent panel would deal with it. On 6 December, Miss Mountford informed the Claimant that Ms Michelle Smith (Area Manager) would be investigating it, but was on annual leave [355]. On 27 December 2018, Ms Smith wrote inviting the Claimant to a grievance hearing on 3 January 2019]356]. He was informed that he could bring a Trade Union ("TU") representative or work colleague [356]. He replied to say that he had been unable to arrange for a representative. He confirmed that he wanted a representative to be present. He later proposed 19 January 2019, but this was not convenient for Ms Smith or Ms Mountford. A date of 6 February 2019 was agreed [358-9], Ms Smith wrote on 10 January 2019, inviting the Claimant to a meeting on the agreed date of 6 February 2019 [357].

80 Present at the meeting on 6 February 2019 were: The Claimant; his TU representative; Miss Mountfield (who in fact chaired the meeting); and Ms Smith who took notes. The Claimant wanted to introduce allegations dating back to 2014/15, but Miss Mountford said that she was only dealing with the present grievance because historical allegations should have been raised at the time, not five years later. The Claimant did not accept that Mrs York had dealt with his complaint informally, or had informed him of the informal outcome. Most of the discussion was taken up with the Claimant seeking to raise historical issues, and Miss Mountford confirming that she was responsible for hearing the November 2018 grievance. The notes (signed by the Claimant) record that he raised his voice several times. The meeting lasted for about 90 minutes, but the November grievance was not actually discussed because the Claimant would not accept that earlier matters could not be introduced. Miss Mountford adjourned the meeting so that the Claimant could meet his TU representative separately. She informed the Claimant he had seven days to confirm how he wished to proceed, and that this would be confirmed in writing [See minutes at 361-366]. In her evidence, Miss Mountford said it was quite frustrating that she could not convince the Claimant he should focus on the content of the letter.

81 The request to confirm how he wished to proceed was confirmed in writing by Miss Mountford by email that day [366A]. The Claimant responded by letter dated 8 February 2019. There were two versions of the letter. We were told the correct version was at pages 367 to 369. In summary, he "invited" Miss Mountford to be "independent and impartial"; disputed the events pertaining to the November grievance; and claimed there was a cover up of

race discrimination dating back to 2014/15. Miss Mountford replied on 12 February, summarising the points raised by the Claimant, and asking him to confirm how he wished to proceed with the November grievance by 13 February [370]. The Claimant replied by letter dated 19 February, alleging that Mrs York had racially discriminated against him by not giving him an outcome letter, and choosing to deal with him complaint informally [372]. He said he did not agree with the outcome, and asked for a stage 1 (formal) meeting to discuss the complaints he made to Mrs York in September 2018 [372-3]. He asked for quite a lot of evidence in respect of Mrs York's investigation (i.e. evidence he thought should have been generated), such as CCTV footage. Miss Mountford replied on 21 February 2019 at 07.47, confirming there was no right of appeal against Mrs York's outcome letter, because it was dealt with informally. She stated that the Claimant still had not clarified his intentions regarding the November grievance, and gave him until "the end of play today" to reply. [376-7]. In the hearing before us, the Claimant produced a letter allegedly sent to Miss Mountford the day before (19 February), stating that the November grievance should be addressed using the respondent's grievance policy [375]. Her evidence was that she did not receive it. We concluded that the letter was not a genuine, contemporaneous document.

82 On 20 February 2020, the Claimant lodged a formal grievance about Miss Mountford by letter addressed to "the HR department". He alleged that her handling of his complaints was a continuing act of race discrimination and victimisation, and that she was, "protecting acts of race discrimination by Mrs York", all of which concerned the September 2018 complaint and informal outcome, which he now stated should have been dealt with formally [378-9].

83 In short, having complained about Mrs York and Mr Mulugeta a by bringing a formal grievance ("the November grievance"), the Claimant now brought a formal grievance about Miss Mountford (the "February grievance"), which meant that she could not be involved in progressing the November grievance. This pattern, together with characterising actions by everyone who dealt with his complaints and grievances as direct race discrimination, harassment, and victimisation, continued going forward.

84 At this point, we thought it useful to summarise the timeline of events other than the grievances. As noted above, in March 2019 Ms Everett concluded her internal investigation [397A to E]. Efforts were then made to arrange the Claimant to return to work, but the Claimant would not attend a Return to Work meeting, instead he applied for a career break by letter dated 18 April 2019 [423-4]. He never returned to work, and further findings over the career break issue are set out below at convenient points.

85 On 21 March 2019, Ms Julie Nightingale (Head of Employee Relations) invited the Claimant and his Trade Union Representative to a meeting on 11 April to discuss the February grievance. She said that Mrs Heath would chair the meeting and she would be the note taker. The letter contained a summary of the grievance which was as follows: (1) Bullying and harassment on grounds of race; (2) a systematic campaign of harassment

by Mr Mulugeta; (3) failure by previous and the current Area Manager to prevent this; (4) race discrimination in respect of the way grievances were managed; and (5), Mrs York had not taken reasonable steps to provide management support and stop Mr Mulugeta's racial abuse on grounds of national origin. The issue over the Team Leader position was summarised as follows: (1) a disagreement over whether the Claimant had resigned from that position; (2) acceptance of the resignation; (3); refusal to allow retraction; and (4), being pushed by Mrs York and Mr Mulugeta to resign from employment. The letter also raised further issues. These were: (1) being instructed not to work more than twelve hours per day; and (2), a number of complaints about supervision meetings; (2)(a) a third party in attendance; (2)(b) not being given timescales to improve; and (2)(c), not being given an opportunity to explain his position). The letter also summarised the grievance process from the October grievance being raised to the meeting on 6 February 2019 [398-400].

86 The grievance meeting took place on 11 April 2019. The notes recorded that the Claimant was happy with the way his grievance was summarised in the invitation letter. The Claimant raised issues dating back to 2015 and named members of staff at that time who he said would support his account of Mr Mulugeta's alleged behaviour. The notes were lengthy, and were later sent to the Claimant [406-412]. The Claimant sent additional information about two people he had said were witnesses to the historical allegations referred to during the meeting on 16 April 2019 [413].

87 The first Claim Form was presented on the 24 April 2019.

88 We shall now return to the career break. Part of the reason the Claimant gave for applying for a year long career break was that he wanted to focus on his Employment Tribunal proceedings. He later raised personal circumstances. His case before us was that as a result of the investigation into the concern about service user X, his wife asked him to leave the family home where they lived with their seven children in case the police came round to carry out an investigation.

89 Mrs Heath dealt with the career break issue as well as the grievance. She wrote to the Claimant setting out the principles applied by the Respondent.

90 There are a number of points to make about the career break. Firstly, the decision is at the Respondent's discretion and is dictated by operational needs. Secondly, Mrs Heath said the Claimant's request was a very unusual - it was the first that she dealt with during her career with the respondent. Thirdly, a year was much longer than expected and would create operational difficulties.

91 Initially the career break was refused and the Claimant then sought to appeal although there was no right to appeal because it was a discretionary decision. Mrs Heath took into account his further representations and eventually agreed he could take a year. She made it clear that there was no right to return to work in the same place and that if the Claimant did not return to work at the end of the career break, he would be deemed to have

resigned [the policy is at 279-280]. The Claimant told us that during the career break he took out a loan to study a Master's degree, which was a two-year course. We shall return to what happened about the career break when it was due to end, at the relevant point in the fact finding.

92 We shall now return to the grievance. As already noted, Mrs Heath allowed the Claimant to provide information about the allegations dating back to 2014/15. She did her best to investigate them. This is why, although they are not allegations we had to determine, they became part of the evidence presented to us. We shall record the historical allegations and the steps taken by Mrs Heath in respect of them next.

93 The Claimant alleged that on 31 July 2014, when he had been asked to go and cover another service, but said he was unable to, Mr Mulugeta shouted at him which caused him to leave the office in tears. He told Mrs Heath he spoke about it to a staff member called Christother (sic) Jena, and also reported it to the Area Manager, Ms Sue Salis. The Claimant also alleged that around that time there was an issue about transport over the Christmas period for staff. He alleged he was not told by Mr Mulugeta that the Respondent would pay for staff to use taxis. He also alleged that he complained to Ms Kaur about Mr Mulugeta (the email exchange about this has already been referred to). The Claimant alleged he was not happy with the outcome and continued to feel harassed working with Mr Mulugeta. The Claimant also alleged that he was suspended because of an error over medication. The Claimant told Mrs Heath about the alleged Timbuctoo comment and said Mr Mulugeta thought French-speaking African people were arrogant. He alleged he complained about that those comments to Ms Salis and received an apology from Mr Mulugeta. He told Mrs Heath that a member of staff called Mr Edmar Bango was present when the Claimant was being bullied by Mr Mulugeta. Mrs Heath later contacted staff named by the Claimant in relation to the 2014/15 allegations who were still employed by the Respondent. As described below, she conducted telephone interviews with them but did not find anyone who corroborated the allegations of race discrimination or harassment. Some of the people she spoke to told her that the Claimant did not have a good working relationship with Mr Mulugeta.

94 There was another grievance meeting on the 22 May [251-257]. Mrs Heath asked for a list of people to be included in the investigation. The Claimant identified the following people as having witnessed Mr Mulugeta bullying him and/or making racist remarks: Mr Christopher/Christother (sic) Jena; Mr Edmar Bango; Mr Ennie Runganga, Mr Toshwa Denis; Mr/Ms Farai Bako; Ms Gift Moffat: Ms Pauline Chigoma; Ms Corneille Tosingila; Mr Pierre Gwavala; and Ms Freweni Zerai [451].

95 Mrs Heath then asked the Claimant about the parts of his grievance relating to the Team Leader position/alleged resignation; being instructed to only work twelve-hour shifts; and the issues around supervision meetings and timescales to improve. There was also a discussion about communication i.e. whether the Claimant could access the Respondent's email system on his mobile phone. He said that he could not, and characterised Mr

Mulugeta's action in sending work emails to his personal email address as harassment. The Claimant said he was not prepared to use his own laptop for work emails because his family had access to it. There was then a discussion about the September grievance, which was dealt with at an informal level by Mrs York. The Claimant was also asked when he had seen the outcome letter, and said this was not until the meeting on 6 February 2019 (which we did not accept). The Claimant was asked how many grievances he had made, and he replied "two". This reply was significant in relation to the disputed documents.

96 The Claimant also raised the investigation about service user X. Mrs Heath said there was a statutory obligation to investigate, which the Claimant appeared to accept. He said the suspension letter was intimidating and had led to his wife becoming upset and a breakup of their family.

97 Mrs Heath agreed to review the documentation and carry out interviews. The meeting was lengthy [451-457].

98 Mrs Heath started the investigation immediately. She had a meeting with Ms Sandhu during which Ms Sandhu said that at the supervision meeting she attended on 12 September 2018, the Claimant raised his voice but Mr Mulugeta remained calm, and that she felt her presence was necessary to prevent escalation [458-9]. On 24 May 2019, Mrs Heath held a meeting with Mrs York. Her account was as already described [460-461]. Mrs Heath did not interview Mr Mulugeta straight away because he was on annual leave, but later held a meeting with him during which he denied the allegations of bullying, racism and harassment, and denied making the Timbuctoo comment or saying French-speaking Africans were arrogant. Mrs Heath interviewed Miss Mountford on 10 June 2019. Miss Mountford said the Claimant was difficult and aggressive and only wanted to discuss the 2014/15 allegations. She also said that the Claimant had been aggressive to his TU representative. She observed that there was nothing in the November grievance letter relating to the historical allegations [462-463].

99 As regards the 2014/15 allegations, Mrs Heath spoke to staff who were still employed. She had telephone discussions with Mr Ennie Runganga and Mr Edmar Bango, neither of whom made reference to the "Timbuctoo" comment or the "French speaking African people being arrogant" comment. Mr Edmar Bango did say the Claimant and Mr Mulugeta argued a lot. Mrs Heath spoke to Mr Christantus Nith on 21 June 2019 [499C]. He was asked about being a witness to an alleged incident between the Claimant and Mr Mulugeta. He said his only recollection was when Mr Mulugeta had visited the house and asked the Claimant if he completed an assignment. The Claimant said he had, but it later transpired that he had not. This led to a telephone call (which was in speaker phone) from Mr Mulugeta to the house. Mr Nith was asked if Mr Mulugeta was rude or aggressive. He replied that Mr Mulugeta was not happy that the Claimant had not completed the task, but was not rude. Mr Nith said the call was "uncomfortable". He also said that Mr Mulugeta was responsible for ensuring the paperwork relating to the assignment the Claimant was tasked with, was complete [499C].

100 Mrs Heath was unable to contact Ms Salis, Ms Kaur and the other people mentioned in paragraph 94, because they were no longer employed by the Respondent.

101 Mrs Heath checked the Claimant's personnel file for evidence of any allegations made regarding 2014/15. There was none. She was the third person to check.

102 Having completed the investigation, Mrs Heath sent an outcome letter on 16 July 2019 [500-512]. To summarise, she set out all of the documents reviewed in respect of each group of allegations. This included the personnel file; various supervision records; email correspondence; and correspondence about the two grievances. Mrs Heath stated that the instruction to work 12 hour shifts was because of unsafe working hours and the responsibility to ensure time was managed appropriately and legally. She concluded there was no evidence the Claimant was singled out, and the request was reasonable in light of the hours the Claimant was working [465-466]. She upheld the part of the grievance about using the Claimant's personal email address and said he had now been provided with the facility to access the Respondent's email system. She added that when the Claimant returned to work, there would be a discussion about how to use his off-rota time to the best effect [466-467]. She did not uphold the Claimant's allegations about the grievance processes in September and November 2019 and February 2019 [466-469]. Mrs Heath recommended that when the Claimant returned to work, he should meet Mrs York because it was inappropriate for Mr Mulugeta to continue to be his line manager due to an irreconcilable breakdown in their working relationship. She also stated that the Claimant had behaved inappropriately and had failed to act reasonably and professionally to colleagues, and that this would be further discussed on his return. The Claimant was told there was a right to appeal, and that any appeal should be within seven days of receipt of the letter, and sent to Ms Caroline Forty, Head of HR Operations [470].

103 The Claimant lodged an appeal on 2 September 2019 [475-484]. In summary, the appeal was a complaint about how Ms Heath had not properly investigated his allegations, the tenor of which was that he was appealing against any findings that were not in his favour, and that her actions were a cover up of race discrimination. We shall deal briefly with various arguments made on behalf of the Claimant. Essentially, he tried to demonstrate that the investigation by Mrs Heath was not sufficiently thorough. The Claimant's case was that she should have interviewed more staff regarding the 2014/15 allegations. We rejected that proposition – she interviewed those staff who were still employed by the respondent, which was more than reasonable given that the Claimant did not allege race discrimination at the relevant time. It was also argued that conducting some interviews by telephone rather than holding a meeting was flawed. We did not accept that. In short, we concluded that Mrs Heath's investigation was thorough, fair, and balanced.

104 Before returning the grievance appeal against Mrs Heath's decision, we shall touch on the career break issue. As noted above, at the point of

lodging the appeal, the career break had not been approved. The Claimant refused to return to work after the suspension was lifted. He was not disciplined for that. He remained a Team Leader although absent from work without permission. On 12 November 2019, the Claimant asked Michelle Heath to reconsider her decision on the career break but also said she was not impartial [529]. A career break for a year was eventually approved and the Claimant was notified on 21 November 2019. On 28 April 2020, Mrs Heath wrote to the Claimant asking him what he was going to do in relation to his career break which was due to come to an end on the 11 May 2020 [5534]. The Claimant replied saying that he was not living in Birmingham because of the breakup of his family; and that the respondent's actions had caused him mental health issues and loss of income. He asked to extend the career break until 20 November 2020 [554A]. This was eventually agreed. The consequence was that the Claimant was still absent from work when the grievance appeal was concluded. We shall return to the career break later.

105 The grievance appeal was conducted by Mrs Wendy Salt, a Regional Director from a different region. The intention was to hold a meeting on 7 November 2019, but in fact this did not take place because the Claimant requested the appeal should be conducted using his written appeal letter. Mrs Salt reviewed the documentation and asked questions of the Claimant and other people by email. As noted above, her evidence was not really challenged, so we shall cover the appeal stage briefly.

106 The outcome was sent to the Claimant on 3 January 2020 [531-549]. In a lengthy written letter, Mrs Salt set out what documents she had reviewed, and her conclusions on the points raised by the Claimant. The appeal was not upheld. The second Claim Form was presented on 7 February 2020.

107 On 6 November 2020, a letter was sent by Mrs Heath reminding the Claimant his career break was due to come to an end on the 20 November 2020 [558]. She asked him to contact her by the 10 November to confirm whether he intended to return to work [558]. On 9 November 2020, the Claimant said he planned to return to work around the 21 November 2020 [559] . He did not do so. He was offered a number of potential Team Leader vacancies, but did not accept them. By way of example, one alternative Team Leader position was rejected as being not possible unless he received a significant pay increase because otherwise it was too inconvenient to travel to work [564]. Mrs Heath replied that there were no other vacancies at that point. She said that because of fixed terms and conditions in relation to pay and holiday entitlement, it would be unfair to other Team Leaders if his terms were more favourable. She said that there were Support Worker vacancies nearer his home [565]. The Claimant still did not agree to return to work. He said that the reason for the career break was that he was not being supported against victimisation, discrimination, harassment and unfair treatment. He alleged that because he had brought Employment Tribunal claims, the offers that were being made about his return to work were actually intended to be barriers to it. He asked to extend the career break again, from that date (3 December 2020) until a Team

Leader post was available in the area where he had worked for the last ten years [567].

108 On 8 December 2020, Mrs Heath informed the Claimant that a Team Leader position had become available in the area where he had previously worked, and that it was 2.8 miles away from his home and accessible by public transport. We have already commented on the fact that the Claimant was wholly unable to accept that the majority of the working population would not regard that as a lengthy commute by public transport. Instead, the Claimant rejected the offer, saying he would have to waste more time on public transport and spend money because of having to buy a bus ticket. He said it would impact on his family life and his children's schooling, and on his attendance at work, which would give the Respondent an opportunity to discipline him. He went on to say that this offer indicated in fact that he was being victimised because of his Employment Tribunal claims. He queried why he could not return to his previous position which was 600 metres from his home. He asked to extend his career break again until a Team Leader role suitable to him was available i.e. in a location where he could walk to work [571].

109 On the 14 December 2020, Mrs Heath wrote to express surprise at the rejection of the latest offer. She pointed out that the Claimant had now rejected two Team Leader offers and that the Respondent could not accommodate a further career break or an extension to the existing one [573-4]. The Claimant's response was an email dated 16 December 2020, alleging that the career break had been caused by Mr Mulugeta and the various managers covering up for him; that barriers were being put in place to prevent his return to work; and (again) asking to extend the career break. On 20 December 2020, Mrs Heath wrote to say that the career break would not be extended further; that the Claimant had been given a number of options; that he was still free to return to work in the last vacancy identified; but that if he did not confirm that he would do so by the 23 December, the post would have to be filled. She said, that if he did not want to return to work, it was his prerogative and he would be processed as a leaver, but the Respondent would be happy to consider him for a post in the future if he applied. She went on to say that it wasn't really appropriate for her to discuss the matters now being dealt with by the Employment Tribunal [578-9]. The Claimant responded saying he would accept to return to work, but only if various items of disclosure relevant to these proceedings were made [580]. It was apparent to us that the Claimant did not intend to return to work, except on his terms. Whether this was because of the two-year degree course, the ongoing proceedings, or his family circumstances (all of which he mentioned in his evidence), or a combination of those factors, falls into the realm of speculation.

110 The Claimant was processed as a leaver and brought the third claim (unfair dismissal) on 31 March 2021.

Submissions

111 We shall now set out briefly key points made in the written and oral submissions.

112 The Respondent's submissions were quite lengthy and we have already quoted from various parts of them in connection with the disputed documents. The Respondent's case is that the Claimant's allegations were entirely without merit and were no more than mere assertions of discrimination, victimisation and harassment without any evidential basis. The Respondent submitted that the Claimant had utterly failed to make a prima facie case of discrimination, harassment or victimisation. There were time points made about some of the allegations. The respondent also made submissions about credibility. The Respondent's representative dealt with each allegation in turn, setting out the Respondent's position on them. The respondent's position on the unfair dismissal claim was that the Claimant's employment ended because he did not return to work – he was not dismissed.

113 In the Claimant's written submissions, his representative set out the lengthy litigation history of the three claims. It was contended that the 2014/15 allegations were admissible as background information. In respect of the allegations which Judge Self allowed to proceed, it was argued that there was a continuing course of discriminatory conduct and therefore the claims were presented in time. There were some submissions about why Mr Adognan's complaints and case were relevant despite the binding COT3. The Claimant's case was that he had the protected characteristics of being from Rwanda and a French-speaking African. One assumes (although the submissions did not say so) that he was relying on the protected characteristic of age as well. The victimisation claims were founded on the basis of the discrimination complaints and Employment Tribunal claims, being protected acts. The unfair dismissal claim continued to be pursued.

The Law

The framework of the Equality Act 2010

114 The relevant legislation in respect of the allegations of direct discrimination is contained in the Equality Act 2010 "The EA10". The legislative intention behind the EA10 was to harmonise the previous legislation and modernise the language used. Therefore, and in general terms, the intention was not to change how the law operated unless the harmonisation involved codifying case law or providing additional protection in respect of a particular protected characteristic (see above, for example). Because of that, much of the case law applicable under the predecessor legislation is relevant, as has been confirmed by the higher courts on many occasions.

115 Race and age are protected characteristics. as defined by section 4 of the EA10. Race includes ethnic or national origins (section 9(c) EA10). Age is defined by reference to being a person of a particular age group (Section 5(1) EA10)

116 Sections 39 and 40 of the EA10 prohibit unlawful discrimination against employees in the field of work.

Section 39(2) provides that:

"An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B; or

(d) by subjecting B to any other detriment."

117 Section 39(4) provides the same protection in respect of victimisation and section 40 concerns unlawful harassment in the field of work. Section 120 EA10 confers jurisdiction on an Employment Tribunal to determine complaints relating to the field of work. Section 136 of the EA10 provides that: "if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred". This provision reverses the burden of proof if there is a prima facie case of direct discrimination or victimisation.

118 The courts have provided detailed guidance on the circumstances in which the burden reverses[1] but in most cases the issue is not so finely balanced as to turn on whether the burden of proof has reversed. Also, the case law makes it clear that it is not always necessary to adopt a two-stage approach and it is permissible for Employment Tribunals to instead identify the reason why an act or omission occurred (see discussion below).

119 In summary, the EA10 provides that a person with a protected characteristic is protected at work from prohibited conduct as defined by Chapter 2 of it. In addition to the statutory provisions, Employment Tribunals are obliged to take into account the provisions of the statutory Code of Practice on the Equality Act 2010 produced by the Commission for Equality and Human Rights if it is relevant.

Direct discrimination

120 Direct discrimination is defined in section 13 (1) of the EA10 as "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".

[1] Barton v Investec [2003] IRLR 332 EAT as approved and modified by the Court of Appeal in Igen v Wong [2005] IRLR 258 CA

121 In the predecessor legislation, the words "grounds of" were used instead of "because of". However, subsequent case law has confirmed that the change in wording was not intended to change the legal test. This means that the legal principles in respect of direct discrimination remain the same.

122 The application of those principles was summarised by the Employment Appeal Tribunal in London Borough of Islington v Ladele (Liberty intervening) EAT/0453/08, which was upheld by the Court of Appeal[2]. Summary:

(a) In every case the Employment Tribunal has to determine the reason why the claimant was treated as he was.[3] In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.

(b) If the Employment Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial.[4]

(c) Direct evidence of discrimination is rare and Employment Tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test which reflects the requirements of the Burden of Proof Directive (97/80/EEC). The first stage places a burden on the claimant to establish a prima facie case of discrimination. That requires the claimant to prove facts from which inferences could be drawn that the employer has treated them less favourably on the prohibited ground. If the claimant proves such facts, then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If they fail to establish that, the Tribunal must find that there is discrimination.[5] The wording in s136 of The EA10 has not changed the way the burden of proof operates – the claimant still has to show a prima facie case of discrimination.[6]

(d) The explanation for the less favourable treatment does not have to be a reasonable one.[7] In the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation.[8] If the

[2] London Borough of Islington v Ladele [2009] EWCA Civ 135
[3] By reference to Nagarajan v London Regional Transport [1999] IRLR 572 HL
[4] By reference to Nagarajan and also Igen v Wong [2005] IRLR 258 CA
[5] By reference to Igen
[6] By reference to Efobi v Royal Mail Group Ltd [2019] EWCA Civ 18
[7] By reference to Zafar v Glasgow City Council [1998] IRLR 36 HL
[8] By reference to Bahl v Law Society [2004] IRLR 799 CA

employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. The inference is then drawn not from the unreasonable treatment itself - or at least not simply from that fact - but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, the burden is discharged at the second stage, however unreasonable the treatment.

(e) It is not necessary in every case for an Employment Tribunal to go through the two-stage process. In some cases it may be appropriate simply to focus on the reason given by the employer ("the reason why") and, if the Tribunal is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen test. The employee is not prejudiced by that approach, but the employer may be, because the Employment Tribunal is acting on the assumption that the first hurdle has been crossed by the employee.[9]

(f) It is incumbent on an Employment Tribunal which seeks to infer (or indeed to decline to infer) discrimination from the

surrounding facts to set out in some detail what these relevant factors are.[10]

(g) It is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The determination of the comparator depends upon the reason for the difference in treatment. The question whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was.[11] However, as the EAT noted (in Ladele) although comparators may be of evidential value in determining the reason why the claimant was treated as he or she was, frequently they cast no useful light on that question at all. In some instances, comparators can be misleading because there will be unlawful discrimination where the prohibited ground contributes to an act or decision even though it is not the sole or principal reason for it. If the Employment Tribunal is able to conclude that the respondent would not have treated the comparator more favourably, then it is unnecessary to determine the characteristics of the statutory comparator.[12]

[9] By reference to Brown v London Borough of Croydon [2007] IRLR 259 CA
[10] By reference to Anya v University of Oxford [2001] IRLR 377 CA
[11] By reference to Shamoon
[12] By reference to Watt (formerly Carter) v Ahsan [2008] ICR 82 EAT

123 If the Employment Tribunal does identify a comparator for the purpose of determining whether there has been less favourable treatment, comparisons between the two people must be such that the relevant circumstances are the same or not materially different. The Tribunal must be astute in determining what factors are so relevant to the treatment of the claimant that they must also be present in the real or hypothetical comparator in order that the comparison which is to be made will be a fair and proper comparison. Often, but not always, these will be matters which will have been in the mind of the person doing the treatment when relevant decisions were made. The comparator will often be hypothetical, and that when dealing with a complaint of direct discrimination it can sometimes be more helpful to proceed to considering the reason for the treatment (the "reason why" question).[13]

124 It should be noted that Section 13(2) EA10 provides that "If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim". Although this provision may appear to be akin to the concept of justification in an indirect discrimination claim, case law has made it clear that the threshold for establishing justification of what would otherwise be direct age discrimination, is higher. It is for the respondent (A) to show justification.

Victimisation

125 Section 27 of the EA 2010 defines victimisation as follows: "A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act."

126 The definition is substantially the same as under the previous legislation, save that reference was made to "less favourable treatment" rather than

"subjecting to detriment". The former definition technically required a comparator, although there was a real question as to whether a comparator was necessary.[14]

127 The starting point is that there must be a protected act. That was not in dispute in this case, although when it took place was. If there has been a protected act, the Employment Tribunal must then consider whether the claimant was subjected to detriment and, if so, whether that was because of it.

Harassment

128 Harassment is defined in Section 26 of the Equality Act 2010 as follows:

"(1) A person (A) harasses another (B) if –

[13] See for example Shamoon and Nagarajan v London Regional Transport [1999] IRLR 572 HL
[14] St Helens MBC v Derbyshire [2007] IRLR 540 UKHL

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

(b) The conduct has the purpose or effect of –

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

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account-

(a) the perception of B;

(b) the other circumstance of the case;

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

129 It is relevant to note that Section 212 EA10, which deals with general interpretation, provides at section 212(1) that " 'detriment' does not, subject to subsection 5, include conduct which amounts to harassment." (Subsection 5 is not relevant because it applies where the act does not prohibit harassment in respect of a particular characteristic, such as pregnancy or maternity).

130 Consequently, where detrimental treatment amounting to harassment is alleged, that allegation should be considered before considering whether the act complained of amounted to direct discrimination, because it cannot be both. That does not, of course, prevent a Claimant from pleading in the alternative, and it would usually be prudent to do so.

131 The wording of section 26 makes it clear that a distinction is to be drawn between conduct with "the purpose of… which will amount to harassment as a matter of law, and conduct with "the effect of… " In the latter case the test is partly subjective ("the effect on B" and, arguably, "the other circumstances of the case") and partly objective ("whether it is reasonable for the conduct to have

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that effect").

Statutory Defence

132 In this case the Respondent did not seek to rely upon the statutory defence contained in Section 109(4) of the EA10.

Time limits

133 Section 123(1) provides that a complaint must be brought within the period of three months from the date of the act complained of, or such other period as the employment tribunal considers just and equitable. If acts extend over a period i.e. form part of a continuing course of conduct, limitation is judged by reference to the last act. The test is broad but C must show a link (see Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 EWCA). If an act is out of time, there is a wide discretion to extend time, but the Claimant must show time should be extended on a just and equitable basis (see Robertson v Bexley Community Centre [2003] IRLR 434 EWCA). However, that is essentially a question of fact for the Employment Tribunal (see Lowri Beck v Brophy [2019] EWCA Civ 2490).

Unfair dismissal

134 The relevant statutory provisions are contained in section 98 of the Employment Rights Act 1996 ("The 1996 Act"):

98 General

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

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either for a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this section if it –

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without a contravention (either or his part or that of the employer) of a duty or restriction imposed by or under an enactment.

(3) ……. (not relevant)

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

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

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

135 The respondent must then satisfy the tribunal as to the reason, or principal reason for dismissal, and that the reason is one listed in section 98(2) of the 1996 Act, or is some other substantial reason. If the respondent establishes a potentially fair reason for dismissal, the tribunal then has to consider the question of fairness, which must be done in accordance with the provisions of section 98(4) of the 1996 Act.

136 It is not necessary to summarise the legal principles, because in this case the Respondent contended that the Claimant was not dismissed. We did not understand the unfair dismissal claim to be one of constructive unfair dismissal. We were not really addressed about the unfair dismissal claim or the wrongful dismissal claim by the Claimant's representative, and it is difficult to understand how a case could be made for either of those claims.

Wrongful dismissal

137 This is a breach of contract claim for notice pay. In summary, the respondent should pay notice pay unless the Claimant's actions amount to a repudiatory breach of contract, which the respondent accepts by summarily dismissing them. We do not need to cover this in more detail because the Respondent contended that the Claimant was not dismissed.

Applying the Law to the Facts as Found

138 When we gave oral reasons, we briefly summarised the above principles, and made it clear that we would set them out in full in our written reasons.

139 In many respects the facts as found speak for themselves. We have extracted the allegations from the Order of Judge Self [T1 & R1 at 224-229]. We shall start with the allegations of harassment referred to in the Order as harassment (H), direct race/age discrimination (D), and victimisation (V). In the Order, the allegations are numbered quite oddly because they are by reference to various roman numerals used in the Claim Forms and/or the schedules of allegations. We shall deal with them chronologically and number them accordingly, but will add the numbers used in the Order in square brackets. We should also clarify that the Order defined the protected acts as:

(a) A verbal complaint to Ms Sue Salis in 2014 that Mr Mulugeta was making racist comments; and

(b) An oral disclosure to Mrs York on 20 November 2018.

(c) For the purposes of the second claim, the allegations made in the first claim.

As already stated, we did not accept that a protected disclosure was made in 2014 for the reasons set out above. We found that the Claimant and Mr Mulugeta were friendly until Mr Mulugeta became his line manager, after which their working relationship was poor. We did accept that the Claimant made a protected disclosure to Mrs York on 20 November 2018, although it appears the date is wrong, and that he made the allegation in a meeting on 15 October 2018, before retracting it. It follows that any victimisation allegations pre-dating 15 October 2018 cannot proceed because there was no protected act. Clearly, the bringing of the first claim was a protected act.

Claim Form 1

140 We shall start with the allegations arising from the first Claim Form. The first allegations which Judge Self allowed to proceed started with the supervision meeting between the Claimant and Mr Mulugeta on 10 August 2018. He did note that some of the allegations could be out of time, but rightly left that issue for the substantive hearing.

141 Allegation (1) [T1 at 225 para 4(x)]. The first allegation was that Mr Mulugeta failed to provide a timescale for improvements at the supervision meeting on 10 August 2018. This allegation failed on the facts. There were timescales in the action plan. Furthermore, we did not accept that setting timescales amounted to harassment, direct race discrimination, and/or victimisation. In addition, the victimisation allegation failed for the reasons set out in paragraph 136. Finally, this allegation (however it was put) was out of time because it did not form part of a course of discriminatory conduct.

142 Allegation (2) [T1 at 225 para 4(xi)]. The second allegation was that Mr Mulugeta breached the Respondent's confidentiality policy by inviting Ms Sandhu to attend the supervision meeting on the 10 August 2018. This allegation also failed on the facts. There was no breach of confidentiality – it was an internal meeting and Ms Sandhu was a manager. The Claimant was given notice that she would be present. Although he queried the reason for her attendance, he attended the meeting and participated in it. In addition, the Claimant did not actually identify a matter that could constitute a breach of confidentiality. Also, it was clear that other managers do sometimes attend supervision meetings, for example on one occasion Mrs York attended the Claimant's supervision meeting with Mr Mulugeta at his request. In conclusion, we did not accept that asking Ms Sandhu to attend amounted to harassment, direct race discrimination, and/or victimisation. In addition, the victimisation allegation failed for the reasons set out in paragraph 136. Finally, this allegation (however it was put) was out of time because it did not form part of a course of discriminatory conduct.

143 Allegation (3) [T1 at 225 para 4(xii)]. The second allegation was that Mr Mulugeta issued a written warning "for dissatisfaction with the improvement required and progress made" on 14 September 2018. In fact the warning was verbal, and was then confirmed in writing. It is factually correct to say that this occurred. However, we did not accept that issuing the warning amounted to harassment, direct race discrimination, and/or victimisation. In addition, the victimisation allegation failed for the reasons set out in paragraph 136. Finally,

this allegation (however it was put) was out of time because it did not form part of a course of discriminatory conduct.

144 Allegation (4) [T1 at 225 para 4(xiii)]. This allegation was that between the 10 August and 14 September 2018, Mr Mulugeta failed to permit or allow the Claimant to explain what he had done to meet challenges in relation to the identified areas of improvement. This was not the case as can be seen from the minutes of the meetings. We did not accept that attempting to monitor performance and identifying areas requiring improvement (which was actually what happened) amounted to harassment, direct race discrimination, and/or victimisation. In addition, the victimisation allegation failed for the reasons set out in paragraph 136. Finally, this allegation (however it was put) was out of time because it did not form part of a course of discriminatory conduct.

145 Allegation (5) [T1 at 225 para 4(xiii)]. This allegation was that in August 2018, the Claimant was singled out by Mr Mulugeta by being told not to work over 12-hour shifts. That was factually correct. *If* the practice was widespread, *and* the Claimant was the only Team Leader to be told not to do it, that could amount to being singled out. However, the Claimant produced no evidence whatsoever to establish that proposition. Instead, what was very clear, was that Mr Mulugeta had evidence to show the Claimant was causing a potential health and safety risk to himself and service users by working very long hours. Clearly this had to be addressed. It does the Claimant little credit that he continued to prepare rotas which included him working unsafe hours after being instructed not to. His evidence on this point was totally contradictory – he appeared to accept that working long hours could present a health and safety risk, and would not be acceptable to the CQC, yet he maintained it was discriminatory not to allow him to do so. We did not accept that attempting to implement safe working practices, amounted to harassment, direct race discrimination, and/or victimisation. In addition, the victimisation allegation failed for the reasons set out in paragraph 136. Finally, this allegation (however it was put) was out of time.

146 Allegation (6) [T1 at 225 para 4(xxiii)]. This allegation was that on 15 October 2018, Mrs York handled the Claimant's grievance unsatisfactorily in that there was a lack of proper investigation and that she failed to provide investigation documents. As will be clear from our findings of fact, we concluded that Mrs York dealt with the Claimant's complaint informally, and it was resolved. The Claimant agreed with the outcome. We did not accept there was any investigation documentation except for her record of their meeting. Nor did we accept that the Claimant did not receive the outcome letter at the time. This allegation was put as direct race discrimination and/or victimisation. We did not accept that the Claimant had established a prima facie case of direct race discrimination or of victimisation. Finally, this allegation (however it was put) was out of time.

147 Allegation (7) [T1 at 225 para 4(xviii)]. This allegation was that in the supervision meeting on 21 November 2018, Mr Mulugeta and Mrs York believed the Claimant was resigning when he stated he was thinking of

resigning. Clearly there was a factual dispute about whether the Claimant used the word "resign" or said he was "stepping down". We concluded that Mr

Mulugeta and Mrs York did think the Claimant was "stepping down" as a Team Leader. We also thought they must have concluded his statement was unequivocal because steps were initially taken by Mr Mulugeta to transfer the Claimant to a Team Leader position. Of course, as they acknowledged, they should have given the Claimant time to reconsider, given that he spoke in the heat of the moment. We thought it was unclear how their belief, if genuine, which we accepted that it was, could unlawful treatment. Consequently, we concluded the allegation was not well-founded and there was no harassment, direct race discrimination, and/or victimisation.

148 Allegation (8) [T1 at 225 para 4(xix)] was that Mr Mulugeta approached the Claimant and asked him to transfer from being Team Leader to a Support Worker. We found as a fact that Mr Mulugeta told the Claimant where to report to work having accepted what he believed to be a decision to step down. For the same reasons as set out in relation to Allegation 6 (see paragraph 143), we did not accept Mr Mulugeta's instruction amounted to harassment, direct race discrimination, and/or victimisation. As set out in our finding of fact, the Claimant was never actually demoted from the position of Team Leader.

149 Allegation (9) [T1 at 228 para 5]. This is the only allegation of direct age discrimination and we have covered it here because it happened at the same time as Allegation 8. In fact, and despite the chronology, it was not identified as an allegation in the first Claim Form, and not raised as part of the grievance process covered by that claim. The Claimant alleges he was asked to transfer his Role to that of Support Worker reporting to Mr Chikosi. Judge Self recorded that the Claimant specified his age group as being in his fiftieth year whereas Mr Chikosi was between 35 and 38. As can be seen from our findings of fact, Mr Chikosi was not a Team Leader, and he was not aged 35 to 38. This allegation was difficult to follow, as we have already observed. In any event it failed on the facts. There was no direct age discrimination.

150 Allegation (10) [T1 at 225 para 4(xxiv)]. This allegation was that on 21 October 2018, Mrs York stated she had accepted the Claimant's resignation from Team Leader. It was factually correct. For the same reasons as set out in relation to Allegation 6 (see paragraph 143), we did not accept Mrs York's view of what had occurred amounted to direct race discrimination, and/or victimisation.

151 Allegation (11) [T1 at 225 para 4(xxv)]. This allegation was that between 21 November 2018 and 5 December 2018, Mrs York failed to investigate and address the issues raised by the Claimant in his letter of 21 November 2018. Factually that was correct. At this point there was a grievance against Mrs York, so she was not able to be further involved. In addition, she had dealt with the September complaint informally, and given an outcome. There was no right of appeal. For those reasons, we did not accept Mrs York's failure to carry out more investigation amounted to direct race discrimination, and/or victimisation.

152 The next item (T1 at 226 para 4(xxvi) was a repetition of the previous complaint about failing to investigate (Allegation 11).

153 Allegation (12) [T1 at 226 para 4(xxvii)]. This allegation was that Miss York refused or rejected the Claimant's retraction of his resignation with no supporting reason. This was factually correct. Mrs York confirmed that the Claimant had (as she saw it) stated he wanted to stand down as a Team Leader. For the same reasons as set out in relation to Allegation 6 (see paragraph 143) and Allegation 10 (see paragraph 147), we did not accept Mrs York's view of what had occurred amounted to direct race discrimination, and/or victimisation.

154 Allegation (13) [T1 at 226 para 4(xxviii)]. This allegation was that on 6 February 2019, Miss Mountfield refused to discuss the Claimant's grievances (allegedly) raised in 2014/15. This was factually correct. It was also, in our judgement, completely understandable and wholly reasonable. The Claimant did not bring a formal grievance and/or allege harassment, direct race discrimination etc. at that time, and was seeking to introduce allegations five years later which were stale due to the passage of time, and therefore could not fully investigated. It was clear that he chose to do so, rather than providing evidence about the September and February grievances, which was what she wanted to focus on. This was an allegation of direct race discrimination and victimisation. It was manifestly ill-founded.

155 Allegation (14) [T1 at 226 para 4(xxvii)]. This allegation was that Miss Mountfield handled the Claimant's grievance improperly in that there was a lack of proper investigation and/or she failed to provide investigation documents. This was an allegation of direct race discrimination and/or victimisation. As can be seen from our findings of fact, Miss Mountfield did her best to investigate the recent grievances, but was hampered by the Claimant's refusal to focus on them. She did send all the documents generated by the stalled investigation to him. We fully accepted that she found his stance very frustrating. This was an allegation of direct race discrimination and victimisation and was ill-founded for the reasons set out in relation to Allegation 13 at paragraph 151.

156 Allegation (15) [T1 at 226 para 4(xxix)]. The Claimant alleged that on 11 April and 20 April 2019, Miss Mountford, Mrs Heath and Ms Everett handled the Claimant's grievance unsatisfactorily and failed to investigate properly and failed to provide investigation documents. This allegation requires some unpicking: at this point Miss Mountfield had no involvement apart from to give an account to the investigation because the Claimant had brought a grievance involving her; Ms Everett was responsible for dealing with the investigation into the concerns over service user X and not the Claimant's grievance; and Mrs Heath was responsible for the Claimant's grievance. Consequently, Ms Everett and Miss Mountfield had no responsibility for the subject matter of the allegation because they were not dealing with the grievance or the paperwork. Mrs Heath, for the reasons already stated, investigated very thoroughly indeed and did her best to investigate the 2014/15 issues, despite the limitations caused by the passage of time i.e.

staff leaving and imperfect recall of events from those who could be asked. This was an allegation of direct race discrimination and/or victimisation. It failed on the facts. The allegation was totally without foundation. It does, however, demonstrate the scattergun approach that the Claimant and/or his representative have taken in these proceedings, which has involved very substantial case management and judicial time.

157 Allegation (16) [T1 at 226 para 4(xxxi). This allegation was that on 1 March 2019, the Claimant was suspended by Ms. Raj Sandhu. It is factually incorrect - he was suspended by Miss Everett because he would not turn up to meetings to discuss the concerns about service user X. This was an allegation of victimisation.

158 We shall also deal with Allegations 17 and 18 at this point.

159 Allegation 17 [T1 at 226 para 4(xxxii)This allegation was that from 4 March 2019, Miss Everett handled the Claimant's concerns raised in his letter of 18 April. This was an allegation of victimisation.

160 Allegation (18) [T1 at 226 para 4(xxxiii). This allegation was that from 18 April 2019, Miss Everett handled the Claimant's concerns in his letter dated 18 April 2-18 unsatisfactorily in that there was a lack of proper investigation and/or that she failed to provide investigation documents. This was an allegation of direct race discrimination and/or victimisation.

161 Our conclusions on allegations 16 to 18 are that they are factually incorrect. The Claimant failed to make out a prima facie case of direct race discrimination or (in the case of allegation 18) victimisation. As can be seen from our findings of fact: Ms Sandhu did not suspend the Claimant; he was suspended pending investigation; he did not turn up to an investigation meeting; his written submissions (insofar as they related to service user X) were taken into account; Miss Everett finished the investigation; she did not recommend any disciplinary action over the concern about X; the Claimant's suspension was lifted; and he was provided with relevant documentation in respect of that investigation. It is possible, but unlikely, that the Claimant conflated the grievance process with the entirely separate investigation into weight loss by service user X, which he accepted had to take place when the concern was raised. The respondent's representative made the point that it was difficult to understand why the Claimant pursued these allegations, given that the investigation by Miss Everett effectively exonerated him. We would not go so far. That is because he thought the investigation was initiated by Mr Mulugeta (which was not the case, he simply relayed the concern, as he was obliged to do); and he blamed the suspension for the marital breakdown. That said, these allegations about the investigation into concerns about X, are quite evidently without foundation.

162 Allegation (19) [T1 at 226 para 4(xxxiv). This allegation was that Mrs Heath failed to provide the Claimant with the notes of the grievance hearing within 7 days. This is factually correct. However, the notes are very lengthy so that is hardly surprising. This was an allegation of direct race discrimination

and/or victimisation. We did not accept that the Claimant had made out a prima facie case of either. It sadly falls under the conduct we have described in the final sentence of paragraph 153.

Second Claim Form

163 These allegations were also set out in T1. As with the previous allegations, we have dealt with them chronologically but have also included details of where they are found in T1 at paragraphs 4 and 5. Judge Self recorded that the direct race discrimination allegations were based on national origin – Rwandan. He recorded that the allegations were of direct race discrimination and victimisation i.e. not harassment. Judge Self also recorded that the protected acts relied on for victimisation allegation were as set out in relation to Claim Form 1 plus the bringing of the first Employment Tribunal claim.

164 Allegation 20 [T1 at 226 para 4 (a)]. The allegation was that on 10 May 2019, Mrs Heath rejected the Claimant's request for a career break with no good supporting reasons. Factually, the allegation is not correct. The supporting reasons were provided, and essentially came down to operational need. This was in line with the Respondent's policy which is described in our findings of fact, and the decision was wholly discretionary. The allegations of direct race discrimination and victimisation have no foundation evidentially and are without merit.

165 Allegation 21 [T1 at 226 para 4 (b). The Claimant alleged that on 19 July 2019, Mrs Heath rejected the Claimant's grievances with no good supporting reasons. It is factually correct to say that the grievance was not upheld. It is completely incorrect to say there were no good supporting reasons. We found that her investigation was very thorough, particularly given the problems investigating the 2014/15 allegations. The Claimant was supplied with the report, and was invited to view his personnel file It is hard to imagine that she could have done more. The allegations of direct race discrimination and/or victimisation have no foundation evidentially and are without merit.

166 Allegation 22 [T1 at 227 para 4 (c)]. The Claimant alleged that Mrs Heath failed to provide a signed copy of the grievance documents and investigation report with no good supporting reason when asked to do so on 25 July and 12 August 2019. We fail to understand the basis of this allegation, let alone why the Claimant contends there was a requirement to do so. If the allegation related to conducting telephone interviews rather than holding meetings, which is not how it reads, there were valid reasons for doing so. If the allegation was that she fabricated the evidence of witnesses, which is not how it was put in writing but appeared to be what was argued before us, then we reject that proposition entirely. The fact that the Claimant chose to fabricate documents in support of his case (see our findings on the disputed documents), does not mean that anyone else did. We took great care to reach our findings about the Respondent's case on the disputed documents, as we have explained. Such findings are very serious and Employment Tribunals are very cautious about making them.

Merely asserting something to be true, does not make it so, which is a point that the Claimant and his representative failed to appreciate.

167 Allegation 23 [T1 at 227 para 4 (d)]. This allegation was that Mrs Heath failed to carry out a proper/full investigation within the time permitted by the Respondent's policy about grievances of race discrimination, with no good supporting reason. We have covered this extensively in our finding of fact. She did the best she could given the scope of the grievance (which now encompassed 2014/15; there were logistical issues over availability of witnesses, the Claimant and his representative; and the timescales are based on single issue or simple grievances, not multiple allegations which expand exponentially with the involvement of other managers trying to resolve the problem. We shall set out our conclusions on the allegations about her investigation and report after setting out what the remaining allegations are.

168 Allegation 24 [T1 at 227 para 4 (e)]. This allegation was that Mrs Heath failed to give any reason why, where there was a conflict of evidence, she accepted what other witnesses said rather than the Claimant. That is not correct. She gave reasons.

169 Allegation 25 [T1 at 227 para 4 (f)]. This allegation was that Mrs Heath failed to investigate Mrs York's failure to comply with the grievance and disciplinary policy, and gave no good supporting reason for this. Mrs York was not involved in the alleged disciplinary procedure i.e. the investigation into the concern about service user X. Mrs York, on our findings, did comply with the procedure for what was (at that point) identified to be an informal complaint. Mrs Heath found that to be the case when she investigated.

170 Allegation 26 [T1 at 227 para 4 (g)]. This allegation was that Mrs Heath failed to take any steps that would allow for the Claimant's appeal letter of the 18 October to be dealt with in accordance with the appropriate company policy. This relates to the finding that there should have been a right to appeal Mrs York's decision at the informal stage. Firstly, there was no right of appeal under the Respondent's policy; and secondly, instead of accepting this, by sheer persistence, the Claimant secured an investigation of this during the grievance dealt with by Mrs Heath.

171 Allegation 27 [T1 at 227 para 4 (h)]. This allegation has sub-paragraphs. The overall allegation was that Mrs Heath failed to deal with the Claimant's complaints related to 6 February 2019 meeting and provided no good supporting reason for this failure. The sub-paragraph allegations are set out below). To make a general point, the proposition that a person cannot possibly have dealt with complaints properly because the complainant does not agree with the outcome, is flawed. In this instance, Mrs Heath investigated and did not (apart from on the points set out in the findings of fact) uphold the grievance. It simply does not follow that she did not properly investigate, or give proper thought to her conclusions.

172 Allegation 28 [T1 at 227 para 4 (g) (i)]. The Claimant alleged Mrs Heath concluded her investigation into his grievance without considering his evidence. We did not accept that proposition.

173 We shall now set out our overall conclusions on Mrs Heath's investigation, which need to be read in conjunction with our findings on the disputed documents; our findings of fact; and the matters already set out in this section of our conclusions on the allegations. Without repeating those, we shall record that none of these allegations had any merit. Mrs Heath's investigation was conducted thoroughly. The Claimant could point to no evidence whatsoever of discrimination or victimisation, although these were labels he made the choice to attach.

174 The remaining allegations in the second Claim Form concern the grievance appeal which was heard by Mrs Salt. As stated previously, her evidence was not challenged. However, since we heard the evidence, we shall record our conclusions below.

175 Allegation 29 [T1 at 227 para 4 (j)]. The Claimant alleged Mrs Salt delayed in concluding the appeal meeting with no supporting reasons. There was no unreasonable delay; the Claimant did not want a meeting, he asked for the appeal to be dealt on the papers; and she kept him informed of progress.

176 Allegation 30 [T1 at 227 para 4 (k)]. The allegation was that Mrs Salt rejected the appeal with no good supporting reasons with the express intention of covering up acts of race discrimination and/or protecting perpetrators of race discrimination and/or to protect the interests of the Respondent. Quite apart from the fact that the allegation wasn't really properly put to Mrs Salt, the fact is she dealt with the appeal perfectly competently and that is doubtless why Dr. Ibakakombo could find little, if anything to challenge in her evidence.

177 Allegation 31 [T1 at 227 para 4 (l)]. The Claimant alleged that Mrs Salt failed to investigate material evidence contained in the appeal letter. We have already covered this – she clearly did. Her remit was to review the process and that is what she did. She upheld Mrs Heath's findings.

178 Allegation 32 [T1 at 227 para 4 (m)]. This allegation was that Mrs Salt failed to find that, when asked to do so on 29 July and 12 August 2019, Mrs Heath had not provided a signed copy of the grievance investigation document. As already noted, there was no requirement to do so. We would refer the reader to our conclusions at paragraph 163.

179 Allegation 33 [T1 at 227 para 4 (n]. This allegation was that Mrs Salt failed to give any reason why, where there was a conflict of evidence, she accepted what the other witnesses said, rather than the Claimant. This is a misunderstanding of her role. She was not evaluating the witness evidence given to Mrs Heath. She was reviewing how Mrs Heath had evaluated the witness evidence and whether she had explained properly why she had made the decisions she did. Mrs Salt concluded that she had.

180 Allegation 34 [T1 at 227 para 4 (o)]. This as an allegation that Mrs Salt failed to investigate Mrs York's failure to comply with a grievance and disciplinary procedure. This was a misunderstanding of Mrs Salt's role and, in any event, Mrs Salt upheld the conclusion that Mrs York had not failed to comply with the grievance procedure. The reference to the disciplinary procedure was irrelevant.

181 Allegation 35 [T1 at 227 para 4 (p)]. This allegation as that Mrs Salt ignored the Claimant's appeal letter dated 19 February 2019. Clearly this was not the case.

182 To summarise, we concluded that Mrs Salt dealt with the appeal thoroughly and competently. The Claimant failed to establish a prima facie case of direct race discrimination or victimisation by her.

183 The next allegation (which we shall not number because it is not an allegation about the Claimant [T1 at 227 para 4 (q)]), was that the Respondent had failed to provide the Claimant with a number of documents relating to Mr Adognon's claim. This was a disclosure point, if anything; and Mr Adognon's case was the subject of a COT3 Agreement.

184 Allegation 36 [T1 at 228 para 4 (r)]. This allegation was that Mrs Silwood lied about not seeing the alleged document sent to her previously until the 9 December 2019 – see our finding on disputed documents. We concluded that she had not seen it until disclosure because it was a fabricated document. Therefore, this allegation of direct race discrimination and/or victimisation was totally without merit.

185 Finally, the Claimant made the direct age discrimination claim in the second Claim Form [T1 at 227 para 5. We already covered this – see Allegation 9 at paragraph 146.

Third Claim Form

186 Finally, the third Claim Form alleged unfair dismissal and wrongful dismissal. The Claimant also alleged that the fact that his employment came to an end was victimisation. The main premise was that the Respondent was putting up barriers to the Claimant returning to work from his career break. We can deal with this quite briefly. Mrs Heath acted in accordance with the Respondent's policy, save for allowing the Claimant a de facto appeal and/or taking his further representations into account, which led to his application being allowed. The Claimant's career break was extended beyond the length envisaged by the policy. He was given multiple opportunities to return to work but chose not to. He was warned (more than once) that if he did not come back, he would be classed as having left voluntarily. Finally, he was informed that the Respondent would be happy to consider employing him again if he applied in the future. The Respondent was evidently actively encouraging the Claimant to continue in its employment. It is fair to say that when we read the papers for this case, we were surprised by the extensive attempts the respondent made to get the Claimant to return to work. It only became apparent when Mrs Heath gave evidence as to why that was - the Respondent valued the Claimant as an employee and thought he had a really good

skill set. The proposition that barriers were being erected to prevent his return, was wholly fanciful, as was the idea that the Respondent no longer wanted to employ the Claimant because he had made a claim to the Employment Tribunal.

187 We concluded that the Respondent did not dismiss the Claimant – he chose not to return to work. The Respondent did not wrongfully breach the contract of employment – the policy was discretionary and the Claimant was given every opportunity to preserve the employment relationship. He did not do so. The Respondent did not victimise the Claimant.

Conclusion

188 In conclusion, the majority of the allegations failed on the facts. The Claimant was wholly unable to establish a prima facie case that there was a causal link between his race or his age and the allegations concerned (i.e. harassment or direct discrimination), nor did he establish that any alleged mistreatment was because of a protected act (i.e. victimisation). The proposition that Mr Mulugeta was a discriminatory bully was without foundation. The proposition that the remaining people named in the allegations were part of a cover up/conspiracy was equally flawed and could best be characterised as an attempt to challenge any decision they made that the Claimant did not agree with. We have dismissed all of the allegations because they were not well-founded. In our judgment (Appendix A), we said that the matter would be listed for a costs hearing because the Respondent requested this. We have not yet listed it, but will do so and make appropriate directions once these Reasons have been promulgated.

Mrs Heath

189 We should note for the record that Mrs Heath was a named individual Respondent to the third Claim, but as a matter of law the only claim which could be against her was victimisation. We invited the Claimant to remove her as a named individual Respondent because the Respondent employer did not rely on the statutory defence. The Claimant did not agree to do so. For the sake of completeness, the victimisation allegations against her were without merit and failed. The judgment at Appendix A dismissed the claim against her as well as the claims against the Respondent employer.

Employment Judge Hughes

Date 2 August 2023

Appendix A

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr J Bishweka	**AND**	(1) Lifeway Community Care Ltd (2) Mrs M Heath

JUDGMENT MADE AT A LIABILITY HEARING

HELD AT Birmingham **ON** 11-13,16-20 August 2021 &
3 September (Chambers) &
7 September (Reasons)

EMPLOYMENT JUDGE Hughes **MEMBERS** Mr RS Virdee
Mr MZ Khan

Representation
For the Claimant: Dr R Ibakakombo, Lay Representative
For the Respondent: Ms L Amartey, Counsel

JUDGMENT

The unanimous judgment of the Employment Tribunal is that the claimant's claims for harassment related to race, direct race discrimination, victimisation, unfair dismissal and wrongful dismissal are not well-founded and are hereby dismissed. This case will be listed for a Costs Hearing.

Signed by Employment Judge Hughes on 8 September 2021

Judgment sent to Parties on

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