EMPLOYMENT TRIBUNALS

Claimant: **Mr T Fingi-Mlotshwa**

Respondent: **Cygnet NW Limited**

Heard at Sheffield **On: 22, 23, 24, 25 August, and 18 October 2023**

Before: **Employment Judge Brain**

Members: **Mr M Lewis**
Mrs A Brown

Representation

Claimant: **In person**
Respondent: **Mr S Proffitt, Counsel**

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The complaints identified in paragraphs 1.1 and 1.2 stand dismissed upon withdrawal by the claimant:
   1.1. Pursuant to section 47B of the Employment Rights Act 1996, that the claimant was subjected to detriment upon the grounds that he had made a protected disclosure.
   1.2. Pursuant to section 103A of the 1996 Act, that the claimant was constructively dismissed and that the reason or the principal reason for his constructive dismissal was that he had made a protected disclosure.
2. The complaints identified in paragraphs 2.1 and 2.2 stand dismissed:
   2.1. That the claimant was discriminated against upon the grounds of his race contrary to section 13 (when read with section 39(2)) of the Equality Act 2010.

2.2. That the respondent subjected the claimant to harassment related to race contrary to section 26 (when read in conjunction with section 40) of the 2010 Act.

3. The claimant's claims were brought within the limitation period in section 123 of the Equality Act 2010. Accordingly, the Tribunal has jurisdiction to consider them.

REASONS

Introduction

1. The claimant commenced these proceedings against the respondent by presenting his claim form to the Employment Tribunal on 21 December 2022. Before doing so, he complied with the requirement to undergo mandatory early conciliation as required by the Employment Tribunals Act 1996. Early conciliation commenced on 16 November 2022 and concluded on 21 December 2022. The respondent presented their grounds of resistance in answer to the claimant's claim on 7 February 2023.

2. By way of introduction, the respondent is a member of the Cygnet Healthcare group which operates hospitals and provides health care and rehabilitation services for patients with mental health needs, learning disabilities and autism. The respondent operates a hospital in Sheffield which is known as Cygnet Sheffield. At the material time of the events with which the Tribunal is concerned, the claimant was employed by the respondent as a registered mental health nurse at Cygnet Sheffield. It is not in dispute that the claimant was employed as a staff nurse there between 29 March 2021 and 19 December 2022. Prior to that, he worked at Cygnet Sheffield as a bank worker between April 2019 and February 2021.

3. The claimant resigned from his position by notice given on 28 October 2022. The effective date of termination of his contract of employment was 19 December 2022.

4. He raised several claims arising during the period of his employment. The case benefited from a case management hearing which came before Employment Judge Maidment on 21 March 2023. This was conducted by telephone. The record of that preliminary hearing is contained within the hearing bundle at pages 45 to 55.

5. It was identified that the claimant was pursuing the following claims:

5.1. That he was constructively dismissed by the respondent and that the reason (or the principal reason) for his constructive dismissal was that he had made disclosures which qualify for protection pursuant to the provisions in Part IVA of the Employment Rights Act 1996.This complaint was brought pursuant to section 103A of the 1996 Act. (The two years' qualifying service requirement to pursue an unfair dismissal claim does not apply to cases brought under section 103A of the 1996 Act. It was therefore open to the claimant to pursue an unfair dismissal claim upon this ground).

5.2. That the respondent had subjected the claimant to detrimental treatment upon the grounds that he had made disclosures qualifying for protection. This complaint was brought pursuant to section 47B of the 1996 Act.

5.3. That the respondent discriminated against the claimant by treating him less favourably than the respondent treated or would treat others because of the protected characteristic of his race. This complaint was brought pursuant to section 13 of the Equality Act 2010 when read in conjunction with sections 39(2)(c) and (d).

5.4. That the respondent harassed the claimant and that such harassment related to his race. This is a complaint brought pursuant to section 26 when read in conjunction with section 40 of the 2010 Act.

6. Employment Judge Maidment gave case management orders and listed the case for hearing over four days between 22 and 25 August 2023 inclusive.

7. On the fourth day of the hearing (25 August 2023) the claimant withdrew the complaints brought under the 1996 Act. The Tribunal's judgment is that these complaints therefore stand dismissed upon withdrawal. The complaints brought by the claimant under the 2010 Act are unaffected by that judgment.

8. The hearing bundle ran to 488 pages. This was supplemented by documents introduced by each party during the hearing. These shall be identified in due course where relevant.

9. The Tribunal heard evidence from the parties over the four days allocated for the hearing of the case. Upon conclusion of the respondent's case on 25 August 2023, there was insufficient time for the Tribunal to receive submissions from the parties. The Tribunal gave directions for these to be presented in writing ahead of the resumed hearing which was listed for 18 October 2023. Oral submissions were received on 18 October. Following receipt of the parties' helpful written and oral submissions, the Tribunal deliberated in chambers during the remainder of 18 October 2023.

10. The Tribunal heard evidence from the claimant. He also presented a witness statement from his mother, Beatrice Fingi. The respondent agreed Mrs Fingi's evidence. It was therefore not necessary to call her to give live evidence.

11. The Tribunal heard from the following witnesses called on behalf of the respondent:

11.1. Stacey Burgess. She is employed by the respondent as a ward manager at the Pegasus Ward at Cygnet Sheffield. She commenced her current role in July 2022. She has been a registered mental health nurse since 2013.

11.2. Alicia Curtis. She has been employed by the respondent since 2017. Her current role is as the corporate CAMHS (Child and Adolescent Mental Health Services) nursing lead. She is a certified instructor in safe intervention and safeguarding lead. She is based at Cygnet Sheffield.

11.3. Tom Griffiths. He has been employed by Cygnet (and Cygnet's predecessors) since 2018. Since 2019 he has worked as hospital director of Cygnet Sheffield.

11.4. Kerry Matthews. She has been employed by Cygnet for around five years. Her current role is as HR business partner. She has held that role since

June 2021 (after a break in her employment). She holds CIPD Level 5 and 7 qualifications.

12. The Tribunal also received witness statements of Mark Moran and Lisa Boyles. Mr Moran has been employed by Cygnet since August 2022. He is employed as clinical team leader in the Pegasus Ward at Cygnet Sheffield. Lisa Boyles has been employed by the respondent since January 2022. She is currently employed as a clinical manager at Cygnet Sheffield.

13. Neither Mr Moran nor Miss Boyles attended the Tribunal to give evidence. Accordingly, the Tribunal shall attach such weight to their witness as seen fit.

14. The Tribunal shall firstly make our findings of fact. We shall then consider the relevant law. We shall then go on to set out the conclusions which we have reached by applying the relevant law to the findings of fact to arrive at our conclusions upon the issues in the case.

15. When making our findings of fact, we shall say where it has been necessary to resolve some factual disputes. Although there were several factual disputes in the case, as with most cases there is much that is not in dispute. This includes the general description of Cygnet Sheffield's operation contained in the witness statements of Mrs Curtis and Mr Griffiths. It is there where we shall commence our factual findings.

Findings of fact

16. Mr Griffiths gave undisputed evidence about Cygnet Sheffield's operation in paragraphs 3 to 11 of his witness statement. We shall now quote this here to set the scene:

"2). Cygnet Hospital Sheffield offers a low secure service for women and CAMHS services for male and female adolescents over four distinct wards.

3). Within the adult service, the women (who are under section) are supported by a full multi-disciplinary team who are focused on helping service users regain independence, maintain family links, and prepare for discharge. There is a focus on community access, therapy, meaningful activity, and offering a warm and welcoming environment for the delivery of support and care.

4). In the separate and distinct CAMHS service at Cygnet Hospital Sheffield, young people may be admitted to our PICU [psychiatric intensive care unit], general adolescent ward or low secure ward, depending on their individual needs. All young people are supported by a full multi-disciplinary team alongside the therapy and education departments.

5). Cygnet Hospital Sheffield is a purpose built, therapeutic environment close to the city centre of Sheffield with a focus on supporting individuals to move along their care pathway towards independent living. Everyone has access to a range of social, therapeutic and activity spaces including classrooms, art rooms and gyms, teaching kitchens and gardens. It is a spacious and vibrant service providing positive and effective care with close links to local colleges and employers.

6). The ward at Cygnet Hospital Sheffield include:

- *Griffin Ward – low secure CAMHS*
- *Unicorn Ward – tier 4 CAMHS PICU*

- *Pegasus Ward – tier 4 general adolescent*
- *Spencer Ward – female low secure.*

7). Griffin Ward is a 15-bed low secure service that positively supports both female and male young people who are under section and who may need a longer stay in an in-patient setting with a low secure environment. It offers a care and treatment pathway for individuals who may have complex and mental health issues and whose needs and risk are such that they need to be supported in this environment.

8). Unicorn Ward is a 10-bed CAMHS PICU (psychiatric intensive care unit) which provides support for young people both male and female (under section) who have complex needs and require high intensity nursing care. The focus is on stabilisation with a view to enabling transition to a general acute ward or back into the care of community services. The service is able to provide robust care and support for young people displaying significant levels of challenging behaviour.

9). Pegasus Ward is a 13-bed general adolescent acute service, providing support for young people, both male and female, and focuses on helping them return home or into community placements. The service is dedicated to helping young people maintain their school placements, if possible. Admission may or may not be under the section.

10). Spencer Ward is a 15-bed low secure female service providing assessment and treatment for women with mental disorders. Treatment is aimed at identification and management of needs rather than just a particular diagnosis. We are dedicated to providing gender sensitive care and treatment for women detained under The Mental Health Act. Spencer Ward is the only female low secure unit in South Yorkshire.

11). Cygnet Hospital Sheffield is a registered CQC provider and is regulated for the below:

- *Treatment of disease, disorder or injury.*
- *Assessment of medical treatment for persons detained under The Mental Health Act.*
- *Diagnostic and screening procedures."*

17. Mrs Curtis gave a brief overview of the four wards of Cygnet Sheffield in paragraph 2 of her witness statement. She corroborated Mr Griffiths' account that Cygnet Hospital Sheffield as a 53-bed psychiatric hospital and his general description of the operation.

18. When he was giving live evidence, Mr Griffiths clarified that:

- The reference to 'Tier 4' in relation to Unicorn Ward and Pegasus Ward is to in-patient treatment.
- Griffin Ward has the highest rate of patient acuity. By this, as Mr Griffiths explained, is meant the number or severity of incidents involving service users.
- Spencer Ward is for adult females.

- Pegasus Ward is the one with least acuity. In other words, Griffin Ward is regarded as the most challenging environment within which to work and Pegasus the least challenging.

19. It is necessary now to consider some of the policies with which the Tribunal was presented. These are at pages 73 to 109 of the bundle.

20. Mrs Curtis introduced the policies (in paragraph 5 of her witness statement). She mentioned several of them in paragraph 5. For the sake of completeness, the Tribunal lists them all here:

    - The grievance policy (pages 73 to 75).
    - The whistleblowing policy (pages 76 to 80).
    - The disciplinary policy (pages 81 to 89).
    - The harassment and bullying policy (pages 90 to 94).
    - The equality and diversity policy (pages 95 to 98).
    - The seclusion and long-term segregation policy (pages 99 to 109).

21. The claimant took us to the disciplinary policy and in particular the provision within it around gross misconduct at clauses 5.28 and 5.29.

22. The Tribunal's attention was also drawn to the seclusion and long-term segregation policy. The aim of this policy (as is said in clause 1.1) is "*to ensure that all Cygnet Healthcare Services with seclusion facilities comply with the standards set out in The Mental Health Act Code of Practice (2015)".* At clause 1.2 it is said that *"The objective of this policy is to provide guidance for staff undertaking the use of seclusion or long term segregation in England, Wales and Scotland".* The relevant legislation is in section 3 of the policy with the relevant procedures and policies in sections 7 and 11 respectively.

23. Clause 5 of the policy says that *"Seclusion is one of the most restrictive interventions we can subject an individual to. Therefore, it is important that seclusion is avoided wherever possible and safe to do so. Cygnet Healthcare acknowledges that the use of seclusion is sometimes the safest and least restrictive option for the individual and for others in their physical environment*." At section 5.3 it is said that "*Seclusion is a form of restraint (environmental) and should only be ever used as a last resort and as an emergency response where there is an immediate risk of significant harm to others. Therapeutic approaches such as prevention and de-escalation must always be considered in the first instance for the management of disturbed and violent behaviour and PRN medications may be considered to reduce agitation or escalation or challenging behaviour."* (The emphasis is in the policy document).

24. Clause 5.4 says that the seclusion and long-term segregation policy "*makes direct reference to the Mental Health Act 1983 (Amended 2007): Code of Practice (2015) … and sets out the context and framework within which staff should practice."* By clause 5.7, seclusion should only be undertaken in a room or suite of rooms, which have been specifically designed and designated for the purposes of seclusion and which serve no other function. However, in exceptional situations due to necessity and risk considerations, seclusion may occur in areas other than designated seclusion rooms, for example in bedrooms, corridors etc. However, by clause 6, the senior management or on call manager and "*RC or nominated deputy"* must be informed, and a written record completed in the

individual's clinical records. Clause 6 prescribes circumstances in which seclusion should and should not be used.

25. Within the same section, there is guidance as to the use of tear-proof clothing. Clause 6.12 provides that, "*Individuals should never be deprived of appropriate day time clothing with the intention of restricting their freedom of movement".* The policy recognises in clause 6.14 that, *"It may be appropriate in a small number of instances for individuals to be asked to wear special tearproof clothing.*

26. Mr Griffiths gave evidence (in paragraph 13 of his witness statement) that 375 people (including bank workers) work at Cygnet Sheffield. He referred to the Cygnet Staff Survey (pages 486 to 488). From the survey results at page 486 we can see that 40% of staff identify as white British and 37% as black or black British African. The claimant identifies as black of African origin. A numerical table is set out at page 488. Of the 375 staff who have completed the survey, it appears as if 145 preferred not to identify their ethnic origin. 110 of those replying identified as white British. 79 identified as black or black British African. 12 identified as Asian. The Tribunal notes this survey to be from 2023 and therefore post-dates the claimant's employment. That said, the claimant did not seek to challenge the survey upon the basis that the ethnicity of the respondent's workers had changed significantly. *(The percentages cited by Mr Griffiths are borne out by the survey results by extrapolation from the 232 responses).*

27. The Tribunal also noted the respondent's equality and diversity policy. In addition, Mrs Curtis gave evidence (which was not challenged) that the respondent operates a multi-cultural network with multi-cultural ambassadors working within the hospital and an LGBTQ+ network. She also said that all staff undergo annual diversity training. Mr Griffiths gave similar evidence in paragraph 12 of his witness statement.

28. Before the claimant qualified as a registered mental health nurse, he worked at Cygnet Sheffield as a casual bank support worker. Mr Griffiths said in paragraph 14 of his witness statement that recruiting and retaining registered mental health nurses can be challenging. When he became aware that the claimant had completed his training to become a registered mental nurse (which we shall now abbreviate to '*RMN'*) an interview was arranged. The claimant was offered employment following the interview. Mrs Curtis' evidence was that it was easy to recruit but not to retain mental health nurses.

29. The offer letter dated 13 August 2020 is in the bundle at pages 114 and 115. The offer of employment was to the position of preceptor RMN. As Mr Griffiths explained, this is the term given to newly qualified RMNs *"to ease the transition from training to practice as a qualified nurse".* The claimant's contract of employment is at pages 116 to 127. Clause 5.1 gives the commencement date as 29 March 2021. The contract was subject to the successful completion of a six-months probationary period of 26 weeks (by clause 6.1).

30. The job description is at pages 128 and 129. It was signed by the claimant on 20 August 2020. The claimant's job title was staff nurse. In that capacity, the staff nurse is responsible to their team leader.

31. The Tribunal was not taken to the job description. However, we note that it requires the postholder to ensure that Cygnet clinical policy and procedures are complied with and, where appropriate, local protocols are implemented. The staff nurse is expected to take charge of a ward in the absence of the team leader.

32. On 10 August 2021, Mrs Curtis had cause to email the claimant about his communication style. She says in paragraph 12 of her witness statement about this that *"I was concerned that the claimant's communication style was confrontational, not supportive and, indeed, damaging causing necessary upset. As a qualified nurse it is important you work as part of a team and communicate effectively – not simply shoot off emails."* In her email (at pages 130-131), Mrs Curtis was encouraging of the claimant. She says, *"I honestly feel that you have the capability to become a fantastic nurse, but while you are in your preceptorship, I need to see some learning around this [the communication style], and immediate improvement will be vital for your success. Keith [Gwyther] will be having a supervision with you regarding your communication style and I request that you submit to him a reflective piece to support your preceptorship. For your own development, I strongly suggest this is an area you focus on."*

33. At this stage in his career with the respondent, the claimant was working on Unicorn Ward. Keith Gwyther was the ward manager of Unicorn.

34. On 15 September 2021, the claimant emailed Mr Gwyther (pages 133 and 134). He raised concerns about his team leader, Beth Gatus. In this email, the claimant explained in trenchant terms difficulties he was having in working with her.

35. Several days later, on 19 September 2021, Mrs Curtis had cause again to email the claimant (page 135). She asked him to refrain from making adverse comments about colleagues and copying others in who were not involved in the matter in question. She concluded, *"I really do wish you would think before sending these kind of emails."*

36. The day after that email, Mr Gwyther conducted an interim probation assessment of the claimant. This is at pages 138 and 140 and is dated 20 September 2021. The claimant was rated as *"good"* for many of the competencies. However, Mr Gwyther noted that improvement was required upon the following competencies:

    - *Positive contributions to the service/business.*
    - *Ability to use own initiative.*
    - *Quality of relationships with other staff.*

37. In the probation assessment, Mr Gwyther was complimentary of the claimant's performance. However, there were concerns about the claimant's interpersonal skills and team working which was causing friction with other staff. Upon this basis therefore Mr Gwyther decided to extend the claimant's probationary period for a period of two months. This was expressly for the purpose of practising *"interpersonal relationships and team working."* A review date was set for 20 November 2021.

38. The claimant's preceptorship was successfully completed. His salary was increased consequently. A letter dated 21 September 2021 to this effect (mistakenly dated 4 May 2023 in the bundle copy) is at page 141.

39. On 31 October 2021 the claimant emailed Mr Griffiths, Ms Gatus and Emily Merrick (HR administrator) that he was resigning his position with immediate effect (page 144). This was because he had been underpaid by one pound an hour. Sumairaa Hamid replied to the claimant's resignation very promptly. Following her intervention, the claimant rescinded his resignation. He emailed Mr Gwyther to this effect on 2 November 2021 (page 142). *(In principle,*

a resignation is a unilateral act unless the contract provides otherwise. An employee does not therefore have the right to rescind of their own volition. The Tribunal infers that the respondent agreed with the claimant that he could rescind his resignation and continue working for them. Mrs Curtis was therefore correct when she said in her email of 1 November 2021 (at page 147) that there was no obligation upon the respondent to accept a retraction of the claimant's resignation).

40. It was suggested by Mr Proffitt that the claimant had overreacted to the pay issue which arose in October 2021. The claimant maintained that he had not overreacted and that he was entitled to resign because the issue of pay had been *"poorly communicated."*

41. In anticipation of the extended probationary period ending on 20 November 2021, Mr Gwyther emailed Emily Merrick and copied in Mrs Curtis. The email is at pages 149 and 150. Mr Gwyther expressed "*concerns around [the claimant's] interactions with others (staff and patients), he currently has two safeguarding concerns outstanding that are being investigated by social work and I have just received a complaint from a patient about him. These are all around non-physical things like the way he has spoken to patients."* Mr Gwyther sought guidance as to how to proceed.

42. Mrs Curtis says in paragraph 17 of her witness statement that these complaints *"included an incident on 8 November 2021 when the claimant had asked a young patient to remove her underwear. A copy of the claimant's statement in respect of the same is at pages 151 and 152."* In his statement at pages 151 and 152, the claimant justifies his actions upon the basis that there had been two prolonged ligature incidents where the patient had ripped her clothing. She had been asked to remove her underwear because there was a belief that she was concealing ligatures and other items. The removal of all her clothes was in the presence only of female staff who supervised her changing into strong clothing. Hidden items were recovered from her underwear.

43. There was no evidence from the respondent that the claimant's intervention had been inappropriate. During Mr Griffiths' cross-examination, the claimant questioned him about the matter and sought to link it with a very serious incident which had occurred in April 2021 involving a different patient.

44. In this connection. at the start of the hearing the claimant had produced a *"Regulation 28 report"* dated 18 August 2022 addressed to the respondent and NHS England. This is labelled as "Annex A" and is plainly part of a full report to which the Tribunal was not privy. It was signed by HM Assistant Coroner for the South Yorkshire (West) District. The circumstances are set out in the third paragraph of the annex: that on 10 April 2021 at Cygnet Sheffield, this patient had performed an act of self-harm by tying two non-fixed ligatures. The report says that, "*As a result of insufficient care, crucially inadequate observations and the delays in emergency response, this led to her unexpected death two days later on 12 April in the Northern General Hospital, Sheffield."* The circumstances of death in paragraph 4 include that she began to self-harm using ligatures which was a new behaviour for her.

45. The claimant drew Mr Griffiths' attention to paragraph 5.5 of the report which recorded the coroner's concern that staff downgrade the seriousness of the use of ligatures. The claimant's argument in essence was that his actions on 8 November 2021 had to be seen in light of the tragic events which occurred in

April 2021 and that his actions were therefore appropriate. There was no evidence that the claimant's actions on 8 November 2021 were inappropriate. No action was taken by the respondent against him.

46. Mr Griffiths had no direct involvement with the claimant until July 2022. When he gave evidence before the Tribunal and was taken to the claimant's statement at pages 151 and 152, he offered no criticism of the claimant's actions. Mrs Curtis referred to it as a safeguarding concern in paragraph 17 of her witness statement but does not go on to criticise the claimant's actions.

47. On 15 November 2021 the claimant emailed Mr Gwyther. He raised concerns about aspects of a colleague's practice. By way of reply, Mr Gwyther raised a concern about the claimant's failure to countersign the *'DLM/CD'* book (which is to do with the dispensing of controlled prescription drugs). Mr Gwyther counselled the claimant not to risk his nursing registration over such matters. Mr Gwyther then emailed Alicia Curtis (also on 15 November 2021). He resolved to put the claimant on to a Performance Improvement Plan. It appears that consideration was being given to ending the claimant's employment. Mr Gwyther commented that, *"HR felt we could not terminate his contract due to continued service from time spent on the bank."* (These emails are at pages 153 to 157).

48. The Performance Improvement Plan is at pages 158 to 161. This sets out the improvement objectives, the success criteria and review schedule (amongst other things).

49. Bethany Hilder, HR administrator, wrote to the claimant on 22 December 2021 (page 163). This was to confirm the claimant's successful completion of his probationary period with effect from 22 December 2021.

50. There was then an incident which occurred on 14 January 2022. An allegation was raised by Tutu Nyadongo (a black staff nurse) about the claimant's conduct towards her. She alleged that the claimant had made threats towards her impacting upon her safety. Mr Gwyther undertook an investigation. His investigation report is at pages 164-191. He was unable to corroborate that threats had been made by the claimant. There plainly was an issue between the claimant and Ms Nyadongo as she had also raised an allegation against him about unsafe practice in relation to the administration of medication, following which the claimant raised a similar allegation against her.

51. Following the matter coming to light in January 2022, the claimant had been moved from the Unicorn Ward to the Griffin Ward. The claimant asked to remain on Griffin as he was uncomfortable returning to Unicorn and working alongside Ms Nyadongo. Mr Gwyther also suggested the possibility of the claimant returning to Unicorn but working upon a different shift to Ms Nyadongo. He noted that since the claimant's move to Griffin no further incidents between them had occurred. He noted that a permanent move to Griffin would have to be approved by the Griffin ward manager or the clinical/hospital manager.

52. Mrs Curtis was on maternity leave between December 2021 and May 2022. She therefore had no involvement in matters arising out of the incident between the claimant and Tutu Nyadongo which occurred in January 2022. She tells us in paragraph 20 of her witness that the claimant had moved to Griffin Ward by the time of her return from maternity leave.

53. The Tribunal did not have the benefit of hearing evidence from Keith Gwyther. The Tribunal was not taken to any documentation or evidence confirming the

permanence of the claimant's move from Unicorn to Griffin. However, we infer that this took place in or around February 2022. At all events, there appears to be no dispute that the claimant was working on Griffin Ward from around the early part of 2022.

54. On 14 February 2022 Bethany Hilder, HR administrator, wrote to the claimant (page 192). She confirmed that the respondent "*has decided that no formal disciplinary action will be taken against you on this occasion"* (arising out of the incident with Tutu Nyadongo).

55. On 8 June 2022, Gillian Kaye, the ward manager of Pegasus, had asked the claimant to complete a reflective piece for a drug error. Mrs Curtis explains in paragraph 22 of her witness statement that, *"Cygnet policy regarding medication errors is to always include a reflective piece from the nurse involved. This is a standard template to allow the nurse to reflect on how the error occurred, any contributing factors, understand the severity of the error and allow learning to prevent errors occurring again."* In evidence before the Tribunal, Mrs Curtis explained that reflection of this kind is encouraged by the Nursing and Midwifery Council ('NMC') as an essential part of nursing practice. *(At this stage, the claimant was still assigned to work on the Griffin Ward. However, from time-to-time staff do work on other wards hence the involvement of the Pegasus ward manager)*.

56. On 9 July 2022, the claimant wrote to Mrs Curtis to ask for a transfer to Pegasus Ward. The email is at page 201.

57. Two days later, on 11 July 2022, the claimant emailed Mrs Curtis with "*a few concerns on the manner incidents are handled and how [the respondent] has failed to reinforce boundaries with troublesome patients."* The email is at pages 203 and 204. The claimant then raised concerns around five patients.

58. Mr Curtis replied very shortly afterwards on the same day (pages 202 and 203). She thanked him for his emails. She acknowledged that he had made "*some great suggestions."* She went on to say that *"some of your comments are very concerning. I do not appreciate you referring to our young people as "troublesome patients" – this is not appropriate. Your language in your email is incredibly negative throughout. It is quite disappointing to see you continuing with this style of communication despite my concerns being raised with you a year ago."* She requested Gillian Kaye to meet with the claimant to discuss his concerns.

59. When she was giving evidence during her cross-examination, Mrs Curtis fairly acknowledged that the claimant had made good points in his email of 11 July 2022 regarding medication issues. However, she said that her role includes the challenging of inappropriate language and the negativity evident from the claimant's email.

60. Also on 11 July 2022, the claimant emailed Miss Hamid and Gillian Kaye to the effect that he was *"feeling unwell due to feeling anxious about the current unsafe and stressful working conditions on Griffin."* This is at page 206. He went on to say that he was not going to be working that evening. He then said that "*As you are probably aware on 26 January 2020 and 19 October 2019, I had two very traumatic experiences, where I was seriously injured whilst supporting YPs [young persons] that presented as a risk towards others. Last night, a support worker nearly lost their thumb and recently a considerable number of staff have*

been consistently getting injured." Mrs Curtis said in evidence that the claimant had exaggerated the risk of injury to the support worker's thumb. Mrs Kaye replied to say that the serious assaults should be reported to the police and that she would catch up with the claimant upon his return to work.

61. On 12 July 2022 the claimant was invited to attend a welfare review meeting to be held on 14 July 2022. Emily Merrick's letter to this effect is at page 209. She informed the claimant that the meeting would be attended by Mrs Curtis, Stacey Burgess and Mrs Kaye. Emily Merrick was to attend as note taker. The purpose of the meeting was to:

- Deal with concerns raised about the Griffin Ward.
- Consider any reasonable adjustments.
- Consider alternative employment and/or job roles.
- Consider an occupational health review and/or access to the claimant's medical records.
- Consider the way forward and any potential outcomes as well as any other discussions.

62. On 13 July 2020 the claimant emailed Emily Merrick (pages 212 and 213). He objected to Mrs Curtis' attendance at the meeting *"due to her continuously misconstruing my words and portraying me as a negative person who doesn't care about and/or respect the patients."* The claimant said that he was "*more than happy to speak to Gillian, Stacey and the clinical nurse manager Lisa Boyles tomorrow."*

63. In the event, the meeting took place on 15 July 2022 and was attended by Mr Griffiths, Miss Burgess and Ms Kaye.

64. There are no notes of the welfare meeting of 14 July 2022. In paragraph 25 of his witness statement, the claimant says that he raised the following concerns regarding patient and staff safety on Griffin Ward. (The same issues were later raised by the claimant on 29 August 2022 during the morning handover on Griffin ward attended by Mrs Curtis, Gilliam Kaye and Dr Hakim, consultant psychiatrist and medical director):

(a) Staff shortages and sickness due to work related injuries and stress.

(b) The frequency and severity of fixed ligature incidents occurring on the ward on a daily basis.

(c) How patients' safety was severely compromised and inadequate due to the ward nursing four very high risk patients at the time.

(d) That it was inappropriate for the ward to admit additional high-risk patients, while the nursing team was struggling to keep the current patients safe.

(e) Many of the nurses including the claimant felt that two of the patients were inappropriately placed and required to be nursed in a young offenders' institute and medium secure service respectively.

65. The claimant goes on to say in paragraph 26 of his witness statement that he felt that "*Thomas Griffiths and Gillian Kaye downplayed the frequency and severity of the incidents that I had raised as concerns. They argued that they were consistent from the ones seen in previous years, and that there had been no escalation in the severity and frequency of these incidents."*

66. In paragraph 19 of his witness statement, Mr Griffiths said that *"The welfare meeting lasted for approximately an hour. During the meeting the claimant said that … Griffin … had high levels of acuity with very violent young people with an increase in incidents. The claimant asked if I was aware of this. We discussed the process of how we review all incidents daily and also the themes and trends in our Positive and Safe meeting which is an incident review meeting. I discussed with the claimant that the incidents had in fact reduced as had the number of violent incidents. We also discussed the nature of the low secure CAMHS services and that unfortunately some young people are violent to others, which is why we have specialist training."*

67. Although there is perhaps a difference in emphasis between the accounts of the claimant and Mr Griffiths, there is similarity in the general tenor of each of their accounts of the matters discussed in the meeting and the concerns raised by the claimant. There is no issue that the claimant raised the matters in paragraph 64 of these reasons on 14 July 2022 (and 29 August 2022). Mr Griffiths denied downplaying the claimant's concerns. He said in paragraph 20 of his witness statement that he "*tried to put them in the context of a secure psychiatric hospital and his role as a registered mental health nurse."* The Tribunal accepts Mr Griffiths' account. It was right for Mr Griffiths to seek to put the claimant's concerns in context. Mr Griffiths was an impressive witness. He has a wealth of experience in this area. His professional expertise led him to not overreact to the claimant's concerns and to give him reassurance that such incidents were commonplace but were capable of being managed because of the specialist training which the staff receive. The Tribunal is confident that had there been a matter of real concern then Mr Griffiths would have reacted appropriately. There was no evidence upon which basis for us to impeach his professional judgement as to how to react to the information divulged to him by the claimant.

68. In paragraph 21 of his witness statement, Mr Griffiths says that there was also a discussion around the claimant's *"proposals for managing who he inappropriately described as "troublesome" patients differently to reinforce boundaries."* He then went through the claimant's several suggestions including the proactive use of chemical restraint, the use of long-term segregation, the use of stronger clothing after ligature incidents, the use of seclusion following incidents of violence or aggression or disruptive behaviours. Again, the tenor of the claimant's and Mr Griffiths' evidence is similar in terms of what was discussed.

69. Mr Griffiths was concerned about the claimant's proposals. He said in paragraph 22 of his witness statement that, *"the claimant was proposing that those he regarded as troublesome be injected or secluded which is simply not the way young people with mental health issues (who may themselves be victims of abuse) are cared for in the 21st century, is contrary to the Mental Health Code of Practice and simply not the way to approach care."* Mr Griffiths goes on in paragraph 23 to say that the claimant's proposals were contrary to the respondent's policies (which we mentioned earlier). The Mental Health Code of Practice is reflected in the respondent's policies and procedures. The Mental Health Code of Practice is statutory guidance on how mental health professionals should carry out their functions under the Mental Health Act. Mr Griffiths says in paragraph 24 that he *"discussed [with the claimant] the [Mental Health] Act's 5 guiding principles which should be considered when making all decisions in relation to care, support or treatment provided*." In paragraph 34 of his witness statement, Mr Griffiths described the claimant's suggestions as *'archaic and*

essentially involved drugging and/or isolating, which is contrary to the [Mental Health] Act."

70. At the conclusion of the meeting, Mr Griffiths handed to the claimant a copy of the Mental Health Act to help with his reflective practice.

71. In evidence given under cross-examination, Mr Griffiths said that it was concerning that the claimant was suggesting some of the measures referred to in paragraph 21 (of Mr Griffiths' witness statement). He describes all of these as a *"diversion"* from the Mental Health Code of Practice and are measures which should be used only as a last resort.

72. Mr Griffiths was asked by the claimant at the hearing about the frequency of rapid tranquilisation as a proactive use of chemical constraint upon Griffin Ward. Mr Griffiths said that two such incidents had occurred on the Griffin Ward in the last four weeks, but the frequency will depend upon the patient profile from time to time.

73. It is credible that Mr Griffiths would harbour concerns about the claimant's approach. We have seen that Alicia Curtis was concerned by the claimant's reference to the patients in the respondent's care as *"troublesome."* The view taken by Mr Griffiths and Mrs Curtis of the claimant's approach is that it was inconsistent with the respondent's policies.

74. It is not in dispute that the claimant and Mr Griffiths discussed the prospect of moving from the Griffin Ward to the Pegasus Ward. Mr Griffiths says in paragraph 25 of his witness statement that *"We discussed that patients on the Pegasus Ward are sometimes also violent and if he didn't want to work with this risk, we could look at opportunities at other Cygnet sites that do not manage the same level of risk as we experience in a secure hospital."* Mr Griffiths denies suggesting to the claimant that he may wish to leave the respondent's employment. Mr Griffiths was concerned that a move to Pegasus would be the second move in a short space of time. Moving to Pegasus would mean that the claimant had worked on three of the four wards in Cygnet Sheffield. Mrs Curtis said that this was unusual. In evidence before the Tribunal, she said that this was, *"not common at all. I can't think of a single occasion where someone has moved more than once."*

75. It was agreed that the claimant could transfer to Pegasus with effect from 1 September 2022. The claimant was notified of this on 15 July 2022 (page 219).

76. Mr Griffiths said in that email that he had asked Miss Burgess to complete *"a supervision with you prior to your start date so she can discuss her expectations on Pegasus and also to enable you to discuss what support you may need to help this to be a successful move."* Stacey Burgess is the ward manager of Pegasus Ward at Cygnet Sheffield. She held that position from July 2022, at around the same time as the claimant moved to Pegasus.

77. In his email of 15 July 2022 Mr Griffiths said that if the move to Pegasus *"does not help and you feel that a move to a different Hospital altogether would be beneficial then I can look at different hospitals in the locality and discuss this with the relevant hospital managers."*

78. In evidence given in cross-examination Mrs Curtis told the Tribunal that Cygnet is a very large organisation. It has operations near to Sheffield (in Barnsley and Chesterfield) as well as other operations in the city of Sheffield.

79. The Tribunal accepts that the respondent was not suggesting that the claimant leave their employment. That is not a fair reading of what Mr Griffiths said in the email of 15 July 2022. The Tribunal accepts that this reflected what he said at the welfare meeting the day before. Further, the claimant replied on 16 July 2022 (also at page 219). He did not take issue with what was said by Mr Griffiths in the email to him of 15 July 2022. We have seen several examples of the claimant highlighting what he perceives to be poor practice and defending his own position. Had Mr Griffiths threatened his employment at the welfare meeting of 14 July 2022 it is surprising that the claimant did not take issue about this. This persuades the Tribunal that no such threat was made.

80. The claimant contends that there was an initial resistance to the claimant transferring to Pegasus Ward. Alicia Curtis says in paragraph 29 that *"There was no initial resistance to the claimant's transfer, we simply wished to discuss the concerns, ensure that there was no gap on Griffin Ward and reflect on what would be his second ward transfer. The claimant transferred to Pegasus Ward on 1 September 2022."* For her part, Stacey Burgess says in paragraph 4 of her witness statement that, "*I was not resistant. All I said was that he first needed to approach his ward manager to obtain their consent, as any vacancy obviously needs to be filled. This is the same process we would follow with any employee and is nothing to do with the claimant's race. The conversation took place before the meeting on 14 July 2022."*

81. It was put to the claimant in cross-examination that there was a tension between his allegation that the respondent wished him to leave altogether while at the same time agreeing to a move from Griffin to Pegasus. The claimant said that he agreed with that proposition when it was put to him by Mr Proffitt. The agreement to the ward move corroborates the Tribunal's finding that Mr Griffiths had not threatened the claimant's position. Further, the Tribunal finds there to be no reluctance to agree to a move of wards. There was a process to follow. This takes time. There was no protest from the claimant at the time about him not starting on Pegasus until 1 September 2022.

82. The claimant said in evidence that he had had several issues with Stacey Burgess prior to July 2022 on the occasions where she had worked on the Griffin Ward. The claimant said that he had *"kept these to myself."* Again, this appears to be out of step with the claimant's willingness (as we have seen) to raise his concerns about the actions of fellow staff members. The Tribunal does not accept that the claimant had any serious issues with Stacey Burgess before moving to the Pegasus Ward. Had he entertained such concerns, there must be some doubt as to whether he would have asked for a move there at all.

83. On 29 July 2022 Miss Burgess conducted the supervision meeting with the claimant. The notes of this are at pages 225 to 227. She noted that the move of the claimant to Pegasus Ward had been approved by the senior management team and that the claimant was to transfer with effect from 1 September 2022. She recorded that the claimant was happy to be moving to the Pegasus Ward. The claimant identified some gaps in his learning. It was recorded the claimant would restart his preceptor booklet as a guide to plug these gaps. Miss Burgess talks about this in paragraph 11 of her witness statement. She said that "*Every newly qualified nurse has to complete a preceptorship. When we were discussing the claimant's transfer to Pegasus he said that he had gaps in his learning. Accordingly, and as reflected in the supervision notes, we agreed that he would recomplete some parts of the preceptorship."*

84. The supervision plan was signed by both Miss Burgess and the claimant on 29 July 2022. The Tribunal notes there to be no record of the claimant expressing any disquiet about how the transfer to the Pegasus Ward had been handled by the respondent. This corroborates our finding in paragraph 82.

85. Miss Burgess asked Mr Moran to conduct the claimant's supervisions on Pegasus Ward. Mr Moran completed supervisions on 26 September 2022 (pages 232 to 237) and 21 October 2022 (pages 251 to 258). Miss Burgess justified the decision to have Mr Moran complete the claimant's supervisions upon the basis that he (Mr Moran) was "*new to the hospital and could approach with a fresh pair of eyes."* This is at paragraph 15 of her witness statement.

86. The claimant's case (as appears from the grounds of complaint) is that the claimant's supervision should have been with Dumisani Ndhlovu. Mr Ndhlovu is a black nurse. The claimant says that he was more suitable than was Mr Moran upon the basis that Mr Moran had only worked with the claimant once, whereas Mr Ndhlovu had worked with the claimant on numerous occasions. Miss Burgess said in evidence that she had discussed with Mr Ndhlovu whether he would conduct the claimant's supervisions. Mr Ndhlovu felt this was inappropriate upon the basis that he was a friend of the claimant.

87. When dealing with this point in cross-examination, the claimant was taken to pages 274 and 275. This was an email from the claimant to Miss Burgess of 21 October 2022 (the date of Mr Moran's second supervision). The claimant in the email said that he "*enjoyed the straightforwardness of the conversation. However I don't think it was entirely appropriate and at times felt more fault seeking than anything else."* The claimant then gave a number of examples to back up his point. We need not set them out here. (*We observe in passing that one of the objections raised by the claimant was that he had worked only once with Mr Moran. We therefore accept that the claimant did object to Mr Moran as his supervisor).*

88. There is a complaint (in page 275) that the supervision should have been undertaken by Mr Ndhlovu but not that Mr Moran's supervision was tainted by any race discrimination. When asked by Mr Proffitt if he felt that there was such a taint at the time the claimant replied, *"I did, but didn't share it with the respondent."* He said that he thought Miss Burgess was "*the perpetrator."* He said he had not raised it by way of a grievance pursuant to the respondent's grievance policies, with HR or through senior management as he *"felt I needed time."* Again, all of this is difficult to credit against the background of the claimant's ability and willingness to defend his own position from time to time (as we have seen).

89. Miss Burgess refers (in paragraphs 13 and 14 of her witness statement) to a need for discussion with the claimant about a couple of matters arising during September 2022 following his transfer to Pegasus Ward. One was about ordering medication. She was concerned that the claimant had ordered far too much medication for Pegasus Ward and asked him in future to order only one week's supply at a time. The second concern was around the use of anti-ligature clothing. We have seen that the use of such clothing is carefully controlled. This must only be used if prescribed by a doctor and all alternatives have been considered because the use of such garments is extremely restrictive for the patient. Miss Burgess was concerned that the claimant had not obtained a doctor's consent when giving it to a patient to wear.

90. The Tribunal accepts Miss Burgess' evidence that she had cause to speak to the claimant about these matters. The claimant refers to them himself in his grounds of complaint at page 22 of the bundle (as having occurred on 20 September and 22 September 2022). The claimant appears to have accepted the guidance around medication as he there describes Miss Burgess as having given *"constructive feedback."*

91. There was then an incident which took place on 24 September 2022. This involved a patient who we shall refer to as *"A".*

92. Miss Burgess introduces this issue in paragraph 17 of her witness statement. She says that *A "returned to Pegasus Ward after an unsuccessful home leave escorted by police. The claimant was on duty. The patient was restrained and secluded. Seclusion is very extreme and may only be used as a last resort and in accordance with Cygnet policy and regulations."* We have referred to the relevant policy in paragraph 23 above.

93. She then goes on in paragraph 18 of her witness statement to say that on 28 September 2022 she reviewed the CCTV. After that, she says that she "*spoke to the claimant after the incident and asked him to write a short paragraph of apology and to reflect on the incident. As stated in my email dated 10 October 2022 the claimant's letter [dated 10 October 2022 at page 281] was worrying because of his failure to take any accountability for his actions [279]. The suggestion he had been singled out because of his race is nonsense. The claimant was the nurse in charge and responsible for the decision to restrain and seclude. Shanice Thompson and Shona Flannery did not make the decision to seclude and simply responded to an alarm call."* (The discussion here referred to took place on 4 October 2022 as recorded at page 367 which is part of Miss Burgess's investigation report dated 6 December 2022 commencing at page 363. The discussion was described as an informal supervision).

94. On 12 October 2022 Miss Burgess emailed the claimant (pages 244 and 255). She invited the claimant to an investigation the following week with herself and representatives from the respondent's HR department. Miss Burgess was concerned that the claimant appeared not to understand why seclusion was unjustified and she wanted to investigate the matter further and get him to reflect "*on legal and Cygnet policies."* She noted that he had not yet prepared a letter of apology or reflection piece. The claimant replied the next day (13 October 2022) with an apology letter to A and a "*reflection log and statement regarding the seclusion incident."* He said he had accepted and reflected upon the respondent's concerns and advice: page 244.

95. The letter of apology is at page 282 and the statement and reflection log is at pages 283 to 287.

96. In evidence given under cross-examination, Miss Burgess said that the purpose of the letter of apology and the reflection log was not about apportioning blame but about learning lessons. She said that the letter of apology was not intended to go A's parents. This was not made clear to the claimant at the time.

97. The claimant had at first declined to write a letter of apology purportedly addressed to A (or A's parents) as requested by Miss Burgess pending seeking legal advice (page 281). This was the claimant's letter to which Miss Burgess referred in paragraph 18 of her witness statement and which prompted her decision to hold an investigation meeting. That said, in another email of 10

October 2022 (page 278) the claimant told Miss Burgess that he was *"100% accountable for A's seclusion."* However, he went on to say that "*I am just concerned that an apology would downplay A's behaviours which were unacceptable."*

98. Miss Burgess said in paragraph 20 of her witness statement that the decision to move matters on to an investigation meeting was reached after she had discussed the matter with Alicia Curtis. It was resolved to invite the claimant only to attend an investigation meeting. She said that *"the other nurses [involved in the incident with A] were not investigated because it was the claimant's decision to seclude."*

99. During the hearing (on 24 August 2023) the respondent produced an incident report form (known as the *"IMISS"* report).

100. It appears from this that one of A's parents (referred to as "*Parent 1")* contacted Pegasus Sheffield at around 16:45 on 24 September 2022. This concerned verbal aggression directed at Parent 1. A's other parent (referred to as *"Parent 2"*) was out at the time but returned home and attempted to deescalate the situation. However, A continued to be verbally abusive towards Parent 2 and towards A's sister. The police arrived at 16:55 following an escalation of the incident into physical violence and aggression towards both parents. A continued to throw objects including a light bulb which fortunately did not break upon impact with one of the attending officers.

101. A lives in Hertfordshire. There was an initial reluctance upon the part of the Hertfordshire police to transport A back to Sheffield. However, a plan was devised whereby the Hertfordshire police agreed to transfer her to Cygnet Sheffield accompanied by two police officers and one parent.

102. A plan was also devised for when A arrived back at Cygnet Sheffield. This is in the IMISS report. The plan included increasing observations and assessing her mood and mental state upon her return. The plan said that if there were signs of agitation then she should be moved into a low stimulus area known as *"ECA".* This presented a difficulty as there is no ECA within Pegasus Ward where A resided. Moving her to an ECA therefore entailed moving her to another ward (in this case, as it transpired, Unicorn).

103. The plan therefore provided that at the time of entry to Pegasus, A was to be moved to the ECA on Unicorn Ward to be assessed by the night SNOS *('senior nurse on site)*' prior to returning her to Pegasus Ward. However, upon a fair reading of the plan, the proposal to move her to the ECA on Unicorn was conditional upon her still showing signs of agitation upon her arrival at Cygnet Sheffield. The claimant was aware of the plan. He makes this clear in his pleaded case at page 22 (in the entry dated 24 September 2022) and the premise of his cross examination of Miss Burgess was on his knowledge of the plan.

104. In his reflection log (commencing at page 283) the claimant says that A and her escorts arrived at Cygnet Sheffield at 20:55 on 24 September 2022. He said that the day nursing team at handover had said that A needed to be assessed in the ECA before being allowed back on to Pegasus Ward. This briefing was at 20:20. The Tribunal observes that this was not the plan in the IMSS report which was to assess S's mood on her return. The claimant recorded here (at pages 283 and 284) that when A was informed of the plan, A began to *"fluctuate in mood and mental state because A wanted to go on to the ward"* (that being Pegasus). A

then became verbally aggressive and verbally abusive towards staff, in particular the claimant. The claimant said that "*A then attempted to abscond having been prompted to do so by one of the police officer's remarks that were she to abscond we are not going to chase after them."* Staff then utilised physical restraints to prevent her from absconding and escorted her to the ECA area in Unicorn. The claimant says that during her escort she physically assaulted the two agency support workers who were assisting the claimant. This resulted in the claimant then supporting A's head.

105. A senior support worker then sought to de-escalate the situation. A threw her slider or slipper at the senior support worker at the ECA whereupon the claimant and the senior support worker utilised physical restraint and placed her in seclusion.

106. The claimant had the opportunity of reviewing CCTV footage of the incident on 7 October 2022. This was reviewed in the presence of the reducing restrictive practice lead and quality lead. He commented on this in the reflection log (page 286). The claimant reflected upon the advice given that A should have been given a second chance and seclusion should have been considered only when there was an escalation of prolonged physical violence and aggression towards staff. The claimant reflected that he was to familiarise himself with the young persons' support plans on how best to support them while in crisis, with the respondent's policies (particularly regarding seclusion) and that should he make an error in clinical judgment he should not hesitate to apologise.

107. In an email dated 19 October 2022 (page 288) the claimant made several additional points. He maintained that A's seclusion took too long to be terminated because too many people ended up being involved in the decision to end her seclusion.

108. On 19 October 2022, Miss Burgess attended work and noticed that one of the patients (whom we shall refer to as '*B'*) had a wound to their head. She spoke to all three members of staff on duty. These were the claimant, Nazia Tasnim and Beth Gatus. Miss Tasnim is Asian. Miss Burgess was concerned that B's wound had not been documented. Miss Burgess went on to say in paragraph 21 of her witness statement that "*The claimant said he was unaware of the incident. Beth Gatus said that she was aware of the incident, and she would write the notes up. The claimant, who had said he had not witnessed anything, then took it upon himself to write notes of an incident he said he had not witnessed, and to apologise to the parents, without any prior discussion. No action was taken against Beth Gatus because she accepted her mistake and rectified this immediately. The error was not normal practice for Beth."*

109. On 21 October 2022, the claimant was suspended. The claimant's suspension was confirmed by way of a letter dated 24 October 2022 addressed to the claimant from Miss Hilder (page 305). (The decision to suspend had been communicated to the claimant by Miss Burgess and Mr Moran). The suspension was *"pending an investigation into the allegation of inappropriate interpretation of blood pressure readings and not acting on the results, inappropriate use of medication and untrue documentation."* The latter reference (to *"untrue documentation"*) was to the incident involving B. We shall come to the blood pressure and medication issues in due course. The claimant was not suspended arising out of the incident with A which had taken place on 24 September 2022.

110. Miss Hilder informed the claimant in the letter that suspension was necessary *"in order to allow us to conduct the investigation impartially and fairly."* The claimant was informed that he would continue to be paid as normal. He was also informed that he must not communicate with any of the respondent's employees, contractors or individuals in their care unless authorised to do so by Miss Hilder.

111. On the day of the suspension, the claimant emailed Mrs Curtis asking if he could return to Griffin Ward (pages 261 and 262). Mrs Curtis replied to say that her understanding from Mr Griffiths was that following the move to Pegasus there would be no further ward moves. She informed him that this could not be agreed without Mr Griffiths' authority. She said she would discuss the matter with Mr Griffiths upon his return from annual leave.

112. Miss Burgess was then commissioned to conduct two investigations. The first was in relation to A. The second was in relation to the incident with B, the inappropriate interpretation of blood pressure readings and inappropriate use of medication. To this was added an allegation that the claimant had contacted another staff member while suspended (in breach of Miss Hilder's instruction in the suspension letter) and asking her to add an entry to the patient's "*pink notes".*

113. We shall deal with Miss Burgess' investigation into the incident with A first before then looking at the concurrent investigation into the other matters. Miss Burgess' investigation report into the issue involving A is at pages 363 to 422. The upshot was that she recommended inviting the claimant to a disciplinary hearing and for him to undergo refresher training upon the use of seclusion and the Mental Health Act Code of Practice.

114. Miss Burgess said that upon her review of the CCTV, A was uncuffed when she arrived at Cygnet Sheffield. She was standing outside the Pegasus reception door and was knocking to be allowed in. She concluded that the holds used by the claimant and the two agency workers was disproportionate. She reached a similar conclusion upon the actions taken after the slider or slipper was thrown which precipitated the seclusion and concluded that the use of seclusion was neither reasonable nor proportionate.

115. Miss Burgess also concluded that there was a delay in ending the seclusion of one hour and 15 minutes. The speciality doctor on charge that evening signed at 23:15 to say that seclusion should be terminated (page 415). *(It is not clear how Miss Burgess reached the conclusion that the seclusion was delayed by one hour and 15 minutes given that it ended at 00:30 hours on 25 September 2022 (page 420). It appears to the Tribunal that this was a 45 minutes' delay, albeit that nonetheless this may be an unreasonable delay).*

116. Miss Burgess concluded that the claimant failed to contact the on-call speciality doctor within one hour of initiating the seclusion. This is against the observations at page 417 of A being settled in mood. The seclusion commenced at 21:30 on 24 September 2022- page 413. Miss Burgess concluded that the seclusion was not used for the shortest amount of time possible in accordance with Cygnet's use of seclusion policy or the Mental Health Act Code of Practice.

117. It was put to the claimant that Miss Burgess had simply recommended a disciplinary hearing take place. She did not recommend any sanction arising out of the incident with A. The claimant replied that it could be inferred that action would be taken against him. He said that he had formed the view there was no chance of him being exonerated which is why he resigned. He then went on to

say that it was in the public interest for this matter to be investigated as he has a professional duty to the NMC and is regulated by them.

118. It is of course no part of the Tribunal's function to conduct a judicial inquiry into the treatment of A on and around 24 September 2022. The Tribunal needs only to make factual findings pertaining to the issues of discrimination related to race and harassment upon the grounds of race.

119. The claimant's cross-examination of Stacey Burgess, upon the issue of A, focused upon his justification of the decision to seclude her in accordance with the plan. Miss Burgess' point was that A was calm when she arrived, and the plan only catered for the contingency of her continuing to be agitated upon arrival. This was something the claimant should have considered. She accepted, under questioning from Mr Lewis, there may simply have been a difference in professional judgement between her and the claimant as to the circumstances which presented upon her arrival that evening. She went on to say "*There is no blame on the claimant. It is about learning lessons."* She said that she had had to have similar conversations about the seclusion policy *"with other members of staff of all races."*

120. It was put to Miss Burgess by the claimant that the speciality doctor had falsified the document at page 415.This is the *"internal MDT review"* page. It records the conclusions following review of seclusions by those caring for the patient. This was signed by the speciality doctor at 23:15 to say that the seclusion should be terminated. Miss Burgess told us that the original file is comprised of paper documents held together with a sliding binder and therefore theoretically it would be possible for pages to be removed or inserted without being easily detected (as would be the case, for example, with a page torn out of a bound notebook).

121. This was a very serious allegation to level against the speciality doctor by the claimant. If upheld, it has the potential to be career ending. It is difficult to see any good reason why somebody in the speciality doctor's position would risk their career by forging this document and what they would have to gain from it. None of this was explained by the claimant. This allegation did the claimant little credit.

122. The nurse in charge on the day shift on Pegasus Ward (on 24 September 2022) was Leigh Holmes. She said in an email dated 19 October 2022 addressed to Miss Burgess that she, as nurse in charge, discussed with the day SNOS (Bev Gatus) a safe return plan for A. This email is at page 385 and is appendix 3 of Miss Burgess's investigation report. It is right to observe that there is no mention in Leigh Holmes' email of a need to assess A's mood and mental state upon return and only to move her into ECA if there were signs of agitation. However, the claimant would be working from the plan and not from Leigh Holmes' email prepared after the event.

123. It was put to Miss Burgess by the claimant that she (Miss Burgess) was a friend of Leigh Holmes. The claimant produced a copy of a group photograph taken at Leigh Holmes' wedding (page 271). Miss Burgess is in the group, as are Beth Gatus and Mark Moran. Victoria Higgins-Kay, clinical team leader of Pegasus Ward, also features in the photograph. The claimant also introduced a photograph at page 270 of Miss Burgess and Miss Higgins-Kay. It is a poor photograph but from what the Tribunal can make out, it appears that Miss Burgess is holding or carrying Miss Higgins-Kay. Some further photographs were introduced by the claimant which the Tribunal placed into the bundle. These

feature Miss Burgess with other members of staff and appear to have been taken on or around 6 July 2022.

124. On 20 October 2022 Miss Higgins-Kay emailed Miss Burgess, Mr Moran and Mrs Curtis to the effect that in supervision, Elizabeth Obiorah (staff nurse) had raised concerns about the claimant (page 259 and 260). Ms Obiorah is black. These concerns included the claimant's treatment of A. Miss Obiorah also prepared a statement about the incident involving A (at pages 398 and 399). This was appendix 8 of Miss Burgess's report. In this statement, Elizabeth Obiorah said that she trusted the claimant's judgment at the time but reflected that mistakes had been made.

125. There is a log of calls at pages 318 and 319 to the claimant from Miss Obiorah on and after the date of his suspension. The claimant said he had not answered these calls because of the terms of his suspension.

126. The claimant did not say in express terms what inferences he was inviting the Tribunal to draw from the disparate pieces of evidence summarised in paragraphs 122 to 125. The Tribunal accepts the claimant's case that the relationship between Stacey Burgess and Leigh Holmes was more than that simply of work colleagues. The same goes for Miss Burgess' relationship with Victoria Higgins-Kay. In the Tribunal's experience, one would not be photographed in the pose shown at page 270 with somebody who is simply a work colleague. All of the participants in the group photograph at page 271 are white.

127. The claimant appeared to be suggesting that Victoria Higgins-Kay had pressured Miss Obiorah to criticise the claimant's treatment of A. In pages 398 and 399, Elizabeth Obiorah does no more than relay what the claimant told her about the circumstances which pertained when A arrived back at Cygnet Sheffield. She does criticise the claimant for being condescending towards her. It is credible that he was condescending, given the criticism which he made of colleagues when he first qualified as an RMN (and to which we have referred earlier).

128. Before leaving the incident involving A, the Tribunal should comment about the actions of Shanice Thompson and Shona Flannery that evening. This is because the claimant had cited them as his comparators upon this issue.

129. Mr Proffitt put to the claimant that neither of them had decided to seclude A. The claimant said that *"They were part of it. The investigation has been destroyed. They were present."* It is not clear what the claimant meant by this.

130. In her email of 19 October 2022, Shanice Thompson explained to Miss Burgess that the involvement of her and Shona Flannery was *"actually minimal."* We refer to page 400. This is appendix 9 of Miss Burgess's report. She (Ms Thompson) opened by saying, *"I think I tried to talk to A and reassure her that seclusion should not be for long and for as short as possible."* The suggestion from this is that the decision to seclude had been taken prior to her involvement.

131. In another email of the same date (pages 401 and 402) Ms Thompson said that she saw A being escorted to Unicorn in holds. She said, *"I took hold of the head as no one was holding/guiding the head. In regards to the seclusion process, it was handed over to myself that A had been violent and aggressive on leave (including hitting someone over the head with a light bulb) and upon return to ward and that she bit a support worker. Seclusion was initiated due to the level of violence at the time."* So far as the Tribunal can see, Shanice Thompson's

name does not feature in the seclusion booklet at pages 410 to 421. No statement appears to have been obtained from Ms Flannery.

132. The Tribunal may have been helped by having the opportunity of viewing the CCTV footage. Mr Griffiths explained that the CCTV footage was downloaded to a memory stick to enable Miss Burgess and others to view it. However, this was overwritten and not kept. The stick was returned to the respondent's security lead David Kiddy. He was not told to keep it. This is unfortunate and doubtless the respondent will reflect upon their practice around the retention of CCTV footage when such incidents occur. The respondent knew (or at least ought to have known) that the claimant was contemplating Employment Tribunal proceedings as ACAS was (as we said in paragraph one of these reasons) contacted for the purposes of early conciliation as early as 16 November 2022. As we say, it is most unfortunate that, in those circumstances, the CCTV was not retained.

133. We now turn to Miss Burgess' second report. This is at pages 333 to 358 of the bundle.

134. Miss Burgess' conclusion was that the respondent ought to consider disciplinary action arising out of her findings.

135. The blood pressure reading incident involved a patient whom we shall refer to as *'C.'* This occurred on 21 October 22. A blood pressure reading of 77/44 was recorded which was concerning. No further action was taken. The blood pressure reading was taken by Miss Obiorah. Miss Burgess said that with a blood pressure reading so significantly low, the reading should be repeated and then a doctor called if needed. The claimant said before the Tribunal that he put the readings for C on the notes of another patient 'D.'

136. The claimant accepted before the Tribunal that he appeared to have mixed up the patients' notes (albeit Miss Burgess said that he did not accept this at the time of her investigation).

137. The next incident was the inappropriate use of medication. This was on the same night as the incident involving C. The medication incident concerned patient D. The medication *Gaviscon* was administered by the claimant which is inappropriate because the patient was complaining of stomach ache. The claimant is recorded as having accepted that he missed some relevant information from D's medical notes and that the use of *Gaviscon* was contra-indicated.

138. It appears that D's blood pressure was sought taken by the claimant. D refused to have a blood pressure test when requested as there was nothing wrong with his blood pressure. (The reason for the request of D was that C's blood pressure reading had been incorrectly put on to D's notes).

139. At all events, there appears to have been a mix up and, in any case, there was no evidence that the patient with the unusually low blood pressure had been asked for a repeat blood pressure test. The wrong patient had been asked for the purported repeat blood pressure reading (or, at any rate, had been asked for a repeat reading). Miss Burgess told us that she was by this stage greatly concerned about the claimant's practice. She accepted that a one-off mix up would not have been a matter of great concern but, as she put it, it was *"one thing after another"* in relation to the claimant's professional practice. She accepted that Elizabeth Obiorah had countersigned for the administration of Gaviscon and

therefore the inappropriate medication was not the claimant's mistake alone (nor was the mix up with the blood pressure readings).

140. The next issue was that described by the respondent as *"untrue documentation."* This is to do with the head injury sustained by B. It appears from her investigation (at page 336) that Miss Burgess spoke to all three staff on shift (the claimant, Ms Tasnim and Beth Gatus). She found that it was in order that *"one staff nurse"* could take the *"responsibility and accountability to make a retrospective entry and complete the incident report along with reporting the matter to the family".*

141. The criticism of the claimant appears to be that he had not documented the incident. Miss Burgess said in the report (at page 337) that "*As the nurse on shift [the claimant] is required to know the current risk and incident status on the ward to make a clear and accurate documented account in the young person's daily notes. [The claimant] did not take responsibility the following day to have this actioned by support staff."* By '*nurse on shift'* we understand Miss Burgess to be saying that the claimant is the nurse in charge and hence accountable. Miss Burgess approached Ms Gatus who reported that she was present and would make a retrospective entry. Miss Burgess then goes on to record as another matter of concern that the claimant wrote the pink note entry with no mention of an incident/head injury. It is acknowledged (at page 337) that the claimant did take accountability the following night to ask Ms Tasnim to make the retrospective entry. *(It is not wholly clear to the Tribunal whether both Ms Gatus and Ms Tasnim wrote retrospective entries. Miss Burgess suggested that they each did: Ms Gatus wrote a pink note entry and Ms Tasnim made an entry on IMS. This appears to be corroborated by Miss Burgess's report at page 336 where she refers to "support staff" having signed the pink note and IMS. At all events, whether they did or not cannot detract from Miss Burgess's criticisms of the claimant).*

142. We can see the relevant pink note concerning B at pages 354. This is dated 19 October 2022 (the night of the incident). The claimant has written "*N/a"* in the section concerning incidents and safeguarding matters. In evidence before the Tribunal, Miss Burgess said that it was the claimant's responsibility as nurse in charge to check with the members of staff as to whether there had been any untoward incidents during the shift which needed to be recorded. Miss Burgess said that this was good nursing practice, and the claimant is accountable when he signs the medical notes. He had not checked, otherwise he would not have written *N/a.*

143. Miss Burgess told the claimant (during the investigation meeting into these matters held on 14 November 2022) that he had misunderstood her instruction given at the time of the incident. The investigation meeting notes are at page 340 to 342. The claimant said that Miss Burgess had asked him to input into the pink notes a retrospective entry which is what he did as he was a nurse on the shift. Miss Burgess replied, *"no what I asked was that whoever dealt with the incident needed to input the entry into the pink notes."* The claimant replied*, "what I took from that was the nursing team someone needed to input so I did it. Dumi [Ndhlovu] and I discussed it and Naz [Tasnim] did the entry as she was there, but I signed, countersigned it."*

144. Miss Burgess justified the decision not to take any disciplinary action against Beth Gatus upon the basis that she had taken responsibility that evening for not documenting the injury at the time. Beth Gatus had agreed to make a

retrospective entry. During his cross-examination of Stacey Burgess, the claimant maintained that he had asked Beth Gatus and Nazia Tasmin if anything had happened during the shift, and they had told him not. This key piece of information was omitted from the record of the investigation meeting at pages 340 to 342 and also in the claimant's email to Emily Merrick of 28 November 2022 where he corrects those minutes (pages 327 and 328). It is surprising that the claimant did not mention it in the minutes or the email of 28 November 2022. We find as a fact that the claimant did not ask Beth Gatus and Nazia Tasmin if anything had occurred before signing off the pink note at 05:34 on 19 October 2022 (at page 354) to the effect that nothing had occurred. We find that he was not told of the incident involving B by Ms Gatus and Ms Tasmin that evening.

145. The claimant was concerned there was no mention of Beth Gatus within the minutes themselves. This is a reasonable point. The claimant said that the minutes gave the impression that he was present when the head injury was sustained. This may be a reasonable interpretation of the minutes but in the final analysis Miss Burgess accepted that he was not present. The claimant's error was in failing to verify with the two others that nothing untoward had occurred on the shift and therefore incorrectly documenting the record relating to B to this effect. This was a finding open to Miss Burgess based upon her information. (*She was not party to the email of 23 October 2023 referred to in paragraph 149 below).*

146. The claimant also cross-examined Stacey Burgess and Tom Griffiths about an incident involving Beth Gatus on another occasion. This concerned an allegation that she had thrown keys at a black team leader. Mr Griffiths said that she had not thrown keys at him but rather had thrown some keys down (but not in his direction). He denied that she had been demoted because of her actions. She had been allowed to move to the Pegasus Ward from the Unicorn Ward with a change in capacity as staff nurse for her own welfare and benefit. The Tribunal accepts the respondent's evidence upon this issue. There was nothing to corroborate the claimant's belief that Beth Gatus had thrown keys at a colleague.

147. Miss Burgess asked the claimant, at the investigation meeting of 14 November 2022, about contact made by him with Elizabeth Obiorah after the suspension. There do appear to have been some calls to her in the call log at pages 319 and 319. At all events, the claimant accepted that he had asked Ms Obiorah to add a note to the pink note log (about the incident involving the patient's blood pressure). It is clear from the text messages that Miss Obiorah was uncomfortable with what she was being asked to do by the claimant. She complained to Stacey Burgess that the claimant was looking to *"set me up".* The texts were produced during the hearing. They are all dated 27 October 2022.

148. Even though the claimant was called to an investigation meeting to discuss the issue of contacting Elizabeth Obiorah, and he was questioned about this by Stacey Burgess, she makes no recommendation or findings upon the matter.

149. On 23 October 2022, the claimant had emailed Mrs Curtis, Lisa Boyles, Emily Merrick and Bethany Hilder (pages 263 to 265). In this email, he said that he had lost confidence in Stacey Burgess' ability to be a fair and impartial ward manager and investigator. The claimant raised the following issues:

    149.1. That he had been unfairly blamed for not documenting the incident involving patient B. *(The claimant did not say here that he had asked Ms Gatus and Ms Tasmin about any untoward incident which corroborates*

our findings in paragraph 144 that the claimant had not asked them about it in his capacity of nurse in charge).

149.2. That he was unfairly blamed for errors in others' documentation concerning patient C.

149.3. He defended his medication of patient D.

149.4. That he found the supervision of Mark Moran unhelpful and that it should have been undertaken by Mr Ndhlovu.

149.5. He had received a text message from Miss Burgess concerning an exchange of messages between the claimant and a registered mental nurse April Thomas about the latter's car. The claimant was concerned that Miss Burgess had taken an innocent comment made by the claimant out of context and it was evidence of her targeting him.

149.6. That he had sought guidance from others before penning the written apology to A and then was pressured to write an apology letter and reflection log.

149.7. That Miss Burgess and Mr Moran are friends as evidenced by the fact that they attended Leigh Holmes' wedding on 15 October 2022.

150. Lisa Boyles emailed the claimant on 25 October 2022 inviting him to attend a meeting on 1 November 2022 to discuss the issues raised. In between times, on 28 October 2022, the claimant emailed to resign with effect from 19 December 2022 (page 294). He said, *"I am resigning because I am very unhappy about how I have been poorly treated during my short time on Pegasus Ward."*

151. The meeting went ahead nonetheless on 1 November 2022. The notes are at pages 296 to 303. Lisa Boyles copied and pasted the claimant's email of 23 October 2022 into her notes.

152. Lisa Boyles concluded there to be no evidence that Miss Burgess was biased. She also determined that as she was *"the majority of the way through the investigation it made sense for her to complete them"* notwithstanding the claimant's resignation. We refer to paragraph 7 of Lisa Boyles' witness statement. (The Tribunal did not of course have the benefit of hearing from her. Nonetheless, this appears to be a safe finding. It was not challenged by the claimant and appears to be uncontroversial. The fact of the matter is that Stacey Burgess was permitted by the respondent to complete her investigations).

153. Kerry Matthews' evidence, in paragraph 12 of her witness statement, was that following the conclusion of Stacey Burgess' investigation her conclusions were to be reviewed by an external colleague. This was undertaken by Joanne McAuliffe – regional nursing director (North) and assessment team manager.

154. The investigation reports were sent to Joanne McAuliffe on 12 December 2022. She reviewed the matter very quickly. She concluded there to be no evidence in the report and supporting documentation of any bias on the part of Stacey Burgess (page 428). She said that "*my belief is disciplinary action is necessary for this person as all items have been thoroughly investigated and upheld."* By way of reminder, Miss Burgess' report into the incident with A was concluded on 6 December 2022 and her report concerning the incident with B and the other matters was concluded on 1 December 2022.

155. Miss Matthews tells us that there was a discussion about whether the claimant's employment should be extended to enable him to attend a disciplinary hearing. The claimant had said on 30 November 2022 that due to the ongoing investigation and being on suspension he was unable to work elsewhere. He therefore said he was pushing back his resignation to 15 January 2023 (page 433). (The claimant had applied for a job with his new employer after he resigned from the respondent. He commenced employment with his new employer on 23 January 2023).

156. On 13 December 2022, Miss Hilder emailed the claimant to confirm there was nothing stopping the claimant from working elsewhere before the outcome meeting was held (page 434). She recommended keeping the new employer up to date with any relevant developments. The claimant replied the same day to say he did not think that an outcome meeting would be necessary (page 434). Reassured that he could work elsewhere after 19 December 2022, the idea of deferring the resignation date went away at that stage.

157. On 19 December 2022 Miss Hilder wrote to the claimant (page 445). This letter said, "*I am writing to let you know that the investigation has been concluded and the recommendation is to proceed to a disciplinary hearing. No outcome has been reached at this stage. We would normally invite you to a disciplinary hearing in order to reach an outcome but given that you have resigned and your leave date is 19 December 2022 there is unfortunately no time to schedule the disciplinary hearing. Any employment reference request will state that you resigned pending an investigation."* The claimant replied on the same day resurrecting his request to defer the date of termination to 15 January 2023 (page 448).

158. On 20 December 2022 Laura Nelson, HR manager, emailed Bethany Hilder (page 446). This obviously was sent the day after the letter to the claimant at page 445. Miss Nelson said that she would have given the claimant the option to attend a meeting *"on the basis of a disciplinary hearing whereby an outcome could be reached".* She acknowledged that there would be no meaningful sanction as he was no longer in employment, but it would have been open to the respondent to say *"had you have been in employment then you would have been issued with X, Y and Z."* She acknowledged there to have been some delays with the investigation process and had it been concluded sooner then the claimant would have had an outcome. She was concerned this *"pose[d] a risk if it will affect his future employment and we can't justify the delays to the investigation."*

159. Taking on board this advice, Bethany Hilder emailed the claimant on 21 December 2022 (page 451). She wrote:

> *"For further clarity, the investigation has been concluded, and had you have remained in employment you would have been invited to attend a disciplinary hearing. The allegations that would have been considered at a disciplinary hearing would have been in relation to the following investigations:*
>
> - *Errors with the use of seclusion.*
> - *Inappropriate interpretation of blood pressure readings and not acting on the results.*
> - *Inappropriate use of medication.*

- *Untrue documentation.*

I appreciate that you had requested for your notice to be extended and we have already shared our position regarding this – your leave date of 19 December 2022 remains unchanged, and we have backfilled your position."

160. On 16 December 2022 Kerry Matthews recorded that it was the view of Miss McAuliffe that the claimant's actions did not warrant an NMC referral. It appears from this email that that was also Mr Griffiths' view.

161. The claimant named an Asian nurse, Aneesa Mahmood as another comparator. The claimant complained that she was not suspended in circumstances where she had omitted to give medication to a high-risk patient. The claimant said, *"had it been me, I would have been dismissed."* The claimant's case is that she was more favourably treated as she was allowed the flexibility of movement (to change ward to Griffin). The respondent's justification was that Miss Mahmood felt burnt out by work and there were other issues affecting her performance, and there were no grounds upon which to suspend her.

162. The claimant accepted that he felt under a great deal of stress towards the middle of July 2022. It was this which had prompted the discussions which took place on 14 July 2022. The claimant said that the respondent's actions from October 2022 until the end of his employment were calculated to cause him psychiatric distress.

163. The claimant produced no medical notes in support of his injury to feelings claimed. He accepted that a suspension and the prospect of a disciplinary hearing would cause distress to anyone.

164. The claimant pleaded (at page 25 of the bundle) that he was motivated to resign, at least in part, by the respondent's alleged institutional racism and at page 27 again alleged that the respondent is institutionally racist. In support of his case, the claimant sought to rely upon a workplace survey in which a question is asked about bullying and harassment at the hands of members of the public and from managers and team leaders. It is right to observe that, regrettably, instances of racial abuse at the instigation of patients are high. 101 responses were received by the respondent in answer to the question about racist abuse by patients. 38% of those responses cited racial abuse. Only 24 responses were received to the question about bullying and harassment from managers and team leaders. Of those 24 responses, only 8% reported racial abuse. On any view, therefore, that is too small a small sample size from which institutional racism can be inferred.

165. The respondent produced a table on 24 August 2023. This shows those employees for the year from October 2021 who had been subjected to suspension, investigation or disciplinary action. Mrs Curtis gave evidence about this. From this, it is right to say there is no evidence of targeting one racial group over another. No adverse trends could be discerned from this statistical information.

166. This concludes our findings of fact.

The relevant law

167. The Tribunal shall now set out the relevant law. The claimant pursues complaints of direct race discrimination and harassment related to race. We shall look at the individual allegations of direct discrimination and harassment shortly. The same

nine allegations are raised by the claimant as acts of race discrimination and harassment.

168. By section 212(5) of the Equality Act 2010, *"Where this Act disapplies a prohibition on harassment in relation to a specified protected characteristic, this application does not prevent conduct related to that characteristic from amounting to a detriment for the purposes of discrimination within section 13 because of that characteristic."* Section 26 of the 2010 Act does not disapply a prohibition on harassment in relation to race. It follows therefore that a complainant pursuing a complaint both of harassment related to race and direct race discrimination cannot succeed upon both. There is nothing wrong with the claims being brought in the alternative. As Mr Proffitt said in his submissions, the usual practice of the Tribunal will be to consider the complaints of harassment first. The Tribunal shall follow that course within these reasons.

169. By section 26 of the 2010 Act, a person (A) harasses another (B) if a engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

170. In deciding whether conduct has the effect of violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B, then, by virtue of section 26(4) of the 2010 Act, each of the following must be taken into account:

- The perception of B;
- The other circumstances of the case;
- Whether it is reasonable for the conduct to have that effect.

171. The statutory words ('*violating, intimidating, hostile, degrading, humiliating or offensive'*) are strong words. As was observed by Elias LJ in **Grant v HM Land Registry** [2011] EWCA Civ 769 Tribunals must not *"cheapen"* those words. This is really to emphasise the statutory purpose of section 26(4). As was said by the Employment Appeal Tribunal in **Richmond Pharmacology v Dhaliwal** [2009] ICR 724 when considering whether the unwanted conduct had the effect of violating dignity or creating an intimidating etc environment the complainant must have felt, or perceived, their dignity to have been violated or an adverse environment to have been created. The Tribunal must then go on to consider whether it was reasonable for the claimant to have those feelings or perceptions.

172. Harassment (as defined in section 26 of the 2010 Act) is made unlawful in the workplace by section 40 of the 2010 Act. This provides that an employer (A) must not in relation to employment by A, harass a person (B) who is an employee of A's.

173. There are three elements of a harassment claim. Firstly, it must be shown that there was unwanted conduct. Secondly, the conduct needs to have the proscribed purpose or effect. Thirdly, the conduct must relate to a relevant protected characteristic. In **Richmond Pharmacology** Underhill P expressed the view that it would be a *"healthy discipline"* for a Tribunal in any claim alleging unlawful harassment to address in its reasons each of these three elements.

174. The Equality and Human Rights Commission's *Employment Code* notes that unwanted conduct can include a wide range of behaviour. The conduct may be

blatant such as for example bullying or more subtle (for example ignoring or marginalising an employee).

175. The word *"unwanted"* is not defined in the 2010 Act but is essentially the same as *"unwelcome"* or *"uninvited"*. This is confirmed by the EHRC's Code (at paragraph 7.8). Whether the conduct is *"unwanted"* should largely be assessed subjectively from the employee's point of view *per* **Thomas Sanderson Blinds Ltd v English** [EAT 0316/10] upon the basis that the conduct has to be unwanted from the perspective of the employee.

176. The second limb of the statutory definition of harassment requires that the unwanted conduct in question has the purpose or has the effect of violating the complainant's dignity or creating an intimidating etc environment for them. Conduct that is intended to have that effect will be unlawful even if it does not in fact have that effect.

177. The test of whether the conduct in question has the effect of violating a person's dignity or creating an intimidating etc environment for them has subjective and objective elements. The subjective part involves the Tribunal looking at the effect that the conduct of the alleged harasser has upon the complainant. The objective part requires the Tribunal to ask itself whether it was reasonable for the complainant to claim that the conduct had that effect.

178. The other relevant circumstances of the case should also be taken into account. The EHRC Code notes that relevant circumstances may include those of the complainant, such as their health, including mental health and previous experiences of harassment. It can also include the environment in which the conduct takes place.

179. In order to constitute unlawful harassment, the unwanted conduct must be related to a relevant protected characteristic. However offensive the conduct, it will not constitute harassment unless it is so related. Whether or not the conduct is related to the characteristic in question is a matter for the appreciation of the Tribunal, making findings of fact and drawing upon the evidence before it.

180. The Tribunal now turns to a consideration of the complaint of direct discrimination. By section 13 of the 2010 Act 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. The relevant protected characteristic in this case is of course race.

181. Direct discrimination is made unlawful in the workplace pursuant to section 39(2) of the 2010 Act. This provides that an employer (A) must not discriminate against an employee of A's (B) by (amongst other things) subjecting B to any other detriment.

182. Upon a comparator of cases for the purposes of section 13 of the 2010 Act, there must be no material difference between the circumstances relating to each case. Therefore, in order to claim direct discrimination under section 13, the claimant must have been treated less favourably than a comparator who is in the same, or not materially different circumstances to the claimant.

183. A successful discrimination claim depends upon the Tribunal being satisfied that the claimant was treated less favourably than a comparator because of the relevant protected characteristic. It is for the Tribunal to decide as a matter of fact what is less favourable. This is an objective test – the fact that a claimant

believes that they have been treated less favourably does not of itself establish that there has been less favourable treatment.

184. In the absence of a statutory comparator – that is to say, an actual comparator who is in materially the same circumstances as the claimant and who has not suffered the same treatment – the question of less favourable treatment may be determined by reference as to how a hypothetical comparator would have been treated. However, there must be some evidential basis for this. It is not open to a complainant simply to make an assertion that somebody with a different protected characteristic would have been treated better. There must be evidence of others whose circumstances are not sufficiently similar to warrant them being treated as actual statutory comparators, but who are sufficiently relevant for inferences to be drawn from the way they had been treated.

185. Essentially, upon a consideration of the direct discrimination complaints, it is for the Tribunal to decide factually upon the treatment received by the claimant, whether the treatment was or would have been less favourable than that of others who do not share the complainant's protected characteristic and the reason for that treatment. Was the complainant treated less favourably because of a protected characteristic?

186. The key issue is the reason why the complainant was treated as he was. A complaint of direct discrimination will only succeed where the Tribunal finds that the protected characteristic was the reason for the claimant's less favourable treatment. This may involve a consideration of the mental processes, conscious or subconscious, of the alleged discriminator to discover what facts operated on their mind. The protected characteristic need not be the only reason for the less favourable treatment provided it is an effective reason.

187. In **Madarassy v Nmoura International Plc** [2006] EWCA Civ 371, Mummery LJ explained that the bare facts of a difference in status or treatment only indicates a possibility of discrimination. They are not without more sufficient material from which a Tribunal *"could conclude"* that on the balance of probabilities the respondent has committed an unlawful act of discrimination.

188. Complaints of harassment do not depend upon the claimant establishing less favourable treatment in comparison to another (as with complaints of direct discrimination). However, the shifting burden of proof in section 136 of the 2010 Act applies to harassment complaints as well as complaints of direct discrimination.

189. By section 136 of the 2010 Act, upon a complaint of discrimination or harassment, it is for the complainant to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an unlawful act. Only once the burden of proof has shifted is the respondent required to prove that discrimination was in no sense whatsoever the reason for the treatment.

190. In his written submissions, Mr Proffitt referred to the case of **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] UK HL 11. The passage referred to by Mr Proffitt was in support of the proposition that an actual comparator must be in the same position in all material respects as the claimant save that they do not share the protected characteristic. Where there is a materially different circumstance, a hypothetical comparator must be used. **Shamoon** is helpful upon the issue of the burden of proof. Plainly, it pre-dates

the statutory burden of proof rules to be found in section 136 of the 2010 Act. The principles in **Shamoon** nonetheless hold good.

191. Lord Nicholls said in **Shamoon** that the sequential two stage analysis may give rise to needless problems. He said that *"Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues intertwined."* A Tribunal may therefore focus upon the reason why and proceed to the second stage of the burden of proof enquiry which requires the respondent (per **Igen Limited and Others v Wong and Others** [2005] ICR 931, CA) to prove on the balance of probabilities that the treatment of the complainant was in no sense whatsoever based on the protected ground.

192. As the claimant observed in paragraph 72 of his written submissions, the Tribunal must determine the reason why the complainant was treated as he was. Authority for this proposition may be found in **Nagarajan v London Regional Transport** [1999] ICR 877, HL. Lord Nicholls said in that case that *"If racial grounds … had a significant influence on the outcome, discrimination is made out. The crucial question in every case was "why the complainant received less favourable treatment … was it on the grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?""*

Discussion and conclusions

193. We now turn to the issues in the case. We shall deal with the nine allegations in turn. The Tribunal shall apply the relevant law to the facts as found to reach conclusions upon each of the issues raised by the claimant.

194. The first allegation of harassment which we shall consider are those at sub-paragraphs 8.1.1, 8.1.2 and 8.1.3 of paragraph 35 of the case management order at pages 45 to 55 of the bundle. (It is in paragraph 35 that Employment Judge Maidment set out the issues in the case).

195. It is convenient to take sub-paragraphs 81.1., 8.1.2, and 8.1.3 together as they all arise from the events of 14 July 2022. They are as follows:

"8.1.1. On 14 July 2022, Tom Griffiths and Gillian Kaye downplaying the incidents reported by the claimant.

8.1.2. On 14 July 2022, Tom Griffiths telling the claimant to leave the Cygnet Hospital Sheffield.

8.1.3. On 14 July 2022, the respondent's initial resistance to the claimant moving from LSU to the Pegasus Ward." (The reference to "LSU" is to the Griffin Ward).

196. The factual findings upon these issues may be found principally in paragraphs 64 to 81.

197. Tribunals are encouraged *per* **Richmond Pharmacology** to consider the three elements of the harassment complaint sequentially. The first question therefore (upon the issue in sub-paragraph 8.1.1) is whether Mr Griffiths and Gillian Kaye downplayed the incidents reported to them by the claimant at the welfare meeting held on 14 July 2022 and whether this was unwanted conduct. The question of whether the conduct is unwanted should largely be assessed subjectively from the perspective of the complainant.

198. It is right to observe that the claimant had asked for a welfare meeting due to him feeling anxious about unsafe and stressful working conditions on Griffin Ward

(paragraph 60). He therefore called for and wanted the meeting. However, he was disappointed as his perception was that the severity of the incidents was being downplayed. The Tribunal therefore accepts that the claimant was disappointed with what he was being told at the welfare meeting and to that extent therefore the conduct was unwanted.

199. The Tribunal finds that the conduct at the welfare meeting was not done with the purpose of violating the claimant's dignity or creating an intimidating etc environment for him. In fact, the reverse was the case. As we have said, the claimant called for a welfare meeting. This was granted by the respondent. The respondent acceded to the claimant's request for Alicia Curtis not to attend the meeting. Mr Griffiths and Gillian Kaye spent an hour with the claimant contextualising the work undertaken by the respondent.

200. Had it been the intention of the respondent to create an intimidating etc environment for the claimant or to act in violation of his dignity the respondent would not have acted in such a supportive manner. Not only did Mr Griffiths and Gillian Kaye take time to see the claimant, but positive suggestions were also made for the improvement of the claimant's clinical practice for the benefit of the claimant's career, a move of wards was agreed coupled with the assurance that if the claimant did not wish to work with the risk presented on Pegasus Ward the respondent could look at other opportunities within the group. These are not the actions of an unsupportive employer intent upon violating an employee's dignity or creating an intimidating etc environment for him.

201. For the same reasons as in paragraph 200, whilst subjectively the Tribunal finds in the claimant's favour that the conduct was unwanted, we do not find that the unwanted conduct could reasonably be said to have had the effect of violating the claimant's dignity or creating an intimidating etc environment for him. Mr Proffitt was right to remind the Tribunal of the *dicta* of Elias LJ in **Grant** that the language in section 26 (1)(b) contains strong words the meaning of which must not be cheapened. We accept that Mr Griffiths and Gillian Kaye were seeking to be supportive of the claimant. This is far from acting in violation of his dignity or creating an intimidating etc environment for him.

202. As we said in paragraph 81, the agreement to the ward move corroborates the Tribunal's findings that Mr Griffiths did not threaten the claimant's position. The claimant asked for a move of wards. This was granted to him. These are not the acts of an employer acting in violation of an employee's dignity or creating an intimidating etc environment for them. The position is to the contrary. A refusal to permit a move of wards (where such is possible) leaving the employee in a hostile environment may reasonably have that effect.

203. Mr Griffiths attempted to put the claimant's concerns in the context of working in a secure mental health hospital. Mr Griffiths has far more experience of matters than did the claimant. Mr Griffiths was seeking to supporting the claimant by encouraging him to adopt modern practices and follow the respondent's policies and procedures at an early stage in the claimant's career. This could only be of benefit to the claimant. Mr Griffiths acknowledged the claimant's concerns that the Griffin Ward was not the right environment for him and granted him a move. Mr Griffiths was also alive to the possibility of Pegasus (being a more challenging environment) likewise being unsuitable for the claimant.

204. This signals that Mr Griffiths objectively was not downplaying the claimant's concerns but on the contrary was alive to them (particularly upon the issue of

safety). We find that Mr Griffiths was concerned that the challenging environment entailed by working at Cygnet Sheffield may not be the best match for the claimant's skills. Mr Griffiths left the door open for a possible move within the respondent's group of companies should matters not work out on Pegasus.

205. There is an irreconcilable tension in the claimant's case between his allegation that the respondent wished him to leave altogether while at the same time the respondent agreed to a move from Griffin to Pegasus. An employer set upon managing employee out would be unlikely to be so helpful.

206. We find that the conduct of Mr Griffiths and Gillian Kaye on 14 July 2022 was in no way related to the claimant's race. It is not clear how the claimant says that it was. It was related entirely to the claimant's wish to have a welfare meeting to discuss his concerns.

207. The claimant raised no complaint at the time that Mr Griffiths or Gillian Kaye conducted themselves in such a way as to constitute harassment related to race. We refer to the claimant's email at page 219 of the bundle. As we have said in paragraph 79, the claimant did not take issue what was said by Mr Griffiths in the email of 15 July 2022 recording what had occurred at the welfare meeting the previous day. Given the claimant's propensity to complain about the conduct of colleagues (as recorded for example in paragraphs 32 to 37 and paragraph 62) it would be surprising were the claimant to make no complaint about something as serious as harassment related to race if it had occurred. The claimant's failure to do so is, in our judgment, telling.

208. The allegation at sub-paragraph 8.1.2 that Mr Griffiths told the claimant to leave the Cygnet Hospital Sheffield fails on its facts. We find that the claimant was not told to leave by Mr Griffiths. The position is summarised in paragraph 79. We also observe that were the respondent intent upon the claimant leaving, then one may have expected action to have been taken about the claimant's abrasive communication style and/or out of the incident involving Tutu Nyadongo referred to in paragraphs 50 and 51. Further, there were several incidents along the way which may have caused the respondent to contemplate disciplinary action against the claimant were they intent upon managing him out. We refer for example to the drug error (in paragraph 55) and the inappropriate language used by the claimant about the respondent's patient (referred to in paragraph 58).

209. We find that there was no resistance to the claimant moving from the Griffin to the Pegasus Ward. This allegation (at sub-paragraph 8.1.3) therefore also fails upon the facts. The claimant was notified the very next day following the welfare meeting that the move had been agreed (paragraph 75). There was a process to be followed. This involved Stacey Burgess completing a supervision with the claimant prior to the claimant's start date. This was arranged quickly. It took place on 29 July 2022. Therefore, the respondent agreed to the move very quickly and put in hand arrangements to facilitate it within a reasonable timeframe.

210. As the allegations at sub-paragraphs 8.1.2 and 8.1.3 have failed upon the facts, the Tribunal is not required to conduct the three-stage analysis per **Richmond Pharmacology.** There can be no unwanted conduct in Mr Griffiths asking the claimant to leave Cygnet Sheffield where this did not happen (on our findings). Likewise, there can be no resistance to the claimant moving to the Pegasus Ward where on our findings no such resistance took place.

211. We now move on to the issue at sub-paragraph 8.1.4 of the list of issues. This is that on 4 October 2022 the claimant was told to write an apology letter to patient A for having secluded her. It is convenient to consider, at the same time, the allegation in sub-paragraph 8.1.5 which is that the claimant was investigated regarding the seclusion of A. The findings of fact are in paragraphs 91 to 107 and 113 to 132. Those findings pertaining to the letter of apology are at paragraphs 93 to 97.

212. The Tribunal accepts that being asked to write a letter of apology was conduct which was unwanted from the perspective of the claimant. He makes no claim that being asked to write a reflective piece was unwanted conduct. It would be difficult to see how that could be unwanted given the claimant's wish to pursue a career as a nurse and be part of a regulated profession. It was not clear to the Tribunal that the claimant knew that the letter of apology was not intended to be sent. As we said in paragraph 97, the claimant was concerned that writing a letter of apology may downplay A's behaviours. Whatever the rights and wrongs of the requirement for him to write a letter of apology, it is clear from the evidence that the claimant found this to be a difficult request to make of him in circumstances where he considered that he had done nothing wrong. Being asked to write a letter of apology in those circumstances must be unwanted conduct.

213. The Tribunal does not accept that the request made of the claimant to write a letter of apology was made with the purpose of violating his dignity or creating an intimidating etc environment for him. There is no evidence that it was done for this purpose. We accept Stacey Burgess' evidence that the writing of a letter of apology was part of the reflective process policy adopted by the respondent (referred to in paragraph 55). Miss Burgess said that the purpose of the letter of apology and the reflection log was not about apportioning blame but about learning lessons. This the Tribunal accepts as it is consistent with the NMC practice as explained by Mrs Curtis

214. Having ruled that the request was not done with the purpose of violating the claimant or creating an intimidating etc environment for him the next issue is whether it reasonably had that effect. For the same reasons for our finding in paragraph 212 that it was unwanted conduct, we have determined that the request to write a letter of apology was a violation of the claimant's dignity and created a humiliating environment for him. It was not made clear to the Tribunal by the respondent why a letter of apology was required in addition to the writing of a reflective piece.

215. However, we find that the claimant being told to write a letter of apology was in no way related to the claimant's race. We accept that Ms Burgess had concerns about how A's return to the ward on 24 September 2022 was handled. The claimant was the nurse in charge. He was accountable. It was those concerns which led her to meet with the claimant and request him to write a reflective piece and a letter of apology. Ms Burgess' request was made pursuant to the respondent's policies which followed an NMC guidance. There is simply nothing to suggest that the claimant's race played any part whatsoever in Miss Burgess' decision making.

216. We accept that the respondent's decision to investigate the claimant regarding the seclusion of A was unwanted conduct from his perspective. Plainly, most employees would not welcome being the subject of an investigation.

217. We are satisfied that this was not done with the purpose of violating the claimant's dignity or creating an intimidating etc environment for him. The respondent's intention in escalating matters to an investigation was because of concerns which they held that the claimant appeared not to understand why seclusion was unjustified. Miss Burgess was concerned that the claimant appeared resistant to preparing the letter of apology and the reflection piece and lacked insight.

218. We accept that being subject to an investigation process reasonably had the effect of violating the claimant's dignity and of creating a hostile environment for him. This is often the case where an employee is subject to an investigation. It is almost inevitable, in our judgment, that such an employee will experience the working environment as less conducive and unwelcoming in those circumstances.

219. Again, the Tribunal finds there to be no connection between the unwanted conduct or subjecting the claimant to an investigation about the incident involving A on the one hand and his race on the other. The decision to move on a stage to an investigation was not in any way related to the claimant's race. It was entirely related to the respondent's perception that the claimant was resistant to the respondent's reflection process, failed to take accountability for his actions on the evening of 24 September 2022 and demonstrated a lack of understanding as to why a seclusion was unjustified. As we noted in paragraph 23 of these reasons, the respondent's policy says that seclusion must be used as a last resort and as an emergency response only. Emphasis is given to this part of the policy by way of underlining (as we saw in paragraph 23).

220. The claimant plainly felt that seclusion was warranted that evening. Miss Burgess was concerned that seclusion was not justified and that the claimant had acted contrary to the respondent's policies. There was a difference in professional clinical opinion between them. Subjectively, the claimant may have felt that the respondent's actions in having him write reflective pieces and subjecting him to an investigation were uncalled for and heavy-handed. We do accept that Miss Burgess had genuine and well-founded concerns about the claimant's conduct and understanding of the plan upon A's return to Cygnet Sheffield. Those concerns were unrelated to the claimant's race and were the reasons why she acted as she did. There is nothing to suggest that consciously or sub-consciously she was in any way influenced by the claimant's race.

221. The next issue is at sub-paragraph 8.1.6. This is "*On 19 October 2022, singling out and blaming the claimant for not documenting patient B's headbanging incident on 18 October 2022."*

222. The findings of fact about this incident are at paragraphs 108 and 109 and 140 to 145.

223. This allegation fails on the facts in so far as it alleges that the claimant was singled out around this incident. It is clear from our factual findings that he was not. Stacey Burgess made enquiries of all three members of staff involved (the claimant, Beth Gatus and Nazia Tasnim). The claimant was the most senior of the three as the nurse in charge. Ms Gatus and Ms Tasnim both accepted that their documentation arising from the incident had been insufficient and took responsibility to write retrospective entries.

224. The claimant was held responsible by Miss Burgess as the nurse in charge for having failed to check with the other two staff members that no untoward incidents

had occurred that evening and (by reason of having failed to undertake that to check) making an entry in the record at page 354 to the effect that no incidents had taken place. It was for that that the claimant was investigated and not for the headbanging incident itself. It follows therefore that the claimant was not singled out for treatment arising out of the incident involving B. We do accept however that Miss Burgess sought to attribute some blame to the claimant for not properly documenting matters that evening.

225. To that extent, therefore, it follows that Ms Burgess apportioning blame to the claimant (in the sense that he was subjected to suspension and investigation arising from it) was unwanted conduct. No employee wishes to be suspended or blamed for an incident. On any view, a suspension is unwelcome and uninvited conduct on the part of an employer towards an employee.

226. We accept that Miss Burgess did not take this step with the purpose of violating the claimant's dignity or creating an intimidating etc environment for him. Miss Burgess' motivation for suspending the claimant arose from concerns which she had about the claimant's clinical practice. As we said in paragraph 139, it was her evidence that it was *"one thing after another"* about the claimant's professional practice. The claimant was not suspended solely because of the issue documenting the headbanging incident involving B. We accept that this was a material influence in her decision to suspend. The purpose of the suspension was to remove the claimant from the workplace pending an investigation into his clinical practice.

227. We accept the claimant's case that not only was this unwanted conduct but that it reasonably had the effect of violating his dignity or creating an intimidating etc environment for him. The Tribunal takes judicial notice of the fact that the removal of an employee by way of suspension is recognised as bringing with it a stigma. Being deprived of the ability to carry out one's occupation or profession is a violation of dignity. Again, in such circumstances, the workplace becomes a less welcoming environment and upon this basis therefore we find that the suspension of the claimant arising (in part) out of the incident involving B was unwanted conduct which reasonably had the effect of violating dignity and creating an intimidating etc environment for the claimant.

228. The difficulty for the claimant is that there is nothing to link that unwanted conduct to his race. As with the investigation into patient A, Stacey Burgess' decision making was rooted in her concerns about the claimant's professional practice. The reason for the suspension was made clear (as we said in paragraph 109). Miss Burgess was justifiably concerned that the claimant had failed to ask the two support workers about the welfare of B (and for that matter the other patients). While we accept that the claimant was not informed by them that an untoward incident had occurred, it is his responsibility as nurse in charge to ask before documenting to that effect. There was a lack of professional curiosity on the claimant's part which on the face of it was a failing in his professional practice. That, coupled with the incidents involving the patient's C and D (paragraphs 137 to 139) led Ms Burgess to suspend the claimant. The respondent of course has a professional duty of care to the patients. They are duty bound to step in and take action against members of staff where there may be failings.

229. The next issue is at sub-paragraph 8.1.7. This is that "*On 20 October 2022, the provision of supervision/feedback from Mr Moran who had worked only once with the claimant rather than from Mr Ndhlovu who had worked a significant number*

of shifts with him, ensuring that those nurses and senior support workers who provided feedback to Mr Moran were all white and failing to ask any black nurses for feedback."

230. The relevant findings of fact are at paragraphs 85 to 88 and paragraph 124.

231. The allegation that only white members of staff may provide feedback to supervisors fails upon the facts. As we saw in paragraph 124, Elizabeth Obiorah (a black nurse) provided feedback about the claimant to Victoria Higgins-Kay who in turn passed that feedback on to Mr Moran.

232. The claimant is factually correct that Mr Moran had only worked once with the claimant whereas he had worked on a significant number of occasions with Mr Ndhlovu. This is accepted by the respondent. We can therefore accept that the appointment of Mr Moran as the claimant's supervisor was unwanted conduct from the claimant's perspective.

233. We find that the respondent did not appoint Mr Moran with the purpose of violating the claimant's dignity or creating an intimidating etc environment for him. The reason for his appointment was that he was new to the hospital and could approach matters with a fresh pair of eyes (see paragraph 85). Further, Miss Burgess said in evidence (which we accept, there being nothing to the contrary) that Mr Ndhlovu had in any case declined the opportunity of supervising the claimant upon the basis that they were friends, and it would therefore be inappropriate.

234. The Tribunal does not accept that the appointment of Mr Moran as the claimant's supervisor reasonably had the effect of violating the claimant's dignity or creating an intimidating etc environment for him. The reason for Mr Moran's appointment was explained to the claimant by Stacey Burgess on 21 October 2022 (pages 273 and 274). She told the claimant that Mr Moran was independent and new to the respondent. She assured the claimant that Mr Moran was there to support him.

235. Mr Moran was new to the respondent and accordingly the claimant cannot have had any prior dealings with him. The objection to Mr Moran supervising him was articulated by the claimant in the email to Stacey Burgess of 21 October 2022 (at pages 274 and 275). While the claimant starts off on a positive note (commenting upon the *"straightforwardness of the conversation"*) he then goes on to say that Mr Moran was more *"fault seeking than anything else".*

236. There can be nothing wrong with Mr Moran raising the issues of concern which had been raised with him by Victoria Higgins-Kay (at pages 259 to 260). He would be failing in his duties as supervisor not to mention them.

237. During his cross-examination of Ms Burgess, the claimant suggested that the email from Victoria Higgins-Kay (at pages 259 and 260) have been fabricated. This was a baseless allegation.

238. Accordingly, there was no reasonable basis for the claimant's perception that the appointment of Mr Moran as his supervisor was a violation of his dignity or created an intimidating etc environment for him. It is a reasonable requirement for those working in the claimant's role to have a supervisor. The claimant was not singled out for supervision in circumstances where others were allowed to work unsupervised. It being the norm, it is difficult to see how the allocation of a

supervisor to the claimant can be a violation of dignity or can create an intimidating etc environment.

239. The only objection that the claimant had to Mr Moran appears to be that he (Mr Moran) is white. There being no suggestion that Mr Moran was in any way unsuitable to act as the claimant's supervisor, this cannot reasonably form the basis of a belief in a violation of dignity or the creation of an intimidating etc environment. We agree with Mr Proffitt that the fact of Mr Moran doing the claimant's supervisions is an innocuous act properly explained by Miss Burgess. The claimant may not have welcomed Mr Moran giving feedback to the claimant at his supervision about the matters relayed to Victoria Higgins-Kay. However, as Mr Moran would be failing in his duties were he to fail to raise these with the claimant.

240. The Tribunal has carefully read the claimant's written submissions. He appears not to address the issue of Mr Moran's appointment as his supervisor. He therefore he appears not to be pursuing this allegation with any great rigour in any case.

241. At this juncture, the Tribunal refers to paragraphs 123 to 126 of these reasons (in particular, the presence of Mr Moran and Miss Burgess at Leigh Holmes' wedding and that the group photograph features only white colleagues).

242. As we observed in paragraph 126, the claimant did not say in express terms what inferences he was inviting the Tribunal to draw from such evidence. He offers no elaboration in his written submissions (nor did he take the opportunity of making oral submissions upon the issue on the morning of 18 October 2023).

243. In answer to one of Mr Lewis' questions, the claimant referred to the culture at the respondent as being *"like an apartheid kind of thing".* As we observed in paragraph 164, the claimant's pleaded case included an allegation of institutional racism within the respondent. From this, the claimant's suggestion may be tantamount to one that black employees should not be supervised by white employees. (We are somewhat hesitant about this given the oblique way in which the claimant presented this aspect of the case). However, if such a suggestion were to be made then it is plainly unsustainable. We found in paragraph 164 that there is no basis for the suggestion of any institutional racism within the respondent. There was nothing to point towards Mr Moran being an unsuitable choice to conduct the claimant's supervision. The mere fact that Mr Moran is white does not in and of itself point to the fact that Stacey Burgess' choice of him as a supervisor was related to the claimant's race. She gave a rational explanation for his selection which the Tribunal accepts and is unrelated to race.

244. The next issue is at sub-paragraph 8.1.8. This is *"On 21 October 2022, suspending the claimant because of the seclusion of patient A and the failure to document the incident involving patient B."*

245. The first limb of this allegation fails on the facts. The claimant was not suspended because of the seclusion of patient A. We refer to paragraph 109.

246. The decision-making around the decision to suspend the claimant because of the failure to document the incident involving patient B has been dealt with already in connection with sub-paragraph 8.1.6. We refer to paragraphs 221 to 228 above.

247. The ninth and final allegation is at paragraph 8.1.9. This is that *"despite an investigation having been completed, the respondent determining after the claimant's notice of resignation not to carry on with the disciplinary process so as to act consistently and/or in a manner which might have exonerated him."*

248. The findings of fact upon this issue are at paragraphs 150 to 160. By way of reminder, the claimant resigned on 28 October 2022. He gave notice which expired on 19 December 2022. He then sought to push back the date of his resignation to 15 January 2023. Having served notice giving an expiry date of 19 December 2022, it was not open to the claimant to unilaterally push back the effective date of termination. The claimant's motivation for doing this was to obtain an outcome as he was concerned that he would be unable to work elsewhere in his chosen profession pending the outcome of the respondent's investigation. The claimant was assured on 13 December 2022 that this was not the case. Upon that basis, as we said in paragraph 156, the idea of deferring the resignation date went away at that point and the claimant, significantly, said that he did not think that an outcome meeting was required.

249. It is right to say that Laura Nelson, HR manager, recognised there to have been some delays with the investigation process. We refer to paragraph 158. The claimant is correct to say that the respondent resolved not to carry on with the disciplinary process (see paragraph 157). The reason for the respondent's decision not to carry on was that he was due to leave the respondent's employment on the very same day that he was notified that the investigation had been concluded but that the respondent would not be taking matters further to a disciplinary hearing.

250. We have some difficulty, in these circumstances, in accepting the claimant's case that the respondent's decision not to carry on with the disciplinary process was unwanted in circumstances where the claimant told them that an outcome meeting was not necessary. The claimant appeared to take the view at the time that he did not wish the process to run its course once he had received an assurance from the respondent that their process was no bar to him working elsewhere.

251. As we said in paragraph 160, the respondent took the view that the claimant's actions did not warrant a NMC referral. This tells against the respondent the motivated to act improperly towards the claimant. It undermines the claimant's case of institutional racism that the respondent eschewed the possibility of referring the claimant to his regulatory body.

252. As far as the respondent was concerned, no further action was to be taken after 19 December 2022. It is difficult to see how not being subjected to a disciplinary process is subjectively unwanted conduct. Upon this basis, therefore, this allegation must therefore fail.

253. There is, in our judgment, much in what Mr Proffitt says in paragraph 32 of his submissions that the claimant's complaint in reality is that the respondent did not exonerate him.

254. The respondent's decision not to proceed was because the claimant was no longer in their employment. Even if, contrary to our earlier finding, this was unwanted conduct on behalf of the respondent (as the claimant did repeat the request to defer the termination date so that a conclusion may be reached) it is difficult to see how it is a violation of his dignity or the creation of an intimidating

etc environment for him. The claimant was no longer an employee of the respondent. He was therefore no longer in their environment. Accordingly, there was no environment within which for the claimant to feel intimidated or to experience a sense of hostility. It is difficult to see how it can be a violation of an employee's difficulty not to proceed to a disciplinary hearing. In any case, the respondent's decision making was entirely unrelated to race. It was because the claimant was no longer in their employment.

255. As we said in paragraph 118, it is no part of the Tribunal's function to conduct the judicial inquiry into the matters with which the Tribunal has been concerned. The claimant was reminded of this during the course of his cross-examination of Stacey Burgess. This reminder was required as it appeared to the Tribunal (from the tenor of questioning) that the claimant was seeking exoneration for his role in the incident involving A.

256. The Tribunal can sympathise with the claimant's wish to seek exoneration. Whether, upon an airing of such matters before a suitably qualified body, the claimant would be exonerated is a matter for which the Tribunal can express no opinion. The Tribunal is not qualified to express such an opinion as it involves questions of professional judgment and practice in a field outside the Tribunal's expertise. The Tribunal has no jurisdiction to conduct such a judicial inquiry. There may be no forum through which the claimant can seek exoneration. That may be considered unfortunate. However, upon those matters which fall within the Tribunal's jurisdiction, we find there to be no unwanted conduct with the purpose or with the effect of violating the claimant's dignity or creating an intimidating etc environment for him and related to his race in relation to this matter. As we have said, even if the respondent's refusal to conduct an internal enquiry of some kind (whether in the form of a disciplinary hearing or otherwise) into matters was unwanted from the claimant's perspective such cannot reasonably have the effect of violating the claimant's dignity or creating an intimidating etc environment for him nor is such in any way related to his race.

257. We now turn to the complaints of direct race discrimination. These involve the same nine allegations. They appear at sub- paragraphs 7.1.1 to 7.1.9 of Employment Judge Maidment's case management record sent to the parties on 23 March 2023. They appear in the same order as in sub-paragraph 8.1. Our conclusions are as follows:

    7.1.1 For the same reasons as for our conclusions upon issue 8.1.1, we find that Tom Griffiths and Gillian Kaye did not downplay the incidents reported to the claimant. The reason why Mr Griffiths conducted matters as he did was with a view to try to put the claimant's concerns in the context of work within a secure and heavily regulated environment and because of Mr Griffiths' greater experience of that environment. Mr Griffiths was trying to assist the claimant with his career to support him to be the best nurse he could be in a most appropriate working environment for the claimant's skills. This was unconnected with the claimant's race. There is no evidence that anyone of a different race had their welfare concern dealt with in a different way or that the claimant was subjected to any less favourable treatment in comparison with others. This allegation therefore fails.

    7.1.2 This allegation fails on the facts. We find that Mr Griffiths did not tell the claimant that he should leave Cygnet Hospital Sheffield.

7.1.3 This allegation fails on the facts. There was no initial resistance to the claimant moving from the Griffin Ward to the Pegasus Ward. Upon the issue of ward moves, the claimant cited as an actual comparator an Asian nurse, Aneesa Mahmood. Our findings of fact about her are in paragraph 161. The claimant's complaint that she was more favourably treated than him was in fact in connection with the claimant's request for a move out of Pegasus Ward which the claimant requested on the day of his suspension (paragraph 111). The claimant raised no complaint of direct race discrimination about that request. We agree with Mr Proffitt that Ms Mahmood is not a statutory comparator as her circumstances were materially different to those of the claimant. Her request for a move was temporary based upon her feeling burnt out by work and other issues which she was experiencing at the time. We do accept the claimant's case that Ms Mahmood may stand as an evidential comparator upon which basis the Tribunal may draw a hypothesis as to how somebody in the same or similar circumstances as the claimant would have been treated when making a ward move request. There is simply no evidence that an individual of a different race would have had a ward move request treated more favourably. Indeed, we should not lose sight of the fact that upon our factual findings there was no resistance to the claimant moving from the Griffin Ward to the Pegasus Ward in July 2022 anyway. There is no evidence that a ward move request made by somebody of a different race would have been dealt with quicker. As we observed earlier, the respondent agreed to the request made by the claimant on 15 July 2022 (the day after the welfare meeting) and put in hand arrangements reasonably quickly. Further, in paragraph 74 we observed that Mrs Curtis said that moving wards more than once was unusual within the respondent's workplace. That tells against there being an actual comparator against whom to measure the claimant's treatment.

7.1.4 In his oral submissions, Mr Proffitt urged the Tribunal to consider the reason why the claimant was treated as he was in relation to some of the allegations of direct discrimination (of which this is one such). This is a permissible approach per **Nagarajan**. It is of great assistance in our analysis of this allegation. On any view, the reason why the claimant was treated as he was was because of Stacey Burgess' concerns about his medical practice and conduct arising from his handling of matters following A's return to Cygnet Sheffield by the police. That is the reason why the claimant was treated why he was. It provides a non-discriminatory explanation.

7.1.5 We reach a similar conclusion upon this issue as with issue 7.1.4. The claimant sought to rely upon two white members of staff, Shanice Thompson and Shona Flannery, as comparators. However, they are not statutory comparators as they were not in the same or materially similar circumstances to the claimant. The claimant was the nurse in charge. He was the person who made the decision about the seclusion of A. Ms Thompson and Ms Flannery did not. They may have been involved in the incident. That is not sufficient for them to amount to statutory comparators. The reason why the claimant was investigated was not related to is race. It was because of how he handled matters when A returned to Cygnet Sheffield.

7.1.6 The first limb of this allegation fails for the reasons given when we looked at paragraph 8.1.6. The reason for taking action against the claimant was because of his documentation failures as discussed when we looked at issue 8.1.6. That provides the reason why the claimant was treated as he was. This is untainted by discrimination. Beth Gatus is not a statutory comparator. The claimant was the nurse in charge. She is therefore not in the same or in materially similar circumstances to the claimant. We agree with the claimant that she may stand as an evidential comparator from which a hypothesis may be reached as to how a person in the same or similar circumstances as the claimant would have been treated. Beth Gatus accepted responsibility for her failings. She agreed to retrospectively document matters. There is nothing to suggest that had the claimant similarly taken responsibility he would have been treated any differently. Likewise, had he fulfilled his professional duties and asked the support staff whether there had been any untoward incidents there is nothing to suggest that Miss Burgess would have not felt the need to take any action at all. The reason for the difference in treatment was the acceptance of responsibility by Beth Gatus in contrast to the claimant's approach when the matter was discussed in supervision with Mr Moran (page 254).

7.1.7 The second limb of this allegation fails on the facts as we said when we considered the allegation in the context of harassment upon issue 8.1.7 as non-white employees can give feedback. Upon the first limb of the allegation, the respondent has given a clear non-discriminatory explanation as to the reason why Mr Moran was appointed as the claimant's supervisor.

7.1.8 The reason for the suspension of the claimant was attributable to there being several incidents of poor medical practice involving patients B, C and D. Mr Proffitt made a telling point that the respondent operates in a heavily regulated and critically important field. It would be remiss of them to take no action in the light of ongoing concerns. There is no evidence that a comparator of a different race in the same or materially similar circumstances was not suspended or would not have been suspended. The Tribunal observes in passing that the respondent, in our view, used injudicious language in the suspension letter (page 305). The reference to *"untrue documentation"* was to the incident involving B. The claimant understood that the reference to *"untrue documentation"* was about that incident. To that extent, there was no unfairness to him. However, we have concerns about the use of the word *"untrue".* This implies some falsification or bad faith upon the part of the claimant. That description is not fitting. In reality, the claimant did believe that nothing untoward had occurred that evening hence him making a relevant entry at page 353 to that effect. The claimant's belief was of course founded upon his lack of professional curiosity and failure to ask members of staff whether any untoward incidents had occurred. Writing an incorrect entry was therefore a product of negligent or poor professional practice in contrast to a more serious situation where an employee knowingly makes an untrue record or declaration. The respondent may wish to reflect upon this aspect of matters.

7.1.9 Again, the reason why the respondent acted as it did provides a non-discriminatory explanation. There is no evidence that a person of a different race in a same or similar circumstances was or would be treated more favourably in taking matters to a conclusion. The reason why the respondent did not is unrelated to the claimant's race and is entirely related to the fact that by the time that the investigation had been concluded there was insufficient time to convene a disciplinary hearing.

258. It follows therefore that all of the claimant's complaints of direct discrimination and harassment related to race stand dismissed. We now turn to the issue of jurisdiction.

259. Mr Proffitt said, in oral submissions on 18 October 2023, that were the Tribunal to find in the claimant's favour upon some or all the allegations, no issue would be taken by the respondent that they do not form part of a continuing course of conduct. This was a sensible concession on the respondent's part given that by and large the same individuals were involved throughout and that the subject matter was essentially around patient care.

260. The general position is that a claim concerning work related discrimination brought upon Part 5 of the 2010 Act (such as the one before us) must be presented to the Employment Tribunal within the period of three months beginning with the date of the act complained of. Conduct extending over a period is to be treated as done at the end of that period.

261. The end of the course of conduct complained of by the claimant was on or around 19 December 2022 when his employment ended. The claimant in fact commenced early conciliation before the end of his employment. It concluded two days after his employment ended. He presented his claim form on the same day (that being 21 December 2022) – see paragraph 1.

262. On this basis, the claim was brought within a limitation period in section 123 of the 2010 Act. The Tribunal therefore has jurisdiction to consider the claimant's complaint. However, those complaints fail in any case.

Employment Judge Brain

Date: 17 November 2023