EMPLOYMENT TRIBUNALS

Claimant:	**Mr C B Ayogu**
Respondent:	**Tees Esk and Wear Valleys NHS Foundation Trust**
Heard at:	**Newcastle Employment Tribunal (sitting in Teesside)**
On:	**23rd, 24th, 25th, 26th and 27th October 2023**
Before:	**Employment Judge Sweeney** **Sheila Don** **Peter Chapman**
Appearances:	**For the Claimant: In person,** **For the Respondent: Roger Quickfall, counsel**

JUDGMENT having been given on **27 October 2023** and written reasons of the Judgment having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

WRITTEN REASONS

The Claimant's claims

1. By a Claim Form presented on **09 January 2023**, the Claimant brought claims of direct race discrimination and harassment related to race. On **10 July 2023**, Employment Judge Aspden permitted an amendment to add a complaint of victimisation.

The Hearing

2. The Claimant Mr Ayogu represented himself. The Respondent was represented by counsel, Mr Quickfall. There was an agreed bundle consisting of 633 pages. Some additional pages were added to the bundle in the course of the hearing, taking the total number of pages to 645.

3. It was agreed at the outset of the hearing that the issues to be determined were:

    3.1. Whether, because of race, the Respondent

3.1.1. Restricted the Claimant from being permitted to take shifts from **21 September 2022** to **19 October 2022** and cancelled shifts which had previously been booked in that period,

3.1.2. Refused to pay or compensate the Claimant for the shifts he lost from **21 September 2022** to **19 October 2022**.

[**direct discrimination: section 13 Equality Act 2010**]

Or

3.1.3. Whether, in doing the things in paragraph 3.1 above the Respondent engaged in unwanted conduct related to race which had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

[**harassment related to race: section 26 Equality Act 2010**]

3.2. Whether, because the Claimant did a protected act (by bringing these proceedings) the Respondent subjected him to a detriment in:

3.2.1. stopping his eligibility for shifts / suspending him on **19 June 2023** and/or

3.2.2. deregistering him from the bank on **23 June 2023**

[**victimisation: section 27 Equality Act 2010**]

3.3. If appropriate, the remedy issues as recorded by Employment Judge Murphy in her case summary of the preliminary hearing of **29 March 2023** [**page 38 – 46 of the bundle**]

These are set out in the Appendix at the end of these reasons

4. Mr Ayogu gave oral evidence. He also submitted three unsigned statements from: Thabo Moyo, Alicia Rhiannon Isolde Painter and Alfred Parkson, who were former agency/bank workers at the Respondent Trust. Mr Ayogu said that he was not calling them to give oral evidence but wished the Tribunal to read and take into account the statements. The Tribunal said that it would do so explaining that it would be a matter of what weight it would be proper to attribute to them as they were not coming to the tribunal to give oral evidence.

5. The Respondent called the following witnesses:

5.1. Laura Burke, Ward Manager on Overdale Ward

5.2. James Donegan, Modern Matron on Bransdale and Bilsdale Wards

5.3. Rebecca Norton, Temporary Staffing and Agency Team Assistant Manager – she provided a supplemental statement addressing the amended claim of victimisation.

5.4. Rachel Rennison, Temporary Staffing Manager – she too provided a supplemental statement addressing the victimisation claim

5.5. Andrea Shotton, Head of Information Governance and Data Protection

Preliminary application by the Respondent

6. Before we could start hearing evidence, the Tribunal was required to consider and determine an application by the Respondent, dated **19 October 2023**, for an order Rule 50 ET Rules. The Respondent applied for one or more of a number of restrictions, ranging from a hearing in private, to a restricted reporting order to the anonymisation of the Respondent and witnesses. Counsel for the Respondent handed up a draft order on the first morning of the hearing. The Tribunal spent the rest of the morning reading into the case and the parties returned at 2pm for submissions on the Rule 50 application. The Tribunal adjourned at 3.20pm to deliberate and the parties were released to the following day.

7. On the second day of the hearing, the Tribunal gave its decision on the application. It was refused and full oral reasons were provided. We were able to start hearing evidence just after 11.30am beginning with Mr Ayogu.

Findings of fact

8. The Respondent is an NHS Foundation Trust. It provides a range of mental health services operating over a number of sites, one such site being Roseberry Park, a mental health Hospital in Middlesbrough.

9. Mr Ayogu was engaged by the Respondent as a Bank Worker (specifically as a Healthcare Assistant, or HCA) in the period **26 May 2022** to **23 June 2023**, on which date he was de-registered from the bank. During this period his status in the UK was such that he was limited to working 20 hours a week, as he was on a Student Visa.

10. Bank Workers and agency workers who are engaged through the 'Trust Bank' are the responsibility of the Temporary Staffing and Agency Team. That team is managed by Rachel Rennison, assisted by Rebecca Norton. The Respondent has no obligation to offer bank workers work; neither is the bank worker under any obligation to accept work offered to him or her.

11. Roseberry Park consists of a number of wards which are assembled around a central courtyard. Wards mentioned in and relevant to these proceedings are: Overdale Ward, Brandsdale Ward, Bedale Ward, Bilsdale Ward and Stockton Ward.

12. The story for our purpose begins in **September 2022**. In the evening of Sunday **18 September 2022**, on Overdale ward, at approximately 7.15pm, staff nurse Christopher Luke and an HCA, responded to a nurse's call alarm and attended the room of a patient, referred to as 'patient A'. Patient A was, according to the note, in a hysterical like state. At 8.47pm that evening, Mr Luke made an entry in the patient's records, providing a summary of the incident [**pages 357- 358**]. The note recorded that patient A had an audio recording on which, she said, she could hear 'another person' present in her room when she had been asleep. This recording was made on **10 September 2022** when she had been on a different ward, namely, Bransdale Ward. Bransdale is a female only patient ward. Patient A said that upon listening to the recording, she could hear a zipper being pulled down. The note records that patent A alluded to 'rape' and to previous multiple rapes earlier in her life. Mr Luke, and others on shift, tried to listen to some of the recording.

13. Later in the shift, Christine Wicks, a staff nurse, who was also working on Overdale Ward was approached by patient A, who proceeded to tell Nurse Wicks about the incident. Nurse Wicks also made an entry of the conversation with patient A in the patient's records on **19 September 2022** at 03.02am [**page 358**]. Her note records that patient A asked Nurse Wicks to listen to the recording, that she did but that she could not decipher what the background noise. Patient A was very distressed and said that the incident had triggered previous trauma in her life. She told Nurse Wicks that she had called the police who were coming to the ward (that is, Overdale) to interview her. Ms Wicks told patient A that she could not imagine that something like that would happen to her in hospital as there were camera everywhere on the wards. She asked if Nurse Wicks could get the doctor to prescribe her Lorazepam, to help her settle.

14. Nurse Wicks did get the doctor, that was Doctor Sarah Zbaeidy. She visited patient A in her room. The doctor also made an entry in the patient's records at **01.45am** on **19 September 2022** [**page 484**]. It is clear that Doctor Zbaeidy visited the patient before Nurse Wicks made her entry and it is equally clear that Nurse Wicks made her note after the doctor's visit and that she had seen the doctor's note. That is clearly so because in her entry, Nurse Wicks says "*see doctor's entry*".

15. The doctor recorded the following note:

> "*I was asked to review [patient A] as she divulged to staff member that she believes she was raped on another ward at RPH by a member of staff and she feels quite edgy at the moment*."

16. The note goes on to say that when the doctor attended, the patient's door was locked and that she only agreed to open it when she explained she was the doctor coming to review her. She recorded that the patient requested lorazepam and refused Zopicione and was refusing to sleep because she wanted to be aware of what was happening around her when she sleeps.

17. Therefore, Nurse Wicks told the Doctor that the patient had said she had been raped and the doctor noted that in her records. This was all before Laura Burke came on

shift. Laura Burke is, and was at the time, a Ward Manager of Overdale Ward. On **19 September 2022**, she was working as the Duty Manager, it being an extra bank holiday on the occasion of the funeral of the late Queen Elisabeth. She arrived for work at around 07.30am that morning. As part of the handover, nurses Luke and Wicks told her that patient A had been hysterical during the night. They told Ms Burke that the patient believed she had been raped; that she had an audio recording of what she says reveals the sound of a zipper being pulled down and a condom being opened and that the nurses tried but could not hear anything like this on the recording. Contrary to Mr Ayogu's suggestion, Ms Burke did not make up any reference to rape.

18. Between 07.30am and 8.00am, Ms Burke spoke to patient A herself. Patient A told her the same story, that she believed she had been raped when on the Bransdale ward during the evening of **9th/10th September 2022**. She explained to Ms Burke that she was in the habit of audio recording her sleep patterns on her phone and that in the evening of **18 September 2022** she had noticed that she had used up the space on her phone. She said she then started going through old recordings, to delete them in order to make space to record her sleep later that night. It was upon listening to the recording she had made of **09/10 September**, that she said she could hear that someone, she believed a man, was in the room and that she could hear the opening of a condom and the undoing of a zipper.

19. Ms Burke listened to the recording herself but could hear only muffle noises. She could not discern anything that matched the description given by the patient. The patient told Ms Burke that she had called the police had that she was expecting them to come to the ward to speak to her.

20. Unlike the other nurses and unlike Doctor Zbeidy, Ms Burke did not make any entry of this discussion with patient A in patient A's records.

21. We considered Ms Burke's evidence carefully. We were conscious that she had failed to record a note of the discussion. She acknowledged that this was an error on her part and she accepted that she should have made one. As she put it, she 'held her hands up'. She had not done so at the time because she felt that the nurses on the night shift had dealt with the matter appropriately and recorded what had happened during the night. On this issue, we accepted Ms Burke's evidence as straightforward and truthful, albeit in one minor respect not 100% acccurate. In paragraph 3 of her witness statement she said that patient A told her she had been 'raped by a male'. We find that what she had been told by nurse Wicks and by patient A herself, was that patient A believed she had "been raped" - not that she had been by a "male", simply that she had been raped. Indeed, that was Ms Burke's oral evidence. The words 'by a male' in paragraph 3, were superfluous and unnecessary additions.

22. Although the note is recorded by Nurse Luke on **page 357** as 'another person', it is highly likely, we so found, that the patient at some point referred to a man being in the room. However, the words 'I was raped by a male' we very much doubt were used. It is most improbable that someone would talk in that way. For most people, when they speak of rape it is implicit that it is rape 'by a man'. Legally, a woman cannot rape

another person – although Mr Ayogu contended otherwise. Not only is that the legal position, but in our judgement and experience, it would be highly unusual for someone who said 'I was raped' to be asked to qualify the statement by asking whether it was 'by a man or by a woman'. Anyone hearing this allegation of rape would automatically take from it that a man had sexually assaulted her. There was simply no need to add the words 'by a male'. The context is also important. The patient had spoken of multiple rapes in the past. None of the professionals – nurses , doctor and police officer - who spoke to patient A on **18 to 19 September** were under any doubt about what patient A believed: that a man came to her room and raped her. The words 'by a male' have crept into the language in these proceedings unnecessarily. The words 'by a male' have also fuelled the Claimant's suspicion. He has latched on to the use of the words as proving in his own mind that Nurse Burke had lied and that she was acting against him because he is black, simply because the words 'by a man' or 'male' do not appear in the notes made on patient A's records.

23. On **19 September 2022**, responding to patient A's call, a police officer, PC Coulson, duly attended the ward She spoke to the Claimant in the presence of Ms Burke. The patient played the audio recording. The officer listened and provided patient A with a link to upload the recording, which she said she would review again later.

24. By the time PC Coulson arrived, Ms Burke had obtained and viewed the CCTV footage with others, including Mr Donegan. They could see that a male worker (which transpired to be the Claimant) had been working that night but at no time did he enter the patient's room alone. As far as they could see, there was nothing on the CCTV that showed anything untoward happening at all. Ms Burke told PC Coulson this when she arrived. The police officer then watched the CCTV footage while still on the ward. The officer asked for the name of the male person seen on the CCTV. However, Ms Burke did not have that information to hand. She said that she would provide this to the officer. She asked Mr Donegan who checked the rota and identified that it was the Claimant. We can see from the rota [**page 491**] that he did indeed work that shift and that he was the only male worker. Had the officer believed that the patient believed she had been sexually assaulted by a woman or a man, it is unlikely that she would have asked only for the name of the male worker. It can be seen from the rota, that on **5th, 6th and 7th September**, the only male employee on shift was Dale Smith [**page 491**]. Had patient A reported the rape to have been on one of those dates and not the 9th/10th September, he would have been the one under the spotlight and not Mr Ayogu.

25. The officer also provided Ms Burke with a link for the CCTV to be uploaded, so that she could review this again later. When Ms Burke attempted to upload the CCTV she found that she was unable to do so. Therefore, she subsequently provided the footage on a CD.

26. When an incident occurs regarding a bank worker, someone is required to enter that on to the intranet in the section dealing with temporary workers. In this case, that would have to be either Laura Burke or James Donegan. That did not happen – someone should have done. It is clear from **page 62** that it had not been done by **05 October 2022**, some 2 weeks after Mr Ayogu's suspension (note it had been done in fact by **19**

October). Also, once the Claimant was 'suspended' (that is convenient shorthand to describe that he was not given shifts) Laura Burke became the lead person with responsibility for communicating with the police officer. She did attempt to speak to the police by calling 101 but was unable to make contact with the officer in the case. She did not have any other number for the officer, nor did she have an email address. Neither did she ask to be given one so that she could contact the officer directly. The consequence of this and the officer's failure to get back to anyone was that a case that could and should have been closed almost as soon as it had been opened in fact dragged on for four weeks causing the Claimant understandable distress.

27. On **20 September 2022**, Ms Burke called the police on number 101. She spoke to someone (not PC Coulson) and gave them the Claimant's name. [p**age 49**]. Ms Burke naturally expected that information to be passed on to PC Coulson.

28. On the same day, Mr Donegan informed Rebecca Norton of the allegation. [**page 47**]. In the email he said: '*we have had an allegation of rape made by a female patient*'. He added that it was likely that they would need to "*prevent him picking shifts up whilst this is being looked into?*".

29. Ms Norton spoke to an HR adviser, Thomas Vickers. He told her that the worker would have to be restricted pending a fact-finding exercise and that as the police were involved they would have to await the outcome of that investigation. The Respondent's process for managing incidents involving bank workers [page **405**] states among other things:

    29.1. Decision to be made: - does the bank worker need to be restricted? If restricted all future shifts will be removed by TSS.

    29.2. A fact finding exercise will commence – under this, it says that "*if there is involvement from a third party, TSS must await an outcome from them before proceeding*"

30. On the morning of **21 September 2022**, the Claimant received a call from Gee Wayne, of the Temporary Staffing Department. He explained that his shifts had been cancelled and he was restricted from working but could not say why as they did not have the full information.

31. At 10.13am that morning (**21 September**), Ms Norton emailed Mr Donegan and others asking if there was an update. She said that she had spoken with Mr Donegan the day before and he was waiting for the police to get back to him, thinking that it may have been resolved yesterday [**page 49**]. Laura Burke emailed later in the morning, at 11.54 [**page 49**] to say that the police are still ongoing with their investigation and that she had given them the gentleman's name and she was awaiting their contact.

32. Later that day, at about 5pm, Ms Norton called the Claimant and explained that the situation to him. She told him that as the allegation was a serious one and had been referred to the police, in accordance with their policies, they had to temporarily restrict

him from working until they heard back from the police. The Claimant was shocked by the allegation. He said it was not true. Ms Norton said that she expected the police to get back quickly as the Trust had reviewed the CCTV and there was no evidence that he had been in the patient's room alone. She said that they would keep chasing the police so that it could be resolved quickly.

33. The Claimant emailed shortly after that call saying that he can't remember anything that happened during the **9/10th September 2022** shift. He assured her that he does his job with respect and care for the service users and his team. He said that he looked forward to hearing from her regarding his shift [**page 53**]. Ms Norton replied the following day, **22 September 2022**, at 10.03 to say that she will be chasing them again that day for an update.

34. The Claimant heard nothing further from anyone that day. The following day, **23** September **2022**, at 09.30am he emailed Ms Norton. He said he had spoken to someone on the ward and had been assured that he had done nothing wrong. He hoped he would be fully paid for the shifts he missed if ultimately determined that he had done nothing wrong [**page 54**].

35. In her witness statement at paragraph 10, Ms Burke said that between her and Ms Norton, they were chasing the police at least daily. We accept that she chased the police but do not accept that it was at least daily. She is also wrong to say that Ms Norton was chasing the police. Ms Norton was not chasing the police – she was chasing Ms Burke. Ms Norton never spoke to the police at all. We find that Ms Burke only spoke to them on three occasions after giving them the Claimant's name on **20 September**. We considered Ms Burke to have exaggerated the number of times she had tried to contact the police.

36. **On 23 September 2022**, Ms Norton emailed Ms Burke and others asking if there was any update [**page 68**]. Ms Burke did not reply to that email. Ms Norton emailed Ms Burke again on **26 September 2022** at 08.55am [**page 68**]. She asked Ms Burke if she had an update and if not 'can we contact the police today please?'. At 2.01pm that day (**26 September 2022)**, Ms Norton emailed the Claimant to keep him updated [**page 55]**. She said she had been in touch with the ward for an update and escalated it to higher management. She said she hoped to be in touch soon when they (being the ward) had received an update.

37. Having received Ms Norton's chasing email on **26 September 2022**, Ms Burke called the police that day on number 101 [**page 55/67**]. She did not get to speak to PC Coulson. She was told that there was no current update on their system. The person she spoke to said that they would contact the officer who is dealing with the case who will then contact Ms Burke with an update. However, no one from Cleveland Police got back to Ms Burke.

38. On **30 September 2022**, the Claimant emailed Ms Norton at 4.15pm [**page 58**]. He said that it had now been 9 days since this started and there was no headway at all, that he has suffered in that time for something he knows absolutely nothing about. He

said that it was not fair, that they are all working in a mental health facility so there should be an understanding how this kind of thing would affect someone's mental health. Rebecca Norton immediately forwarded the email to Ms Burke, asking whether there was any update noting that Mr Ayogu was calling every day [**page 57**]. Ms Burke then called the police. That was clearly in response to Ms Norton chasing her again. Ms Burke was told there was no update. She said she would keep trying.

39. The Claimant had still heard nothing by **05 October 2022** so he emailed Ms Norton again that day at 10.19am [**page 58**]. He said that he had tried many times to reach her by telephone but was told she was unavailable. He asked what was going on with his case and said he was starting to consider speaking to his union about the matter.

40. Mr Ayogu's email prompted Ms Norton into emailing Laura Burke (and others), which she did at 10.40am that day (within 10 minutes of receiving his email) [see **page 62**]. She asked whether there was any further update and if not whether Ms Burke could provide her with the name of the officer and number to contact so she can follow it up. In her email she said "*the worker is still restricted from working and we have not had this concern logged by the correct process, the only information we have is the original email from James and when I spoke to James after receiving the email he advised that the accused was the only male on shift so the conclusion was made that the allegation was against him. However CCTV was watched and he did not enter the bedroom and on care grounds he was accompanied by a female member of staff. Is this information correct or has there been anything else that has come to light*?"

41. The reference to not logging the concern by the correct process is a reference to the Respondent's policy or practice of logging concerns regarding bank workers onto its intranet. This ensures that they have an audit trail. Ms Norton is not able to create a concern or 'log' it herself. That was the responsibility of either Ms Burke or Mr Donegan. The intranet contains a temporary staffing section, within which there is a 'log of concerns' section. Once logged, this opens up a 'case file' so to speak, on to which Ms Norton and others can then add information (such as emails and correspondence). Although thid did not happen, it was to no disadvantage of the Claimant.

42. Ms Norton's email of **05 October** prompted Ms Burke into calling the police again. She replied at 2.46pm that day to say: "*Hi, I have spoken to the police today. There is no current update the officer who is on the case is on Sunday after 2pm and Monday after 2pm P2806 Coulson*" [**page 62**]. The Sunday and Monday were **09** and **10 October 2022** respectively. That was the last contact with the police that we could see, at least from the email documentation. We find that it was indeed the last time that Ms Burke attempted to call the police for an update.

43. That same day, **05 October 2022** at 9.48pm, Mr Ayogu complained about the delay, shift payments and the effect on his mental health. He said that he had been told that the ward had found no wrong from his side. He said that it was messing with his mental health and wanted his Employee online to be opened so that he could book shifts. He asked for HR to investigate this and help bring it to a quick resolution. His email was

sent to Rebecca Norton and a number of others, including HR and legal services [**page 63].**

44. At 09.56 am on **06 October 2022**, having read the Claimant's complaint email, Ms Norton emailed Thomas Vickers of HR asking for a team call. She explained the up-to-date position. She explained to HR that the patient had not named the Claimant but that the ward (Mr Donegan and Ms Burke) had come to the conclusion that the allegation was against the claimant because he was the only male on shift that night. She told Mr Vickers that Mr Ayogu was obviously very distressed about the allegations against him. She said "*we have not had the concern logged so the only information recorded is what is in this email*" (that is, Mr Donegan's email at **page 47**).

45. Rebecca Norton replied to the Claimant's complaint email on **06 October 2022.** She said that she had spoken with HR Manager, Thomas Vickers and have been advised that they need to await the outcome from the police. She expressed that it was unfortunate and would continue to pursue an outcome from Cleveland Police and gave him the police officer's name and badge number for him to pursue them as well **[page 72/83**].

46. Although Ms Norton said that they would continue to pursue the police, we could see no evidence that any further attempt was made by anyone from management to do that. Whilst we accept that Ms Burke was not given any personal number or email address, neither she nor anyone else took any steps to obtain a direct number or email address for PC Coulson. On **17 October 2022**, Ms Norton emailed Ms Burke and others again asking if there had been any update regarding the police investigation. She said "… *we continue to have the worker restricted because we are unable to do anything without the feedback from the police. Can this be chased up today please?*" [**page 77**].

47. After he had been given PC Coulson's name the Claimant tried to the officer. He too struggled to get hold of her. We can see from **page 96** and we so find that he had left his number – and we infer his email address – with the police for PC Coulson to get back to him. PC Coulson emailed the Claimant at 07.45am on **18 October 2022** saying that she was not sure what he was referring to as she had had a look on the system and he was not showing as having any outstanding crimes. The Claimant emailed the officer back half an hour later [**page 95**] saying that he had been told by his office that he can start work '*when the police clears the case'* and that she was the officer in charge of the case [**page 95**]. On the same day at 08.20am, the Claimant emailed Ms Norton [**page 73**]. He said that the police had been in contact and according to her he does not have a case in their system. He said he really did not understand what was going on again and asked why he was being punished.

48. Ms Norton emailed Ms Burke and Mr Donegan very shortly after this at 09.25am that day [**page 75**]. She explained that the Claimant had received an email from PC Coulson that there was no open crime regarding him. She asked if there was a crime number so she could contact the officer that day.

49. PC Coulson got back to the claimant the same day, on **18 October 2022** at 12.47pm **[page 94**]. In that email PC Coulson said:

> *"So I have investigated this job. However, when I attended I was informed of the allegation but I was never actually passed your information as you being involved so you are not linked to this job at all. The investigation has been closed as the CCTV shows that nothing has occurred. Have you contact information for your employer and I can email them the same information."*

50. From the Claimant's perspective this is an important email. He said that up until this email he had no intention of taking any tribunal proceedings. He submitted that the email proves two things:

    50.1. That patient A had never said he had raped her – he said that up until this email he believed that his name had been given by patient A and

    50.2. That the case had closed by the police on the day.

51. However, the email in itself proves neither of those things.

52. The police email was sent through to Mr Donegan. In an email to Ms Norton and others of **19 October 2022** at 11.42am [**page 76**] he said "….*I was satisfied that the worker involved did not enter the patients bedroom when I viewed CCTV but Police have now advised they have closed the case. In light of this, I feel the restriction can be lifted*."

53. Ms Norton then spoke to the Claimant. She emailed Hayley Stewart, Gee Wayne and Thomas Vickers at 12.03pm, to say that the Claimant intends to log a formal complaint about his concern; that the police have indicated he was not linked to the case when it was logged and that he has suffered with his mental health as well as loss of earnings. She added "*this concern was never logged through the correct process therefore the only information I have is the email that you have been included in*" [**page 79**]. So, still by **19 October 2022** the matter had not been logged properly in the temporary staff section.

54. The Claimant forwarded a screenshot of PC Coulson's email to Ms Norton on **19 October 2022** at 12.16pm. He said "*I am glad we have gotten to the end of this investigation finally. But my question now is why was I punished for this if I was not involved in the case. I want to make a formal complaint to demand payment for all my shifts that I missed and also compensation for the suffering I have been through this past months. I also want to understand how I was included in the case if the police is saying I was never involved and why the case took this long since the police said they closed the case immediately as they didn't see any wrong doing. This is looking like I was targeted for a reason I don't know*." [**page 80]**

55. The Claimant had now involved his trade union. On **19 October 2022**, Mr John Malcolm emailed to say that they will seek for his lost earnings during suspension to be paid if found he has had no involvement in the incident [**page 93**]. On **21 October**

2022, Claimant emailed HR and legal services and others with a complaint [**page 87**]. He raised in that email that maybe it was because he is black that he was stopped from working even though he did nothing wrong.

56. On **21 October 2022**, Ms Norton emailed the Claimant to say that she has been advised that it is the Trust's policy that they do not pay workers for shifts not worked and they are unable to process any shifts he has not worked due to the restrictions being in place [**page 91**]. The Claimant responded to say that he would speak to a lawyer and sue the Trust.

57. On **24 October 2022**, the Claimant emailed Ms Norton again asking why he was restricted from working. He said he weas ready to take the matter up anywhere legally to get answers and justice. He said he could not accept to be intimidated and stopped from working probably because he is black. He asked for explanation as to why he should accept the unfair treatment of being restricted for a case that had nothing to do with him, that the police confirmed they had closed long ago. He added that they (management) lied that it was the police closure that kept him from working [**page 91**].

58. That same day, **24 October 2022**, the Claimant spoke with Dewi Williams, the "Freedom To Speak Up Guardian" regarding his concerns [**page 102**]. Dewi Williams set out the basis of the Claimant's complaint, that he had not received an answer as to why he did not receive further shifts after the police had closed the case right away, that he was beginning to suspect that racism may be part of the answer.

59. On **10 November 2022**, Lesley Hodge, Associate Director of Operations Delivery and Resourcing responded to Claimant's complaint [**page 104-105**]. In that response, she decided that the Claimant was not entitled to reimbursement of payment for lost shifts. That was the Respondent's position irrespective of who cancels the shift or for whatever reason. We find that the Respondent takes a strict approach to payment of cancelled shifts of bank workers, rightly or wrongly according to one's view on the matter. Ms Hodge was quite up front about matters in her letter: "*bank workers are not employees and…. do not have the same employment rights as an employed member of staff…there is no requirement for the Trust to offer shifts. Where concerns are raised and shifts subsequently cancelled the Trust do not pay for cancelled shifts*." Given the circumstances in which the Claimant found himself in that may seem rather harsh. Had he been an employee, he would have been suspended on full pay. However, there was no evidence that the Respondent had taken a different approach to lost shifts in any other case.

60. There followed email exchanges on the subject between the Claimant, Rachel Rennison, Dewi Williams and Sarah Dallal, the Respondent's Equality and Diversity Officer. The subject of the exchanges was the allegation against him regarding patient A. He wanted to know how his name was included in the issue since the police officer involved said his name had not been given to her.

61. This resulted in a meeting on **21 November 2022**. Those who attended were the Claimant, Dewi Williams, Sarah Dallal, Laura Burke, James Donegan and Rachel

Rennison. The Claimant was told how his name came to be given to the police and why he was 'suspended' pending clearance by the police. The Claimant also raised concerns at that meeting about the way he felt BAME workers were treated on Overdale ward. He felt that bank workers did not have equal rights and said that bank workers tend to avoid working on Overdale ward. It was agreed that the Respondent would look at this and consider a way of looking into what he raised by for example preparing a survey.

62. At this meeting, the claimant also raised concerns regarding Overdale, about what it was like to work there and how he felt there to be racism on the ward, that bank workers did not want to work on the ward and avoided it. He suggested management carry out a survey. Following the meeting Rachel Rennison and Ms Dallal, the equality and diversity lead, discussed how to go about this with the HR Director, Sarah Dexter smith. No one else had come forward with any issues regarding Overdale of the sort the Claimant had spoken about. Ms Rennison and Sarah Dexter Smith prepared a survey, however, as requested by the Clamant.

63. The email on **page 189** shows that the survey was sent to those who had worked on Overdale ward either substantively or as a Bank / Agency worker in the previous three months. Although both parties were in possession of it, we did not get to see the survey or the outcome as it was not in the bundle. It was not sent to those who worked on all wards across the site or the Trust because Ms Rennison and Ms Dexter believed that, if no-one had worked on Overdale at all it was felt that they would not be able to offer anything of value. We found the approach to be a reasonable and logical one.

64. On **21 November 2022**, the Claimant commenced EC process as a precursor to commencing tribunal proceedings regarding the patient A allegation.

65. Aside from the Respondent's survey, the Claimant also took it upon himself to create and send his own survey [**pages 120 – 129**], where staff expressed their concerns about racism within the hospital. The Claimant was by now, we find, taking on the mantle of an unappointed spokesperson on behalf of ethnic minority workers to fight racism and perceived racism within the Trust. On **09 January 2023**, Mr Ayogu commenced proceedings in this tribunal. The ET1 was about the alleged discrimination regarding his suspension and non-payment of shifts.

66. On **08 February 2023**, an agency worker, we shall refer to as Nimi, was working on Bransdale ward. She was on a 1:1 duty with a patient which, adopting the terminology of the Trust, meant that she was required to have '*eyesight*' of the patient at all times. An incident occurred on that day, resulting in Nimi temporarily leaving the patient unattended with the result that, for a short period of time, no one had eyesight on her. This was regarded as a very serious issue in the hospital, it being a psychiatric hospital. The patient attempted to abscond, saying to Nimi that she was going to jump off a bridge. She made her way out of the premises on to Marton road. This patient had a history of trying to jump in front of cars. Nimi returned to the ward believing that it was the only option available to her in the circumstances. We are not here to judge

whether Nimi's decision-making was right or wrong in what must have been very difficult circumstances. We are not in a position to do so.

67. The Claimant seeks to rely on this incident as an example of discriminatory treatment of black workers by the Respondent and from this invites the Tribunal to draw an inference of discrimination in relation to his treatment as regards his own suspension regarding patient A. Nimi's case is that referred to by Judge Murphy in paragraph 1.4.4 of her Case Summary of **29 March 2023 [page 44]**. We should say at this point that, during the hearing, Mr Ayogu abandoned reliance on the cases referred to in paragraphs 1.4.1, 1.4.2 and 1.4.3 of that Case Summary.

68. Returning to the sequence of events, on **02 March 2023**, the Claimant emailed Rebecca Norton and others [**page 112**] regarding a concern over shift allocation from the previous night shift on Stockdale ward. Essentially, he was concerned that two employed HCAs (Hannah and Danielle) had taken over the responsibility of allocating jobs to workers in place of the Nurse in Charge (Damian). Damian, who is black and was a bank worker, is the person referred to in paragraph 1.4.5 of Judge Murphy's Case Summary [**page 44**]. The Claimant was concerned that the HCAs had bullied him into allowing them to allocate work. The Claimant alleged that the two HCAs had given themselves easy jobs and black workers, including the Nurse in Charge, the more onerous 1:1 observations. He wanted this to be looked into and the staff to be cautioned and made to know the hierarchy on shift.

69. On **09 March 2023**, [**page 214**] the Claimant emailed Hayley Stewart and others to say that he was disappointed that "*the lady I reported [that is Hannah) that she was bullying Damian somehow knew that I reported her, because the people on hand over last night said that when the nurse told them that the report I gave from my observation* from *a patient, she said they shouldn't believe that I am used to raising false allegations on people. I wonder how she found out that I raised a concern about her. And even if the concern were false is that why she should suggest that the report I gave about patient care is false*?" Mr Ayogu did not hear Hannah say this. It had been reported to him second hand.

70. From what had been reported to him, Mr Ayogu immediately concluded that Hannah was referring to the concerns he had raised in his email of **02 March 2023** and secondly that someone (unidentified) from management had told Hannah that he had reported her.

71. We did not agree that there was a reasonable basis for drawing those conclusions simply from what he had been told. Working on the assumption or premise that Hannah did say this, it is not at all clear that the reference to "*false allegations*" is a reference to the **02 March 2023** email at all and in any event, Mr Ayogu is only assuming - as he accepted - that someone from management told Hannah, without any evidence of anyone having done so. The Claimant assumed, without any evidence, that someone from management told Hannah about the allegation. We noted that Hayley Stewart had said to the Claimant on **09 March 2023** that they were dealing with his concerns [**page 216**] and that she hoped he would see some change.

If Hannah said what was alleged (and unheard by him) (and there was insufficient evidence for us to be able to conclude that she did) we would add, that, it was obviously inappropriate for her to so - but we are not making a finding that she did. Moreover, we do not accept the assertion based on an assumption that management told Hannah that it was the Claimant who raised any issue regarding shift allocation. If she knew, it is more likely than not that she worked it out for herself. Mr Ayogu, as he accepts, was by this stage well-known as an outspoken person in the hospital.

72. In **March 2023**, the Claimant raised a concern regarding a bank worker, Mahroz Sidique. This is the case referred to by Judge Murphy in paragraph 1.4.6 of her Case Summary **[**page **44**]. The incident is the one addressed by Rachel Rennison in paragraph 29 of her first witness statement. The incident referred to in paragraph 24 of the Claimant's witness statement is a different incident.

73. Mahroz had been escorting a patient at the time, and the patient at some point attempted to abscond by making her way into the courtyard, accessing the courtyard via the management corridor, then via the foyer and through the sliding doors which lead onto the courtyard and facing Newtondale Ward (we were referred to a plan showing the layout: **page 645**). Before the patient got to the courtyard, Mahroz had activated the alarm. A response team appeared in the courtyard and certainly by the time the patient had got to the foyer, the manager in charge was able to see the situation unfold in front of him/her. At no point was the patient by herself without '*eyesight*'. The incident was logged as an assault on the worker, Mahroz and was not investigated.

74. On **21 April 2023**, the Claimant emailed a concern that Hannah and Danielle had been deliberately cancelling shifts when they had been placed on shift with black members of staff. This was investigated –and Sarah Dexter-Smith reported back to the Claimant on **23 April 2023** [**page 425].** The Respondent had asked Mr Ayogu not to carry out his own private investigations. He had expressed the view that this was to prevent him from speaking up. However, Ms Dexter Smith said that this was not the case. She encouraged him to speak up but to go about matters appropriately from the Respondent's point of view.

75. On **03** May **2023**, there was a series of messages exchanged between Christine Wicks and other staff regarding a shift that they were to work on or about **03 May 2023**. That exchange is on page **488-489**. This was a Whatsapp group for staff. Laura Burke was part of the group. At **page 489**, it can be seen that Christine Wicks messaged to a colleague Naiomi: "*yeh but quality is better than quantity Naomi. There's not really a gate balance tonight is there*". She then amended a typo: '*gate'* to '*fair*'.

76. The Claimant says that this was a racist message. The implication, said Mr Ayogu, was that the black staff were believed to be of poor quality. He arrived at that view by the words alone. However, we cannot accept that that is a reasonable interpretation of it, especially when considered in context. The exchange was about the skill mix of workers on shift. Rightly or wrongly, the permanent nursing staff take the view that there is a quality issue with having a shift largely staffed by bank and agency staff.

There is simply insufficient evidence to warrant a drawing of any inference that Christine Wicks' comment was consciously or unconsciously motivated by race.

77. The Claimant raised this comment and shortly after he did, Laura Burke left the group. He infers from this that she thereby recognised that Christine Wicks' comment was indeed a racist comment. However, there is no reasonable basis for such an inference. Laura Burke, when discussing her membership of the group in supervision with her manager, came to realise that she should not have been in that group at all, as she was a manager. When this was pointed out to her, she agreed to leave the group and she did. She was right to leave. However, that cannot be construed as the Claimant says as a recognition that the comment from Ms Wicks was racially motivated. We agree that it was inappropriate for Christine Wicks to make that remark in a whatsapp group. That was also the view of Laura Burke. This was subsequently addressed by Ms Burke in supervision with Christine Wicks.

78. On **09 May 2023**, the Claimant accessed patient A's records. He had been working on that ward on that day when he accessed them. Therefore, there is no reason to suggest that his accessing of the record was for anything other than clinical reasons. However, upon accessing the records, he noted that the record on **page 357** of Christopher Luke's first discussion with patient A referred to 'another person' and not a 'male' or 'man'.

79. From this, the Claimant has concluded that he should never have been in the frame alone for the allegation and that all staff working that night should have been suspended as possible assailants. However, we refer back to our findings in paragraphs 21 and 21 above. Everyone knew patient A was talking about a male worker. He has, we find, fixated on this reference to '*another person'* at the expense of reading the records as a whole. Upon reading the records as a whole, it is clear, as we have earlier referred to, that the staff on the night were talking about an alleged 'rape', which to most people and we find, to those involved on the night and in the immediate aftermath the following morning and day, including the police, meant 'a man'. That is the natural and obvious conclusion to draw. Everyone concerned worked on the understanding that Patient A was referring to a man and the unfortunate fact was that the Claimant was the only man on shift on 9th/10th September.

80. Returning to the events of **09 May 2022**, the Claimant was able to access the records through the Respondent's information system called 'PARIS'. This allows all clinical staff to access patient records. There is good reason for all clinical staff to have such access, for example to deal with emergency cases where there is a need to access a patient's records. However, the Respondent has a policy that any clinical staff must have a good reason, namely a clinical or other business reason for accessing records. They may not do so for their own personal or any other reason.

81. In paragraph 5.2 of the PARIS procedure, it states: "*all PARIS users must have a legitimate business or clinical need to access and view patient records…. At any time a* user's *system usage may be subject to audit. Failure to comply with Trust and*

system policy may result in disciplinary action." Therefore, the Respondent seeks to limit access to clinical records even in the case of clinical staff.

82. The Respondent uses the terminology '*break glass'*. This means that if a staff member tries to access a patient record that is not in their normal caseload, they will be automatically challenged by the PARIS system before the record opens. It signifies and unauthorised or unexpected attempt to access, by analogy, to 'break in'. The system will then ask for the staff member to give a reason why they are trying to access the patient's record. When there is a 'break glass' incident, this is flagged to the Privacy Officer who routinely reviews activity, usually weekly. The policy is consistent with the Caldicott Principles, which are well established in the NHS. Some of the applicable principles are set out in Andrea Shotton's witness statement at paragraph 5.

83. The Claimant, in accessing Patient A's records, did not break glass. It had initially been thought that he had broken glass in respect one point of access on another record. However, this was discounted as he had only been in the record for a very short period of time, indicating that it was accidental access. The Claimant accepted that what he says in paragraph 8 of his witness statement was wrong. He mistakenly read the email from Nicola Hubicks on **page 427.**

84. The second patient referred to in these proceedings is known as 'Patient B'. On **15 May 2023**, the Claimant heard of an incident of alleged sexual assault made by a male patient against the female nursing team. On page **487** there is an entry dated **13 May 2023** where it is recorded that a male patient on Bilsdale was saying that female nursing staff were offering him oral sex and then mocking him when he refused. The Claimant was curious. He was curious to know what this allegation was about and how it had been handled in order to draw comparison with the handling of the allegation against him regarding Patient A. Therefore, on **17 May 2023**, the Claimant accessed patient B's records. He also accessed them again on **22 May 2023**.

85. On the occasions when he accessed patient B's records, he was working on Stockdale ward. On the second occasion, **22 May 2023**, when accessing the records, he would, we find, have seen the entry of **16 May 2023** where it is clearly recorded that the assessment was that the allegations made by Patient B were most likely part of the patient's paranoid delusions. He would also, we find, have seen the entry on **page 485** where it is stated that the patient no longer believes nursing staff are flirting with him or offering him sexual favours. There is no reference in any note that the police were contacted by police. All of this would have been apparent to him.

86. The Claimant would, therefore, have seen that the situations as between patient A and patient B were not comparable: the fundamental difference being that no third party (the police) was involved and the records showed that it was down to delusional paranoia. However, he persisted in seeking disclosure of Patient B's records from the Trust's solicitors, who were then under a professional obligation to refer the request for disclosure back to the Trust. This is how the Respondent came to learn that the Claimant had accessed Patient B's records.

87. Rebecca Norton was made aware on about **15 June 2023**, that the Claimant had accessed patient records when he had no apparent clinical need to do so on **22 May 2023** (she was at this stage unaware of the **17 May** access). This followed on from the request which the Claimant had made of the Respondent's legal representatives for disclosure of patient B's records.

88. Therefore, she emailed the Claimant on **19 June 2023** explaining: "*we have had a concern raised as detailed below, due to the concern being a serious privacy and information governance breach we have cancelled future shifts and will be unable to offer any further bookings within the Trust until the concern is looked into further*." Essentially this was a further 'suspension'.

89. On **19 June 2021**, the Claimant emailed to say, among other things, that he maintained his curiosity to see how the Trust would address the patient B issue. He said that **if** it appears that he accessed the patient's records on **22 May 2023**, it was because he was working on the Bilsdale ward during the early hours of that day [**page** *439*].

90. On **21 June 2023**, Ms Norton emailed highlighting the **17 May 2023** access [**page 462**]. She had received a report that day from Information Governance setting out the times and dates of access. Ms Norton spoke to the Claimant on **21 June 2023.** *She* explained that further information had come to light which suggested he had accessed patient B's records without legitimate reason on both **17 and 22 May 2023**. He told her that he did so to keep an eye on how the Trust was dealing with an issue which he believed to be similar to the incident he had been through with patient A. He said that he had also accessed patient A's records after he returned from suspension in **October 2022**. The Claimant set out his response in writing on **21 June 2023** [**page 463**].

91. On **23 June 2023**, Rebecca Norton wrote to the Claimant de-registering him from the Respondent's Temporary Staffing Register because he had accessed patient B's records on at least two dates without a clinical need to do so [**page 475**].

92. The Claimant is not the only bank worker to have been de-registered for accessing patient records without a clinical need to do so. There have been three other cases where the same decision was taken [**pages 481, 482 and 483**]. In each case, the bank worker was a white British female. Rachel Rennison had personal knowledge of the identities of the three workers. We accepted her evidence as truthful.

Relevant law

93. Section 39(2) Equality Act 2010 provides that an employer ('A') **must not** discriminate against an employee of A's ('B') by, among other things, subjecting B to any detriment. For these purposes, 'employee' has the wider meaning given under section 83 of the Act.

94. When considering whether an employee has been subjected to a 'detriment' Tribunals should take their steer from the judgement of the House of Lords in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] I.C.R. 337, where it was held that a detriment exists *'if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment*'.

95. Section 40(1)(a) EqA 2010 provides that an employer 'A' **must not, in relation to employment by 'A' harass a person**, 'B' who is an employee of A's.

96. These concepts of discrimination and harassment are then defined in other provisions, namely section 13 (direct discrimination) and section 26 (harassment).

Direct discrimination – section 13 Equality Act 2010

97. **Section 13** provides that:

> (1) *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*.

98. For there to be direct discrimination, the treatment needs to be because of a protected characteristic. In considering this, motive is irrelevant. Where the reason for the treatment is not immediately apparent – or inherently discriminatory - it is necessary to explore the mental processes, conscious or unconscious of the alleged discriminator to discover the facts that operated on his or her mind: **Amnesty International v Ahmed** [2009] I.C.R. 1450, EAT. However, the protected characteristic need not be the only reason or even the main reason for the treatment for it to be said to be 'on grounds of' or 'because of'. It is enough that the protected characteristic is an effective cause. The protected characteristic must be a significant influence of the treatment.

99. Person 'B' in section 13 is often referred to as 'the statutory comparator'. It follows from the wording of the section that the statutory comparator must not share the claimant's protected characteristic. In these proceedings, therefore, the comparator must be an individual who is not black or black Caribbean.

100. In addition to this, **section 23(1) Equality Act 2010** provides that:

> *(1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.*

101. This means that the comparator must be someone in the same position in all material respects as the claimant, save only that he is not a member of the protected class: **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] I.C.R. 337 HL. This does not mean that the circumstances of the claimant and the comparator must be identical in all respects. An employer can be liable for discriminatory treatment in circumstances where the decision maker in relation to the claimant is different to that in the comparator's case. The mere difference in identity of decision makers is

unlikely to constitute a material difference for the purpose of section 23 EqA: **Olalekan v Serco Ltd** [2019] IRLR 314, EAT.

102. Only those circumstances that are 'relevant' to the treatment of the claimant must be the same or nearly the same for the claimant and the comparator (see also paragraph 3.23 of the EHRC Code of Practice on Employment 2011).

103. In **Shamoon**, Lord Rodger said:

> ***"….the 'circumstances' relevant for a comparison include those that the alleged discriminator takes into account when deciding to treat the claimant as it did".***

104. A circumstance may be relevant if an employer attached some weight to it, when treating the person as it did. In **Macdonald v Ministry of Defence v Governing Body of Mayfield Secondar School** [2003] I.C.R. 937, HL, Lord Hope held that:

> ***"All characteristics of the complainant which are relevant to the way his case was dealt with must be found also in the comparator".***

105. This principle applies whether the comparator is an actual or hypothetical comparator: **Shomer v B and R Residential Lettings Ltd** [1992] IRLR 317, CA. Where there is no actual comparator, it is incumbent upon the Tribunal to consider how a hypothetical comparator would have been treated: **Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting** [2002] I.C.R. 646, CA.

106. Where a complainant relies on a hypothetical comparator, the 'circumstances' of the **comparator** must be constructed. When considering whether the employer would have treated the comparator any differently from the claimant, it may draw inferences from (among other things) the treatment of a person whose circumstances are not sufficiently similar to warrant them being treated as an actual comparator. Although not actual comparators, their circumstances may be sufficiently similar, and their treatment such, as to justify an inference that the Respondent would have treated a hypothetical comparator in similar circumstances to the claimant, more favourably.

107. In **Stockton on Tees Borough Council v Aylott** [2010] I.C.R. 1278, CA, **Mummery** LJ stated:

> ***"I think that the decision whether the claimant was treated less favourably than a hypothetical employee of the council is intertwined with identifying the ground on which the claimant was dismissed. If it was on the ground of disability, then it is likely that he was treated less favourably than the hypothetical comparator not having the particular disability would have been treated in the same relevant circumstances. The finding of the reason for his dismissal supplies the answer to the question whether he received less favourable treatment."***

108. Therefore, in cases where the identity of the comparator is in issue, a tribunal may find it helpful to consider postponing the question of less favourable treatment

until after it has decided why the treatment was afforded to the worker. If it is shown that the protected characteristic had a causative effect on the treatment of him, it is almost certain that the treatment will have been less favourable than that which an appropriate comparator would have received. Similarly, if it is shown that the characteristic played no part in the decision making, then the complainant cannot succeed and there is no need to construct a comparator: see **Law Society and others v Bahl** [2003] IRLR 640, EAT (Elias J, as he then was).

Harassment – section 26 Equality Act 2010

109. Section 26 provides:

> (1) A person (A) harasses another (B) if--
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of--
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account--
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect.

110. The unwanted conduct must be related to the protected characteristic (in this case, race, which includes colour). The intention of those engaged in the unwanted conduct is not a determinative factor although it may be part of the overall objective assessment which a tribunal must undertake. It is not enough that the alleged perpetrator has acted or failed to act in the way complained of. There must be something in the conduct of the perpetrator that is related to race. This is wider than the phrase '*because of*' which is used elsewhere in the legislation and requires a broader inquiry. However, the necessary relationship between the conduct complained of and the protected characteristic is not established simply by the fact that the Claimant is of a particular race and that the conduct has the proscribed effect.

111. Unwanted conduct is just that: conduct which is not wanted or 'welcomed' or 'invited' by the complainant (see ECHR Code of Practice on Employment, paragraph 7.8).

Victimisation – section 27 Equality Act 2010

112. Section **27** provides:

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because:
>
> (a) B does a protected act, or
> (b) A believes that B has done, or may do, a protected act

113. In complaints of direct discrimination, the less favourable treatment must be 'because' of the protected characteristic. In complaints of victimisation, the detriment must be because of the protected act.

Burden of proof – section 136 Equality Act 2010

114. Proving discrimination can be very difficult. As Lord Rodger of Earlsferry said in **Shamoon** (@para 143):

> ***"Discrimination is rarely open and may not even be conscious. It will usually be proved only as a matter of inference: Nagarajan v London Regional Transport [1999] I.C.R. 877 e – h, per Lord Nicholls. The important point is that there are no restrictions on the types of evidence on which a tribunal can be asked to find the facts from which to draw the necessary inference. In Chief Constable of West Yorkshire Police v Vento [2001] IRLR 124 the Employment Appeal Tribunal discussed some of the kinds of evidence that are used and how they should be approached. In particular, Lindsay J pointed out, at p.125, para 7, that one permissible way of judging how an employer would have treated a male employee in cases which, while not identical, were also now wholly dissimilar. Despite the differences, the tribunal may be able to use that evidence as a sound basis for inferring how the employer would have treated a male employee in the same circumstances as the applicant. Of course, a tribunal cannot draw inferences from thin air, but it can draw them by using its good sense to evaluate the evidence, including the comparisons offered: p.126, para 12."***

115. To assist complainants in establishing discrimination, the Equality Act 2010 provides for a reversal of the burden of proof in certain circumstances.

116. Section **136** provides that:

> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred;*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision*

117. This lays down a two-stage process for determining whether the burden shifts to the employer. However, it is not obligatory for Employment Tribunals to apply that process. Whether there is a need to resort to the burden of proof provision will vary in

every given case. Where there is room for doubt as to the facts necessary to establish discrimination, the burden of proof provision will have a role to play. However, where the tribunal is in a position to make positive findings on the evidence one way or the other, there is little to be gained by otherwise reverting to the provision: **Hewage v Grampian Health Board** [2012] I.C.R. 1054.

118. In cases where the tribunal is not in a position to make positive findings, s136(2) means that if there are facts from which the tribunal could properly conclude, in the absence of any other explanation, that A had failed to make reasonable adjustments or harassed B, it must so conclude unless A satisfies it otherwise. In considering whether it could properly so conclude, the tribunal must consider all the evidence, not just that adduced by the Claimant but also that of the Respondent. That is the first stage, which is often referred to as the 'prima facie' case. The second stage is only reached if there is a prima facie case. At this stage, it is for A to show that he did not breach the statutory provision in question. The Respondent must show a non-discriminatory reason for the treatment in question. It is not required to show that it acted reasonably or fairly, although unreasonable and unfair treatment is not irrelevant. Therefore, the Tribunal must carefully consider any explanation for the conduct or treatment in question: **Madarassy v Nomura International pl**c [2007] I.C.R. 867, CA; **Igen Ltd v Wong** [2005] I.C.R. 931, CA.

Discussion and conclusions

119. Turning to our conclusions on the claims brought.

Direct race discrimination

120. There were two parts to this complaint: (1) the 'suspension' of the Claimant back in September and (2) the refusal to reimburse him for money lost as a result of that 'suspension'. We (as did the parties) use the word 'suspension' as shorthand for ease of reference, recognising that it was not technically a case of suspending an employee, rather a case of excluding the Claimant, a bank worker, from the workplace by not allocating shifts.

121. It is not disputed that the Claimant was subjected to detriment in respect of those matters. The dispute was about the 'reason why'. Mr Ayogu says, in relation to both, it was because he is black or because he is not British. In asserting less favourable treatment, He was unable to point to any actual comparator. Therefore, Mr Ayogu relied on a hypothetical comparator: his case was that a worker who is not black or who is British would have been treated more favourably than him in that such a comparator would not have been 'suspended' following a similar allegation by a patient. He also argued that such a comparator would have been reimbursed for the shifts missed as a result of the suspension.

122. The circumstances of the hypothetical comparator must resemble those of the Claimant in all material respects, save for the protected characteristic. The circumstances may differ according to the complaint. That is because the

circumstances include the factors that the alleged discriminator took into account in treating the individual as they did (see paragraph 103 above) In the case of the suspension complaint, that would require that the comparator to be a worker or employee who had been the only man on a shift at a time when a female patient had made an allegation of rape and had reported the same to the police. Mr Quickfall submitted that the relevant circumstances required the hypothetical comparator to be a 'bank worker'. We were not so sure about that. The employment status of the Claimant was not a factor in excluding him from the workplace. It was a factor as to whether he would be paid and subsequently reimbursed, but that was relevant to the second part of his direct discrimination complaint. As regards the complaint regarding reimbursement, the need for the circumstances to be materially similar would require the comparator to be a bank or agency worker who had been excluded from work, missed shifts as a consequence and who was not reimbursed for the losses after he had returned to work, his name having been cleared. Those, then, were the circumstances we had in mind for the purposes of comparison. We address each part of the direct discrimination claim in turn.

The Claimant's 'suspension'

123. Having considered the evidence very carefully, we were able to and did make a positive finding as to the reason why the Claimant was suspended. In our judgement, we are very clear that the Respondent did not suspend the Claimant or cancel his shifts because he was black or non-British. It suspended him solely because of the police involvement in a complaint of rape in circumstances where he was the only man on shift at the time of the alleged rape. Race and/or nationality had no part to play in the decision whatsoever.

124. My Ayogu does not know what was said by patient A on the night in question. He can only go by the written record. Having accessed the patient records on **09 May 2023**, he fixed on to the reference to 'another person', ignoring the rest of the records. That raised his suspicions. This has led him to advance the rather spurious argument (although one he no doubt believes in) that a woman can rape a woman and that from the written record, no one should have considered the allegation necessarily to be about a man.

125. Everyone concerned believed that patient A was talking about a man. Referring back to our findings, the police officer said she would investigate the matter, asked for CCTV footage and the audio recording which she would review after she left the hospital and asked for the name of the male worker to be provided, which it was. The officer did not get back to Ms Burke. In accordance with the Respondent's policy and practice, it did not 'reinstate' the Claimant until it was cleared to do so by the police and it did so immediately upon becoming aware of this. As observed in the case of **Hewage v Grampian Health Board,** there is little to be gained by reverting to the burden of proof provision.

126. However, we considered the burden of proof provision in any event, as a second check, to test our positive finding almost by way of a sense-check.

127. We considered whether the Claimant had done enough to establish a prima facie case of discrimination or harassment in relation to his 'suspension'. In other words, had he proved facts from which, in the absence of an explanation, we could conclude that the Respondent had contravened section 13 or section 26 Equality Act 2010.

128. In the absence of an actual comparator and for the purposes of seeking to establish that the treatment was on the grounds of the protected characteristic claimants will often look at the treatment of others, which is sometimes referred to as circumstantial evidence. These other cases may not be sufficiently similar to warrant them being actual comparators, but it may be argued that they are sufficiently relevant to warrant the drawing of an inference of discrimination from the way they have been treated and to lend support to how the hypothetical comparator would have been treated. We understood this to be Mr Ayogu's purpose in relying on the examples outlined in Judge Murphy's case summary. From these other cases (or at least some of them) he sought to draw an inference of discrimination generally and to demonstrate that the hypothetical comparator would have been treated more favourably by the Respondent than it treated him. In principle, this is a perfectly valid way of seeking to construct a picture of how a hypothetical white or British comparator would have been treated.

129. Of course, everything depends on the facts and whether it is legitimate or proper to draw inferences from those facts. We considered whether we might legitimately infer from our findings of fact relating to those cases and the other circumstances (for example, the surveys and shortcomings of the Respondent) that there was a racial ground for the acts of discrimination complained of. We referred back to our findings regarding the cases of Nimi and Mahroz and also those relating to Daniel. The Claimant said very little about the case of Daniel himself. He relied more on the treatment of himself by Hannah following the complaint he had made regarding Daniel (**paragraphs 69-71 above**).

130. Mr Ayogu focused extensively on the case of Nimi. He did not call Nimi as a witness, nor did he provide a statement from her. Therefore, we had no direct evidence from her as to the circumstances of her case. We only had the material in the bundle and the evidence of those who were familiar with her case, including the Claimant, Mr Donegan and Ms Norton. There were few, if any, parallels between the Claimant's case and Nimi's. Mr Ayogu accepted this but argued that Nimi's case and Mahroz's case were very similar. This was, as we understood, for the purposes of inviting the Tribunal to infer direct discrimination against Nimi, firstly on grounds of nationality in that Nimi – who was deregistered - is not British whereas Mahroz is British. He relied on the fact that Mahroz was not de-registered following an incident regarding a patient. Mr Ayogu relied on Nimi's circumstances for the purposes of demonstrating how the Respondent treats black people generally. It is right that there were some similarities between the cases of Nimi and Mahroz (they both were unfortunate to be working with a patient who attempted to abscond) but there were also key differences between the

two. In Nimi's case she lost *eyesight* on the patient (considered a very serious matter in a psychiatric hospital); the patient had left and made her way to a main road and had a history of suicide attempts by jumping in front of cars. In the case of Mahroz, the patient did not leave the grounds and there was no occasion when a person had no eyesight. Further, there were no similarities between those two cases and the claimant's suspension. As regards the incident with Hannah, we refer to our finings in **paragraphs 69-71** and to the finding in **paragraph 74**, that the complaint regarding cancellation of shifts had been investigated. We found no facts that would warrant the drawing of an inference that the Claimant's treatment was discriminatory. We concluded that none of the cases examples put forward by Mr Ayogu was such that it would be legitimate for us to draw any inference of discrimination either in relation to the cases themselves or in the Claimant's case.

131. We considered the results of the Claimant's own survey. It was impossible for us to understand what lay behind the comments made in the survey. All we could do was to proceed in recognition that there may well be racist behavior in some people in the workplace and there is likely to be perceptions of racist behaviour in the workplace. It was impossible for us to delve into the comments underpinning the perceptions of racism set out in the survey. But even proceeding on the basis that there were pockets of discriminatory behaviour in parts of the Trust, the question was whether this, along with the other findings, warranted an inference that the decision to suspend the Claimant was influenced by race or that a hypothetical comparator in similar circumstance would have been treated more favourably. On the evidence before us, we were unable to draw such an inference.

132. We also looked at the way in which the Respondent handled the allegation against the Claimant. This too is something that potentially might warrant the drawing of inferences (whether in its own right or alongside our other findings). We had our criticisms and misgivings about the way the Trust handled the communications, internally between management and externally with the police. We had at the forefront of our minds that the allegation against the Claimant was a very serious one. He must have been under some significant distress as an innocent man accused of a serious matter, even though those managing him reassured him. It was not just the allegation, but the time and delay in closing it down that caused him stress. As far as he knew the police were actively investigating him.

133. We looked at our findings on the inadequacies or shortcomings, which included:

133.1. The failure by Laura Burke to record her discussion with patient A on PARIS.

133.2. The failure of the ward managers (either Laura Burke or James Donegan) to log the incident on to the temporary work section of the intranet

133.3. The poor handling of communications between the Trust and the police, including the exaggeration regarding the number of times contact was attempted (see paragraph 35).

134. In our judgement, the efforts made to establish the status of the police inquiries were inadequate and contributed to the delay which exacerbated the Claimant's distress. We could see why he came to believe that he had suffered an injustice given the length of time he was 'suspended'. His interpretation of PC Coulson's email confirming that he was never on the system, to him demonstrated unequivocally that she had closed the case on the very day she visited the hospital. From this, he believed he had been singled out and discriminated against. However, he was wrong. PC Coulson did not close the investigation on the day she visited the hospital. As we found, she left the hospital having instructed Ms Burke to send her further information, including the audio recording which she said she would review later (paragraph 23 above). She never told Ms Burke or anyone else within the Trust that she had completed any investigation. She had asked for the male worker's name and the Claimant's name. She would not have asked for these things had she closed the investigation. The police seem to have done nothing after PC Coulson left the hospital that day and the Claimant's name, as we found had been given by Ms Burke as instructed but (we inferred) not passed on to PC Coulson. That is a poor and regrettable state of affairs which had adverse consequences for the Claimant, in that it prolonged his 'suspension'.

135. We asked ourselves whether, in respect of the Respondent's shortcomings these were facts which either by themselves or taken alongside the other facts were such that we could conclude, in the absence of any explanation, that by suspending Mr Ayogu, the Respondent had discriminated against him or harassed him within the meaning of section 26 Equality Act 2010.

136. We concluded that they were not sufficient to do so. In as much as we had criticisms of the Trust's poor communications, the major cause of the delay, in our judgement, lay with the police. After all, Laura Burke had passed on the information as she had been asked to and was told that the police officer would contact her. She was naturally waiting for the police to get back. The police did not get back to her. It is likely that PC Coulson did not get back because, having viewed the CCTV, and then listened to the audio recording, she too believed that there was nothing in the allegation. The name of the Claimant not having been passed on, it is more likely than not, that the matter went to the bottom of the pile, so to speak. These regrettable facts resulted in the Claimant being left in limbo. This was compounded by the fact that he was a bank worker. Bank workers are managed by Ms Rennison's and Ms Norton's team. However, the lead in communicating with the police lay with Mr Donegan and Ms Burke (in fact Ms Burke) on the wards. As a ward manager, Ms Burke has many responsibilities for patients and is without doubt very busy. Ms Norton was acting as the go-between. Had Ms Norton been given the responsibility as lead contact with the police, it is possible that the matter might have been resolved earlier. She had demonstrated to us that she acted diligently. But she was between the ward and the Claimant, liaising with both and chasing the ward for updates. We had real sympathy

for Mr Ayogu in this situation. However, in the end, we concluded he had got 'the wrong end of the stick' in believing that his treatment was motivated in any way by race or nationality.

137. Looking at the evidence of the whole, we considered that the Respondent's shortcomings were not facts from which we could decide, in the absence of any other explanation, that the Respondent had discriminated against the Claimant. Mr Ayogu himself accepted that if we were to find that the patient's complaint was about a man, he and any other man working that night would have to be suspended. That was, indeed, our finding.

138. Even if were right to say that the burden passed to the Respondent (because of the shortcomings, the circumstances of the other cases and the surveys referred to in evidence), the Respondent satisfied us that the sole reason for suspending the claimant on **21** September **2022** was that patient A had reported to the police that she had been raped and that the policy requires the police to have given the 'all clear', so to speak before returning the worker to the workplace. The decisions were in no way because of or related to race or nationality. We gain further support for this conclusion in the fact that no-one thought that the Claimant had done anything wrong or that patient A had in fact been raped. Indeed, the Claimant himself accepts that the Respondent's managers told him that they did not believe any wrongdoing had taken place but they had to await the police investigation before he was able to return. Had it not been for the police involvement, we infer that the Claimant would not have been suspended. Had patient A not reported the matter to the police, it is likely that upon viewing the CCTV, the Trust would have taken no further action. Had she reported a rape on 5th, 6th or 7th September, someone else, namely Mr Smith, would, we infer, have found himself in the situation the Claimant did.

139. Therefore, whether one takes as a starting point the 'reason why' or whether one applies the 'burden of proof' provision requiring an explanation from the Respondent, the answer is the same: the Respondent has satisfied us that it did not restrict him from being permitted to take shifts from **21 September 2022** to **19 October 2022** and did not cancel shifts booked in that period because of race or nationality. Race and nationality played no part at all in the decision-making.

The refusal to reimburse the Claimant for the lost shifts

140. We then considered the complaint of direct discrimination in refusing to pay or compensate the Claimant for the shifts missed in the period of 'suspension'. Again, there was no actual comparator, therefore, Mr Ayogu relied on a hypothetical comparator as described above. Would a white or British bank worker, who had lost shifts following a serious false allegation resulting in his 'suspension' have been reimbursed the lost shifts? There was no evidence of any similar case or even of a case on entirely different facts whereby a person (whatever their protected characteristic) had been reimbursed for lost shifts having lost shifts as a result of a false accusation, or for any other reason. There were no facts from which we could

decide, in the absence of an explanation, that the Respondent had contravened section 13 (or for that matter, section 26 EqA).

141. Applying the same reasoning and legal principles to our findings in paragraph 59 above, we concluded that the Respondent had satisfied us that it refused to reimburse the Claimant for the lost shifts solely because of its strict policy that bank workers are not paid for cancelled shifts (see paragraph 59 above) and that race or nationality played absolutely no part in this decision.

Harassment complaint

142. The harassment complaint is based on the same facts relating to the Claimant's 'suspension' and refusal to reimburse him payment for the lost shifts. In a harassment complaint, the unwanted conduct complained of must be 'related to' the protected characteristic. This is a broader test than 'because of' but there must be some connection between the conduct and the characteristic relied on. It is not in dispute that there was unwanted conduct in the suspension of and failure to reimburse the missed shifts and we conclude that it was. We were also prepared to accept that the conduct had the effect of violating the Claimant's dignity, having regard to his perception and that it was reasonable for the conduct to have this effect. The key question was whether the unwanted conduct related to race.

143. We were satisfied that it did not relate to race. The suspension related solely to the fact that there was police involvement in a rape allegation. It was not in any way whatsoever connected to race. It simply did not come into it. Although there was no suggestion of it, we make clear that the patient did not and could not have connected the rape allegation to race as she was asleep at the time and had no idea who was in the room – we add, of course that there was no-one in her room and it was imagined by her. Further, until the CCTV was viewed nobody knew if there had been a man on shift that night or if so, what the race or colour of that man was. Therefore, by the time Laura Burke and James Donegan came to look at the CCTV there was question of the matter being connected to race. When they came to view the CCTV, they saw that it was the Claimant. It happened to be that the male on shift that night was black. Had the allegation been on one of the nights Mr Smith had been working, as the only man on shift, the Respondent would have engaged in the same conduct. There was no connection with race at all.

144. The same reasoning applies in the case of the the non-reimbursement of lost shifts. This conduct, though unwanted, was not in any way related or connected to race but related wholly to the policy that bank workers are not paid for missed shifts. In the circumstances this may be considered as harsh – especially given our criticisms of the failings in communication with the police, which had they not occurred might possibly have resulted in the matter being cleared up earlier. However, harsh though some may regard it, that does not equate to harassment.

Victimisation complaint

145. The protected in this case is the bringing of proceedings in the ET1 dated **09 January 2023**. That is accepted. The detriment in this case is the Respondent 'suspended' the Claimant again on **19 June 2023** and then de-registered him on **23 June 2023**. Clearly these are detriments. There is also no argument about that.

146. The key issue was, again, what was the reason for the Respondent subjecting the Claimant to those detriments. Was the Respondent materially or significantly influenced by the fact that he had brought proceedings in the Tribunal?

147. The Claimant relies on the timing of the decision and on the fact that he had accessed records of patient A on **09 May 2023** and that the Respondent and its solicitors had been made aware of this by him at the time. However, this does not assist the Claimant. He had presented his ET1 on **09 January 202**3. He had accessed those records when on the ward and there was no reason to suggest he had no clinical reason for doing so.

148. The Claimant's case is that 'management' were waiting for him to slip up – he relied on a message from a person whose identity was not given to us to say that they are looking out for him, so to speak.

149. However, the evidence was clear: the Respondent has a strict policy on accessing patient records. The facts are that the Claimant accessed patient B's records out of curiosity. He accepted that. It is right that this curiosity was fuelled by his sense and belief that he was the victim of race discrimination in relation to patient A. However, we rejected his argument that this amounts to a 'business case' within the confines of the Trust's policies. This was another spurious argument, advanced to try and justify his access to patient B's records when he knew that he did not have any clinical or business reason for doing so. If that were so, this could result in countless hundreds of people being able to access patient records to satisfy their curiosity in a potentially endless range of legal disputes. No Trust would operate such a policy. We do not consider the Clamant genuinely believed that he had a 'business' case at the time he accessed the records.

150. In any event, the more important point is that the Respondent did not consider this to be a business need, one of which would be clinical research.

151. We did not accept the Claimant's reference in the second last paragraph of his written submissions. The point he raises there about legal proceedings is misplaced and it came out of a passing discussion during the course of the hearing.

152. The Claimant made the point that the Respondent in de-registering him did not taken into account contributing factors [**page 492**]. This document did not apply to bank workers. However, we considered the general principle underlying the submission, namely, whether a manager, in deciding whether to terminate a bank worker's engagement should take into account contributing factors (such as his belief that he was the victim of race discrimination) and whether any failure to do so might

enable an inference to be drawn that the decision to de-register was made because of the protected act.

153. We were unable to draw any such inference. The facts as we have found them are that there have only been four bank workers de-registered for unauthorised access to patient records. The policy is applied strictly. The Respondent satisfied us on the evidence that the reason for 'suspending' and de-registering the Claimant in **June 2023** was solely because he accessed patient B's records and that it was not significantly influenced by the fact that the Claimant had presented a claim in the ET. That was the background and context to the Clamant accessing patient B's records but it was not an influence on the Respondent's decision to suspend and de-register for having done so. He ought not to have breached the well-publicised and well-understood rules of patient access to satisfy his curiosity, even if he did so to assist his case in the employment tribunal. There are mechanisms within the judicial system whereby case management orders can be made regarding disclosure.

154. Given our findings and reasons, we must dismiss all claims. By reference to the issues we have concluded that:

154.1. The Respondent did not subject the Claimant to a detriment by treating him less favourably because of race (colour and/or nationality) in respect of the things set out in paragraph 1.2 of the list of issues and did not, therefore, directly discriminated against the Claimant in contravention of section 13 Equality Act 2010

154.2. The Respondent did not, in relation to those things (2.1 in the list of issues) engage in unwanted conduct related to race (nationality and/or colour) and did not, therefore, harass the Claimant in contravention of section 26 Equality Act 2010.

154.3. The Respondent did not subject the Claimant to any detriment because he had done a protected act or because it believed he had done a protected act and did not, therefore, victimise the Claimant in contravention of section 27 Equality Act 2010.

Closing remarks

155. In our judgement, this was a case where the Claimant has an unwavering conviction that there is systemic underlying racism in the Respondent Trust. The failings in the Respondent's record keeping and the poor quality of communications only served to confirm his beliefs. Mr Ayogu is a person who will speak up in the face of what he considers to be race discrimination, which is an admirable quality. However, based on our observations and analysis of his evidence and the documents, he has a tendency, in our judgement to take a binary approach to events, by which we mean he sees no middle ground. Any error in procedure or any statement that is factually incorrect, is to him irrefutable proof of a lie and proof that his belief is right and he will not be shifted from this. A good example of this was his response to what the Respondent said in its Grounds of Resistance (paragraph 22, **page 33**] that '*the*

*Respondent met with the Claimant on **24 October 2022** to discuss his concerns*'. The response did not go on to say anything else about this meeting or who had attended it. It was no more than a reference to the chronology or sequence of events. However, Mr Ayogu insisted it was a lie and would not countenance the prospect that it was an error, or a reference to the fact that he had discussed his concerns with Dewi Williams (see our finding in paragraph 58 above). Other examples were to do with the emails from PC Coulson [**pages 74 and 94**]. Mr Ayogu insisted that the emails proved that the officer had closed the case on the very day she had visited the hospital, even though they do not say that. Nor would Mr Ayogu countenance any possibility that the police might have in any way at fault by failing to pass on his name to the officer in the case or by not getting back to the Respondent. When asked whether he thought those things might be possible he said not. There was no room for error or misinterpretation in his view. There was no room for any middle ground.

156. It is an admirable quality that Mr Ayogu is prepared to speak up and we would hope more would do so. However, sometimes, where an unwavering conviction meets imperfect or flawed managerial processes, it can lead to an entrenched position, which in our judgement, the Claimant reached in this case. We sympathised considerably with the position he found himself in back in **September and October 2022**, through no fault of his. However, having given very careful consideration to the facts we dismiss his complaints of race discrimination and/or harassment related to race and victimisation.

157. We would also record that whilst we were critical of some of the failings of the Trust in communication and recording of information, we could also see that they did engage with the Claimant in respect of his concerns, and positively involved the Freedom To Speak Up Guardian and the Equality and Diversity officer and senior representatives of HR, all of whom, in our judgement, treated Mr Ayogu's concerns respectfully and seriously. We were also impressed by the way that Ms Norton did her best to communicate between the ward and the Claimant. The division of responsibilities between the ward managers and the temporary staff managers almost certainly contributed to the failings which we have identified.

158. We hope that there are learning points for all concerned coming out of these proceedings.

159. As far as our role is concerned, however, we must dismiss all of the claims.

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Employment Judge Sweeney

Date: 17 November 2023

APPENDIX

LIST OF ISSUES

1. **Direct race discrimination (Equality Act 2020 section 13)**

   1.1. The claimant is black of African origin and Nigerian nationality. He compares himself with white British employees and / or employees of colour of the respondent who are British nationals.

   1.2. Did the respondent to the following things:

      1.2.1. Restrict the claimant from being permitted to take shifts from **21 September 2022** to **19 October 2022** and cancel any shifts he lost from **21 September 2021** to **19 October 2022**?

      1.2.2. Refuse to pay or compensate the claimant for the shifts he lost from **21 September 2021** to **19 October 2022**?

   1.3. Was that less favourable treatment?

   1.4. If so, was it because of the claimant's colour and or nationality and or ethnic origins?

   1.5. Did the respondent's treatment amount to a detriment?

2. **Harassment related to race (Equality Act 2010 section 26)**

   2.1. Did the respondent to the following things:

      2.1.1. Restrict the claimant from being permitted to take shifts from **21 September 2022** to **19 October 2022** and cancel any shifts he lost from **21 September 2021** to **19 October 2022**?

      2.1.2. Refuse to pay or compensate the claimant for the shifts he lost from **21 September 2021** to **19 October 2022**?

   2.2. If so, was that unwanted conduct?

   2.3. Did it relate to race?

2.4. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

2.5. If not, did it have that effect?

3. **Victimisation (Equality Act 2010 section 27)**

4. Did the Respondent do the following things:

4.1. Stop the claimant's eligibility for shifts (or, in the claimant's words, 'suspend' him) on **19 June 2023**?

4.2. Deregister the claimant from the bank on **23 June 2023**?

5. Was the claimant thereby subjected to detriment?

6. If so, did the Respondent do so because the claimant had done a protected act or because the Respondent believed he had done so (the protected act being the bringing of these proceedings)?