



EMPLOYMENT TRIBUNALS

Claimant

Mr Dilip Panan

v

Respondent

London North West University
Healthcare NHS Trust

Heard at: Norwich

On: 29 and 30 November 2023
1, 4 – 8, 11 December 2023

In Chambers: 13 and 14 December 2023

Before: Employment Judge M Warren

Members: Mr G Edmondson, Mr A Chinn-Shaw

Appearances

For the Claimant: In person

For the Respondent: Mr L Harris, Counsel

RESERVED JUDGMENT

1. The Claimant's claims of race discrimination, disability discrimination, victimisation, unfair dismissal and unlawful deduction from wages fail and are dismissed.

REASONS

Background

1. Mr Panan was employed by the Respondent, latterly as a Modern Matron, from 1 November 1999 until his dismissal on the grounds of capability due to ill health on 18 October 2022.
2. Mr Panan has issued three sets of proceedings, which have been consolidated. They are:-

- 2.1. Claim 1 Case Number: 3304863/2020 – issued on 20 May 2020 and consists of complaints of direct race discrimination.
- 2.2. Claim 2 Case Number: 3323897/2021 – issued on 30 December 2021 and consists of complaints of direct race discrimination, direct disability discrimination, failure to make reasonable adjustments, victimisation and unlawful deduction of wages.
- 2.3. Claim 3 Case Number: 3300540/2023 – issued on 20 January 2023 and consists of complaints of unfair dismissal and unauthorised deduction from wages.

The Issues

3. It is an unfortunate feature of this case that the issues have been identified by reference to five separate documents:-
 - 3.1. On Claim 1, a List of Issues which makes cross reference to allegations set out in a landscape document entitled, “Table of Complaints”;
 - 3.2. On Claim 2, a “Final List of Issues”, (dealing only with the issues arising out of Claim 2) which also cross refers to allegations set out in a separate, “Final Table of Complaints”; and
 - 3.3. In respect of Claim 3 an, “Agreed List of Issues” dealing only with the unfair dismissal / unauthorised deduction of wages claim.
4. It is unfortunate that no single List of Issues covering all three claims in one document has been produced, (or ordered).
5. It is also unfortunate that the allegations relied upon are not set out in the tables in any logical, or chronological, order.
6. It is also an unfortunate feature of the case that many of the allegations have clearly been dated incorrectly by Mr Panan.
7. I will set out the allegations in italics in our findings of fact where they might logically appear.
8. Mr Panan had not grasped that the case the Tribunal would decide is that as set out in the Lists of Issues. The first List of Issues was agreed at a Preliminary Hearing before Employment Judge Tegerdine on 14 July 2022 and as is usual practice, the parties were told if they thought the List was wrong or incomplete they should write to the Tribunal to explain.
9. An Agreed List of Issues in relation to Claim 2 was presented to Employment Judge Klimov at a Preliminary Hearing on 12 October 2022.

The List of Issues was clearly discussed, further particulars provided and the parties directed to file a Final Agreed List of Issues in due course by 19 October 2022. In fairness to the parties, I note that Employment Judge Klimov directed there was no need to consolidate the Lists of Issues.

10. The matter came before Employment Judge Allott for a further Preliminary Hearing after the issue of the third claim, on 30 June 2023. This referred to an Agreed List of Issues to be submitted to the Tribunal in due course and directions were made as to how that was to be achieved.
11. It was made clear to Mr Panan that the issues for the Tribunal to decide, as agreed by him, are those set out in the five documents I have referred to.
12. I should record that during the course of evidence, Mr Panan withdrew three aspects of his case:-
 - 12.1. He told us that it was not his intention to allege that Mrs Marsland had committed any act of race discrimination against him;
 - 12.2. In respect of Claim 1 Allegation 2, he did not allege that Mr da Silva had made him feel unwelcome in meetings at the Northwick Park Hospital; and
 - 12.3. He did not pursue Allegation 20 of Claim 1, that as an act of race discrimination Mrs Hyde had changed the role of Lead Nurse – Critical Care 8B to Head of Nursing for Critical Care 8C, in order to discourage him from applying.

Evidence

13. We have a Witness Statement from and we heard evidence from Mr Panan. There were no further witnesses for the Claimant.
14. We had Witness Statements from and we heard evidence from each of the following Witnesses for the Respondent:-
 - 14.1. Mr Anil Jaggernath, former Clinical Head of Nursing for Critical Care, no longer in the Respondent's employment;
 - 14.2. Mrs Victoria Marsland, Matron in the employment of the Respondent;
 - 14.3. Mrs Nancy Hyde, the Respondent's Divisional Director of Nursing for Surgery;
 - 14.4. Mrs Debbie van der Velden, the Respondent's Lead Nurse for Critical Care Outreach and Resuscitation from January 2022, previously the Respondent's Matron for ITU, Critical Care and

Outreach at the Northwick Park Hospital, February 2019 to March 2021;

- 14.5. Mrs Margaret Rose Gunnoo, formerly the Respondent's Head of Nursing for Theatres and Critical Care, latterly from March 2020 Head of Nursing for Theatres;
 - 14.6. Mrs Ruth Cross, the Respondent's Head of Nursing for Surgery;
 - 14.7. Mr Pedro da Silva, formerly a Matron in the Respondent's employment, no longer employed by the Respondent;
 - 14.8. Mr Luke Connelly, Lead Nurse Critical Care Outreach Team for the Respondent;
 - 14.9. Mr Andrew Scurr, employed by the Respondent as a Consultant Intensive Care Anaesthetist;
 - 14.10. Ms Aziza White, at the time in question employed by the Respondent as a Senior HR Advisor, now an Organisational Development Lead;
 - 14.11. Mrs Isatu Kargbo, employed by the Respondent as Head of Nursing for Critical Care and Theatres;
 - 14.12. Mrs Donna Adcock, employed by the Respondent as Deputy Chief Nurse, no longer in the Respondent's employment; and
 - 14.13. Mrs Vivian Baje, employed by the Respondent as the General Manager – Trauma & Orthopaedics & Urology.
15. On day one and day two, 29 and 30 November 2023, the Tribunal read the witness statements, read or looked at the documents referred to in the witness statements in our discretion and we read documents recommended in a reading list provided by Mr Harris. Day two had not been intended as a reading day, but in the course of explaining to Mr Panan the process of the hearing, he told us that he had not yet read the Respondent's witness statements. He acknowledged that he'd had them for a week. We decided to adjourn for the day to enable Mr Panan to read the Respondent's witness statements before he started his evidence, so that he could confirm to us whether there were any supplemental points he wished to deal with arising out of those statements. It is at this point that Mr Harris referred to his reading list and we therefore took the opportunity of the adjournment to read the documents in that reading list.
 16. The Tribunal proceeded to hear evidence from Mr Panan and each of the Respondent's Witnesses on 1, 4 – 8 December 2023. We heard submissions on the morning of 11 December 2023, began our

deliberations in Chambers that afternoon and continued in Chambers on 13 and 14 December 2023.

17. The Tribunal, (and Mr Panan) have been assisted by the Respondent's witness statements being set out in such a way that the witnesses deal with their evidence in relation to the relevant allegations under headings which identify those allegations. We are grateful to the Respondent's Solicitors for their attention to detail in that preparation.
18. We had before us a Bundle of documents in paper and electronic format. The Tribunal used the electronic Bundle. We are grateful to the Respondent's Solicitors for ensuring that the page numbers were co-ordinated so that entering the page number on the electronic search took us to the correct page. We are also grateful that they ensured the Bundle had optical character recognition.
19. The Bundle originally ran to page 2268. During the course of the hearing, both the Claimant and the Respondent sought to add further documents to the Bundle to which in each case no objection was raised. The documents were included, the Respondent's Solicitors providing paginated PDF copies. By the conclusion of the hearing the Bundle ran to page number 2302.

Refused Application by the Claimant for a Postponement

20. At 05:41 on the morning of 4 December 2023, Mr Panan submitted a request for an adjournment. He did not copy that to the Respondent. The reason he gave for the request was that he had encountered difficulties in obtaining legal assistance and that his witness statement and disclosed documents were without important information. He attached to his Application, copies of emails to show efforts that he had made during the Autumn of this year to secure representation.
21. In reaching our decision to reject the Application, we had regard to the overriding objective and the necessity of seeking to balance the relative prejudice to the parties were we to grant or refuse the Application.
22. This case was listed for hearing over 12 days. It has been in the list for over a year, since a Preliminary Hearing on 12 October 2022. Mr Panan has had plenty of time to seek legal advice and assistance and to arrange representation.
23. An adjournment now would likely entail a delay of at least another year. Three days of work have gone into the case to the point of the application and an adjournment part heard would entail co-ordinating the diaries of me, the Tribunal's two Members, Mr Harris and fourteen Witnesses. An adjournment over such a period of time, part heard, would not be in the

interests of justice given the inevitability of memories fading as to what we have read and taken in so far.

24. If we were to postpone and re-list before a fresh Tribunal, we would still have the problem of co-ordinating the diaries of Mr Harris and the 14 Witnesses, it will still entail a delay of a similar period and would entail wasted costs for the last three days.
25. We noted that some of the events appearing in the Lists of Issues date back to June 2016 and a significant number of allegations date back to 2019 / 2020. A further year's delay would result in an all the more significant impact on the cogency of evidence being lost, which is doubtless already impacted by the delay so far.
26. We had already allowed Mr Panan an extra day to get himself organised at the time of considering his Application. He had also had the weekend to start preparing his cross examination of the Respondent's witnesses.
27. We note that Mr Panan was pointed towards the President's Guidance on Procedure on the Tribunal Website in the Preliminary Hearing on 10 June 2021. We note that what was required in a witness statement was explained to him by Employment Judge Klimov at the Preliminary Hearing on 22 October 2022, when he was again pointed towards the President's Guide on Procedure. We also note that before Employment Judge Allott at the Preliminary Hearing on 30 June 2023, he was provided with another explanation of what is required in a witness statement and again, pointed towards the President's Guidance.
28. Mr Panan is an intelligent, literate person who has risen to the Senior position of Matron in the NHS. Whilst equality of arms is an important factor to bear in mind in accordance with the overriding objective, doing one's best to try and achieve, "a level playing field" the Tribunal has to act in a manner which is proportionate. The prejudice to the Respondent of postponement is the wasted costs, the witnesses continuing to have these proceedings hanging over their heads for a further considerable period of time and the impact further delay will have on the cogency of evidence. The prejudice to Mr Panan is ameliorated by the amount of time he has had to prepare this case, the explanations he has been given as to what is required and the latitude he has been allowed so far.
29. Having regard to the foregoing, the conclusion which we reached is that it would not be in accordance with the overriding objective to grant the postponement request.

The Law

Discrimination

30. The relevant law is set out in the Equality Act 2010.

31. Section 39(2)(c) proscribes an employer from discriminating against an employee by dismissing the employee or, at (d) by subjecting the employee to any other detriment.
32. Section 39(5) imposes a duty on an employer to make reasonable adjustments.
33. Race and disability are amongst a number of protected characteristics identified at s.4.
34. Race is defined at s.9 and includes colour, nationality, ethnic and national origins.

Time

35. Section 123(1) requires that a claim of discrimination shall be brought before the end of the period of three months beginning with the date of the act to which the complaint relates or such further period as the Tribunal thinks just and equitable. Conduct extended over a period of time is treated as having been done at the end of that period, (section 123(3)).

Direct Discrimination

36. Mr Panan says that he was directly discriminated against because of, his race and disability. Direct discrimination is defined at s.13(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”.

37. Section 23 provides that in making comparisons under section 13, there must be no material difference between the circumstances of the Claimant and the comparator. The comparator may be an actual person identified as being in the same circumstances as the Claimant, but not having his protected characteristic, or it may be a hypothetical comparator, constructed by the Tribunal for the purpose of the comparison exercise. The Claimant must show that he has been treated less favourably than that real comparator was treated or than the hypothetical comparator would have been treated.
38. The leading authority on when an act is because of a protected characteristic is Nagarajan v London Regional Transport [1999] IRLR 572. Was the reason the protected characteristic, or was it some other reason? One has to consider the mental processes of the alleged discriminator. Was there a subconscious motivation? Should one draw inferences that the alleged discriminator, whether he or she knew it or not, acted as he or she did, because of the protected characteristic? - (see paragraphs 13 and 17).

39. The protected characteristic does not have to be the only, nor even the main, reason for the treatment complained of, but it must be an effective cause. Lord Nicholls in Nagarajan referred to it being suffice if it was a, “significant influence”:

“Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out.”

40. Detriment was defined in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285; the Tribunal has to find that by reason of the act or acts complained of, a reasonable worker would or might take the view that he or she had been disadvantaged in the circumstances in which he or she had thereafter to work. However, an unjustified sense of grievance does not amount to a detriment.

Reasonable Adjustments

41. Section 20 defines the duty to make reasonable adjustments, which comprises three possible requirements, the first of which might apply in this case set out at subsection (3) as follows:-

“(3) The first requirement is a requirement, where a provision criterion or practice of A’s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage”

42. Section 21 provides that a failure to comply with such requirements is a failure to make a reasonable adjustment, which amounts to discrimination.

43. There are five steps to establishing a failure to make reasonable adjustments (as identified in the pre-Equality Act 2010 cases of Environment Agency v Rowan [2008] IRLR 20 and HM Prison Service v Johnson [2007] IRLR 951). The Tribunal must identify:

43.1. The relevant provision criterion or practice applied by or on behalf of the employer;

43.2. The identity of non-disabled comparators, (where appropriate);

- 43.3. The nature and extent of the substantial disadvantage suffered by the disabled employee;
- 43.4. The steps the employer is said to have failed to take, and
- 43.5. Whether it was reasonable to take that step.
44. The Equality and Human Rights Commission: Code of Practice on Employment (2011) at paragraph 4.5 suggests that PCP should be construed widely so as to include for example, formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. It may also be a decision to do something in the future or a one off decision.
45. The decision of Mrs Justice Simler DBE, (then President) in Lamb v the Business Academy Bexley UKEAT/0226/JOJ assists with identifying what is and what is not, a PCP. The phrase is to be construed broadly, having regard to the statute's purpose of eliminating discrimination against those who suffer from disability. It may in certain circumstances include one-off decisions, (paragraph 26). She approved though, the comments of the former President, Langstaff J in Nottingham City Transport Ltd v Harvey UKEAT/0032/12 where he referred to, "practice" as having an element of repetition. In the former case, a teacher was dismissed after a long period of absence during which a grievance was investigated and an outcome provided. The PCP was the requirement to return to work without a proper and fair investigation. There were repeated failures to properly investigate and repeated delays; that was a practice. In the latter case, a claimant suffering from depression, returning to work and confused by a new swipe card system, altered his time sheet. The EAT held that the one-off application of a flawed disciplinary procedure did not amount to a, "practice". More recently in Ishola v Transport for London 2020 EWCA Civ 112, CA, Lady Justice Simler, (as she now is) affirmed that approach, the Court of Appeal holding that the words provision criterion or practice carry the connotation of a state of affairs indicating how similar cases will be treated in the future; a one off act can amount to a practice if there is some indication that it would be repeated if similar circumstances were to arise in the future. She said at paragraph 35 that the words:
- "...are not terms of art but ordinary English words ... they are broad and overlapping... not to be narrowly construed or unjustifiably limited in their application"*.
46. She also said at paragraph 37, that not every unfair act amounts to a PCP. If such an act is found not to be direct discrimination, it would be wrong by a process of abstraction, to seek to convert it into the application of a PCP.
47. It is important for the claimant to identify the PCP relied upon and for the Tribunal to make its decision on the PCP advanced by the claimant, see Secretary of State for Justice v Prospero UKEAT/0412/14.

48. The duty is to make “reasonable” adjustments, to take such steps as it is reasonable for the employer to take to avoid the disadvantage. The test is objective. Our focus should be not on the process followed by the employer to reach its decision but on practical outcomes and whether there is an adjustment that should be considered reasonable. It is for the tribunal to determine, objectively, what is reasonable. It is not a matter of what the employer reasonably believed.
49. The EHRC Code at paragraph 6.28 sets out examples of matters we might take into account in evaluating whether proposed steps are reasonable as follows:
- 49.1. The effectiveness in preventing the substantial disadvantage;
 - 49.2. Its practicability;
 - 49.3. The financial and other costs and the extent of any disruptions that may be caused;
 - 49.4. The employer’s financial or other resources;
 - 49.5. The availability of financial or other assistance, (eg through Access to Work), and
 - 49.6. The type and size of the employer.

Victimisation

50. Section 27 defines victimisation as follows:
- (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.*
 - (2) *Each of the following is a protected act—*
 - (a) *bringing proceedings under this Act;*
 - (b) *giving evidence or information in connection with proceedings under this Act;*
 - (c) *doing any other thing for the purposes of or in connection with this Act;*
 - (d) *making an allegation (whether or not express) that A or another person has contravened this Act.*
 - (3) *Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.*
 - (4) *This section applies only where the person subjected to a detriment is an individual.*
 - (5) *The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.*

51. The meaning of, “detriment” is explained above.
52. Whether a particular act amounts to detriment should be judged primarily from the perspective of the alleged victim. However, an alleged victim cannot establish detriment merely by showing that she had suffered mental distress, she has to show that such was objectively reasonable in all the circumstances; see St Helens Metropolitan Borough Council v Derbyshire [2007] IRLR 540 HL.
53. To be an act of victimisation, the act complained of must be, “because of” the protected act or the employer’s belief. The protected act does not have to be the sole cause of the detriment, provided that it has a significant influence, (see Lord Nicholls in Nagarajan v London Regional Transport [1999] ICR 877). “Significant influence” does not mean that it has to be of great importance, but an influence that is more than trivial, (see Lord Justice Gibson in Igen v Wong cited below).

Burden of Proof

54. Section 136 deals with the burden of proof:
 - “(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.*
55. It is therefore for the Claimant to prove facts from which the tribunal could properly conclude, absent explanation from the Respondent, that there had been discrimination. If he does so, the burden of proof shifts to the Respondent to prove to the tribunal that in fact, there was no discrimination. The Appeal Courts guidance under the previous discrimination legislation continues to be applicable in the context of the wording as to the burden of proof that appears in the Equality Act 2010. That guidance was provided in Igen Limited v Wong and others [2005] IRLR 258, which sets out a series of steps that we have carefully observed in the consideration of this case. We will set them out-
 - 55.1. It is for the Claimant to prove, on the balance of probabilities, facts from which the Tribunal could conclude, in the absence of an adequate explanation that the Respondent has committed an act of discrimination against the Claimant.
 - 55.2. If the Claimant does not prove such facts, he will fail.

- 55.3. It is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit discrimination even to themselves.
- 55.4. The outcome, at this stage, of the analysis by the Tribunal will, therefore, depend upon what inferences it is proper to draw from the primary facts found by the Tribunal.
- 55.5. At this stage the Tribunal does not have to reach a definitive determination that such facts would lead to the conclusion that there was an unlawful act of discrimination. At this stage the Tribunal is looking at the primary facts proved by the Claimant to see what inferences of secondary fact could be drawn from them.
- 55.6. In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.
- 55.7. These inferences can include, in appropriate cases, any inferences that are just and equitable to draw from evasive or equivocal replies to questionnaires.
- 55.8. Likewise, the Tribunal must decide whether any provision of any relevant Code of Practice is relevant and if so to take it into account. This means that inferences may also be drawn from any failure to follow a Code of Practice.
- 55.9. Where the Claimant has proved facts from which conclusions could be drawn, that the Respondent has treated the Claimant less favourably on the prohibited grounds, then the burden of proof moves to the Respondent.
- 55.10. It is then for the Respondent to prove that it has not committed the act.
- 55.11. To discharge that burden of proof it is necessary for the Respondent to prove, on the balance of probabilities, that the prohibited ground in no sense whatsoever influenced the treatment of the Claimant.
- 55.12. The above point requires the Tribunal to assess not merely whether the Respondent has provided an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that the prohibited ground was not a ground for the treatment in question.
- 55.13. Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, the Tribunal would normally expect cogent evidence to discharge that burden of proof.

In particular the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

56. This does not mean that we should only consider the Claimant's evidence at the first stage; Madarassy v Nomura International plc [2007] IRLR 246 CA is authority for the proposition that a Tribunal may consider all the evidence at the first stage in order to make findings of primary fact and assess whether there is a *prima facie* case; there is a difference between factual evidence and explanation.
57. In Hewage v Grampian Health Board [2012] UKSC 37 Lord Hope of Craighead said:
- "It is important not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."*
58. Having said that, HHJ Tayler cautioned in Field v Steve Pye and Co limited & Others [2022] EAT 68:
- "Although it is legitimate to move straight to the second stage, there is something to be said for an employment tribunal considering why it is choosing that option"*
59. Tribunals are cautioned against taking too fragmented an approach when there are many individual allegations of discrimination. Although we should make individual findings of fact on each allegation and consider whether they amount to an instance of discrimination, we should also stand back, look at the bigger picture and adopt a holistic view on whether the Claimant has been subject to discrimination. See Quershi v Victoria University of Manchester [2001] ICR 863, Rihal v London Borough of Ealing [2004] IRLR 642 and Fraser v Leicester University EKEAT/0155/13/DM.

Unfair Dismissal

60. The right not to be unfairly dismissed is contained in Section 94 of the Employment Rights Act 1996, (ERA).
61. Section 98(1) and (2) of the ERA set out five potentially fair reasons for dismissal, which include the capability or qualifications of the employee for performing work of the kind which he was employed to do and some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

62. If the employer is able to show the reason for dismissal was one of the potentially fair reasons set out in Section 98(1) and (2), the Tribunal must then go on to apply the test of fairness set out at Section 98(4) which reads as follows:

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

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
- (b) shall be determined in accordance with equity and the substantial merits of the case.”*

63. In applying the test of fairness set out in s98(4) the tribunal must not substitute its decision as to what was the right course to adopt and in considering the reasonableness of the employer’s conduct, there will usually be a band of reasonable responses the reasonable employer could adopt and it is to that, one should have regard; a decision inside that band is fair, a decision outside that band is unfair, (Iceland Frozen Foods Limited v Jones [1983] IRLR 439).

64. Where an employee is dismissed by reason of lack of capability occasioned by ill health, the question must be, when looking at the fairness of the dismissal, whether in all the circumstances the employer can be expected to wait any longer, and if so how much longer? One should take into account the nature of the illness, the likely length of continuing absence and the need of the employer to have done the work which the employee was engaged to do, see Spencer v Paragon Wallpapers Ltd [1976] IRLR 373.

65. Furthermore, before a dismissal for ill health is effected, one would expect to see consultation and discussion, and steps taken to discover the true medical position, see East Lindsey District Council v Daubney [1977] IRLR 181.

66. One would also expect to see consideration given to whether there are options other than dismissal open to the employer and whether there is some other employment that could be provided that is within the capabilities of the employer.

67. These principles were drawn together in BS v Dundee City Council [2014] IRLR 131 and expressed at paragraph 27 as follows as follows:

“First, in a case where an employee has been absent from work for some time owing to sickness, it is essential to consider the question of whether

the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take his views into account. We would emphasise, however, that this is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return to work as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him. Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered."

Findings of Fact

68. Mr Panan's employment with the Respondent began on 1 November 1999. With the benefit of five years' experience, he was employed as a Nurse on the ICU (Intensive Care Unit) at Ealing Hospital. Over the next 15 years his career progressed and he was appointed a Matron of the Ealing ICU in March 2014.
69. The Respondents Sickness Absence Policy relevant to the period in question begins in the Bundle at page 572. Reporting procedures are at Section 6 and at paragraph 6.1.10 (page 580) it provides that failure to produce appropriate medical certificates may result in absence being classed as unauthorised with as a consequence, suspension of sick pay and disciplinary proceedings.
70. The procedure for managing short term sickness absence is at Section 7 which begins at page 582. Paragraph 7.1.1 sets out the trigger points for a Manager's Review of an employee's absence, which includes within a 12 month rolling period, four separate occasions of absence or ten calendar days of sickness absence.
71. There are three stages to the Short Term Sickness Absence Review process, including an informal Stage 1, which should agree a target for improved attendance over a review period of normally 3 – 6 months. Next is a Stage 2 formal meeting if the employee has exceeded the target level set at Stage 1. Subject to what is discussed and established at the Stage 2 meeting, the manager will set a target for improved attendance over the following period of 6 months. At the end of that review period, Stage 2 monitoring may cease, it may continue or the manager might instigate Stage 3.
72. Stage 3 is described as a Final Formal Review, to consider the employee's absence in light of their failure to meet the standards of attendance following the original Stage 2 meeting. Depending upon what is discussed

and established, the outcome of the Stage 3 Final Review Meeting might be dismissal on the grounds of capability due to ill health, some other sanction such as a further period of review, further reasonable adjustments or re-deployment.

73. The Long Term Sickness Absence procedure is at Section 8. At paragraph 8.1, it defines long term absence as, "a continuous period of four calendar weeks".
74. Paragraph 8.39 of the Policy provides that if a situation is reached where the employee's job can no longer be kept open and it is clear the employee will not be able to return, the Manager should consider re-deployment, ill health retirement or dismissal.
75. There is of course provision in the Policy for appeals.
76. As for attending Review Meetings, paragraph 9.1 provides that employees absent through ill health are still required to attend Sickness Absence Meetings and where appropriate, Occupational Health advice should be sought as to whether they are fit to attend. Where appropriate, employees may be given the opportunity to provide a written statement if they are not fit to attend.
77. Returning to the chronology, during his career as a Band 6 and Band 7 Nurse with the Respondent, Mr Panan was well regarded, considered to be very able and was well liked. As noted above, he was promoted to Matron in March 2014 and that seems to be when things started to go wrong for him. It may or may not be a coincidence that also during 2014 the Ealing Hospital merged with the Northwick Park and Central Middlesex Hospitals, to form the Respondent Trust.
78. In securing his promotion, one of the interview panel which appointed Mr Panan to the position of Modern Matron was Mr Jaggernath, Head of Clinical Nursing for Critical Care, who became his Line Manager.

Claim 1, Issue 4: no credit for CQC outcome in June 2016.

79. After a CQC Inspection in about June 2016, Ealing ICU received a rating of 'good'. No congratulations, formally or informally, were expressed to Mr Panan or the Team. There was a drinks do afterwards paid for by the Clinical Lead, (Mr Heliatis).

Claim 1, Issue 12: delay in signing University Application forms - 19 February 2020.

80. This event has been mis-dated by Mr Panan, the Application form approval was in August 2017. The allegation of direct race discrimination is made against Mrs Hyde and Mrs Gunnoo. On 11 August 2017, Mr Panan sent an email to Mrs Gunnoo and Mr Jaggernath acknowledging

that he was behind in submitting his Funding Request Form for their signature. He acknowledged they may both be on leave, (which they were). On the same day, he emailed Mrs Hyde making reference to the absence of Mrs Gunnoo and Mr Jaggernath, asking her if she could please sign the form off for him. She replied on 14 August 2017 saying that she would deal with it the following morning, which she did.

Claim 1, Issue 5: not being credited for Team Award in March 2018.

81. The Ealing ICU Team was short listed for a Team Award, the awards were announced at a function in March 2018, they came third. Neither Mr Panan nor his Team were personally were congratulated. There was an informal drinks event to celebrate.

Claim 1, Issue 2: being made to feel unwelcome at regular weekly and monthly meetings at Northwick Park Hospital in June 2018.

82. This is an allegation against Mrs Cross, Mrs van der Velden and Mrs Hyde, (the allegation against Mr da Silva was withdrawn). Mr Panan gave no specific examples in his evidence and there was no corroborative evidence. Having heard evidence from all of the individuals concerned, we do not uphold this allegation as a matter of fact.

Claim 1, Issue 3: non-payment of University fees - 26 July 2018.

83. Again, Mr Panan seems to have the date wrong. We saw in the Bundle email correspondence between the Respondent's Human Resources department and their Accounts department, stating that the invoice was paid. That is not direct evidence of payment. However, there is no evidence in writing from Kingston University that the fees were not paid or that Mr Panan's access to the University was suspended due to late payment. The invoice was dated March 2018 (page 652) and was paid in October 2018. The document produced by Mr Panan confirms this is so and that there were no outstanding payments, (page 62). Mr Panan suggested that he was unable to attend a Graduation Ceremony because his fees had not been paid. An email which he produced, (undated) at page 61 seems to refer to his Graduation Ceremony being cancelled because he had been, "*unsuccessful in achieving your Kingston University Award in time*". Not only is there no evidence of Kingston University chasing late payment of fees, there is no evidence before us of Mr Panan chasing non-payment. The allegation, (of direct race discrimination) is made against Mrs Gunnoo and Mrs Hyde; they had nothing to do with payment of University fees.
84. Mrs van der Velden was appointed Matron for the ICU at Northwick Park Hospital in February 2019. Mr Panan was absent from work at that time. He was absent from work between 27 December 2018 and 7 April 2019. For the period to 19 January 2019, the reason for his absence is noted on the Respondent's Records, (page 1852) as "other known causes". The

second part of that absence from 20 January through to 7 April 2019 is noted as, "anxiety / stress / depression / other psychiatric".

85. The Matrons of the IC Units at the two hospitals would have to liaise regularly with each other and we can see that they had a good relationship at the start following Mrs van de Velden's appointment. On 11 April 2019 Mr Panan sent a nice, pleasant email bidding her good morning, hoping that she had settled in well and inviting her to contact him at any time. She responded to say that she was glad to hear that he was back, comments that she would be going to Ealing the next day and it was a shame that he was not going to be there, she said she was looking forward to working with him.
86. Mr Panan's absences from work through illness continued, he was off on 22 May, 23 May, 26 June and 25 July through to 7 August 2019, predominantly for anxiety / stress / depression.
87. There is evidence of Mr Panan having a poor working relationship with Mr Jaggernath at this time. On 4 July 2019, (page 732) Mr Panan wrote an email to Mr Jaggernath accusing him of intimidating and harassing him, of being disrespectful and having no concern for his dignity. Mr Jaggernath forwarded that email on 8 July to Mrs Hyde, (page 731) seeking advice and in particular, making reference to problems with Mr Panan including his ongoing sickness, his not adhering to the operational function of the Matron, not following managerial instructions and being absent from work prior to the CQC Inspection. We also see at page 729 that on 2 July 2019, Mr Panan had written to Mrs Hyde asking to meet her to discuss the harassment he said he was being subjected to by Mr Jaggernath. On 17 July Mr Panan wrote to Mrs Gunnoo and Mrs Hyde to say that he could not remain on the ICU with Mr Jaggernath, (page 733).
88. On 22 July 2019, Mr Panan raised a Grievance about Mr Jaggernath. The Grievance document is not in the Bundle. The outcome is provided in April 2020 and we will consider that further below when we come to discuss the outcome, (page 1077).

Claim 1, Issues 7 and 8: Mrs van der Velden treating Mr Panan disrespectfully in a meeting in front of Mrs Gunnoo and Mr Jaggernath, condescending, laughing and speaking to him in an upsetting way.

Claim 1, Issue 8: when the Claimant complained Mrs Gunnoo made it look as if he had done something wrong by saying that Mrs van der Velden was upset with the way that he had spoken to her and wanted an apology.

89. Mrs van der Velden discusses a difficult meeting on 2 September 2019, which was to discuss induction and training for new Staff Nurses. The meeting was attended by a number of individuals including Mr Jaggernath, Mrs Gunnoo, Mrs van der Velden and Mr Panan. She described how Mr Panan had objected to everything that she had suggested during the

meeting and that no progress was made. Her impression was that Mr Panan was obstructive because he did not want to have cross site collaboration. She described how, after Mr Jaggernath and Mrs Gunnoo had left the room, Mr Panan began shouting at her. As it happens a third person had remained in the room, a Ms Zzizinga. She is a Lecturer Practitioner in ICU and was present to give education orientated input. She corroborated Ms van der Velden's account of Mr Panan's behaviour. She set out her account in her email of 2 September 2019 at page 753. She described the meeting as a "train wreck". She described Mr Panan as being very argumentative and dismissive towards Mrs van der Velden. She referred to Mrs van der Velden as doing her best to keep the discussion on focus. She described Mr Panan's conduct as very unprofessional. She also expressed concern about the nature of his email correspondence.

90. The allegation is said in the Issues documents to relate to 19 February 2020, but it is clear that it is this meeting that Mr Panan was referring to, in September 2019.
91. Subsequent to the meeting, Mr Panan had written a strongly worded email to Mrs van der Velden stating that he found her approach patronising, intimidating and overpowering, (page 774). On 25 September 2019, Mrs van der Velden wrote to Mrs Gunnoo raising an Informal Grievance, expressing the importance of collaborative working and suggesting an informal meeting to be mediated by Mrs Gunnoo, (page 787).
92. Mrs Gunnoo sought to arrange a meeting with Mr Panan and Mrs van der Velden. He did not respond. She chased him in February 2020, (page 906). Mr Panan's response to the suggestion of Mediation was instructive, he wrote on 19 February 2020, (page 940):-

"I do not believe this is a case for mediation as I did nothing wrong but was repeatedly disrespected by this individual for reasons unknown to me. This is very simple. This individual, for whatever her reasoning, needs to stop what she is doing and treat me (I can't speak for anyone else) with respect, as expected of professionals when... There is nothing to indicate that I have been disrespectful to her. We cannot consider speaking up for oneself as being disrespectful."

93. Allegation 8 suggests that Mrs Gunnoo had made it look as though Mr Panan had done something wrong. She denies this. What she wrote on 11 February 2020 (page 906) is:-

"Regarding Debbie van der Gelden's request to meet informally with you under the auspices of the Trust's Grievance Policy to discuss effective collaborative working. I thought it would be helpful to clarify our conversation in an email."

Debbie has again expressed her desire for this meeting to progress and confirmed this is her chosen option.

...

I am mindful both parties need to agree to a facilitative discussion..."

94. There is nothing to suggest that she is suggesting Mr Panan is at fault and we accept that she did not do so.
95. In November 2019, Mr Jaggernath resigned, having gained promotion elsewhere. He requested that his resignation be kept confidential.

Claim 1, Issue 1: *keeping the Claimant in a low profile outlook, e.g. being told what to say and what not to say at Finance meetings and meetings with the Chief Nurse, being questioned about what the Claimant had said during meetings in November 2019 to January 2020.*

Claim 1, Issue 6: *Mr da Silva being invited to a Finance meeting for no proper reason other than to prepare Mr da Silva for the upcoming Lead Nurse position, the Claimant only becoming aware of the post on 17 March 2020 – 7 November 2019.*

96. On 18 December 2019, Mrs Hyde issued an invitation to all Matrons to attend a Finance meeting. At the instruction of Mrs Gunnoo, Mr Pedro reiterated that invitation. He sent it out because Mrs Gunnoo had asked him to as she was busy, not because he was in any position of seniority. Each of the Matrons had a slot in the meeting at which they were to speak to the finances of their department. We accept the evidence of Mrs Hyde and Mrs Gunnoo that it was usual for the Finance meetings to be conducted in this way and that Nurses often, but not always, sat through the meeting listening to other Nurses' presentations. Mr da Silva sitting in on this meeting was not unusual and was nothing to do with his being groomed for a future appointment. At the time of this meeting there was no plan for a future Lead Nurse position. The plan was that Mr Jaggernath's role was to be lost following his departure, as a cost saving exercise. Mr Panan was not told what to say or questioned about what he had said at this or any other Finance meeting. There was good reason for and it would have been usual for, Mr da Silva to attend this meeting. We accept that Mr Panan was not aware of the Lead Nurse position which subsequently became available, until 17 March 2020.

Claim 1, Issue 15: *Mr Jaggernath bullying the Claimant telling him to move to an office outside the ICU without having a good reason for doing so - October to December 2019.*

Claim 1, Issue 17: *Band 7 Nurses Christine Sharpe and Mrs Marsland behaving differently towards the Claimant, Ms Sharpe informing the Claimant he was no longer her Line Manager, Mr Jaggernath discussing*

issues regarding ICU directly with Ms Sharpe and Mrs Marsland ignoring the Claimant and vice versa, under the direction of Mrs Hyde. No dates stipulated.

Claim 1, Issue 18: *Mr Jaggernath regularly asking the Claimant when he was going to leave - February 2015 to December 2019.*

97. Having reviewed all of the evidence presented to us, having regard to the evidence we heard from Mr Panan and Mr Jaggernath, we find that Mr Jaggernath did not bully Mr Panan, but there were clearly issues between them. Mr Jaggernath tried to manage Mr Panan. He was a difficult person to manage and was difficult with Mr Jaggernath. Mr Jaggernath did ask Mr Panan to use the room next to the IC Unit rather than the office he preferred to use on the floor above; there was a problem on the Unit perceived by everybody that we heard from, (including particularly compelling evidence from Mr Scurr) that Mr Panan was not visible on the ICU, he tended to be either not present at all or when he was in the hospital, using the office on the floor above that of the ICU.

98. It appears that Mr Panan regarded himself as autonomous, for example he felt that it was acceptable to leave the ICU without permission in order to support a housemate working elsewhere in the hospital who was going through disciplinary issues. His attitude appeared to be that the Unit was running well and so he did not need to be there. What was notable was Mr Scurr's compelling response to Mr Panan's cross examination on this point,

"The ICU ran well in spite of you, not because of you."

99. We accept the evidence of Mrs Marsland and Mr Jaggernath that the reason Ms Sharpe and Mrs Marsland went to Mr Jaggernath with issues and he went to them, was because Mr Panan was rarely to be found; he was either away sick, or at work but not visible and not contactable.

100. Mr Jaggernath did not regularly ask Mr Panan when he was going to leave.

Claim 1, Issue 14: *the Respondent deliberately engineering Mr da Silva's appointment as Lead Nurse – Critical Care.*

Claim 1, Issue 14(1): *somebody, (undefined) telling Mr Panan that Mr Jaggernath's vacancy was not going to be filled - December 2019.*

101. Somebody probably did tell Mr Panan that Mr Jaggernath's vacancy was not going to be filled, because that was the plan. In light of budget restraints, a decision had been made not to replace him. That subsequently changed because of Covid, see below.

Claim 1, Issue 9: *the Claimant denied leave – 29 January 2020.*

102. Mr Panan was absent between 14 and 17 January 2020, recorded as due to cold, cough and flu.
103. On 27 January 2020, Mr Panan emailed Mrs Gunnoo to say that he had a GP appointment the following day and an appointment with his Solicitor afterwards. Later that day, he sent her a further email requesting five days annual leave to commence 31 January 2020, (pages 876 – 878). He had attached to his second email of 27 January 2020 a recalculation of his annual leave; it had been thought that he had two days remaining, his recalculation suggested that he had five days. On 28 January 2020, Mrs Gunnoo emailed Mr Panan, (page 883) to say that in order to consider his request for short notice annual leave she would need further information, effectively, who was going to cover for him? This was usual practice. Mrs Gunnoo was satisfied with his response and wrote to him later on 28 January 2020, (page 882) to say that she had been trying to contact him to discuss what type of leave he, “*can take*”. Mrs Gunnoo’s intention was to confirm that he was able to take the leave but they needed to discuss how that would be categorised. We accept that was her intention and her email can certainly be read as such, although it is a tad ambiguous. There was an urgent need for Mr Panan to travel to the United States for family reasons. Mrs Gunnoo tried to arrange a meeting for 30 January 2020, which Mr Panan did not attend. Late on 30 January 2020, he wrote with a request for emergency annual leave, (page 884). There was no further email correspondence, Mr Panan appears to have been given no further response, but he took his leave from 31 January 2020, returning on 10 February 2020.
104. In a letter to Mr Panan dated 17 February 2020, (page 921) Mrs Gunnoo set out her narrative account of what had happened. It includes that she had granted his initial request for permission to attend his GP and his Solicitor. She confirmed that she had been satisfied with the arrangements he had put in place for cover during his proposed leave. She confirmed that her email of 28 January 2020 had indicated his leave was approved, subject to deciding what type of leave was to be taken. She acknowledges that she could have been clearer.
105. We find that Mr Panan was not denied leave on 28 January 2020.

Claim 1, Allegation 19: *Following an update from Mr Panan to Mrs Gunnoo of what he had done on a Sunday responding to Covid, Mrs Gunnoo paying no attention to what he had said but questioned who had approved his working on a Sunday, copying correspondence to other Senior Managers causing embarrassment and making it look as if he was after money - March 2020.*

106. This incident in fact occurred on 16 and 17 February 2020. Mr Panan’s hours of work were Monday to Friday. He did go into work on Sunday 16 February 2020, (when of course the Covid outbreak was developing). He wrote in an email at the end of the day to Mrs Gunnoo to explain that

he had worked a shift that day, “which can be accounted for as Bank or overtime”. He explained the operational reasons as to why he had gone into work, which included assessing the situation with a suspected Coronavirus case. Mrs Gunnoo responded late in the evening and her opening line included, “however, you need to maintain a work life balance and this worries me.” She explained that she was not sure what he was asking of her, was he asking for retrospective approval, at what rate was he looking for payment, did his presence take the staffing levels above what was agreed, was the person in charge, (Mr da Silva) aware? She was concerned he had indicated he needed to go in and give the staff advice on the Coronavirus, (which to her mind they should already have had). That email was copied to other members of the management team, who had to account for over spending against budget at weekly Finance Support meetings.

107. Mr Panan replied to Mrs Gunnoo on 17 February 2020, early in the morning:-

“Yet again, I do find your email to be highly inappropriate, demoralising, insulting and most insensitive. I will need to seek further professional advice before I can respond...”

Claim 1, Issue 11: *not providing the Claimant with support when he raised work place issues with Mrs Gunnoo, his issues not taken seriously and treated in a dismissive way in one to one meetings - September 2019 to February 2020.*

108. Mr Panan gave no evidence about his raising such concerns or about any one to one meetings with Mrs Gunnoo. We accept Mrs Gunnoo’s evidence no such concerns were raised with her during this period.
109. The Covid pandemic was gathering pace during February and March 2020.

Claim 1, Issue 10: *the Claimant not being informed about Mr Jaggernath’s resignation until one week before his last day of service - 28 January 2020.*

110. Factually, this is correct. We have set out above Mr Jaggernath asked for his resignation to be kept confidential. We have no evidence either from the Respondent or Mr Panan about anybody being informed of Mr Jaggernath’s resignation any sooner than Mr Panan.

Claim 1, Issue 14(iv): *modifying the job specification for Lead Nurse.*

111. Because of the gathering pace of the Covid pandemic, a very late decision was made that given the crisis in the NHS, it would be appropriate to create a new Lead Nurse position that covered ICU and Theatre. Mr Panan suggests this change in the job’s specification was to allow Mr da

Silva to meet the essential criteria. We find that is not so, it was to meet a need created by Coronavirus.

Claim 1, Issue 14(3): *advertising the Lead Nurse – Critical Care role on 17 March 2020 with a closing date the next day - 18 March 2020.*

112. The Lead Nurse – Critical Care vacancy was made known to the Respondent's staff in an email on 17 March 2020, (page 982). It was sent to all Matrons including Mr da Silva and Mr Panan. The email explains the thinking behind creating the new Lead Nurse role for Theatres and Critical Care. Applications were invited from substantive Band 8A Matrons and Clinical Theatre Managers. The email does stipulate expressions of interest should be submitted by the next day, 18 March 2020. Mr Panan received and read the email at 14:07 on 17 March 2020, Mr da Silva received and read it at 14:05 and Mrs van der Velden at 14:53.
113. To put this in context, a reminder that National Lockdown started on 26 March 2020.
114. Mr Panan was absent from work ill due to Covid between 24 March and 13 April 2020. During his absence, Mrs Marsland covered for him. She was a Band 7 and was therefore acting up. Mr Panan continued working, sending emails, even though he was away from work ill. Some of those emails were seen as disruptive, undermining Mrs Marsland and scaring junior members of staff.

Claim 1, Issue 14(2): *not following correct recruitment process - March 2020.*

115. The recruitment process for Lead Nurse – Critical Care was indeed short circuited, because of the imperative caused by the Coronavirus crisis.

Claim 1, Issue 13: *Mrs Hyde circulating a congratulatory email announcing Mr da Silva's appointment to the role of Lead Nurse – Critical Care.*

116. On 30 March 2020, Mrs Hyde circulated an email which read:-

"Further to the advert and subsequent interviews last week for a secondment opportunity into the post of Lead Nurse, Theatres and Critical Care, I would like to congratulate Pedro da Silva in being appointed to this role which he has taken up with immediate effect. Pedro will continue to cover the areas that he was responsible for as a Matron as well as being the Lead Nurse for the Directorate."

117. Mr Panan's absence due to Covid ceased on 13 April 2020, but his absence continued, then recorded as being due to stress, anxiety and depression from 14 April to 11 May 2020, then as gastrointestinal

problems 13 May 2020 for one day and then continuing due to back problems starting 27 May to 29 May 2020.

Claim 1, Allegation 16: delay in investigating the Claimant's bullying and harassment complaint and not upholding it - November / December 2019.

118. The Claimant's Grievance of 16 July 2019 had been submitted for investigation by a Ms Kielty, General Manager of the Integrated Medicine Division. Her report was produced in February 2020, (page 2253). The outcome was not provided to Mr Panan until a letter was written to him by Mrs Hyde on 20 April 2020, (page 1077). She opened her letter by explaining the delay was due in part to the number of issues raised, the need to schedule meetings, the time required to obtain information and the availability of individuals who were involved in the process, in addition to which, in the previous month there were unprecedented operational demands on the Respondent. She also explained that she hesitated before providing him with the outcome, in view of his absence from work. The Investigator found that Mr Jaggernath had not ever used or abused his power and position. She found that there was no evidence Mr Jaggernath had exerted unreasonable pressure on him or had ignored him. She found that Mr Jaggernath's interactions and correspondence with Mr Panan with regard to his absence were appropriate and in accordance with the Sickness Absence Policy. She found that Mr Jaggernath had not undermined Mr Panan's decision making. She found there were no irregularities in relation to Mr Panan's appraisals and that the appraisal process had not been used as a tool to manage his sickness absence. She found there was no evidence to support his contention that he was being pressurised into taking leave.
119. The first claim, Claim Number: 3304863/2020 was issued on 20 May 2020.
120. Mrs Marsland found working with Mr Panan difficult during his phased return at this time. She found that he would contradict decisions that had been made, by creating difficulties for junior staff. Mrs Marsland gives as an example, emails of 21 and 22 May 2020 at pages 1100 – 1102, in which he wrote of his concern about re-deployment of staff to Northwick Park Hospital, putting patients at risk with the Ealing Unit under staffed, inviting the recipients to contact him if they were unsure what to do. He caused Mrs Marsland to seek clarification from Ms Mukerjee.
121. The Head of Nursing Ms Mukerjee held a meeting with Mr Panan on 22 May 2020 to discuss concerns with regard to his conduct. These were:-
 - 121.1. He was not following the new National Model of Care within Critical Care by asking ICU staff who had been allocated to Northwick Park to work at Ealing, leaving Northwick Park depleted;

121.2. He left work on 18 May during the day without contacting Ms Mukerjee as he should have done;

121.3. He had been asked to attend Northwick Park because of the Covid crisis until further notice from 18 May 2020, but he had continued going to Ealing. In respect of this point, Ms Mukerjee records that Mr Panan had not given a clear explanation; and

121.4. Staff were receiving mixed and contradictory messages about agreed protocols from Mr Panan.

122. Mr Panan was absent from work due to back issues from 27 – 29 May 2020.

Claim 2, Issue 4: in December 2020 not being informed of Band 8C role whilst off sick.

123. The Band 8C role was in fact advertised in May 2020. There is no process for informing staff of a vacancy other than by its being advertised. New posts are advertised for everyone to see unless they are only to be opened for a particular pool of people.

124. Mr Panan was absent due to gastrointestinal problems on 3 and 4 June 2020.

125. Mr Panan began an extended period of absence due to anxiety, stress and depression from 17 June to 21 October 2020.

126. Ms Mukerjee informed Mr Panan on 1 July 2020 that somebody would be appointed to act up for him during his absence. He was happy with that, (page 1162).

Claim 2, Issue 5: Mrs Marsland being placed in the Claimant's role at Ealing.

127. Mrs Marsland was appointed to act up as a Band 7 into the Matron role, as she had done in April when Mr Panan was absent through Covid.

128. Mr Panan attended a Long Term Absence Review Meeting on 21 July 2020. His absence through stress and his perceived reasons for that stress were discussed. A further Review Meeting was scheduled for 11 August 2020 and Ms Mukerjee said that she would discuss his concerns with the Divisional Head of Nursing.

129. The follow up Long Term Absence Review Meeting took place on 14 August 2020. Amongst the matters discussed were:-

129.1. Mr Panan felt that the support put in place to help improve his health was proving beneficial;

- 129.2. The request for flexible working times and patterns could not be granted due to the nature of his work. Flexible working options could be applied for in accordance with the Flexible Working Policy;
- 129.3. An Occupational Health Report, (to which we were not taken) recommended a two week phased return to work;
- 129.4. Mr Panan was to refrain from responding to emails or contacting staff about work related matters whilst he was absent and he should concentrate on his wellbeing; and
- 129.5. Mr Panan expressed concern as to why it was Mrs Hyde had been seeking to meet with him in June on an attempted return to work.
130. On the subject of the latter, on 14 September 2020, Mr Panan once again attempted to return to work but quickly left when he heard that Mrs Hyde wanted to speak to him. He had assumed that this was with regard to an allegation of a Data Breach by him. The background is that he had sent details relating to a patient to someone in the Critical Care Network, who had reported him for a Data Breach. His position was that it was not a Data Breach, what he had done was standard practice and had been so for many years.
131. On 22 September 2020, Mr Panan wrote what he entitled a 'Formal Grievance', (page 1225). He complained about the way that he was being treated by Managers, which he believed to amount to discrimination. In response a Ms Gore, Director of HR and OD, wrote to Mr Panan on 30 September 2020 to explain his letter could not be accepted as a Grievance because he had not outlined what outcome he was seeking, some of the matters related to the Tribunal proceedings that he had issued were being dealt with by the Trust's Legal Representatives, complaints he made about his Trade Union Representation were not matters for the Trust, he appeared to be complaining about being suspended, which had not taken place and he had given no detail of the discrimination alleged to have taken place. She recited that Mrs Hyde had sought to arrange to meet with him and he had declined the invitation. She explained that if he wishes to raise a Grievance, it should be submitted to his Line Manager or if the Grievance is in relation to his Line Manager, to his or her Line Manager.
132. On 2 October 2020 there was a further follow up Long Term Sickness Absence Review Meeting, confirmed in the letter dated 14 October 2020, (page 1241). Mr Panan raised his concerns about Mrs Hyde's expressed desire to meet with him when he attempted to return to work. Ms Mukerjee said that she would ask Mrs Hyde to provide him with reasons as to why she wished to speak to him. A referral to Occupational Health was to be made.

133. During October 2020, Mrs Marsland was successful in an application for promotion to the role of Matron at the Central Middlesex Hospital. She was to continue to cover as Matron for the Ealing ICU during Mr Panan's continued absence.
134. Mr Panan's absence due to anxiety ended on 21 October 2020, but his absence continued from 22 October, this time for back related issues, until 11 November 2020. His Fit Note expired on that date, but he then commenced a period of annual leave until 11 December 2020. We then see from page 1852 that he had unauthorised absence on 14 December and he was then in isolation because of Covid from 16 – 25 December 2020.
135. On 13 November 2020 there was a further Long Term Sickness Absence Review Meeting, the outcome of which was provided in a letter of 20 November 2020, (page 1248). An Occupational Health Report had not been received, although Mr Panan had seen the OH Physician on 6 November 2020. It was agreed that he would use his annual leave prior to a phased return to work, or use it to extend the period of the phased return beyond that recommended by Occupational Health. They agreed to meet again when the OH Report was available.
136. Plans were made for Mr Panan's phased return to work as set out in an email of 7 December 2020, (page 1256). We assume that he returned to work early in the New Year.
137. On 14 January 2021, Mrs Hyde requested of both Mr Panan and Mrs van der Velden, sight of their prepared presentations for a meeting with the Chief Nurse on 15 January 2021, (pages 861 and 846).
138. Throughout 2021, Mr Panan had a series of absences from work caused by problems with his back. An Occupational Health Report dated 12 April 2021, (page 1279) confirmed that at that point he had problems with painful legs and swelling to his feet and calves which were being investigated and an MRI Scan was pending. The Occupational Health opinion and recommendations were that he was fit to return to work, he should have a phased return to work over one to two weeks and that he would benefit from one to one counselling.

Claim 2, Issue 6: the Claimant instructed not to go to Ealing - April 2021.

139. Mr Panan returned to work on 19 April 2021. The plan was for him to return to Northwick Park to meet his colleagues and re-acclimatise, observing the changes and new structures in place as a consequence of the pandemic. Thereafter he was to work over 12 weeks on a project covering all critical care across the three sites, which would involve him working at Ealing, Central Middlesex and Northwick Park Hospitals.

140. In an email of 19 April 2021 to Mrs Kargbo, Mr Panan said that he was happy to attend Northwick Park Hospital and meet with her, (page 1281). The next day, 20 April 2021, he wrote to Mrs Kargbo to say that he had mobility issues the previous night after his first shift and proposed he should work alternate days, so that he be allowed to rest his legs for that day, (page 1282). Mr Panan wrote again later in the day on 20 April, expressing how stressed and anxious he was feeling, making reference to the fact that he had felt over the years there was pressure to move him from Ealing to Northwick Park. He raised objection to being called upon to work at Northwick Park Hospital and wrote that he wanted to discuss what could be arranged to enable him to continue his work as a Matron for Ealing ICU. The primary focus of this email is emotive; the stress and anxiety caused by requiring him to go to Northwick Park. He does however also refer to mobility issues, in that it is easier to get into the building from the car park at Ealing than it is at Northwick Park and also, that there is a longer drive, (10 minutes to Ealing, 45 minutes to 1 hour to Northwick Park), (pages 1284 – 1285). Mrs Kargbo replied on 21 April 2021 in the morning to say that they would discuss these matters when he came in.
141. Mr Panan went into work at the Northwick Park Hospital on 21 April 2021, (that was his second day back at work) and Mrs Kargbo held a Return to Work meeting with him, also attended by Mrs Hyde. A record of what was discussed is set out in a letter written by Mrs Kargbo which begins at page 1290. Mrs Hyde is recorded as explaining that the Respondents had a number of concerns with regards to Mr Panan including that he did not:-
- 141.1. Follow reasonable management requests such as attending meetings;
 - 141.2. Follow and maintain new staffing levels in line with the structures in place due to Covid;
 - 141.3. Follow sickness reporting procedures;
 - 141.4. Follow instructions to attend Northwick Park rather than Ealing; and
 - 141.5. Communicate with his Manager when not attending work during core hours.
142. Mr Panan is recorded as saying that he wanted to work at Ealing and Mrs Kargbo explaining that she wanted him to work at Northwick Park Hospital for at least the next 12 weeks, so that she could support him in getting used to the changes that have been made. She explained that this would enable him also to get to know the management and staff and that whilst he was working on the project, he would also go to Ealing and Central Middlesex, when she did. Mrs Kargbo also explained that Mrs Marsland, now a Matron, had been covering the ICU at Ealing and would continue to do so for the following 12 weeks. Mr Panan was told not to intervene with

her management during that time. Following his time at Northwick Park, he was told there would be a formal hand over at Ealing.

143. Mr Panan did not go to work on Friday 23 April 2021, taking that as a day's annual leave. He was next due at work after the weekend, on Monday 26 April 2021. He went to Ealing Hospital. Mrs Kargbo wrote to him, (page 1287) to note that he had reported for work at Ealing and that as discussed the previous week, he was to work from Northwick Park for the next three months. She asked him to go to Northwick Park that day and told him his colleagues would support him through the day.

Claim 2, Issue 8: *the Claimant told not to interfere with VM managing ICU - May 2021.*

144. As noted above from the letter of 5 May 2021 recording the Return to Work meeting, Mr Panan was told not to intervene with Mrs Marsland management of the Ealing ICU.

Claim 2, Issue 12: *IK refusing hand over from VM to C - May 2021.*

145. Again it is noted from the Return to Work meeting, Mrs Kargbo said that there would be a hand over after the 12 week phased return to work.

146. After 26 May 2021, in fact, Mrs Kargbo allowed Mr Panan to work alternate days and to just go to Ealing. He had only worked at Northwick Park for two days.

147. Mr Panan attended Occupational Health on 26 May 2021, the Report to the Respondent begins at page 2263. The Occupational Health Doctor records Mr Panan's protest at being asked to work at Northwick Park, citing the longer drive and long corridors. The recommendations are that as Mr Panan's pain has flared, he is not fit for work, when the symptoms improve he should have a phased return to work and that the employer should consider his work location in light of the struggle with commuting.

148. Mr Panan was absent from work due to his back issue from 24 May through to 16 June 2021.

Claim 2, Issue 3: *requiring the Claimant to do Clinical shift - 29 June 2021.*

149. There is no evidence that Mr Panan was required to do a Clinical shift on 29 June 2021. There was an instruction in September 2021 for Matrons generally to do one Clinical shift a week, discussed below.

Claim 2, Issue 10: *IK telling the Claimant to leave Ealing and go to Northwick Park, speaking to him in a disrespectful manner - June 2021.*

150. Mr Panan was working in Ealing in June 2021 with the agreement of the Respondent. There was no evidence that such an incident occurred. We accept the evidence of Mrs Kargbo that it did not occur and that she did not at any time speak to him in a disrespectful manner.

Claim 2, Issue 13: *Mr Scurr making the Claimant feel unwelcome by not asking him how he was and not acknowledging that he had returned to work after a year's absence - June 2021.*

151. Mr Panan's latest return to work had been on 17 June 2021. We accept Mr Scurr's evidence that he may have been preoccupied in the stressful environment of the ICU on the day that Mr Panan returned and indeed that he may have been concerned about his return, given that the ICU had been run well by Mrs Marsland in his absence and Mr Scurr's previous experience of Mr Panan and his many periods of absence to this point.

152. A further Occupational Health Report was provided on 1 July 2021, (page 2266). It explained that an MRI Scan had shown abnormalities and that Mr Panan was waiting for an appointment with a Neurosurgeon. Mr Panan had started a phased return to work two weeks earlier and he should have a work station assessment.

Claim 2, Issue 16: *the Claimant's name removed from draft Outreach Policy, Mrs Marsland's replaced as one of the Authors - 27 July 2021.*

153. On 20 July 2021, Mr Panan emailed Mr L Connelly to comment that he had looked at the draft Policy and noted that his name had been replaced by Mrs Marsland as being one of the Authors, querying how that came about. Mr Connelly replied to say that he was glad to hear that Mr Panan was back, he confirmed his name had been removed from the draft Policy and that he was happy to add his name back. He explained the Policy had been through a number of phases of evolution with contributions from others and it still had not yet been ratified.

Claim 2, Issue 17: *Mrs Kargbo not rectifying the removal of Mr Panan's name from the Outreach Policy after it had been brought up with her - 20 July 2021.*

154. Mr Panan had copied Mrs Kargbo in on the emails to and from Mr Connelly. She rang Mr Connelly and he confirmed to her that Mr Panan's contribution would be acknowledged. In due course and after many re-drafts, the final version of the Outreach Policy named as the Author Mr Connelly, because he was the person who had primarily taken responsibility for it through its many drafts and was responsible for the final draft which was ratified. The Policy acknowledged contribution from five people, including Mrs van der Velden and Mr Panan, (page 636).

Claim 2, Issue 19: *virtual meeting to discuss Informal Grievance cancelled and not re-arranged – 20 July 2021.*

155. On receiving a long email from Mr Panan on this date, Mrs Kargbo replied inviting him to arrange to meet to discuss. Mr Panan did not reply. She did book a date for a meeting with him, but he was off work ill on that date and the meeting did not take place. It is true to say that neither Mrs Kargbo nor Mr Panan followed up.

156. On 29 July 2021, Mr Panan was invited to a Stage 1 Sickness Absence Review Meeting in according with the Short Term Sickness Absence Procedure. The meeting was due to take place on 5 August 2021. Mr Panan did not attend, he gave no explanation and made no contact with the Respondents. There were no repercussions.

Claim 2, Issue 14: requiring Mr Panan to go to a Stage 1 Sickness Absence Meeting and his being spoken to with viciousness and humiliation by Mrs Kargbo – 23 September 2021.

157. The date for Claim 2, Issue 14 must be wrong because there was no Stage 1 meeting on 23 September 2021, presumably Mr Panan had intended to refer to 23 August 2021.

Claim 2, Issue 15: Mrs Kargbo using Mr Panan's disability to make a case that he was not fit for his role.

Claim 2, Issue 18: Mr Panan being told by Mrs Kargbo at a Sickness Review Meeting that he was not the Lead for Outreach– 23 August 2021.

158. In a letter dated 13 August 2021, (page 1377) Mr Panan was invited once again to a Stage 1 Short Term Sickness Absence Review meeting to take place on 23 August 2021. The meeting took place as planned and the outcome is confirmed in a letter dated 6 September 2021, (page 1387). The absences that had given rise to the meeting were all to do with Mr Panan's back issues. The Outcome Letter records that Mr Panan was not able to work at Northwick Park, that it had been agreed he could start work at 09:00 hours rather than 07:30 hours, (but that he did not always turn up at that time), that he would only ever work two days in a row and that a request that he be allowed to work from home in the mornings had not been dealt with because Mr Panan had not followed up an invitation to discuss the proposal. The possibility of wheelchair access was discussed. A further referral was to be made to Occupational Health.

159. We accept the evidence of Mrs Kargbo that she did not speak to Mr Panan with viciousness and humiliation. We find that Mrs Kargbo did not use disability to make a case that Mr Panan was not fit for his role.

160. Mrs Kargbo did tell Mr Panan that he was not the Lead for Outreach. He never was. Historically, there had been no appointed Lead for Outreach Care, it was dealt with by staff from the IC Units individually. At Mrs Kargbo's instigation, a role was created for a Band 8 Nurse in the Critical Care Outreach Team to cover all three hospitals. After a competition, Mr

Connelly was appointed. Mr Panan was informed of that during the meeting on 23 August 2021.

161. Mr Panan was absent from work for the certified reason of stress / anxiety / depression on 23 August to 3 September 2021.

Claim 2, Issue 1 and Issue 2: Mrs Kargbo delaying in dealing with Mr Panan's Application for an NHS Lease Car and refusing to provide a statement to the effect that she had not received his Driving Licence – 15 July and 14 September 2021 respectively.

162. Mr Panan had need of a Lease Car because his own car had been stolen. He asked for a Lease Car on 19 June 2021. Mrs Kargbo was not at work then, her son was married on 18 June and she was off work until the end of June. She had to complete a form for him, which included certifying that she had seen his Driving Licence. Mr Panan sent it to her by Recorded Delivery and it was received at the Hospital's Reception desk, but not collected by Mrs Kargbo. She was not told that it was there for collection. It became lost. In due course, Mr Panan needed a statement from her for his claim against the courier and he complains that she did not provide him with one.

163. Mr Panan obtained a replacement Licence and subsequently showed that to Mrs Kargbo during a Teams meeting, by holding it up to the camera. She then completed the form and the application was processed. The delay was caused by Mrs Kargbo's absence initially and then the unfortunate misplacement of Mr Panan's Licence.

164. On or about 14 August 2021, Mr Panan emailed Mrs Kargbo asking her to,

"Send me an email stating that you did not receive a letter from me which was sent by Recorded Delivery. This is for the company to proceed with their investigation."

165. Mrs Kargbo replied that day,

"I don't understand what you are trying to explain or request."

166. Mr Panan further explained the next day that he had sent his Licence on 4 August, it had not been signed for until 15 August, Mrs Kargbo reported that she had not received it and the delivery company was conducting an investigation as Mr Panan had paid for extra insurance on the delivery. He explained that the company had asked for,

"Written correspondence from the person who the letter was addressed to, confirming that the letter was not received."

167. Mrs Kargbo appears not to have replied. In her witness statement at paragraph 14, Mrs Kargbo says that no one had asked her for a statement that his Licence had not been received, but that anyway, she had

confirmed this to him by email. We can see from page 2300 that she was in effect, asked for a statement. She does not appear to have replied. She says that she had already confirmed this by email, but we cannot see that she has. She sent an email on 16 August when being chased by Mr Panan for the form to be completed, in which she said,

"I have not seen your original Licence as indicated on the form"

Which is not quite the same as making a statement that the Licence sent to her by Recorded Delivery had not been received, in express terms.

168. On 13 September 2021, Mr Panan called in sick due to dental issues, (page 1394). On the same day, he wrote a letter to Ms White of Human Resources to complain about the outcome of the Sickness Review Meeting on 23 August 2021, referring to a barrage of discrimination, injustice, abuse, harassment and disrespect on the part of Mrs Kargbo.
 169. On 17 September 2021, Ms White replied to query whether he was raising the complaint in relation to his Manager and whether he was currently on sick leave. Mr Panan replied to confirm that he was at work, that he had tried to arrange a meeting with Mrs Kargbo to discuss an Informal Grievance. He said she had suggested one to one meetings, but that none had been arranged and he said that he did not know who he should be complaining to. Ms White replied on 23 September to advise that he should write to his Manager directly responding to her Outcome Letter following the Stage 1 Meeting and that he should contact her to request a meeting under the Informal Grievance Procedure.
 170. By letter dated 23 September 2021, Mr Panan was invited to a Stage 2 Meeting under the Short Term Sickness Absence Policy, to take place on 1 October 2021. The further absences listed to have triggered this meeting are for back and dental problems between 7 and 16 September 2021.
 171. On 28 September 2021, Mrs Kargbo emailed Mr Panan to attend the IC Unit to support the nurses, specifically stipulating he should not do any handling or moving.
 172. Mrs Kargbo agrees that at about this time, there was a general request to Matrons to do one Clinical shift a week. She says she had expressly said to Mr Panan that he was not to do any manual lifting. We accept her evidence in that regard.
- Claim 2, Issue 11: Management not explaining to staff what was happening so that they believe Mrs Marsland was Matron – September 2021.***
173. There is no evidence to support this allegation, there is no evidence that the staff did not know that Mrs Marsland was 'acting up' temporarily. We

find it is very unlikely that they did not know. Mrs Marsland said that everyone knew that Mr Panan was off sick, that there was no announcement but that no announcement was necessary. We accept that.

174. On 30 September 2021, Mr Panan asked for the Stage 2 Sickness Absence Meeting scheduled for the next day to be postponed as he had not been able to arrange representation. Mrs Kargbo agreed.
175. On 4 October 2021, Mr Panan submitted a Written Grievance, sent to the HR department. On 6 October 2021, Ms White emailed him re-iterating the advice she had given previously that he should seek to arrange a meeting with Mrs Kargbo to discuss matters under the Informal Grievance Procedure and that he should also respond to her in writing directly in relation to the Stage 1 Outcome. She re-iterated that if the Informal Grievance approach does not lead to a satisfactory resolution, he can then escalate to the next level of management, which would be Mrs Hyde.

Claim 2, Issue 7: a letter from Occupational Health confirmed classification of Mr Panan as disabled, yet “this was not supported by IK” – May 2021.

176. The May 2021 Occupational Health Report did not identify Mr Panan as meeting the definition of a disabled person, but the Occupational Health Report of 7 October 2021 did, (page 1428). We assume that it is to this Occupational Health Report that he had intended to refer. It confirms he has been advised to undergo surgery. The advice is that if he continues at work, he should not be patient facing, should not do CPR or manual handling. He was said to be fit to undertake sedentary work, provided he has a work station assessment and suitable chair. Consideration should be given to allow him to work from home when possible and for there to be flexibility on start and finish times. If such adjustments could not be made, consideration should be given to temporary re-deployment. Mr Panan was unable to explain in what way Mrs Kargbo had not accepted or had not “supported” the conclusion that he met the definition of a disabled person. Mrs Kargbo’s evidence, which we accept, was that she accepted the Occupational Health advice and implemented the recommendations when they arose.
177. In the meantime, on 7 October 2021, Mr Panan wrote again to Ms White, (page 1431) saying that he believed he had made reasonable attempts to settle his issues with his Line Manager and had exhausted the Informal Grievance aspect of the Policy. She replied re-iterating that he should address his issues with regard to the Sickness Absence process with his Line Manager so that she can respond to the issues he was raising.

Claim 2, Issue 20: Informal Grievance Letter not upheld by Trust – 4 October 2021, Mr P Spivey.

178. Mr Panan emailed Mr Spivey, (Deputy Director of HR) on 7 October 2021 with regard to his Grievance, complaining that it is not being accepted as a Formal Grievance and that instead, he is being redirected to his Line Manager. Mr Spivey replied to say that HR do not manage those processes, they advise Managers. He re-iterated that if Mr Panan was unhappy about his Sickness Review he should write to his Manager, or her Manager. He said,

“This is not a case of anyone not accepting your Grievance, we are merely asking you to follow the Policy.”

179. By letter dated 28 October 2021, Mr Panan was invited to attend a re-scheduled Stage 2 Sickness Absence Meeting in accordance with the Short Term Sickness Absence Procedure on 9 November 2021. Mr Panan did not attend that scheduled meeting. His absences continued, 25 October 2021 to 14 April 2022, (not including the period 15 to 25 February 2022).

Claim 2: Case Number: 3323897/2021 was issued on 30 October 2021.

180. On 21 January 2022, Mr Panan attended a Long Term Absence Review Meeting. His surgery was pending with regard to his back issues.
181. Between 15 and 25 February 2022, Mr Panan returned to work temporarily.
182. Mr Panan underwent surgery on or about 25 February 2022. Afterwards, his Surgeon issued him with an old fashioned style ‘Med 3’ sick note signed on 28 February 2022 certifying him as unfit for work for two weeks from 25 February 2022 due to surgery.
183. On 4 March 2022, Mrs Kargbo wrote to Mr Panan to point out that she had not heard from him since his surgery on 25 February, that she had not been able to reach him on the telephone and her messages had not been responded to. She asked him to confirm the reason for his current absence, so that it could be recorded correctly.
184. Mr Panan attended Occupational Health on 25 March 2022 and a report was provided dated 28 March, (page 1510) confirming that he had undergone surgery, he no longer had leg pain, but there was still some moderate pain in his back. The report explains that unfortunately, he had developed a problem with his scalp, probably psoriasis. It was anticipated he would be able to return to work in two weeks, a phased return to work was recommended over two weeks and that heavy manual tasks should be avoided for three months.
185. During Mrs Kargbo’s absence on leave, Mrs Cross, Head of Nursing / Surgical Specialities took over the management of Mr Panan’s absence and wrote to him on 23 March 2022, (page 2216) noting that he had not

responded to Mrs Kargbo's communications. She records that Mr Panan had submitted the handwritten Med 3 and that Mrs Kargbo had communicated with him a number of times to say that the Respondent needed a, "valid fit note". None had been received. He was told that he had therefore been absent without leave from 25 February 2022 and that such unauthorised absence is unpaid and pay roll had been informed accordingly. She also told him that she had decided to commission a disciplinary investigation into whether he had provided a fraudulent Medical Certificate.

186. Mr Panan says that he submitted a proper Fit Note on 17 March, Mrs Cross says that she did not get it. On 28 March 2022, Mr Panan wrote a long letter protesting at the terms of Mrs Cross' letter to him of 23 March, (page 1495).
187. On 31 March 2022, Mrs Cross telephoned Mr Panan, followed up with an email, (page 1507 – 1508) to confirm that she had not received Mr Panan's earlier email of 17 March containing his Fit Note, but that she had now received this. His sick pay was therefore re-instated, his absence was no longer treated as unauthorised and disciplinary proceedings would not be pursued.
188. Mr Panan returned to work on 15 April 2022. He was to complete a 12 week phased return to work, shadowing Mrs Kargbo and completing an Action Plan, (page 1529).
189. By letter dated 28 April 2022, Mr Panan was invited to attend a Stage 2 Meeting in accordance with the Short Term Sickness Absence Policy, (page 1525). This was following up on the meeting originally set for 1 October 2021, which for various reasons had not taken place in the meantime.
190. Mr Panan did not co-operate in completing the Action Plan.
191. The Stage 2 Meeting took place on 11 May 2022, the Outcome confirmed in a letter of 20 May 2022, (page 1548). In the discussions at that meeting as confirmed in the Outcome Letter, were included a discussion about the skin condition he had developed on his scalp. Mr Panan spoke of the anxieties caused by the threat of disciplinary action, the possibility of the Absence Management Process proceeding to Stage 3, of his pay being stopped and his request for leave in April 2022 not being granted. He also expressed concerns about having to return to Northwick Park in April 2021, that the Flexible Working application had not been considered, that his Grievances had not been addressed, and the problems with regard to the Lease Car application. Mrs Kargbo emphasised that the Respondent wanted to support his return to work, which was behind their previous actions. She pointed out Mr Panan had failed to meet with her to discuss his Flexible Working. The outcome was that his absence would continue to be monitored for six months, they set a target of no more than four days

sickness during that period but he would remain at Stage 2 of the process. It was agreed that going forward there would be regular meetings, an appraisal, a work station assessment and no manual handling for three months.

192. In an email to Mrs Kargbo of 22 May 2022, (page 1552) Mr Panan wrote to re-iterate what he said had been said in the Stage 2 Meeting, that he did not expect any further absence in relation to his back / mobility, but he did have concerns about his scalp and that he may need support in the months ahead.

193. In an email of 27 May 2022 addressed to Mrs Kargbo, Mr Panan wrote,

"In light of our working relationship, I have made the decision to seek advice / discuss matters with a member of the Executive Committee as well as the Non-Executive Committee."

194. He wrote that he was due to be at work at the Northwick Park Hospital, but he had based himself at Ealing from where he said, he would conduct his correspondence.

195. Having seen Mr Panan's email to Mrs Kargbo, Mr Panan having copied the same to her, Mrs Hyde wrote to the Human Resources Directorate stating that working relations between her Senior ICU staff and Mr Panan was unsustainable, she said,

"It appears that when Dilip is managed in a supportive way but disagrees with it he either takes out a Grievance, reports individuals to the Executives, submits for an ET, reports individuals to the NMC etc and from his communication below he is indicating HON Isa Kargbo is next in line. I believe this to be a tactic by him to try and intimidate staff so that he is left alone and it makes normal line management duties very challenging as the Senior Team feel that they are walking on egg shells and that they are being watched and notes being taken to use against them by him... I advocate that it is not acceptable for him to remain working in the department."

196. On 29 June 2022, Mr Panan was re-deployed to Corporate Nursing and Mrs Adcock took over as his Line Manager.

197. On 18 July 2022, Mr Panan was on sick leave, but attended a Divisional Governance Meeting. Mrs Adcock found him there and asked him to withdraw. She subsequently wrote to him to explain that whilst he was on sick leave, he is not required to attend meetings or undertake any work commitments, (page 1612). Mr Panan was certified absent from work due to ill health on 18 – 20 July 2022.

198. Mr Panan returned to work on 21 July 2022, but was absent again on 22 July 2022. He returned to work on 25 July and Mrs Adcock held a Return to Work Meeting with him. They discussed his ongoing health

issues, his chronic skin condition and in particular his scalp. Mrs Adcock discussed Mr Panan's skin condition with him at length. She expressed concerns about the risks of infection if he attended work. He did not think there was such a risk. Mr Panan agreed to take that particular day off work as sick leave. The tasks allocated to Mr Panan by Mrs Adcock thereafter were administrative so that he could avoid the wards and carry out his work either from an office or from home.

199. A meeting took place on 26 July 2022, between a Panel and Mr Panan to discuss the breakdown in professional working relationships within the ICU of Ealing Hospital, (page 1709). Mr Panan had gone into work that day, but had gone home and remained off work sick until 1 August 2022.
200. On 4 August 2022, Mr Panan submitted a back dated Fit Note issued by his GP to cover the entire period for 17 July to 7 August 2022.
201. Mr Panan started a further period of absence from 8 August to 22 August 2022.
202. By letter dated 10 August 2022, (page 1656) Mr Panan was invited to a Stage 2 Short Term Sickness Absence Review Meeting to take place on 26 August 2022. It was stated to have been prompted by the fact that he'd had 14 days absence over three episodes, exceeding the agreed targets from 11 May 2022.
203. Mr Panan commenced a further period of absence from 25 to 27 August 2022.
204. The Review Meeting was scheduled to take place at 11am on 26 August 2022. At 09:09 Mr Panan emailed Mrs Adcock to say that he was not well enough to attend work, he was not in a position to attend the Review Meeting and asked for it to be re-scheduled. Given that the meeting was to take place by Teams, (i.e. not in person) it is not clear why Mr Panan's skin condition should prevent him from attending. Mrs Adcock replied at 09:41 to the effect that in accordance with Policy, she invites him to submit a written statement for consideration at the meeting. In effect, she refuses the postponement request. We note that at 15:51 that day Mr Panan wrote to Mrs Adcock to say he was feeling better and would be back at work the next day.
205. The Outcome of the Sickness Absence Review Meeting Stage 2 confirmed to Mr Panan in a letter dated 28 August 2022, (page 1687) that since the previous Review, he'd had absences of 21 calendar days and that he continued to have periods of absence. Mrs Adcock had therefore decided to proceed to Stage 3 of the process.
206. Mr Panan wrote to protest on 31 August 2022, (page 1755) putting forward the argument that he had no Short Term Sickness episodes as the period of absence from 18 July 2022 had lasted for more than four weeks. He

suggested the more recent absences could have been avoided if he had been given a phased return to work.

207. Mr Panan had a day's unauthorised absence on 5 September 2022 and then a period of sickness absence from 6 to 12 September 2022.
208. Mr Panan returned to work on 9 September 2022 and Mrs Adcock held a Return to Work Meeting with him. She confirmed what was discussed in an email of 12 September, (page 1776). Mr Panan said that things were improving, he was on another course of antibiotics, but his scalp condition had not cleared entirely.
209. On 13 September 2022 at 08:09, Mr Panan emailed Mrs Adcock to say that he would like to work from home for a few hours, by which time he would make a decision about whether his scalp condition would allow him to be physically at work. She responded asking him whether he was fit for work or whether he was making this request because he was too unwell to attend for duty. She asks which duties he would be undertaking from home. Mr Panan replied that he was fit for work but there were five Mandatory Training Courses he was going to complete. Mrs Adcock confirmed that she was happy to agree to his request to work from home, but made the point that requests to work from home needed to be made ahead of a shift starting, that he should complete the Mandatory Training and he should complete a report that he had been preparing for her.
210. On 15 September 2022, Mr Panan had a day's unauthorised absence from work. He commenced a period of sickness absence on 20 September, returning on 25 September.
211. In the meantime, an Occupational Health Report was produced on 22 September 2022, (page 2269). This confirmed the main concern was Mr Panan's scalp condition which had various diagnoses, most recently chronic Lichen Simplex. This caused pain and itching to his scalp. It tended to flare up if he was stressed. There was a concern this condition may lead to further sickness absence. He was fit to continue at work and undertake full range of his duties. No adjustments were required.
212. Mr Panan had periods of unauthorised absence, 26 and 27 September 2022, 29 and 30 September 2022. He began a period of absence on 3 October 2022, returning on 14 October 2022.
213. By letter dated 4 October 2022, Mr Panan was invited to a Stage 3 Final Formal Review Meeting to take place on 12 October 2022.
214. A report by way of Management Case was prepared for the Stage 3 meeting by Mrs Kargbo and Mrs Adcock, a copy of this is in the Bundle starting at page 1814. A table of his absences from April 2021 to August 2022 was included. That table included his absences due to back problems as well as anxiety / stress and skin disorder. There were 20

episodes of sickness, amounting to 197 days out of a possible 278 days and there were 39 uncertified days. There were three episodes of absence recorded since Mr Panan's re-deployment on 1 July 2022 and since his recovery from surgery. They were each for a skin disorder and consisted of two days 18 to 19 July 2022, 17 days from 22 July to 19 August 2022 and three days 25 to 29 August 2022. There had of course been further absences since the Stage 2 Meeting in August.

215. The Management Case also included an explanation that in the periods of absence 17 July to 7 August 2022, Mr Panan had submitted a back dated Fit Note but that in fact there had been occasions during that period when he had attended work.
216. The Management Report stated, (page 1840) that Occupational Health recommendations had been implemented, but whenever Mr Panan had asked to work from home or have a different starting time, his requests were granted. It stated that as Occupational Health had advised that he was fit to undertake full duties with adjustments, re-deployment had not been pursued.
217. Mr Panan's absence was said to be having a significant impact on the service; he had not worked in his role for 258 calendar days since resuming duties in April 2021, up until August. This had led to pressure on other staff and on the Respondent's ability to deliver a safe and effective service that meets targets. An additional Matron was needed to cover Mr Panan's absences, creating costs pressures on the Critical Care budget, which was not sustainable going forward.
218. The hearing did not go ahead on 13 October 2022, because it clashed with a Preliminary Hearing in this case. It took place on 14 October 2022. Mr Panan submitted a written Statement (page 1873).
219. The outcome of the Stage 3 Hearing was confirmed in a letter by the Chair Mrs Baje, which begins in the Bundle at page 1882.
220. Mr Panan had been accompanied by a Trade Union Representative.
221. In setting out the outcome, Mrs Baje explained that Mr Panan's musculoskeletal issues had been resolved following surgery in February 2022 and that the concern was his continuing high level of sickness due to his scalp condition. Since April 2022, Mr Panan had 38 days of sickness absence and 7 days of unauthorised leave where he had either failed to follow correct Sickness Absence Protocol or had simply not turned up at work. It was noted that the most recent Occupational Health Report stated that he was fit to continue at work and undertake a full range of duties. Since that appointment, he had 11 sick days and 5 unauthorised days of absence, a total of 16 days and he continued to be off sick. She felt she had no reassurance that his absence would improve. Mrs Baje noted that his continuing absence was impacting on his colleagues and department.

She felt she had no reassurance that re-deployment would provide any improvement. She noted that he complained about the stress caused by the way that he was managed by Mrs Kargbo and that he now complained about the stress caused by the way that he was being managed by Mrs Adcock.

222. Mrs Baje's decision was that Mr Panan's employment should be terminated on the grounds of capability due to his frequent Short Term Sickness.
223. In respect of his wages claims, Mr Panan claims that he had not been paid as he should have been in June 2021 and November 2021, (in Claim 2) and in October 2022, (in Claim 3). When he was taken to the relevant payslips in the Bundle at pages 197, 198 and 199 he was unable to identify any shortfall in the payment that he had received. We find that there was none.

Conclusions

Claim 1

224. All of the allegations in Claim 1 are of direct race discrimination. Mr Panan identifies himself as mixed race Carribean. He is from Trinidad, as is, we note as an aside, Mr Jaggernath. A number of the Respondent's witnesses were not white British.
225. We take each of the issues as identified, in turn.

Issue 1 - Keeping the Claimant in a low profile outlook. E.g. being told what to say and not to say in Finance Meetings and Meetings with the Chief Nurse, and being questioned about what C said during Meetings.

226. This allegation is not upheld on the facts.

Issue 2 - The Claimant had to commute to Northwick Park Hospital and back for regular weekly and monthly meetings (which was not a problem). The Claimant was not made to feel welcome in the meetings by Ruth Cross (RC), Pedro da Silva (PS), Debbie van der Velden (DV), Rose Gunnoo (RG) or Nancy Hyde (NH).

The Claimant was made to feel unwelcome because of:-

- *A lack of greetings;*
- *Unfriendly body language and facial expressions which discouraged him from getting involved;*
- *Condescending laughter when he spoke; and*

- *A failure to include him in conversations at the end of meetings.*

227. The allegation against Mr da Silva was withdrawn. In respect of the allegations against the other individuals, they have not been upheld on the facts.

Issue 3 – The Claimant’s University fees were not paid and access to University was suspended due to late payment of second year fees.

228. There was no late payment of fees on the facts. These allegations were made against Mrs Gunnoo and Mrs Hyde, who had nothing to do with these matters.

Issue 4 – Giving the Claimant no credit or acknowledgement after a successful CQC Inspection.

229. This is factually correct. The allegation of discrimination was made against Mrs Gunnoo, Mrs Hyde and Mr Jaggernath. There is nothing to suggest that the reason for this was because of Mr Panan’s race, there are no facts from which we could conclude without explanation that race lay behind this, the burden of proof does not shift to the Respondent. Had Mr Panan been white British, he would have been treated the same way. The claim fails in this regard.

Issue 5 – Giving the Claimant no credit or acknowledgement after the department made the short list for ‘Team of the Year’ in 2018, ‘Staff Excellence Award’.

230. This allegation is factually correct. For the same reasons expressed in respect of Issue 4, this claim however is not upheld as this had nothing to do with Mr Panan’s race. Had Mr Panan been white British, he would have been treated the same way.

Issue 6 – PS was invited by NH and RG to attend a Finance meeting for no proper reason. The reason for PS’s attendance was unknown to the Claimant at the time as no information about the upcoming position for the Lead Nurse role was made available. The Claimant now believes that PS’s attendance at the meeting was to prepare PS for the upcoming Lead Nurse position which others were not made aware of. The Claimant alleges C only became aware of the post on 17 March 2020.

231. This claim is not upheld on the facts. There was good reason for Mr da Silva to attend the meeting, it was normal for him to do so as did other Matrons. He was not being groomed for the Lead Nurse role. It may be that Mr Panan only became aware of the Lead Nurse role on 17 March 2020, but there are no facts upon which we could properly conclude absent explanation from the Respondent, that this had anything to do with Mr Panan’s race. The burden of proof does not shift to the Respondent.

Mr Panan relies on Mr da Silva as a comparator. Mr da Silva is not white British. Had a person been in exactly the same position as Mr Panan who was white British, they would not have been treated any differently.

Issue 7 – DV, Matron, treated the Claimant disrespectfully in meeting in front of RG and AJ, by saying something condescending to C and laughing, and speaking to C in an upsetting way.

232. On the facts this allegation is not upheld. We accept Mrs van der Velden's account of the meeting.

Issue 8 – When the Claimant complained to RG about the way DV had treated him in the meeting on 19 February 2020, RG made it look as though the Claimant had done something wrong by saying that DV was upset with the way C had spoken to her and wanted an apology from C.

233. This allegation is not upheld on the facts.

Issue 9 – The Claimant was denied annual leave to go and see his mother when she was unwell. The Respondent found it difficult to get his annual leave approved and there was a delay in approving it. The Respondent required C to provide evidence that there would be sufficient cover while he was away. Eventually the Claimant got his Union involved and took emergency leave.

234. This claim is not upheld on the facts. Mr Panan was not denied annual leave to go and see his mother. There was no delay in approval. He was asked to confirm that cover was in place, not provide evidence and this was usual practice.

Issue 10 – The Claimant was not informed about the previous post holder's (AJ) resignation from the post of Lead Nurse for Critical Care until there was only one week before AJ's last day of service.

235. This allegation is factually correct. However, there is no evidence that anybody knew about the vacancy any sooner than did Mr Panan. There are no facts on which we could conclude that absent explanation from the Respondent, that this had anything to do with Mr Panan's race. The burden of proof does not shift and this claim fails. Had Mr Panan been white British, he would have been treated the same way.

Issue 11 – The Claimant was not provided with support when he raised workplace issues with RG. C says he raised issues about multiple matters which affecting the service including staff underperforming, recruitment issues. C says his concerns were not taken seriously and were treated in a dismissive way in one to one meetings.

236. This allegation is not upheld on the facts.

Issue 12 – *Delay in signing University Admission Forms to allow the Claimant to enrol on time.*

237. The date given by the Claimant is February 2020, but the events were in August 2017 and there was no delay. This allegation is not upheld on the facts.

Issue 13 – *NH sent an email announcing PS appointed to post and congratulating him on his appointment. The Claimant alleges that the list of recipients contained 23 names and only two were from an ethnic minority group. The tone of the email was celebratory.*

238. This allegation is correct on the facts. It was an appropriate email for Mrs Hyde to have sent in the circumstances; people needed to know and they needed to know urgently, given the Covid crisis. The email was not celebratory. There are no facts from which we could properly conclude that Mr Panan's race had anything to do with the sending of this email and the way that it was worded or to whom it was sent. Had there been a hypothetical comparator in Mr Panan's precise circumstances but white British, the same email with the same wording to the same recipients would have been sent.

Issue 14 – *The Respondent deliberately engineered things to ensure that PS's appointment to the Lead Nurse – Critical Care role by:-*

(1) *Telling C in a conversation that the vacancy was not going to be filled.*

239. This allegation is probably true because on the facts, the vacancy was not going to be filled. There are no facts from which we could properly conclude absent explanation, that this had anything to do with Mr Panan's race and a white British hypothetical comparator would have been told the same.

Issue 14 - *continued*

(2) *Going through the recruitment process quietly without following the proper recruitment process, so C did not find out about the vacancy.*

240. Factually, this is true. The reason was because of the crisis caused by the Coronavirus. There are no facts from which we could properly conclude the recruitment process followed was so as to make sure Mr Panan did not find out about the vacancy or that it had anything to do with his race. The same events would have occurred if there had been a hypothetical white British comparator in the same situation as Mr Panan.

Issue 14 – *continued*

(3) *Not advertising the Lead Nurse – Critical Care role until 17 March 2020, when the closing date for applications was 18 March 2020.*

241. This is factually true but again, a consequence of the Coronavirus crisis. For the reasons articulated in respect of Issue 14(2) above, this allegation is not upheld.

Issue 14 – continued

(4) *Modifying the job specification to allow PS to meet essential criteria. “ICU IT Systems” changed to “ITU IT Systems” and “Experience of working with Theatre and the ICU IT Systems” was changed from “Extensive experience working in Theatre and ICU”. The Claimant alleges PS does not have sufficient level of academic qualification, including Higher Level Managerial qualification which should have been essential for the role. The Claimant alleges that the emphasis should be on having ITU experience and not ITU IT Systems.*

242. This allegation is not upheld on the facts. The changes to the job specification were because it was a different job to fulfil a different need arising out of the Coronavirus crisis. Mr da Silva had appropriate qualifications and experience. He was appointed after a competition with the one other applicant, Mrs van der Velden. Mr Panan was treated in exactly the same way as all the other Matrons were treated who were potential Applicants to that role. There are no facts from which we could properly conclude, absent explanation, that this had anything to do with Mr Panan’s race. A hypothetical comparator in the same situation as Panan would have had the same experience and the recruitment process would have been just the same.

Issue 15 – *C says he was bullied by AJ. AJ came to the Ealing office three to four times a week. AJ told C to move to an office outside the ICU without having a good reason for doing so.*

243. We find that Mr Panan was not bullied by Mr Jaggernath. He did ask Mr Panan to move office, for good reason, so that he would be more visible. There are no facts from which we could properly conclude, absent explanation, that this had anything to do with Mr Panan’s race. A hypothetical comparator in the same situation as Panan would have been treated the same way. This allegation is not upheld.

Issue 16 – *C submitted a bullying and harassment complaint to HR. There was a delay in investigating his complaint and it was not upheld even though there was a lot of evidence.*

244. There was a delay and the Grievance was not upheld. The Grievance was not upheld for the reasons given by Mrs Hyde in her letter of 20 April 2020, following a reasonably thorough independent investigation. There are no facts from which we could properly conclude that the reason Mr Panan’s

Grievance was not upheld had anything to do with his race. A hypothetical comparator in the same circumstance as Mr Panan who had raised the same Grievance would have faced the same outcome.

Issue 17 – CS and VM behaved differently towards C. CS told C that he was no longer her Line Manager. When AJ wanted to discuss an issue about Intensive Care he went straight to VM and ignored C, and VM when straight to AJ and ignored C. C believes this may have been under the direction of MH.

245. Ms Sharpe and Mrs Marsland did behave differently, in that they did go to Mr Jaggernath with issues and he did likewise with them. The reason for this was because Mr Panan was not visible and he was very often not there at all. There are no facts from which we could properly conclude that this had anything to do with Mr Panan's race. A hypothetical comparator in the same circumstances would have seen Ms Sharpe, Mrs Marsland and Mr Jaggernath behaving in the same way.

Issue 18 – C was regularly asked when he was going to leave, and was made to feel as though the Respondent would be happier if he left his job.

246. This is an allegation made against Mr Jaggernath, it is not upheld on the facts.

Issue 19 – The end of C's shift after 8pm, he contacted RG to give her an update about what had happened at Ealing and how they had responded to the Covid-19 pandemic. RG paid no attention to what C said, but questioned who had approved C going into work on a Sunday and what C was expecting to be paid. RG's email was copied to other Senior Managers, which embarrassed C and made it look as though he was after money.

247. We find that Ms Gunnoo's response was a proper and understandable query. It was appropriate for her to copy that to her managers. The correspondence did not make it look as if he was after money. There are no facts from which we could properly conclude, absent explanation, that this had anything to do with Mr Panan's race. The hypothetical comparator in the same circumstances as Mr Panan who had written to Mrs Gunnoo in the same terms would have received the same response.

Issue 20 – Withdrawn

Claim 2

Disability

248. The Respondent accepts that for the relevant period, up until the time of Mr Panan's operation and immediately thereafter during his recovery, (February 2022) he was disabled as defined in the Equality Act 2010 by

reason of severe L4 / 5 Spinal Stenosis. The Claim was issued on 30 October 2021 and the allegations of disability discrimination therefore are limited to the period up to that date, there are no allegations of disability discrimination in Claim 3.

The Allegations

249. We will work our way through the 20 allegations set out in the Table of Complaints relating to Claim 2, which are variously identified as either victimisation, direct disability discrimination, failure to make reasonable adjustments and direct race discrimination. Before we do that, we make the finding that we accept the evidence of Mrs Kargbo and Mr Connelly, against whom accusations of victimisation are made, that they did not know of the existence of Claim 1 until February 2022. None of the allegations of victimisation against those two individuals can succeed.

Issue 1 – Application for NHS Lease Car and delay in dealing with it – an allegation of direct disability discrimination against Mrs Kargbo.

250. There was a delay. The delay was caused in the first place by Mrs Kargbo's absence from work on leave and subsequently by the unfortunate loss of Mr Panan's Licence. There are no facts from which we could properly conclude, absent explanation, the reason for the delay and actions by Mrs Kargbo because of Mr Panan's disability. Somebody in the same situation as Mr Panan who was not disabled, would have suffered the same delay.

Issue 2 – IK was asked for a statement saying that the Driver's Licence was not received which IK refused to do - this is an allegation of victimisation against Mrs Kargbo.

251. On the facts, Mrs Kargbo did not, "refuse" to provide the statement, but it does appear that she did not comply with his request. Be that as it may, Mrs Kargbo did not know that Mr Panan had issued Tribunal proceedings and therefore as a complaint of victimisation, this allegation fails.

Issue 3 – Required to do a Clinical shift with patients which C could not do due to his disability – an allegation of direct disability discrimination against Mrs Kargbo, said to have taken place on 29 June 2021.

252. No such instruction was given at this time. In September 2021, a general instruction was given to Matrons to do one Clinical shift a week, but it was made clear to Mr Panan that he was not to undertake anything manual. In any event, it was an instruction given to all Matrons and it follows that it was not an instruction given to Mr Panan because he is disabled. There are no facts from which we could properly conclude, absent explanation from the Respondent, that the reason for this instruction was Mr Panan's disability. A comparator who was not disabled would have been treated in the same way.

Issue 4 – Not informed of Band 8C role when off sick – an allegation of direct race discrimination against Mrs Hyde and Mrs Kargbo in December 2020.

253. The role was advertised in the usual way and as a matter of standard practice, the staff were not directly informed. There are no facts from which we could properly conclude, absent explanation from the Respondent, that the reason Mr Panan was not directly informed of this vacancy whilst he was off sick was his race. A hypothetical comparator in the same situation as Panan would not have been directly informed.

Issue 5 – VM being placed in C's role in Ealing – an allegation against Mrs Hyde of direct race discrimination in June 2020.

254. Factually the allegation is correct. Somebody had to be placed in Mr Panan's role in his absence. There are no facts from which we could properly conclude, absent explanation, that the reason was Mr Panan's race. The same would have occurred with a hypothetical comparator being in Mr Panan's situation at that time.

Issue 6 – Despite efforts to explain the challenges of working from NPH, C was instructed not to go to Ealing – this is an allegation of failure to make reasonable adjustments in April 2021 against Mrs Hyde and Mrs Kargbo.

255. On the facts, Mr Panan was told to go to the Northwick Park Hospital. It is semantics for Mr Harris to submit Mr Panan was, "not instructed not to go to Ealing".
256. The PCP relied upon in this regard was requiring Mr Panan to work from Northwick Park Hospital. The point needs to be made clear that this relates to the period of his return to work in April 2021, not April 2022, which is after the issue of Claim 2. There was a requirement on his return to work in April 2021 that he should work from Northwick Park. That requirement did place him at a disadvantage at the time in terms of the discomfort of the longer car journey, the longer walk from the car park and the longer corridors at Northwick Park Hospital as compared to Ealing.
257. The Occupational Health Report prior to his return to work did not make a recommendation specifically in this regard, it did mention limited mobility, but the advice was not clear.
258. Given the way that Mr Panan worded his emails on his return to work, the Respondent might be forgiven for thinking that the real reason Mr Panan objected to working from Northwick Park Hospital were long standing emotive reasons. Be that as it may, after his first two shifts at Northwick Park Hospital and on hearing from Mr Panan about his difficulties, Mrs Hyde and Mrs Kargbo relented and allowed him to continue working from Ealing, thereby making the adjustment contended for. In those circumstances, we find that there was no failure to make a reasonable

adjustment. It became reasonable for the adjustment to be made once Mr Panan had made his physical difficulties clear and upon his doing so, the adjustment was made.

259. Had there been any merit in this allegation, it would have been out of time.

Issue 7 – Letter from the Occupational Health Doctor confirmed the classification of C disability yet this was not supported by IK – an allegation of failure to make reasonable adjustments made against Mrs Kargbo in May 2021.

260. The PCP relied upon is ignoring recommendations from Occupational Health. We find that there was no provision, criterion or practice of ignoring Occupational Health recommendations. We also find that in this instance, the Occupational Health was not ignored, nor did Mrs Kargbo fail to support Mr Panan or the recommendations. The allegation is not upheld.

Issue 8 – IK stating to C that he should not interfere with VM management of the ITU – an allegation of victimisation made against Mrs Kargbo in May 2021.

261. The allegation is correct, Mr Panan was told not to interfere with Mrs Marsland's management of the ICU. That was a reasonable instruction and in any event, Mrs Kargbo did not know of the issue of the first Claim and as a complaint of victimisation this must fail.

Issue 9 – NH stating to C that he should not interfere with VM management of the ITU – an allegation of victimisation against Mrs Hyde in May 2021.

262. Mrs Hyde did know about the issue of Claim 1. She accepts that she told Mr Panan not to interfere with Mrs Marsland's management of the ICU, and rightly so. This was a reasonable instruction for her to have given. We accept Mrs Hyde's evidence the issue of Claim 1 had nothing whatsoever to do with her issuing this instruction. There are no facts from which we could properly conclude otherwise. Further, it did not amount to a detriment.

Issue 10 – IK telling C to leave Ealing and go to Northwick Park Hospital immediately and speaking to C in a disrespectful manner – an allegation of direct disability discrimination against Mrs Kargbo in June 2021.

263. This allegation was not upheld on the facts: Mrs Kargbo did not tell Mr Panan to leave Ealing and go to Northwick Park Hospital immediately and she did not speak to him in a disrespectful manner.

Issue 11 – Management not explaining to staff what was happening so believed VM was Matron – an allegation of failing to make a reasonable adjustment against Mrs Kargbo in September 2021.

264. The PCP relied upon is the policy of not telling staff that Mr Panan remains in the role as Matron. There was no such policy.

Issue 12 – IK refusing the handover from VM to C – an issue of direct race discrimination against Mrs Kargbo in May 2021.

265. The comparator named is Mrs Marsland. She is not an appropriate comparator because she was not in the same situation as Mr Panan; she was not returning to work from a long period of absence with another Matron acting up into her role. It was always the intention that there would be a handover from Mr Panan to Mrs Marsland once he had completed the Action Log over the duration of his planned 12 week phased return to work. He did not complete the Action Log. There are no facts from which we could properly conclude that the failure to facilitate a handover was because of Mr Panan's race and we find that race played no part whatsoever in Mrs Kargbo's decision making in this, (or any other) decision making. A hypothetical comparator would have been treated in the same way.

Issue 13 – AS making C feel unwelcome by not asking how you are and not acknowledging the fact that C returned to work after a year's absence – an allegation against Mr Scurr of direct race discrimination.

266. As Mr Scurr acknowledged, it is possible that he did not ask Mr Panan how he was or acknowledge that he was returning to work after a year's absence, but we accept he did not deliberately do so. There are no facts from which we could properly conclude, absent explanation, that his reason for doing so was because of Mr Panan's race. A hypothetical comparator would have been treated in the same way. We find that race played no part in Mr Scurr's actions or inactions.

Issue 14 – Required to go to Stage 1 Sickness Absence Meeting and spoken to with viciousness and humiliation – an allegation of victimisation and a failure to make reasonable adjustments against Mrs Kargbo on 23 September 2021.

267. The PCP relied upon is the requirement to go to a Stage 1 Sickness Absence Meeting. In evidence, Mr Panan agreed that inviting him to a Stage 1 Sickness Absence Meeting was not a failure to make a reasonable adjustment and that his real complaint was the manner in which he was spoken to. In any event, a Stage 1 Absence Review Meeting is not a detriment, in that its purpose is to understand the underlying reason for the individual's absence and what support, such as implementing reasonable adjustments, may be required.

268. We have found that Mr Panan was not spoken to with viciousness and humiliation.
269. Mrs Kargbo did not know of the issue of Claim 1 and therefore her actions in this regard could not in any event have been regarded as acts of victimisation.

Issue 15 – Line Manager used disability to make case that not fit for role – an allegation of direct disability discrimination against Mrs Kargbo on 23 September 2021.

270. We found on the facts that Mrs Kargbo did not use Mr Panan's disability to make a case that he was not fit for his role.

Issue 16 – C name removed from draft Outreach Policy and VM replaced as one of the Authors – an allegation of victimisation and direct race discrimination against Mrs Kargbo on 27 July 2021.

271. Mr Panan's name was removed from the draft Outreach Policy, by Mr Connelly, not Mrs Kargbo. He did so because the Policy had been through many iterations, he was its Author, Mr Panan's early input was by way of contribution, not authorship. There are no facts from which we could properly conclude Mr Connelly's actions were because of Mr Panan's race. The same would have happened had Mr Panan been white British. Mr Connelly did not know the existence of Claim 1 and so his actions did not amount to victimisation.

Issue 17 – Complaint regarding the above not rectified after bringing it up with IK and LC – allegations of victimisation and direct race discrimination against Mrs Kargbo and Mr Connelly on 20 July 2021.

272. It is illogical that the date for this allegation is seven days before the date of the preceding allegation. In any event, the situation was rectified in that Mr Panan's contribution, (amongst others) was expressly acknowledged. In any event, neither Mr Connelly or Mrs Kargbo knew of the existence of the first set of proceedings and so their actions or inactions could not have amounted to victimisation and there are no facts on which we could properly conclude that their action or inaction was because of Mr Panan's race. A hypothetical comparator would have been treated in the same way.

Issue 18 – Being told not to Lead for Outreach at a Sickness Review Meeting – an allegation of direct race discrimination and victimisation against Mrs Kargbo on 23 August 2021, Mr Connelly is relied upon as an actual comparator.

273. Mr Connelly was the first person to be appointed as a Lead for Outreach. Mr Panan never was the Lead for Outreach. He was informed that Mr Connelly had been appointed to the new role. Mrs Kargbo did not know of

the existence of the first set of proceedings and her actions could not therefore have amounted to victimisation. There are no facts from which we could properly conclude that her actions were motivated by Mr Panan's race. The same thing would have happened, had Mr Panan been white British.

Issue 19 – Virtual meeting to discuss Informal Grievance cancelled and not rearranged – an allegation of victimisation against Mrs Kargbo on 20 July 2021.

274. The meeting was not rearranged, because of Mr Panan's absences, and he himself did not take the initiative to seek to rearrange the meetings. In any event, as we have found, Mrs Kargbo did not know of the existence of the first set of proceedings and her action or inaction cannot therefore have amounted to victimisation.

Issue 20 – Informal Grievance Letter not upheld by the Trust – an allegation of victimisation against Mr Spivey on 4 October 2021.

275. We did not hear evidence from Mr Spivey. However, it is apparent from the documents the Grievance was not progressed because Mr Panan had not followed the Respondent's Policy by seeking to advance it informally. He was told by Mr Spivey what he should do. That is not a detriment. It seems likely that Mr Spivey would have known of the existence of the first set of proceedings, but we find it more likely than not, his reason for not treating Mr Panan's letter as a Formal Grievance were those as set out in his email of 7 October 2021 and not because Mr Panan had issued the first set of proceedings. Directing him to deal with the matter informally first is not a detriment.

Stepping back for an overview

276. We have stepped back and taken an overview of the facts of the case and of the allegations made by Mr Panan, to see whether if looked at in that way, one might see a pattern that suggests that discrimination on the grounds of race or disability, or of victimisation, might lie behind some of the things that happened to him. We are satisfied that there is no suggestion of that.
277. For the above reasons, Mr Panan's discrimination and victimisation claims fail.

Claim 3

Unfair Dismissal

278. We will deal first with each of the eight grounds set out in the List of Issues as to why Mr Panan says his dismissal was unfair:-

- 278.1. He complains that in July 2022, when his skin condition had worsened and he had asked to take a day's leave, he was told by his manager that it had to be recorded as a day off sick, which triggered Stage 2. It is a reasonable step to take to insist that absence due to ill health should be recorded as such. In any event, Mr Panan was dismissed on the basis of 38 days absence since his return to work in April 2022, in circumstances where there was no clear prognosis as to when, if at all, his attendance would improve, against a background of disruption to the service. In those circumstances one day's less sickness absence would not have made any difference to the decision.
- 278.2. Mr Panan complains that as he was at high risk of infection because of his skin condition, the Respondent should have allowed him to work from his office, should not have insisted that he work on the Ward and should not have instructed him that if he could not work on the Ward, that he should go off sick. We accept Mrs Adcock's evidence that this did not happen. Furthermore, if Mr Panan was at high risk of infection, it would be reasonable for the Respondent to say that he ought not to be at work at all and these matters were not raised with the dismissal decision maker, Mrs Baje.
- 278.3. Mr Panan complains about the Respondent proceeding with the Stage 2 Review on 26 August 2022 in his absence. He complains that deprived him of an opportunity to explain his sickness absence, but that is not the case. He had the opportunity to do that at the Stage 3 Meeting. If Mr Panan had been able to come up with compelling arguments either that his absences did not warrant dismissal or that his prognosis was favourable, he would not have been dismissed. Furthermore, it was not clear why Mr Panan had not been able to attend that hearing; giving him the opportunity to make a statement and proceeding in his absence appears to be in line with the Policy.
- 278.4. Mr Panan claims that his absence should have been dealt with under the Long Term Sickness Absence Policy, relying upon his retrospective Fit Note that certified all of his absence under the one umbrella period of absence. As we have seen, the Policy defines Long Term Absence as a continuous period of absence of four weeks or more. The fact of the matter is that during that four week period, he was at work on some occasions and so a retrospective Fit Note does not transform intermittent absence. In any event, Mr Panan did not at the Stage 3 Meeting allege that he had been absent on days on which it was recorded that he had been at work. Further, given Mrs Baje's conclusions that there were no further adjustments that could be considered to facilitate Mr Panan's return to work, that re-deployment was not an option, the difficulties Mr

Panan's absence continued to cause for the Respondent organisation, even if the absence had been treated as Long Term Absence, the outcome would have been the same.

- 278.5. Mr Panan alleges that his previous long term absence was taken into account under the Short Term Absence Policy to justify his absence. It was not. It was there in the background, but it did not inform the decision to dismiss by Mrs Baje.
- 278.6. Mr Panan complains the Respondent never allowed him to resume his post for nearly two years despite many opportunities. This is not true. He was provided with appropriate phased returns to work and if he had completed them, he would have returned to his post. Requiring such phased returns to work were in the best interests of Mr Panan and the Respondent's patients.
- 278.7. Mr Panan complains that he was replaced by a colleague, which demonstrates that his dismissal was pre-determined. A colleague was appointed to act in his place during his absence. Such was necessary and that Mrs Marsland ought to have been working elsewhere is a factor in the difficulties faced organisationally by the Respondent as a consequence of Mr Panan's ongoing frequency of absence. We find that, notwithstanding Mrs Cross' actions, there was no pre-determination or conspiracy to remove Mr Panan.
- 278.8. Mr Panan complains there were other formal processes that demonstrate previous attempts to remove him from his role. This is a continuation of the previous point, that the Respondents had decided to remove him from their employment. He points in particular to the threat of disciplinary action in the alleged data breach, alleged fraudulent sick note, (not the Respondent's finest hour) and the refusal of his Flexible Working request. As we have indicated in the previous paragraph, we find that there was no pre-determination, no conspiracy, to remove Mr Panan from the Respondent's employment and the decision making of Mrs Baje was objectively founded on Mr Panan's recent frequent periods of Short Term Absence and the impact this was having on the Respondent's abilities to provide a service to its patients.
279. Pervading all of this is the test of fairness set out at Section 98(4) of the Employment Rights Act 1996. Having regard to all the circumstances, was the decision to dismiss within the range of reasonable responses of a reasonable employer? All the indications were on the Occupational Health advice obtained by the Respondent, that there would be continuing ongoing absences. Mr Panan himself acknowledged that to be the case. Mr Panan knew very well from the earlier Stage Reviews that continuing intermittent absences would likely lead to his dismissal. The NHS is in a continuing funding crisis, all the worse in the period immediately after Covid. It cannot indefinitely keep on its books expensive members of staff

who are not contributing to the care of patients. It was not sustainable to continue to place another Matron, an additional Matron, in his role to cover for him during his many periods of intermittent absence through ill health. For these reasons, we find that the decision to dismiss was within the range of reasonable responses of a reasonable employer and the complaint of unfair dismissal must also fail.

Wages Claim

280. We have found on the facts that Mr Panan was paid in full on the months referred to in the Lists of Issues and the wages claims therefore also fail.

Employment Judge M Warren

Date: 4 January 2024

Sent to the parties on: 19 January 2024

For the Tribunal Office.