EMPLOYMENT TRIBUNALS

Claimant: **Mr S Molla**

Respondent: **London Borough of Hackney**

Heard at: **East London Hearing Centre**

On: **28, 29 and 30 November 2023**
5, 6, 7, 8 and 12 December 2023

Before: **Employment Judge Gardiner**
Members: **Mrs B Saund**
Ms S Harwood

Representation

Claimant: In person
Respondent: Mr M Salter, counsel

JUDGMENT was sent to the parties on 19 December 2023. The Claimant has subsequently requested Written Reasons. Although the request was made more than 14 days after the date on which the Judgment was sent to the parties, the Tribunal grants the request given that the 14-day period spanned the Christmas and New Year Bank Holidays.

REASONS

References in these Reasons to numbers in square brackets are to the corresponding page number in the hearing bundle. References to issues are to the corresponding issue numbers in the Case Management Orders of Employment Judge Buckley made on 24 March 2022, as clarified during the course of the Final Hearing.

Introduction

1. This is a race and religious discrimination, harassment and victimisation claim brought by Mr S Molla against the London Borough of Hackney. It relates to the way in which Mr Molla was treated whilst working as a Care Support Worker at Century Court, a residential service for those in need of domiciliary care. He had been employed in a permanent role since December 2013. He makes a series of allegations about the way he was treated over the period from 2015 until mid-2021, although many of his allegations occurred during the last two or three years of this

period. The allegations were identified in a list of issues attached to the order of Employment Judge Buckley made in March 2022. This list of issues formed the basis on which documents were exchanged and witness statements prepared. They were discussed at the start of the Final Hearing. As a result, an amendment was made to **issue 1.3.8** to clarify the dates of the matters alleged.

2. The Final Hearing took place over eight days, focusing on liability only. At the outset, with the Respondent's agreement, further pages were added at the back of the agreed bundle. The Respondent did not accept that the new documents were relevant to the issues. On day eight of the hearing, having had sufficient time to deliberate, the Tribunal was able to announce its decision and provide oral reasons.

3. There has subsequently been a request for written reasons. Numbers in square brackets refer to the relevant pages of the Final Hearing bundle.

Findings of fact

4. The Claimant is a Muslim of South Asian ethnicity. He worked as a Care Support Worker at Century Court. His immediate line manager was a Team Leader who in turn reported to the Scheme Manager for Century Court. From 2015, his Team Leader was Ms Folashade Osibogun. She was one of two Team Leaders. Initially the Scheme Manager was Ms Yvonne King. When she left in 2016, the role was performed by Mrs Marie Swaray until she was moved to another scheme in 2017. At that point, Mr Keith Suckram became Scheme Manager.

5. Around August 2015, the Claimant applied for a Team Leader position. His application was unsuccessful. His failure to secure promotion is alleged to be an act of direct race or religious discrimination **[issue 1.3.9]**. The Tribunal has insufficient information about the identity of the other candidates or the criteria for selection to be able to make any positive findings about the Claimant's treatment during this recruitment process.

6. The Claimant's case is that he made a further application in January 2016 for a Team Leader position, and this application was also unsuccessful. This failure is alleged to be a further act of direct race or religious discrimination. This is not specifically disputed by the Respondent, although there were no documents at all before the Tribunal in relation to this recruitment process. Again, the Tribunal is unable to make any findings on this issue**.**

7. In around September 2016 the Claimant was not shortlist when he applied for four posts – Locality Manager, Team Manager, Outreach Support Worker and Assistant Researcher. When he was told he was unsuccessful, he alleged that this was "possibly because of his ethnicity" **[107]**. Again, the Tribunal is unable to make any detailed findings about this application.

8. In December 2016 **[128]**, the Claimant applied for the vacant position of Locality Manager. The post was withdrawn by the recruitment team but readvertised in

January 2017. Ms Ducie was one of the three members of the recruitment panel. The Claimant was unable to attend on the interview date. He asked for the interview to be rescheduled as he was due to be abroad on annual leave on the proposed date. This request was refused because a decision had been made not to delay the process **[131]**.

9. On 10 February 2017 the Claimant emailed Manjit Dhillon complaining about unfairness and inequality in the recent Team Leader recruitment process. He described his engagement with the process, ending "this seems to me very strange. Could you please look into this issue?". Ms Dhillon replied on 13 February 2017 that she had passed his email to Ms Ducie to look into the complaint. Ms Ducie replied asking for more information.

10. On 29 March 2017, the Claimant sent a long email to Ms Ducie **[129]**, which he copied to Manjit Dhillon in HR. In the email, he provided more information about the promotion complaint. He alleged that this was discrimination and unfairness in maintaining equality and diversity. It was clear from the wording he used that he was alleging race discrimination based on his Asian ethnic background and also was alleging sex discrimination.

11. On 3 April 2017, Ms Ducie responded rejecting the complaints the Claimant was raising about his previous applications. She noted he was raising issues about discrimination, adding he had raised issues of feeling unfairly treated and had questioned the competency of managers and Team Leaders going as far back as November 2014. She ended her email by saying that if he remained dissatisfied with her response, he would need to write raising a formal grievance and set out clearly his issues. He was told that it would then be investigated under the Council's grievance procedure. She was dealing with his complaint informally but was giving him the option to resubmit the complaint as a formal grievance.

12. On 4 April 2017 **[127]** the Claimant replied. He provided further details about his qualifications. He contrasted these with the qualifications of the successful candidates for Team Leader roles. He wrote that he wanted to raise the grievance procedure. He said he wanted to take the issue further, to the Employment Tribunal, "but I need to know who will be investigating". This amounted to the Claimant raising a formal grievance.

13. Ms Ducie replied that an officer would be appointed to investigate his grievance and he would be informed in due course who they were. He was asked to state clearly and concisely the nature of his grievance. The Claimant replied he had already done so in his last two emails and said he would send them again "as your're asking for the same information again". Ms Ducie replied: "Please consider the tone of your emails before sending – I am experiencing them as bordering on rude now". She said that his information had not been presented in a manner which would assist the investigation and the current form was unhelpful **[127]**. She never withdrew her commitment to appoint a grievance officer to look into this complaint.

14. The Claimant asked for the relevant policy guidelines to the grievance procedure as he said that the policy and procedure folder was not in the staff office. Ms Dhillon responded providing a link to the Grievance Procedure on the Respondent's intranet **[134]**. There is only one version of the Grievance Procedure in the Bundle. This version has not been dated. We deduce from a comment made by Ms Ducie at the end of her letter dated 6 August 2019 that the grievance procedure was around that time, introducing the need to submit formal grievances using an online form. Therefore, there was no such requirement in 2017 and a formal grievance could be instigated by submitting a complaint in an email.

15. The 2019 Grievance Resolution procedure **[662]** started with a statement that "informal resolution normally gets the best result". At section 4, it sets out the advantages and disadvantages with an informal approach. The disadvantages included a statement that "it's not always appropriate eg if the complaint is serious". The approach to take to consider an informal grievance "must always be agreed with the employee who has made the complaint". Notes should be kept of meetings held to discuss informal grievances **[666]**. The section headed "Examples of Informal approaches" indicated that an informal approach might be appropriate for complaints about "unequal treatment", and unacceptable or offensive behaviour **[667]**.

16. Section 5 noted that the formal approach should be used where the complaint is serious enough to warrant a formal investigation. Grievances should normally be made within 3 months of the event being complained about. At paragraph 5.3, the written procedure stated that "the grievance must be set out in writing using the online form available on the intranet" **[670]**. The implication was that an email complaint would not necessarily be regarded as a formal grievance.

17. At this stage in 2017, and at all times subsequently, the Claimant was a member of Unison. At some point, although the dates are unclear, he was their Equality Officer for the Hackney branch.

18. On 16 September 2017, Ms Osibogan emailed her line manager, Keith Suckram, regarding the Claimant's behaviour towards her on that date, when he was complaining to her about the allocation of work. She considered his conduct was threatening and amounted to harassment. She said she was putting this incident on record so that "when time comes, I will be justified" **[787]**.

19. At the beginning of 2018, the Claimant agreed to work late shifts on Fridays **[788]**. These shifts started at 3pm. There is a table forming part of an email which notes the Claimant's shift pattern. It shows him working a late shift on Fridays for three Fridays in a four-week cycle.

20. When the Claimant subsequently became dissatisfied with his shift pattern, he was advised to submit a Flexible Working Request. He never did so.

21. On 28 February 2018, the Claimant notified Mr Suckram that his father had passed away. Mr Suckram sent his condolences the same day, adding "Please keep in touch and let me know if there's anything you think I/we could do to support you at this time" **[794]**. There is a dispute as to whether the Claimant was granted bereavement leave at this time. According to the typed rotas, which we accept, the Claimant was granted three days dependency leave. He chose not to take any bereavement leave at the time, because he expected he might need to take that leave at a later point to travel abroad to be with his family. At the time, the policy was that members of staff were entitled to up to three days bereavement leave on the death of a close relative. This increased in July 2018 to up to ten days' bereavement leave. As a result, the Tribunal finds that he was not denied bereavement leave, which is alleged to have been an act of direct race or religious discrimination **[issue 1.3.1].**

22. In early 2018 a member of the public complained about various political comments made by the Claimant on his Facebook page **[137]**, given that in the profile section on the Facebook page, it stated he was a London Borough of Hackney employee. The Claimant was suspended whilst a disciplinary investigation took place. The process concluded at the end of October 2018 with a finding he was in breach of various paragraphs of the Code of Conduct relating to political neutrality, honesty and integrity, respect for others and protecting the Council's reputation. He was given a written warning which was to last for a period of 12 months. The Claimant accepts it was appropriate to carry out a disciplinary investigation given the nature of the issue raised. He does not accept it was appropriate for him to receive any sanction. This is because his role was not regarded as a politically restricted role. He did not appeal against the disciplinary outcome. **[139] [467-475]**

23. On 6 November 2018, the Claimant sent a detailed email to Ms Ducie. This raised various complaints about the conduct of Mr Suckram, which he described as misconduct, victimisation and abuse **[141]**. He did not characterise the conduct as discrimination. He also took issue with the wording of Ms Ducie's outcome letter and complained that previous complaints had not been investigated**.**

24. In her reply on 8 November 2018 **[142],** Ms Ducie said that she needed to point out that he did not go into this level of detail at the hearing. She said that the issues he was raising were outside the timeframe in the grievance policy and so could not be considered under that procedure. She reminded him that he had previously complained of unfair treatment over the last four years. She listed the managers who had looked into his complaints. None of them had found evidence of harassment, bullying or less favourable treatment. He had been directed to the policies that could be followed if he wanted to pursue action. She herself referred him to the "relevant policy".

25. On 17 January 2019, the Claimant emailed Norman Saggers, his trade union representative, complaining that the treatment and behaviour he was receiving from Keith Suckram was "nothing but a planned psychological torture". Whilst he referred to bullying and harassment, he did not refer to any protected characteristics

recognised by the Equality Act 2010. He did not characterise the behaviour as discrimination **[145]**. This email must have been forwarded to Diane Ducie. She responded on 18 January 2019, telling him to consult the policies on preventing harassment and bullying and on grievances. She advised he should raise these issues through formal procedures. He chose not to do so, at this point.

26. On 3 February 2019, the Claimant responded to Ms Ducie. His email asked for permission to record Mr Suckram. It included the following words:

"Though I have some evidence of his discriminatory and torturous behaviour towards me over the last couple of months and some from earlier. I'll go through your attachment, however, I look forward to hearing from you regarding my request, which is important as I am the only staff from a completely different background and he knows that you won't get any evidence of his bullying and harassment behaviour unless I can record that"

27. Ms Dhillon responded, saying she was replying in Ms Ducie's absence. She told him that he could not record and that he should submit a grievance so that it could be properly investigated. Ms Ducie did not respond herself and there was no investigation of the allegation of discrimination made in this email.

28. In February 2019, the Claimant's wife suffered a miscarriage. The Claimant was absent on bereavement leave on 18 February and from 27 February to 18 March inclusive, a total of eleven shifts.

29. On 12 April 2019, there was a dispute between the Claimant and Mr Suckram, about a shopping trip with a service user. This was a shopping trip to Tottenham Hale. The dispute focused on whether the Claimant had disregarded an instruction as to where to shop to buy items for the service user. This argument became heated. Anticipating that there might be further enquiries into this argument, Mr Suckram set out his version of events in an email on the same day, blaming the Claimant **[801]**. The email was sent to Ms Harve and copied to Ms Ducie. The Claimant emailed his union representative, saying "Keith Suckram just stepped up his bullying and harassment tactics for the last few weeks … unfortunately today again his behaviour towards me was unacceptable". He did not go into details.

30. The Claimant set out his detailed version of what happened on 12 April 2019 in an email on 18 April 2019 which also raised other concerns. It was addressed to Frances Harve and was copied to Ms Ducie and the Claimant's trade union representative. He accused Mr Suckram of being angry and rude when he returned to Century Court on 12 April 2019. He said that the conduct of Mr Suckram was so stressful he had to leave work. He said he was shaking on the way home. This email also complained about the way he had been treated by Mr Suckram on 1st April. He said that Mr Suckram was angry with him and had shouted at him asking him why he had not called the police about a potential theft. Mr Molla's email was also copied to Diane Ducie and Norman Saggers **[150**]. He ended that email saying

that he had evidence of how Mr Suckram had been discriminating against service users of different colours, which had never been investigated **[806]**.

31. Ms Havre forwarded this email to Ms Dhillon, saying "I am in the process of sending an email to him". She asked Ms Dhillon to let her know what she thought. Ms Dhillon responded as follows:

"Sabu can use some of this as part of his mitigation or defence. I still believe the inappropriate behaviour, ie shouting/raising voice needs to be addressed" **[805]**

32. We interpret this to be a reference to an investigation that had already started into the Claimant's conduct on 12 April 2019 when he had an argument with Mr Suckram in relation to the shopping trip.

33. Ms Havre's response to the Claimant was to acknowledge his email and to write "I mention to you before, I will be looking into your concerns raised" **[150]**.

34. On 29 May 2019, the Claimant was scheduled to attend manual handling training. This was to take place on a date he had originally booked off as annual leave. He volunteered to cancel his annual leave so he could attend the training. His treatment on that date is alleged to be direct race or religious discrimination **[Issue 1.3.2; 1.3.3]**. Mr Molla arrived 30 minutes late. We do not accept he had a good reason for being late. He has given various unsatisfactory explanations during the course of his evidence – lack of joining instructions, sleep deprivation, and getting lost on the way to the venue. The trainer asked him why he was late. We accept the evidence from the trainer as to what took place, set out in his contemporaneous email on that date sent to Ms Osibogan:

"It all started when he was late for today's training arriving at 10.00Hrs, 30 mins after the session had started. As trainers, we use our discretion as to whether to let a late delegate join the session or not, depending on how much they would have missed and whether the trainer can help the delegate on a one to one basis to catch up at coffee break on what they would have missed. This is what I had planned for the delegate in question.

The delegate was very rude and verbally aggressive when asked what had made him late. He even asked me "why t was looking at him like that for. 'His behaviour did upset some of the delegates who apologised to me for his uncalled for lack of self respect and that of all who witnessed this arrogant and aggressive behaviour'.

At that point I informed him that I have been kind enough to allow him to join the session when the usual cut off point would be 15-20 minutes.

He retorted back saying that He would report me to Head Office.

I then asked the group to work in small groups responding to manual handling scenarios that I had set for the groups.

I then jokingly asked Mr Sahabuddin to write down the answers for his group as he was late. This was just to engage him in the activities and hopefully calm him down, but he snapped back at me saying 'I'm not going to be the one to write down answers.'

At that point, I asked Mr Sahabuddin to step outside the class so I could speak to him on his own without distracting the rest of the group. When outside of the training room, he remained unapologetic and threatened to report me to Head Office."

35. Ms Osibogan forwarded this email to Mr Suckram and to Ms Harve **[814]**. She did not herself instigate any disciplinary action in relation to this incident. She did not have the authority to do so.

36. Following a discussion with Mr Suckram, it was decided that the Claimant should not be paid for the first hour of his working day, due to his late attendance **[228]**.

37. On 30 May 2019, the Claimant met with Ms Ducie to discuss his concerns about Keith Suckram **[201]**. There are no notes of this meeting, so the only evidence as to the scope of Ms Ducie's enquiries is provided by her outcome letter dated 6 August 2019. This was over two months after the conclusion of the meeting. There are also no notes of any investigatory meetings held with Mr Suckram or others to look into the nature of the Claimant's concerns, nor any specific explanation for why these notes were not available. In her outcome letter, Ms Ducie wrote that the purpose of this meeting was to clarify the nature of his complaints and to decide the next course of action. The Claimant was not accompanied by a trade union representative. He confirmed he was content to proceed without having a representative present. It is likely that the Claimant had the opportunity to raise any concerns about how he had been treated by Mr Suckram, which Ms Ducie would then investigate. In the absence of any notes, we are unable to reach any conclusions as to the thoroughness of the investigation.

38. The Claimant alleges that on 29 July 2019 he was unsuccessful with a further promotion application. We have no reason to doubt that he did make such an application. Because of a lack of evidence as to the circumstances of the application and the reasons why it was unsuccessful, we are unable to make any factual findings.

39. In Ms Ducie's outcome letter dated 6 August 2019, she rejected the Claimant's complaint of harassment and discrimination. The start of the letter notes that the complaint had not been raised through formal procedures including through the harassment and bullying procedure or the grievance procedure. Her letter finished "If you wish to pursue your complaint of bullying and harassment, I advise you to do so under the prevention of harassment and bullying or grievance policies" **[205]**.

40. By August 2019, the Claimant was contracted to work eighteen hours each week. This was generally worked in three six-hour long shifts. He would also ask to work additional shifts. There is a dispute as to whether Mr Suckram was reluctant to grant the Claimant's requests in circumstances where they would have been granted to other Care Support Workers. We accept that there were occasions when the Claimant asked for additional shifts and was told that he would not be granted these shifts. However, we have insufficient information to make factual findings as to the dates on which the requests were made, and the reasons why particular requests were refused. It is plausible that part of the reason for refusing him shifts in the months from August 2019 onwards was that he was not sufficiently fit to work his allocated shifts, as the Respondent contends. He was absent on extended sick leave for several days in August, the whole of September, much of October and the first part of November 2019. It is unclear to what extent he was unable to work on individual shifts thereafter.

41. From 23 August 2019 to 1 October 2019, the Claimant was absent from work on sick leave. The reason given on the Fit Notes was "occupational stress". He returned on 2 October 2019 but started a second period of sickness absence on 7 October 2019 when he received a phone call from his GP telling him he had tested positive for tuberculosis. He also had ongoing symptoms following a road traffic accident. The date of this accident is unclear.

42. In September 2019, the Claimant and six other care workers lodged a collective grievance. The grievance was complaining about the conduct of Mr Suckram and Ms Osibogun. The focus of the Claimant's grievance was on his dissatisfaction about the way he had been managed by Ms Osibogun and Mr Suckram. He did not in terms allege that either had been discriminating against him on grounds of his race or his religion.

43. On 14 October 2019, the Claimant lodged a formal grievance about his personal treatment using the Respondent's grievance portal. He made various wide-ranging allegations about the way he had been treated by Mr Suckram and Ms Osibogun. This included an allegation of disregarding the Council's equal opportunities policy in relation to his previous promotion applications. He said there was perceived discrimination in the Hackney recruitment process. No specific allegations of discrimination were made against Mr Suckram or Ms Osibogan. This document is admitted to be a protected act – **[issue 3.1.1]**

44. On 31 October 2019, the Claimant was examined by Jane Herns, Occupational Health Advisor **[208]**. She prepared an Occupational Health report on his fitness to work. Her conclusion was that he was fit for his current role with workplace adjustments. She suggested a Stress Risk Assessment should be undertaken before a proposed disciplinary hearing, which might prompt the need for further adjustments. In addition, she recommended a phased return to work with half his hours on the first and second weeks then increasing to full contracted hours. She also recommended lighter duties over a four-week period due to ongoing symptoms following a road traffic accident.

45. In mid-November 2019, it was decided that Simon Cole would investigate the Claimant's individual grievance **[211]**.

46. On 8 November 2019, the Claimant returned to work. He worked a late shift starting at 3pm. He had a Return to Work meeting, which was conducted by Mr Suckram. The Occupational Health report was discussed. Mr Suckram told the Claimant that the report did not indicate what light duties equated to. He did not adjust the Claimant's duties. He said that the male service users that the Claimant would be dealing with required minimal support and there was only one male service user who needed to be hoisted. He also told the Claimant that a phased return would not be required as the Claimant only worked three six hour shifts and because of the nature of his sickness absence. These decisions were recorded on the typed Return to Work form, which was signed as accurate that day by both Mr Suckram and the Claimant.

47. At the Return to Work meeting, there was also a discussion between Mr Suckram and the Claimant about how he felt he was being treated. As recorded on the Return to Work form, he said he regarded this treatment as discrimination. He did not feel he was being treated equally with other members of staff and thought he was being bullied and was suffering harassment. The Return to Work form does not include any details of what the Claimant said about these incidents. Mr Suckram recorded that notes would be typed up to record this aspect of the discussion. This was never done. It was not addressed in his witness statement. When questioned about this, he said he did not get round to it. Because Mr Suckram did not note the discussion, there is no contemporaneous record from Mr Suckram as to what was said about discrimination on both sides.

48. Within an hour of the end of the Return to Work meeting, the Claimant sent the following email to Ms Harve at 16:13:

"Hi Frances,

This is the report produced by the OH health assessment agency where Keith referred me for assessment as it appeared that he was not happy with my GP and hospital's assessment. He had a meeting with me and was questioning me with every single aspect of my health problems, despite having the medical professional's assessment reports. He decided to disregard the OH report and going on his own way.

Also he made an insulting comment about religion while having the meeting. Upon my request to him not to give me shifts on Fridays as I have to go to the Mosque for Friday prayers, he made the comment 'seems you suddenly became a Muslim' and refused to consider my request rather asked me to apply for this concession from the HR.

Kind regards,

Sahabuddin."

49. There is a factual dispute as to whether Mr Suckram made the comment about the Claimant's faith as recorded in the Claimant's email sent at 16:13. Mr Suckram disputes he did so. However, his evidence about what was said during the meeting was vague and unpersuasive. By contrast the first part of the Claimant's email was accurate insofar as it recorded that Mr Suckram was disregarding OH advice about the Claimant being placed on light duties for four weeks. We also accept the accuracy of the second part of the same email. It is likely that the Claimant did ask not to work on Fridays, explaining the reason in terms of his religious duties. An email from Mr Suckram on 4 December 2019 confirms that the Claimant wanted not to be rotaed to work on a Friday at this point.

50. We find that the Claimant's email of 8 November 2019 accurately records Mr Suckram's response to this request not to work on Friday made during the Return to Work meeting, and that the Claimant found this response insulting. It was consistent with the casual way that Mr Suckram treated the Claimant's allegations of discrimination in failing to keep a record and, if necessary, to refer the allegations to others for investigation. We note that, around four weeks later, Mr Suckram denied making such a comment, in his response to the Claimant's email sent in early December where he repeated the allegation (characterising it as derogatory and an Islamophobic attack on his faith). We do not consider Mr Suckram's denial at that point to be plausible. He did not take the Claimant's allegations of discrimination and harassment made on 8 November 2019 sufficiently seriously to type up a note of what was discussed, even when prompted to do so by the further email exchanges at the start of December 2019.

51. We do not find that Mr Suckram suggested during the course of this conversation on 8 November 2019 that if the Claimant was required to work on Fridays then he would choose to call in sick. This is what the Claimant now alleges Mr Suckram said. The Claimant did not include such an allegation in his 8 November 2019 email. Nor did he include it in his subsequent email dated 3 December 2019. There is no contemporaneous documentary evidence supporting this particular aspect of the Claimant's account of this conversation. Therefore, we do not find that the factual basis of this direct race or religious discrimination allegation is made out **[issue 1.3.3.2].**

52. After he sent this 8 November 2019 email, the Claimant continued with his work duties. As had been agreed during the Return to Work meeting, Mr Suckram was present when the Claimant dealt with a particular service user. He attended in order to carry out a Risk Assessment. He advised the Claimant to adopt a different method when engaged in manual handling with this particular resident. The risk assessment was not recorded on a structured risk assessment template or form. It did not consider the particular risks that the Claimant may have faced when working with other service users.

53. At around 17:20, the Claimant and two colleagues were providing assistance to a particular service user. The service user was assisted to get onto his bed with a hoist. The log book entry written by the Claimant with two colleagues records that "manual handling was putting a strain on our own back and my (Sabu) injured shoulder and knee". The entry recorded that this had been observed by Mr Suckram **[1289]**. Mr Suckram's note recorded that the Claimant had agreed to continue to support that particular service user. He was to inform the office if he felt that he could not continue to do so. We find that he had no effective choice. He was not offered light duties. He was being instructed by his manager to continue to support this particular service user.

54. At the time, it had been agreed that several permanent staff of different non-Asian ethnicities working at Century Court could be on light duties. This is confirmed by the outcome of the collective grievance conducted by Mr Binding some time later.

55. The Claimant's email sent at 16:03 on 8 November 2019 to Frances Harve, as set out above, did not use the word "grievance" or indicate that it should be the subject of a formal investigation. The Claimant alleges that Ms Harve ignored the concerns he was raising and this was direct race or religion discrimination **[issue 1.3.6]**. These concerns were not investigated to a conclusion, whether formally or informally. No conclusion was reached as to whether there was a failure by Mr Suckram to adhere to Occupational Health advice and as to whether he had made a potentially derogatory comment about the Claimant's faith. There are no documents detailing any conversations that Ms Harve had about these topics with either the Claimant or with Mr Suckram. We do not accept that Ms Harve spoke to the Claimant in the terms recorded in Ms Harve's witness statement. She is attempting to recall a conversation that took place four years before she wrote her witness statement. Her recollection is that the Claimant effectively decided not to pursue the issue further. We note that her statement does not claim to recall speaking to Mr Suckram about the derogatory comment said to have been made about the Claimant's faith.

56. Ms Ducie evidence is unclear as to when she became aware of this allegation and what action, if any, she chose to take. She sat next to Ms Harve in the office. It is likely Ms Harve would have spoken to Ms Ducie about the email. In any event, Ms Ducie fowarded the Claimant's email of 3 December 2019 to Mr Cole in which the Claimant repeated the alleged comment made by Mr Suckram [email 2 of 3 **[495]**]. She did so, so Mr Cole could consider the content of recent email exchanges in the course of his grievance investigation. We find that Ms Ducie read the emails before she forwarded them to Mr Cole. This is clear from her email to the Claimant on 5 December 2019. That grievance investigation was finally concluded by Ms Sainsbury in 2023. Ms Sainsbury did not reach a conclusion on whether Mr Suckram had made this comment.

57. On 12 November 2019, Mr Suckram was asked to provide a reference for the Claimant for a proposed role at Care UK. One question on the reference form asked if the Claimant was subject to any ongoing investigation or proceedings.

Mr Suckram asked Ms Dhillon for advice on how to fill in the form. She responded that Mr Suckram should say that the Claimant was subject to the Council's disciplinary investigation which had not concluded and add that for further information they may wish to speak to him directly **[845]**.

58. At some point in 2019, the Respondent had asked part time staff if they were interested in applying to work on a full-time basis. Around fifteen part time carers expressed an interest in working full time. The Claimant was not one of them. He was still spending part of his working hours studying for a postgraduate degree. Ms Ducie emailed Ms Dhillon on 26 May 2020, asking her to action a list of those part time staff who had been approved to work on a full-time basis **[861]**. The Claimant's name was not on this list.

59. On 3 December 2019, the Claimant emailed Mr Suckram. He wrote that he was trying to avoid any kind of confrontation or arguments with him or any of the Team Leaders. He said that Mr Suckram was making that impossible. He did not know how long he would be able to continue working **[494]**. Mr Suckram responded saying he would continue to respond in a calm manner without being confrontational or argumentative. He noted that the Claimant had told him that if he did not get to have Friday off, he would have to go off sick. The Claimant's response was to deny this. He accused Mr Suckram of persistent lying and being dishonest. He said this amounted to a gross violation of the Council's Code of Conduct.

60. Ms Ducie emailed him on 5 December 2019 stating that the tone of his recent emails and many of the words within them was inappropriate and a breach of the spirit of the Code of Conduct. The Claimant was not happy with her email. He wrote that Mr Suckram was "nothing but a bare faced liar". He complained that she had never warned Mr Suckram about the need for honesty and integrity and complained she was warning him for reporting his behaviour. He ended his email by referring to Mr Suckram as a "vile Islamophobe", accusing Ms Ducie of failing to tackle Islamophobia in the workplace. In a second email, he said that Ms Ducie was providing Mr Suckram with "all the necessary covers and letting him get away with staff harassment, bullying and victimisation" as well as "vile racism". Ms Ducie forwarded the email chain to Simon Cole so he could consider these issues along with the existing grievance **[492]**.

61. Ms Ducie wrote to the Claimant on the same day, 5 December 2019, telling him not only that his accusations would be investigated as part of his existing grievance. She also told him that the way he was writing his emails would be investigated under the Disciplinary Procedure **[253]**.

62. On 10 December 2019, a disciplinary hearing was conducted by Ms Ducie into two matters. The first was an allegation the Claimant had refused to follow instructions from Mr Suckram in relation to the shopping trip on 12 April 2019. The second was his conduct towards the trainer at the manual handling course on 29 May 2019. This disciplinary hearing could not be concluded on 10 December 2019 and was

reconvened on 18 December 2019. The Claimant was accompanied by his trade union representative.

63. On 6 January 2020 Ms Laura Bleaney was appointed to conduct a disciplinary investigation into the tone of his emails in December 2019.

64. The Claimant's individual grievance hearing had been scheduled for 20 January 2020. Ms Ducie told the Claimant to raise his concerns about Islamophobic comments with Mr Cole at the grievance meeting. On 13 January 2020, Mr Cole wrote to the Claimant. He told him he had concluded it would be inappropriate for him to investigate the individual grievance any further until the group grievance investigation had concluded which had recently started. He would be cancelling the meeting for 20 January 2020.

65. On 17 January 2020, Ms Osibogan was moved to another Scheme.

66. On 23 March 2020, a national lockdown was imposed in response to the Covid-19 Pandemic. This suspended ER cases until June 2020.

67. There was an error in the pay recorded on the Claimant's March 2020 payslip. This was because Mr Suckram had mistakenly recorded the Claimant as being on sick leave rather than working for certain shifts. There was a consequent underpayment made to the Claimant **[issue 3.2.2]**. This was corrected in the April 2020 payroll.

68. On 5 June 2020, the Claimant emailed Ms Ducie asking for the opportunity to work full time hours. This was the first time he had expressed an interest in working on a full-time basis. Ms Ducie responded noting his interest. She said she would get back to him at a later date about this. He chased for a response three weeks later. Ms Ducie replied that she was working out how many full-time staff were needed at Scale 3 and Scale 4. After this, part time staff would be invited to express an interest in becoming full time. She added that his interest had already been noted.

69. At the handover meeting before the night shift on 8 June 2020, there was an altercation between the Claimant and another care worker, Carol Francis. The Claimant reported his version of events at lunchtime the following day **[299]**:

> "Amy handed over first and then I started giving my handover. Unfortunately, Carol ignored my handover and asked Ajara to give her handover. I asked "What's going on?". Immediately Carol became so aggressive and started shouting, and swearing at me using so much dirty languages i.e' "suck my arse.....you sucker, suck your cock...,you nasty piece" and so much more in presence of all the other (Arlette, Christy, Ajara, Amy, Rehana) staffs. I didn't respond to her and told them that my handover in the handover book and had to leave Century Court as Carol continued her attack on me. I never faced this level of aggressiveness in my life, let alone in a workplace."

70. Ms Francis's different account was as follows **[314]**:

> "I Carol Francis, come into the main office to receive handover from late staff on shift. I faced Amy for handover, who in turn gave handover. I faced Ajara, who in turn, started giving handover. Sabu was sitting near printer and stood up and shouted across the room. I in turn lift up one hand to indicate that I am still taking handover. Sabu continued shouting. Stated that he is going no time to give handover (somewhere to be). I explained that I started taking handover" why didn't you state this before instead of being so rude to interrupt. This lead into an argument. Sabu mentioned about night staff avoiding Flat 38 with shower. I mentioned that's why Sabu is often off sick or swapping for late shift, so he don't have to give shower to Flat 38 and Sabu stated "you are lucky that you are at work". At one stage I swore at Sabu as I was provoked."

71. We do not need to resolve the factual dispute as to what took place during the handover.

72. On 2 July 2020, the Claimant met with Mr Binding as part of the collective grievance brought by seven members of staff including the Claimant. There were two union representatives present during the meeting. The Claimant does not criticise the way that Mr Binding conducted this meeting. Mr Binding clarified he would not be looking into each and every allegation but rather would be seeking to agree emerging "themes" and subsequent "terms of reference" for the investigation. He said it was important to ensure that a proportionate approach was taken. Allegations of discrimination did not form part of the terms of reference. The collective grievance process was the same in relation to each of the complainants. The same outcome was issued to all seven complainants. The collective grievance did not focus on the Claimant's individual complaints. Mr Binding had already been told only to consider the complaints that were common to all of the complainants.

73. On 14 July 2020, Mr Binding requested that Mr Suckram be moved to an alternative scheme on a without prejudice basis.

74. On 6 August 2020, Ms Ducie asked Ms Banionyte to investigate the Claimant's complaint about Ms Francis as a formal grievance. She met with the Claimant and with Ms Francis as part of her investigation. That investigation was then paused due to competing priorities in the service caused by the second wave of Covid-19.

75. There was a cyber attack on the 13 October 2020. There is evidence that this caused the Respondent to lose some of its records and also caused disruption and delay in HR processes.

76. On 1 October 2020, Ms Bleaney invited the Claimant to a disciplinary investigation meeting to discuss the tone and content of his emails between 3 and 5 December 2019. He was told that the meeting would take place on 15 October 2020. It was rescheduled to 16 December 2020.

77. In early October 2020, the Claimant discovered he was not permitted access to a ground floor washroom. This was the same for all members of staff. He complained about this in an email dated 9 October 2020 **[303]**. His email recorded that he did his ablutions in that room for his prayer time. He said that the management team were still using the washing facility but this was being denied to care workers. The issue was also raised by UNISON in an email on 12 October 2020 **[305]**. The Claimant's email stated it was vitally important that the washroom was accessible for all staff who wanted to wash their faces, upper arms and legs, given that the wash basins inside the toilets were not large enough for this.

78. In her email response on 15 October 2020, Ms Ducie responded that there was no ground floor washroom. There was a treatment room. This was required for visiting therapy treatments and also if a service user becomes unwell whilst downstairs and needs a quiet area before they could return to their own flat **[304]**. She wrote she was aware that one member of staff needed to follow ritual washing for religious purposes and Ms Harve recently met with the staff member, who was satisfied with the facilities available. We find that this was a reference to the Claimant.

79. On 29 September 2020, Ms Ducie emailed the Claimant asking him to confirm he still wished to be considered for an increase to full time hours. In particular, he was asked to confirm that he met the essential criteria that he was prepared to work shifts as allocated over a seven day a week rota period **[349]**. He replied he was still interested and was able to meet the job requirements. Nothing further was done at that point to action his request to work full time. Again, on 6 January 2021 he was asked if he was still interested in full time work. He replied the following day to say that he was **[349].** By 5 February 2021 he had not received a response and chased for an update. Because he had not heard anything by 16 February 2021, he emailed the Head of Service, Ilona Sarulakis. She apologised for any delay in progressing this and promised that she would follow it up straight away. She asked to be updated on any progress made in a couple of weeks.

80. At the disciplinary investigation meeting with the Claimant and his trade union representative on 16 December 2020, Ms Bleaney discussed the tone and content of the Claimant's emails between 3 and 5 December 2019**. [338, 530-535]**. She also discussed the Claimant's potential mitigation, given the lack of response to complaints lodged by the Claimant.

81. Around December 2019, Mr Debus, the Claimant's trade union representative started a substantial period of sickness absence.

82. The Claimant complains that he was refused promotion in January 2021. We have insufficient information about this promotion process to be able to make the necessary factual findings.

83. On 12 January 2021 there was a further chain of emails between the Claimant and his managers. On 12 Jan 2021 at 12:29, the Claimant wrote **[501]**:

"Good afternoon Marie
Sorry I didn't want to reply to this email as I didn't think the content of this email is relevant to me. I'm relying to you now as I received a voicemail from you this morning. Only thing I can say that I still have 1 and half weeks of annual leave to take. I'll not be dragged into a back and forth argument and counter arguments with this leaves as I'm not the manager, therefore, it's not my duty to ensure the annual leave balance is adjusted correctly. Also I couldn't do my manager's work. If my manager failed to do his job in this regard, then the blame shouldn't be coming onto me. Many of us have clear evidence of how poorly our annual leave had been managed/handled by our previous management, and I personally can provide those evidence if required by any investigation officer."

84. In a further email on 14 January 2021 at 12:17 **[499]**, he wrote to Ms Harve:

When you asked me in December I clarified my position to you then verbally and replied to your email as well. What you and Marie are asking me to do is a very stressful task, and I can clearly remember how much stressful time one of my colleagues ha been going through for few weeks last year. The then manager did the same mess up with her annual leave and the she was told that she had overtaken her annual leave and asked her to ceck and she had to go through all the allocations, timesheets, rota and other available records of that entire fiscal year and anyone could imagine how much stress she was put through by her manager, as our then manager's manager and supervisor, you should have been aware of our then manager's practices.
It should have been our standard practice to confess our mistakes and lack of skills/shortcomings frankly instead of victimising and stressing off others for everyone's interest which is also in the council's code of conduct.

85. In response Ms Harve reminded him of the Code of Coduct and the tone of his email and disregard to senior managers when responding to emails.

86. The tone of his emails sent in December 2021 was added to the matters that would be investigated by Ms Bleaney as part of her disciplinary investigation.

87. Also on 12 January 2021, Ms Banionyte spoke to Ms Dhillon from HR, sharing copies of the witness statements she had gathered in the course of her grievance investigation into Ms Francis' conduct. It was decided that the incident on 8 June 2020 also raised concerns about the Claimant's conduct. As a result, the circumstances of this investigation were added to the investigation already being carried out by Ms Bleaney. Ms Bleaney would consider whether there had been a breach of the Code of Conduct by the Claimant.

88. On 17 January 2021, the Claimant emailed his union representative, Norman Saggers, to complain about the behaviour of Keith Suckram. He complained of bullying and harassment although did not provide specific examples of particular occasions where this had occurred. He also complained he had not been receiving his full salary. This email seemingly was forwarded to Ms Ducie. She directed him

to the policies on preventing harassment and bullying and around lodging grievances. She said she was concerned about the psychological damage he said he was experiencing as a result of this treatment. She referred him to the Employee Assistance Programme for confidential advice support and counselling.

89. The Claimant responded that he would be raising these issues formally. He asked for permission to record Mr Suckram as evidence of his conduct. He said he had evidence of his discriminatory and torturous behaviour towards him "over the last couple of months and some from earlier". He added that he was the only staff member from a completely different background" **[144]**. Ms Dhillon in her reply made it clear that he was not permitted to record colleagues at any time unless it was as an agreed reasonable adjustment.

90. On or around 25 January 2021, Lina Banionyte spoke to the Claimant on the telephone. She told him that allegations about his conduct in the incident with Carol Francis would be included as part of the disciplinary investigation that Ms Bleaney was currently conducting **[cf 310]**. She told the Claimant that this investigation would also consider whether there was a potential breach of the Code of Code by Ms Francis. This would also be considered by Ms Bleaney.

91. From 1 March 2021, the Claimant started another period of long-term sickness absence. This continued until the end of the period with which this claim is concerned.

92. On 3 March 2021, the Claimant emailed Ms Banionyte about her investigation of his grievance. His email was worded as follows **[958]**:

> "Hi Lina
> Please be upfront and make it clear against whom you found the potential breach of Code of Conduct as I'm the complainant. Most importantly you promised both Brian and me to conclude your investigation of my assault case by last year, unfortunately I haven't heard anything about that yet. When I and Brian met Keith in the HSC briefly before this case was handed over to you, Keith stated that he found the evidence that Carole indeed swore at me using those languages which I mentioned in my complaint, Looking forward to hearing from you soon."

93. The email made no allegation of discrimination by reference to any protected characteristics. It did not allege any breach of the Equality Act 2010.

94. In her email, Ms Banionyte did not specifically inform the Claimant that Ms Francis was potentially in breach of the Code of Conduct. Her investigation had not concluded and it was no longer her role to reach any conclusions.

95. Ms Banionyte did not clarify in her response that what had started as a grievance was now becoming a disciplinary process. In an email on 3 March 2021, she stated that Ms Bleaney would explain the process and the next steps **[958]**. Two days later, she added "As Sabu is currently under formal disciplinary investigation for

similar allegations, I was advised by HR (Manjit Dhillon to be specific) for this to be dealt with together". Her email made it clear that she had passed the statements she had taken to Ms Bleaney and Ms Bleaney would be progressing the matter.

96. By early March 2021 there was no investigation outcome to provide to the Claimant. There was no draft report providing an outcome to the Claimant's grievance, only the witness statements that Ms Banionyte had gathered in the course of her investigation. The investigation had not yet concluded and was being passed to Ms Bleaney.

97. On 16 March 2021, Ms Bleaney wrote to the Claimant [361]. The heading of the email was Further Disciplinary Investigation Meeting. The purpose of the email was to rearrange the meeting previously arranged for 25 March 2021 due to his union representative's non-availability. She told him that further allegations would be added to her ongoing investigation for which she had been interviewed on 16 December 2020. The further allegations were that he had sworn at a colleague on 8 June 2020 (this was the incident involving Ms Francis); and the tone and content of his emails during the period from 12 to 14 January 2021. He was told that this was a potential breach of the Council's Code of Conduct. Ms Bleaney told him that the meeting would take place on 7 April 2021.

98. We do not accept that Ms Harve took any further disciplinary action against the Claimant on 16 March 2021 regarding annual leave, nor did she subject him to a lengthy period of investigation. She did not have any part to play in the decision to expand the remit of Ms Bleaney's existing investigation, which is alleged to be an act of direct race or religion discrimination **[issue 1.3.11]** or harassment related to race or religion **[issue 2.1.5.1/2]**. This decision was instigated by Ms Dhillon in HR. At that point, in March 2021, Ms Harve did not "ignore and refuse to investigate the allegation of islamophobia, race and religious discrimination", as the Claimant alleges.

99. On 30 March 2021, the Claimant and the other complainants were sent the outcome of the collective grievance by Ilona Sarulakis **[435]**. The findings of Mr Binding's grievance investigation included criticisms of the practices of Mr Suckram and Ms Osibogun. Whilst noting that Ms Harve had not conducted an appraisal on Mr Suckram for two years, Mr Binding did record that group members referenced confidence in both the Locality Manager (Mr Suckram) and the Service Head (Ms Harve) to resolve issues brought to their attention. In her covering letter, Ms Sarulakis said she noted and accepted the findings of the report. She also attached a Management Response outlining the actions the Respondent had already implemented since the initial submission of the grievance in October 2019, and the proposed actions to address the remaining recommendations. She offered sincere apologies for the identified management failings. The outcome was the same for all those who had participated in the collective grievance. It did not consider any individual grievances. As a result, it did not consider the Claimant's allegations of Islamophobia, race and religious discrimination.

100. The Claimant and the other complainants appealed against the outcome of the collective grievance on 1 April 2021. There was subsequently a grievance appeal hearing conducted by Rory McCallum, which was conducted over two separate meetings, on 26 May 2021 and 3 June 2021. The outcome letter was sent to the parties on 24 June 2021 **[553]**. He partially upheld the appeal, in particular relating to the timescale that it had taken to address the collective grievance. The claimant alleges that the conduct of Mr McCallum was direct race or religion discrimination [**issue 1.3.15.3]**

101. By the start of March 2021, there had been no progress in his application for a change to his working hours. The Claimant emailed Ms Sarulakis on 1 March 2021 asking for an update. Ms Suralakis forwarded the email chain to Ms Ducie and Ms Harve with the comment "surely you'll agree this is unacceptable". She stressed she needed this to be followed up on urgently. This prompted Ms Ducie to email HR asking them to complete a change from 0.5FTE to Full Time effective from 5 April 2021 **[354]**. On 11 March 2021, Ms Ducie again asked Ms Dhillon if she had a chance to look at changing his hours to full time **[353]**.

102. On 12 March 2021, the Claimant emailed Ms Sarulakis to complain that of the four part-time staff in Century Court, three had been given a full-time contract whilst he had been deprived of that opportunity. He said this amounted to direct discrimination against him. He added "Thank you for your efforts but I'll not be pursuing this anymore". He said he was considering submitting his resignation **[357]**. Ms Sarulakis responded to thank him for his email. She said she had forwarded it to the management team in Provided Services for them to respond with an explanation. It is unclear whether this was ever done. We find that the responsibility for doing this would have fallen to Ms Ducie, who was copied into Ms Sarulakis' email.

103. On 7 April 2021 there was a second meeting with Ms Bleaney to discuss the additional matters now forming the subject of disciplinary investigation. This was the opportunity for the Claimant to provide his explanation for the email exchanges he had sent in January 2021 and add anything further about the incident with Ms Francis. Ms Bleaney did not at this point raise any further disciplinary action in relation to the Claimant, contrary to the Claimant's allegation of race or religion discrimination **[issue 1.3.13.1]** or victimisation **[issue 3.2.4]**

104. On 8 April 2021 Ms Banionyte was interviewed by Ms Bleaney regarding her conduct in investigating Mr Molla's complaint.

105. On 11 June 2021, Ms Ducie published her outcome to the disciplinary process which had started in 2019, considered at two disciplinary hearings in December 2019, some 18 months earlier. She sent a lengthy letter which decided that the Claimant should not receive any disciplinary sanction, even though she had found alleged misconduct proven. She felt that this had breached the Code of Conduct. This was the final paragraph of her letter:

> "As stated at the beginning of this letter, given the length of time that has passed it would not be appropriate for any sanction to be issued. However, I make clear to you that if the time hadn't passed, my decision would have been that a formal disciplinary sanction would have applied. I strongly suggest that you reflect on the findings of this letter and consider how you should amend your behaviour to avoid any such situations in the future."

106. There was no consideration in her outcome letter of the Claimant's allegation concerning an Islamophobic comment by Mr Suckram. This was not the place for this allegation to be decided, given that it was a disciplinary outcome letter considering the Claimant's conduct on different dates.

107. On 20 June 2021, Laura Bleaney finalised her investigation report into her disciplinary investigation **[456]**. Her conclusion was that there were occasions when Mr Molla's email interactions with managers from his service were inappropriate. She considered that there had been breaches of the Code of Conduct in relation to the tone of his emails and in how he responded with impatience to a reasonable request by Carol Francis to wait for others to give a handover **[464]**. Her recommendation was that the Claimant should receive enhanced level of supervision and support to address any further concerns about his conduct with colleagues. She also recommended that Carol Francis should be 'Standard Set' in line with the informal Disciplinary Process. No disciplinary sanction was recommended for the Claimant in relation to any of the incidents the subject of the disciplinary investigation. As a result, the disciplinary process was not advanced to a disciplinary hearing. No disciplinary penalty was imposed.

108. On 30 June 2021, the Claimant started the Early Conciliation process. An Early Conciliation Certificate was issued on 11 August 2021 and the Tribunal Claim Form was presented on 9 September 2021.

109. The Claimant alleges that he was denied promotion in January 2022. Again, in relation to this promotion process, the Tribunal has insufficient evidence to make factual findings about this promotion process.

Legal principles

Burden of proof for Equality Act 2010 claims

110. Section 136(2) and (3) of the Equality Act 2010 is worded as follows:

> (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.

111. Guidance on the burden of proof was given by the Court of Appeal in *Igen v Wong* [2005] ICR 931. This guidance has subsequently been approved by the Court of

Appeal in *Madarassay v Nomura International plc* [2007] ICR 867 and by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 (at paras 25-32). In *Efobi v Royal Mail Group Limited* [2021] ICR at paragraph 26, Lord Leggatt made it clear that Section 136 EqA 2010 had not made any substantive change to the previous law.

112. The burden of proof starts with the Claimant. It is for the Claimant to prove facts from which the Tribunal could infer, in the absence of any other explanation, that the treatment was at least in part the result of his age. At the first stage, when considering what inferences can be drawn from the primary facts, the Tribunal must ignore any explanation for those facts given by the Respondents and assume that there is no explanation for them. It can however take into account evidence adduced by the Respondents insofar as it is relevant in deciding whether the burden of proof has moved to the Respondent.

113. The initial burden of proof is on the Claimant. In order for the burden of proof to shift from the Claimant to the Respondent, it is well established that it is insufficient for the Claimant merely to show a difference in status and detriment treatment (see *Madarassay* at paragraph 54). In *Network Rail Infrastructure v Griffiths-Henry* [2006] IRLR 865, Elias J at paragraph 15 said that the mere fact that an unsuccessful candidate was a black woman and successful candidates were white men would be insufficient to be capable of leading to an inference of discrimination in the absence of a satisfactory non-discriminatory explanation. To shift the burden of proof a claimant must also prove something more. That is, in the present case the Claimant must prove facts from which the Tribunal could infer that there is a connection between the protected characteristics of race and the detrimental treatment, in the absence of a non-discriminatory explanation.

114. If such facts are established, then the burden of proof transfers to the Respondent to establish on the balance of probabilities that the protected characteristic formed no part of the reasoning for the impugned decisions to reject the Claimant's application. If the Tribunal accepts that the reason given for the treatment is genuine, then unless there is evidence to warrant a finding of unconscious discrimination, such that the Tribunal is really finding that the alleged discriminator has concealed the true reason even from himself, there will be no basis to infer unlawful discrimination at all.

115. In *Hewage v Grampian Health Board* [2012] ICR 1054, in a passage recently endorsed by Lord Leggatt in *Efobi* at paragraph 38*,* Lord Hope reminded that it was important not to make too much of the role 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" (paragraph 32).

Direct discrimination

116. Section 13 of the Equality Act 2010 is worded as follows:

> (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.

117. The three Claimants seek to compare themselves against identified individuals who do not share their ethnicity, or to how a hypothetical comparator would have been treated. Such a comparator, whether actual or hypothetical must in all other respects be in a comparable position to the Claimants apart from their ethnicity.

118. As with other strands of discrimination, victimisation or detrimental treatment, the focus is on the mental processes of the person that took the impugned decisions. In a direct discrimination claim, the Tribunal should consider whether that person was influenced consciously or unconsciously to a significant (ie a non-trivial) extent by each Claimant's ethnicity. The decision makers' motives are irrelevant.

119. Paragraphs 3.4 and 3.5 of the Equality and Human Rights Commission's Code of Practice on Employment states:

> "If the employer's treatment of the worker puts the worker at a clear disadvantage compared to other workers, then it is more likely that the treatment will be less favourable …
>
> The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated – or would have treated another person".

120. The less favourable treatment needs to be because of the relevant protected characteristic. It does not need to be the sole reason. As was said by Lord Nicholls in *Nagarajan v London Regional Transport* [1999] ICR 877, at 886E-F: "If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out". Significant means more than trivial.

121. Unreasonable treatment is not, on its own, a basis for making an inference of unlawful discrimination. An employer does not need to prove that he behaves equally unreasonable to everybody.

122. In *JP Morgan Ltd v Chweidan* [2012] ICR 268 the Court of Appeal considered whether it was necessary for the Tribunal to carry out a two-stage approach in each case. This is what Elias LJ said at paragraph 5:

> "In many cases it is not necessary for a tribunal to identify or construct a particular comparator (whether actual or hypothetical) and to ask whether the claimant would have been treated less favourably than that comparator. The tribunal can short circuit that step by focusing on the reason for the treatment".

Harassment

123. Section 26 of the Equality Act 2010 is worded as follows:

(1) A person (A) harasses another (B) if-

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

b. The conduct has the purpose or effect of –

i. Violating B's dignity, or
ii. Creating an intimidating, hostile, degrading, humiliating or offensive environment for B

….

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

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

124. In relation to a claim for harassment under Section 26, it is open to a Tribunal to find that conduct was unwanted even if a claimant chooses to stay in employment and even if a claimant chooses not to object whether formally or informally (*Munchkins Restaurant Ltd v Karmazyn and others* EAT 0359/09). The Equality and Human Rights Commission: Code of Practice on Employment (2011) states as follows:

7.7. Unwanted conduct covers a range of behaviour, including spoken or written words or imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour.
7.8 The word 'unwanted' means essentially the same as 'unwelcome' or 'uninvited'. 'Unwanted' does not meant that express objection has to be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment.

125. When considering whether a comment was "related to" a protected characteristic under Section 26 Equality Act 2010, this covers a wider category of conduct than conduct "because of a protected characteristic" under Section 13 Equality Act 2010. A broader enquiry is required involving a more intense focus on the context of the offending words or behaviour (*Bakkali v Greater Manchester Buses (South) Limited t/a Stage Coach Manchester* [2018] UKEAT/0176/17).

126. In order to assess the "purpose" of the alleged conduct, the Tribunal must consider the alleged harasser's motive or intention. When considering the "effect" of the alleged conduct, the Tribunal needs to analyse the three specific factors set out in Section 26(4)(a) to (c). This has both a subjective and an objective aspect. As to the former, the claimant must have felt or perceived his dignity to have been

violated or an adverse environment to have been created. As to the latter, if the claimant had experienced those feelings or perceptions, the Tribunal must consider if it was reasonable for him to do so. If a claimant is unreasonably prone to take offence, there will have been no harassment within the meaning of the section (*Richmond Pharmacology v Dhaliwal* [2009] IRLR 336 at paragraph 15).

127. In assessing whether the conduct met the required threshold by producing the proscribed consequences, Tribunals should not place too much weight on the timing of any objection (*Weeks v Newham College of Further Education* UKEAT/0630/11). Whether it was reasonable for a Claimant to regard treatment as amounting to treatment that violates her dignity or has an intimidating, hostile, degrading, humiliating or offensive environment is a matter for factual assessment of the Tribunal having regard to all the relevant circumstances, including the context (*Richmond Pharmacology v Dhaliwal* [2009] IRLR 336). In that case the EAT said at paragraph 22:

"Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct … it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase".

128. In speaking of the statutory language in Section 26(1), Elias LJ in *Land Registry v Grant* [2011] ICR 1390 said (at paragraph 47):

"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment".

Victimisation

129. Section 27 of the Equality Act 2010 is worded as follows:

(1) A person 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.

130. Protected acts include bringing proceedings under the Equality Act 2010 (section 27(2)(a)) and making an allegation (whether or not express) that A or another person has contravened the Equality Act (section 27(2)(d)).

131. In *Beneviste v Kingston University* [2007] (UKEAT/0393/05) the EAT (HHJ Richardson) discussed at paragraph 29 the minimum requirements for a communication to satisfy the requirements of Section 27(2)(d), by reference to helpful examples:

> "There is no need to for the allegation to refer to the legislation, or to allege a contravention, but the gravamen of the allegation must be such that, if the allegation were proved, the alleged act would be a contravention of the legislation. If a woman says to her employer, "I am aggrieved with you for holding back my research and career development" her statement is not protected. If a woman says to her employer, "I am aggrieved with you for holding back my research and career development because I am a woman" or "because you are favouring the men in the department over the women", her statement would be protected even if there was no reference to the 1975 Act [Sex Discrimination Act 1975] or to a contravention of it."

132. Merely making reference to a criticism, grievance or complaint without suggesting that the criticism, grievance or complaint was in some sense an allegation of discrimination is insufficient.

133. A complaint that a person is being "discriminated against" may or may not fall within the scope of Section 27 depending on an analysis of complaint in its context. It depends whether the word "discriminated" is a reference to unfair treatment generally, rather than specifically because of race (*Durrani v London Borough of Ealing* [2013] UKEAT/0454/12). It is relevant to consider whether a claimant was articulate and well-educated and knew the appropriate language to use to allege race discrimination.

134. Section 27(3) contains two elements. First that the allegation is false and that in making the allegation, the claimant was acting in bad faith.

135. In *Saad v Southampton University Hospitals NHS Trust* [2019] ICR 311, at paragraph 50 HHJ Eady gave the following guidance as to whether a claimant should be regarded as acting in bad faith:

> "I do not say that the existence of a collateral motive could never lead to a finding of bad faith not least because it is impossible to foresee all scenarios that might arise but the focus should be on the question whether the employee was honest when they gave the evidence or information or made the allegation in issue. In answering that question, the employment tribunal will already have established that the evidence, information or allegation was false; that does not mean the employee acted in bad faith, although it may be a relevant consideration in determining that question (the more obviously false the allegation, the more an employment tribunal might be inclined to and that it was made without honest belief). Similarly, the employee's motive in giving the evidence or information or in making the allegation

may also be a relevant part of the context in which the tribunal assesses bad faith. The tribunal might, for example, conclude that the employee dishonestly made a false allegation because they wanted to achieve some other result, or that they were wilfully reckless as to whether the allegation was true (and thus had no personal belief in its content) because they had some collateral purpose in making it. Motivation can be part of the relevant context in which the tribunal assesses bad faith, but the primary focus remains on the question of the employee's honesty."

136. A detriment will only exist if a reasonable worker would also take the view that the treatment was to his detriment: *Ministry of Defence v Jeremiah* [1980] ICR 13 at paragraph 31. An unjustified sense of grievance does not amount to a detriment.

137. In order to succeed with a claim of victimisation, there must be a sufficient causal connection between a protected act and the alleged detriment. It is enough if the protected act had a significant influence on the outcome.

138. If the alleged detriment is a failure to investigate a complaint of discrimination or harassment, there must be a causative link between the fact of the employee making the EqA complaint and the failure to investigate it. It is insufficient for the protected act to be a "but for" cause. Langstaff J commented as follows at paragraphs 21-23 in *A v Chief Constable of West Midlands Police* (UKEAT/0313/14/JOJ (21.4.15):

"But omissions to act must be carefully scrutinised in this regard. The purpose of the victimisation provision is protective. It is not intended to confer a privilege upon the person within the hypothetical bubble I have postulated, for instance by enabling them to require a particular outcome of a grievance or, where there has been a complaint, a particular speed with which that particular complaint will be resolved. It cannot in itself create a duty to act nor an expectation of action where that does not otherwise exist.

It follows that in some cases – and I emphasise that the context will be highly significant – a failure to investigate a complaint will not of itself amount to victimisation. Indeed, there is a central problem with any careful analysis and application of section 27 to facts broadly such as the present. That is that, where the protected act is a complaint, to suggest that the detriment is not to apply a complaints procedure properly because a complaint has been made, it might be thought, asks a lot and is highly unlikely. The complaints procedure itself is plainly embarked on because there has been a complaint: to then argue that where it has not been embarked on with sufficient care, enthusiasm or speed those defects are also because of the complaint itself would require the more careful of evidential bases …

It might be different in some circumstances. An example might be if the particular nature of the complaint meant that it would not be discussed or dealt with in a way in which other complaints of a different nature would. For instance, if a particular employer found the prospect of dealing with a complaint of sexual harassment embarrassing to the extent that it took no action on such a complaint when otherwise it would have a duty to do so, or there was a well-established expectation

that the complaint would be dealt with, it is in my view possible that a Tribunal might conclude that the omission to act, if it caused the victim of the alleged harassment a detriment in terms of the particular effects of her disappointed expectations, could conceivably come within the scope of victimisation."

139. *Iwuchukwu v City Hospitals Sunderland NHS Foundation Trust* [2019] IRLR 1022 is an example of a case where a Tribunal found that the failure to investigate the claimant's grievances was materially influenced by the content of the grievances (which had alleged race discrimination) and was therefore an act of victimisation. This conclusion was upheld by the Court of Appeal.

140. It is open to an employer to allege that the reason for the treatment was not the protected act but some feature of it which could "properly be treated as separable" (*Martin v Devonshires Solicitors* [2011] ICR 352 (Underhill P)).

141. In order for the burden of proof to shift from a claimant to the respondent, the claimant must establish more than that the claimant has suffered a detriment and has done a protected act. There must be some factual basis for potentially inferring that the protected act has influenced the detrimental treatment.

Law on time limits under the Equality Act 2010

142. Section 123 of the Equality Act 2010 is worded as follows:

> (1) …proceedings on a complaint brought within Section 120 may not be brought after the end of –
>
> a. The period of 3 months starting with the date of the act to which the complaint relates; or
>
> b. Such other period as the employment tribunal thinks just and equitable
>
> (2) ….
>
> (3) For the purposes of this section _
>
> a. Conduct extending over a period is to be treated as done at the end of the period;
>
> b. Failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something:
>
> a. When P does an act inconsistent with doing it, or
>
> b. If P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it

143. Under Section 123 of the Equality Act 2010, proceedings on a complaint may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates. An act "occurs when it is done, not when you acquire knowledge of the means of proving that the act done was discriminatory" (*Mensah v Royal College of Midwives* [1995] EAT/124/94). The act is complete for the purpose of the time limitation when the decision is taken rather than when it is communicated. Therefore, time does not start from when the employee acquires

knowledge of the act or deliberate failure to act (*Virdi v Commissioner of Police of the Metropolis*) [2007] IRLR 24).

144. Conduct extending over a period is to be treated as done at the end of the period (Section 123(3) Equality Act 2010). There is conduct extending over a period if there is a continuing discriminatory state of affairs as opposed to a succession of unconnected or isolated specific acts. If so, then the three-month time period for bringing a claim only runs from the date on which the state of affairs ends (*Metropolitan Police Commissioner v Hendricks* [2003] ICR 530). However, if any of the constituent acts is found not to be an act of discrimination, then it cannot be part of a continuing act (*South West Ambulance NHS Foundation Trust v King* [2020] IRLR 168).

145. The three-month time for bringing Tribunal proceedings is paused during Early Conciliation such that the period starting with the day after Early Conciliation is initiated and ending with the day of the early conciliation certificate does not count (Section 140B(3), Equality Act 2010). If the time limit would have expired during Early Conciliation or within a month of its end, then the time limit is extended so that it expires one month after Early Conciliation ends (Section 140B(4), Equality Act 2010).

146. If the claim has been brought outside the primary limitation period, then the Tribunal has jurisdiction to consider the claim if it was brought within such other period as the Tribunal considers just and equitable. The relevant principles were recently reviewed by HHJ Tayler in *Jones v Secretary of State for Health* [2024] EAT 2. The Tribunal has a wide discretion whether to disapply the primary limitation period. There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised.

147. Factors which are almost always relevant to an exercise of the discretion are the length of and the reasons for the delay, and whether the delay has prejudiced the Respondent (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194 at paragraph 19). However:

> "There is no … requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard" (*Abertawe* at para 25)

148. It is not necessary for a Tribunal to consider the checklist of factors set out in Section 33 of the Limitation Act 1980, given that that Section is worded differently from Section 123 of the Equality Act 2010, so long as it does not leave a significant factor out of account.

149. It will frequently be fair to hold Claimants bound by time limits which they could, had they taken reasonable steps, have discovered. If the delay in issuing proceedings

has been caused by the fault of an adviser, this is a potentially relevant factor that potentially excuse a failure to issue proceedings in time, or a delay in issuing proceedings thereafter (*Hunwicks v Royal Mail Group plc* EAT 0003/07; 20 March 2007 per Underhill J at paragraphs 9 and 13). However, to be a relevant factor, the bad advice must have been the reason for the delay.

150. Awaiting the outcome of an internal grievance procedure before making a complaint is just one matter to be taken into account by a tribunal considering the late presentation of a discrimination claim (*Apelogun-Gabriels v Lambeth London Borough Council* [2002] ICR 713, CA per Peter Gibson LJ at p719).

151. Where it is asserted that the claimant's medical condition is the reason for the delay in issuing proceedings, the Tribunal is not bound to accept untested medical evidence as a sufficient basis for concluding that a claimant had difficulty in taking the necessary steps to issue proceedings. It is appropriate to evaluate that medical evidence in the light of other evidence as to what the claimant was capable of doing during the limitation period. This may include evidence of seeking legal advice or of writing coherent letters on this or unrelated matters (*Chouafi v London United Busways Limited* [2006] EWCA Civ 689). The question is whether it is just and equitable to extend time in the light of the claimant's medical difficulties, which are one relevant factor to be considered - even if they were not such as actually to prevent the claimant commencing proceedings (*Watkins v HSBC Bank plc* [2018] IRLR 1015 at paragraph 50).

152. When balancing the prejudice to each party as a result of granting or refusing to grant an extension of time, the Tribunal may have regard to the following factors:

    a. The obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence;

    b. The forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents and losing touch with witnesses;

    c. The prejudice to the claimant in not being awarded a remedy for an otherwise legally sound complaint if the Tribunal holds the complaint to be time barred.

153. If there is no forensic prejudice to the Respondent that is (a) not decisive in favour of an extension and (b), depending on the ET's assessment of the facts, may well not be relevant at all. It will very much depend on the way in which the ET sees the facts (*Miller v Ministry of Justice* (UKEAT/0003/15/LA) (15.3.16).

Conclusions

154. We start with the allegations of harassment. This is because where the Claimant is arguing harassment or direct discrimination in the alternative, then if harassment is established, the same factual allegation cannot amount to direct discrimination.

Harassment

2.1.1 On 29 May 2019 did Ms Osibogan cancel the Claimant's annual leave during Ramadan forcing him to attend training and later took disciplinary action against him regarding training attendance?

2.1.2 On 29 May 2019 did Mr Suckram cancel the Claimant's annual leave during Ramadan and forced the Claimant to attend training and later took disciplinary action against him regarding training attendance?

155. Allegations **2.1.1** and **2.1.2** – We reject the factual allegations that either Ms Osibogan or Mr Suckram cancelled the Claimant's annual leave forcing him to attend training. Neither Ms Osibogan nor Mr Suckram had the authority to cancel his annual leave once it had been granted. The Claimant chose to cancel his leave himself so he could attend the manual handling training course. The decision to start disciplinary action against him following his altercation with the trainer was made by Ms Ducie. It was taken because there had been a complaint made by the trainer about his conduct on that day.

2.1.3 On 8 November 2019, ignore OHS recommendations and manipulated information/provided untrue information forcing the Claimant to do heavy manual work which led to permanent injury to his lower back and hip but accepting and implementing OHS recommendation for the Claimant's other colleagues on many occasions, and allowing them to be on light duty for a number of years?

156. Allegation **2.1.3.** We have found that Mr Suckram did ignore Occupational Health recommendations about a four-week phased return to work in which his hours would gradually increase; and about being placed on light duties due to his ongoing symptoms. We have also found that other Century Court care staff who were not Muslims were regularly engaged to work on light duties. There was therefore inconsistent treatment between the Claimant and other Care Support Workers in relation to light duties. Given that Mr Suckram made the derogatory comment about the Claimant's faith on the same day that he failed to follow these Occupational Health recommendations, we find that the Claimant has proved facts from which the Tribunal could decide, in the absence of any other explanation, that this refusal by Mr Suckram to implement Occupational Health recommendations was influenced by the Claimant's faith. The burden shifts to the Respondent to show that the Claimant's Muslim faith played no part of the reason for Mr Suckram's refusal to follow Occupational Health recommendations.

157. We have carefully considered the reasons given by Mr Suckram. We do not find them to be convincing. Occupational Health can be presumed to have been aware that the Claimant was working 18 hours a week, rather than on a full-time basis. Therefore, the fact that the Claimant was contracted to work 18 hours a week was not a reason to refuse to implement their recommendations. They recommended he work half his contracted hours during the first two weeks (ie nine hours a week). Mr Suckram would have realised this when he decided not to offer the Claimant a phased return to work. He also would have been aware what Occupational Health

meant when they recommended light duties. It was not unclear and if it was, then Mr Suckram could and should have sought clarification. He did not do so. Mr Suckram was able to arrange for the Claimant to be on light duties.

158. We find this failure amounts to harassment in that the treatment had the proscribed effect. In circumstances where there were clear recommendations by Occupational Health for a period of only four weeks, it was insulting to the Claimant and offensive not to follow that advice where other staff had been offered light duties for an extended period of time.

2.1.4 In 2017, 2018, 2020 and 2021, did Ms Ducie raise multiple disciplinary actions with untrue allegations against the Claimant?

159. Allegation **2.1.4** – The Claimant was subject to various disciplinary investigations in relation to the following matters:

a. His reference to his political views on Facebook, which led to a written warning issued by Diane Ducie following a disciplinary process during 2018.

b. The shopping incident on 12 April 2019.

c. His conduct on the moving and handling course on 29 May 2019.

d. The tone and content of his emails between 3 and 5 December 2019. This was referred by Ms Ducie to Ms Bleaney to investigate.

e. His interaction with Ms Francis in June 2020.

f. The tone and content of his emails on 12 January 2021.

160. In each case the Respondent was entitled to instigate a disciplinary investigation into these issues. There was sufficient evidence of potential misconduct to justify the investigation. In these circumstances it did not have the proscribed effect.

2.1.5.1 On 16 March 2021 did Ms Harve raise unfair disciplinary action against the Claimant regarding his annual leave and subjected him to go through another lengthy stressful period of investigation?

161. Allegation **2.1.5.1** On 16 March 2021, Ms Harve was not involved in the decision to instigate disciplinary action in relation to the tone and content of emails written regarding annual leave. This issue was considered by Ms Bleaney at the instigation of Ms Ducie.

2.1.5.2 On 16 March 2021 did Ms Harve ignore and refuse to investigate the allegation of islamophobia, race and religious discrimination, but raised a disciplinary action against the Claimant?

162. Allegation **2.1.5.2** On 16 March 2021, Ms Harve did not ignore and refuse to investigate any allegation of Islamophobia.

Direct discrimination

1.3.1 In around 2018, was the Claimant denied bereavement leave following the death of his father?

163. Allegation **1.3.1** – The Claimant was not denied bereavement leave in 2018 following the death of his father. He chose to defer his bereavement leave. It was taken the following year in February and March 2019.

1.3.2 On 29 May 2019 did Folashade Osibogan, then Team Leader, cancel the Claimant's annual leave during Ramadan, forcing him to attend training and later took disciplinary action against him regarding an altercation with the trainer?

164. Allegation **1.3.2** – Folashade Osibogan did not cancel the Claimant's annual leave in relation to the manual handling training. It was not her responsibility to decide whether disciplinary action should be instigated in relation to events on this day.

1.3.3.1 Did Keith Suckram, Housing Scheme Manager, on 29 May 2019 force the Claimant to attend training and later took disciplinary action regarding an altercation with the trainer?

165. Allegation **1.3.3.1** – Mr Suckram did not cancel the Claimant's annual leave in relation to the training session. He did not decide whether the Claimant should face disciplinary action in relation to his conduct on that day. This was action taken by Ms Ducie.

1.3.3.2 Did Keith Suckram, Housing Scheme Manager, on 8 November 2019, make an Islamophobic attack/comment on the Claimant remarking, 'seems you suddenly became a Muslim' 'if I don't get Friday off, I'll go off sick'?

166. Allegation **1.3.3.2** – We have found that Mr Suckram did make the comment "seems you suddenly became a Muslim" at the Return to Work meeting on 8 November 2019. However, he did not make a further comment that the Claimant would go off sick if he was not granted Fridays off. The comment Mr Suckram did make is inherently discriminatory against the Claimant as a Muslim. He would not have made the comment to an equivalent Care Support Worker who was not a Muslim. It is therefore less favourable treatment because of his religion.

1.3.4 In August 2019, did the Claimant's line manager, Keith Suckram, refuse to give the Claimant extra shifts, having submitted a grievance on 13 June 2019 against Mr Suckram and Folashade Balogun, whilst other Afro-Caribbean part time colleagues and agency workers were given regular extra shifts until April 2021 when his contract was increased from 18 hours to 36 hours by Ilona Sarulakis (then Head of Services)?

167. Allegation **1.3.4** – We find that Mr Suckram did refuse to give the Claimant extra shifts during the period from August 2019 to April 2021, although we have not been able to make sufficient factual findings as to the dates these shifts were requested by the claimant, when they were refused and whether there was a good reason for doing so. Therefore, we reject this allegation of direct discrimination.

1.3.5 On 8th and 9th November 2019, did Mr Suckram ignore OHS' recommendations and manipulated information/provided untrue information, forcing the Claimant to do heavy manual work which led to permanent injury to his lower back and hip but accepting and implementing OHS recommendation for the Claimant's other colleagues on many occasions, and allowing them to be on light duty for a number of years? The Claimant compares himself to Allit Mardey and Hauwa Thbolyefo.

168. Allegation **1.3.5** – This cannot be direct discrimination because we have found that the identical allegation was harassment.

1.3.6.1 On 8 and 9 November 2019, did Frances Harve, Locality Manager ignore the Claimant's concerns about Mr Suckram's refusal to implement OHS's recommendations regarding his health and wellbeing and forced him to do heavy manual work which led to permanent injury to his lower back and hip?

1.3.6.2 Ignore the Claimant's reported Islamophobic attack on him by Mr Suckram?

169. Allegation **1.3.6** – We have found that Ms Harve did ignore both of concerns raised by the Claimant in his email. We find that ignoring these concerns amounts to facts from which the Tribunal could decide in the absence of any other explanation that this was because of Mr Suckram's religion, particularly because of one the concerns was alleged to be a disparaging comment about his religion. Therefore, this omission is sufficient to shift the burden of proof to the Respondent to prove on the balance of probabilities a non-discriminatory explanation.

170. We are not persuaded by the explanation offered by Ms Harve for failing to look into these issues. She had no basis for thinking that they would be investigated as part of the group grievance. We do not find that she had the conversations with the Claimant or with Mr Suckram about the subject matter of the complaint that she refers to in her witness statement. Effectively she did nothing in response to these serious allegations. We have found that the staff members who raised the collective grievance were noted to have had confidence in Ms Havre to resolve issues brought to their attention. It therefore does not appear that Ms Havre would normally fail to deal with complaints of this nature. In these circumstances, we do not consider that there is an innocent explanation apart from the explanation advanced by Ms Havre, which we have rejected. In those circumstances we find the Respondent has not discharged the burden of proof in showing that this failure was not influenced by the Claimant's religion.

1.3.7 On 9 October 2020 did Ms Harve deny the Claimant of a washroom and a room for prayers?

171. Allegation **1.3.7**. A decision was taken by Ms Ducie **[304]** that the Claimant could not use the treatment room for washing or for any purpose. This decision applied to all Care Support Workers, regardless of their race or religion. It was taken so that the treatment room would be free for its intended purpose. The Claimant was provided with a room on the third floor he could use for prayers. Because the Tribunal has been able to make a positive finding as to the reason why this decision was taken, it is not necessary to apply the burden of proof. This allegation of direct discrimination fails.

1.3.8.1 In March 2018, October 2019, October 2020 and April and June 2021, did Diane Ducie, Head of Provided Services raise multiple disciplinary actions with untrue allegations against the Claimant?

172. Allegation **1.3.8.1** – there was a sufficient basis for Ms Ducie to investigate all the potential disciplinary issues that were raised, given the evidence of potential misconduct. Therefore this allegation fails.

1.3.8.2 Did Ms Ducie refuse to make the Claimant full time whilst his part time colleagues were made full time?

173. Allegation **1.3.8.2**. We do not find there was any failure to make the Claimant full whilst his part time colleagues were made full time. The only evidence before the Tribunal concerning colleagues being granted full time hours related to an earlier period when the Claimant had not himself applied to go full time. He did not apply to work on a full-time basis until 2020. It is unclear whether other part time Care Workers applied to work on a full-time basis in the same period as the Claimant. Whilst there was a significant delay from the point at which he first asked to work on a full-time basis to the point at which this was granted, the issue for us to consider is whether there was a refusal. We do not know whether there were others who applied during that year and how long their applications took. We do not find that this allegation is proved.

1.3.9 Did the Respondent deny the Claimant promotion/career progression? The claimant asserts that he unsuccessfully applied for promotions to team leader or manager on or around 11 Jan 2022, 4 Jan 2021, 29 July 2019, December 2017, January 2016 & August 2015. He asserts that individuals responsible for denying him promotion or career progression are Diane Ducie, Keith Suckram, Marie Sawray, Frances Harve and the recruitment panels on each occasion. He compares himself to a hypothetical comparator and argues that if he were white or afro-Caribbean he would have been appointed and relies on Ruth Ajacik (2019 or 2017) and Waybissi Waykan (2016) as actual comparators and/or as evidential comparators.

174. Allegation **1.3.9**. We have not been able to make sufficiently detailed factual findings to be able to decide whether any of the Claimant's promotion applications were unsuccessful at least in part as a result of his race or his religion. Therefore this allegation fails.

1.3.10.1 On 3 March 2021, did Lina Banionyte refuse to provide the Claimant with the written outcome of an investigation into an assault allegation; causing increased stress and worsening of the Claimant's mental health condition?

175. Allegation **1.3.10.1** Lina Banionyte's grievance investigation never progressed to the point at which she had prepared a written outcome. There was therefore no failure to provide the Claimant with the written outcome.

1.3.10.2 On 3 March 2021 did Lina Banionyte inform the Claimant by telephone that there had been a potential breach of the Code of Conduct by his assailant but refused to put it in writing?

176. Allegation **1.3.10.2** We have found that Ms Banionyte did inform the Claimant by telephone that there was a potential breach of the Code of Conduct by Ms Francis. This was what she had been told by Ms Dhillon and was to be considered as part of a disciplinary investigation. It would not be appropriate for Ms Banionyte to put this in writing. In any event, she was not specifically asked to do so in terms by the Claimant. There is no basis for inferring that the failure to do so was influenced by the Claimant's race or religion.

1.3.10.3 On 7 April 2021, did Lina Banionyte turn the Claimant's assault case against him and put him through unfair disciplinary action?

177. Allegation **1.3.10.3**. It was not Ms Banionyte's decision that the Claimant's conduct in June 2019 towards Carol Francis should be the subject of a disciplinary investigation. This was a decision reached by others on advice from Ms Dhillon.

1.3.11 On 16 March 2011, did Ms Harve raise unfair disciplinary action against the Claimant regarding his annual leave and subjected him to go through another lengthy stressful period of investigation?

178. Allegation **1.3.11** Ms Havre did not take disciplinary action against the Claimant concerning annual leave.

1.3.12.1 On 22 March 2011, did the grievance investigation officer, John Binding, Head of Service Safeguarding Adults refuse to investigate the Claimant's allegations of Islamophobia, race and religious discrimination, bullying and harassment in the name of "emerging themes" having been aware of the remark to the Claimant 'seems you suddenly became a Muslim' 'if I don't get Friday off, I'll go off sick'.

179. Allegation **1.3.12.1**. We have found that Mr Binding did not investigate the Claimant's complaints about what Mr Suckram said to him on 8 November 2019. This was because this did not feature in the group grievance which had been issued before this event took place. The Claimant had been told that his individual grievances would be the subject of a separate process which would restart following the outcome of the collective grievance process. In not investigate this, Mr

Binding was acting in accordance with the terms of reference of his collective grievance investigation, rather than influenced by the Claimant's race or his religion.

1.3.12.2 On 22 March 2011, did the grievance investigation officer, John Binding, Head of Service Safeguarding Adults, refuse to accept the Claimant's witness and evidence, but accepted the manager's evidence ruling in their favour?

180. Allegation **1.3.12.2**. Mr Binding did not refuse to accept the Claimant's witness evidence, rather accepting the managers' evidence and ruling in their favour. In several respects, his collective grievance outcome was critical of the conduct of both Ms Osibogan and Mr Suckram. Far from accepting their evidence, he rejected their defence of their behaviour. Instead, he accepted the criticisms advanced by the Claimant and his colleagues. Therefore, this allegation is factually incorrect.

1.3.13 On 7 April 2021 did Laura Bleaney, Assistant Head of Service, Family Intervention and Support Service:

1.3.13.1 Raise an unfair disciplinary action regarding the Claimant's annual leave and subjected him to go through another lengthy stressful period of investigation despite the Group Grievance outcome that his managers failed to deal with his annual leave appropriately?
1.3.13.2 Carry out a disciplinary investigation on the Claimant?

181. Allegations **1.3.13.1 and 1.3.13.2**. By 7 April 2021, Ms Bleaney was already conducting a disciplinary investigation into the Claimant's conduct in several respects. She had originally been asked to consider the tone and content of email exchanges which had been sent in December 2019. Subsequently she was asked to consider the tone and content of further email exchanges sent in January 2021 and was also asked to consider whether there was a breach of the Code of Conduct in the Claimant's interaction with Carol Francis in June 2020. On 7 April 2021, Ms Bleaney met with the Claimant to hear his version of events as part of her ongoing investigation. No decision was taken on that date to instigate or continue disciplinary action against him. This allegation therefore fails.

1.3.14.1 On 11 June 2021, did Ms Ducie carry out a disciplinary investigation on the Claimant; refused to accept/take into consideration the Claimant's witness or statements, but accepted the managers version of the incident and ruled against the Claimant?

182. Allegation **1.3.14.1** There was a sufficient evidential basis both for a disciplinary investigation into the two matters being decided by Ms Ducie; and also for her to find as she did that the Claimant was at fault on both occasions. She decided not to impose any sanction given the passage of time. We do not find that there is any basis for inferring that the disciplinary process and outcome was influenced by the Claimant's race or religion.

1.3.14.12 On 11 June 2021, did Ms Ducie ignore and refuse to investigate the allegation of Islamophobia, race and religious discrimination, but raised a disciplinary action against the Claimant?

183. Allegation **1.3.14.2** We note that this allegation relates to 11 June 2021. It was not part of Ms Ducie's remit at that point to investigate this allegation.

1.3.15 On 24 June 2021, did the appeal officer, Rory McCallum, Senior Professional Advisor, Safeguarding and Learning reject the Claimant's grievance; refuse to accept the Claimant's witness and evidence and refused to hear and look into the allegations of race and religious discrimination, having been aware of the remark that the Claimant 'seems you suddenly became a Muslim', 'if I don't get Friday off, I'll go off sick'; refused to investigate the Claimant's allegations of bullying, harassment and victimisation?

184. Allegation **1.3.15**. Mr McCallum was considering the group appeal against the outcome of the collective grievance, rather than the Claimant's individual grievance. In some respects, he upheld the grounds of appeal**.** It is incorrect to say that he rejected the Claimant's grievance. He was not considering the Claimant's individual grievance. Insofar as the Claimant was arguing that Mr Binding was at fault for failing to consider the Claimant's individual grievance, Mr McCallum was correct to reject this ground of appeal. It was not within the remit of the collective grievance to consider his individual allegations of discriminatory treatment from Mr Suckram, including specific instances raised of bullying or harassment.

1.3.16 On 1 July 2021, did Ms Bleany raise an unfair disciplinary action against the Claimant and subjected the Claimant to undergo a further stressful period?

185. Allegation **1.3.16**. Ms Bleaney did not "raise unfair disciplinary action against the Claimant" in her outcome report. Whilst she recommended enhanced supervision, she did not recommend any disciplinary penalty. No further disciplinary action was taken in the light of her outcome. Therefore, this allegation fails.

1.3.17 Did Ms Osibogan cancel the Claimant's annual leave on another occasion and force him to attend training; unfairly deducted his working hour from his timesheet; and falsely claimed that he would be paid?

186. Allegation **1.3.17** This is an extremely vague allegation. There is no evidence from the Claimant that Ms Osibogan cancelled his leave on another occasion. We reject this allegation. She had no authority to cancel his leave. There is no evidence that the Claimant was forced to attend training on another occasion or that time was deducted from his timesheets; or that Ms Osibogan falsely claimed he would be paid.

<u>Victimisation</u>

(1) Protected act

3.1.1 It is accepted that the Claimant's grievance in June 2019 was a protected act.

187. The Respondent admits that the individual grievance issued through the HR grievance portal was a protected act. Contrary to the parties' understanding when the list of issues was prepared, this was first lodged on 14 October 2019.

3.1.2 Were the Claimant's emails of 12 and 18 January 2019 to Ms Ducie complaining of Mr Suckram and other colleagues also protected acts?

188. In addition, the Claimant alleges that his emails of 12 and 18 January 2019 sent to Ms Ducie complaining of Mr Suckram and other colleagues was also a protected act. We have not found any email to Ms Ducie on 12 January 2019. We accept that the email to his union representative must have been forwarded on 18 January 2019 because Ms Ducie responded on that day. However, we do not regard the language used in that email as an allegation that there has been a contravention of the Equality Act 2010. It therefore was not a protected act.

3.1.3 Was the Claimant's complaint of 3 March 2021 regarding an allegation of assault a protected act?

189. The Claimant's email on 3 March 2021 sent to Ms Banionyte was not a protected act. It did not allege any contravention of the Equality Act. Nor did it make any allegations of discrimination.

(2) Detriment for doing a protected act

3.2.1 In August 2019, did the Claimant's line manager, Keith Suckram, refuse to give the Claimant extra shifts, having submitted a grievance on 13 June 2019 against Mr Suckram and Folashade Balogun, whilst other Afro-Caribbean part time colleagues and agency workers were given regular extra shifts until April 2021 when his contract was increased from 18 hours to 36 hours by Ilona Sarulakis (then Head of Services)? The Claimant compares himself to Elizabeth Joseph and Huawa Tobolayefo and unnamed agency workers.

190. We find that at some point Mr Suckram would have known of the contents of the individual grievance lodged by the Claimant on 14 October 2019, and in particular that the Claimant was making allegations of discrimination against him. It is likely that Mr Suckram would have only been aware of this level of detail at the point when he was interviewed in the course of Ms Sainsbury's investigation. She did not interview Mr Suckram until March 2023. There is therefore no basis for concluding that he was influenced by this allegation in his treatment of the Claimant at any point up until when he went on sick leave on 1 March 2021.

191. We have found no facts from which we could infer, in the absence of any other explanation, that the shift pattern allocated to the Claimant by Mr Suckram from late 2019 was influenced by the allegations of discrimination in the individual grievance he lodged through the grievance portal on 14 October 2019. The discrimination allegations focused on his failure to secure promotion rather than on any treatment by Mr Suckram. Therefore, it is inherently unlikely that Mr Suckram would have retaliated against the Claimant as a result of the discrimination allegations. In any event, the detrimental treatment is said to start in August 2019 and appears to

predate the Claimant's individual grievance. His case is that Mr Suckram denied him additional shifts from August 2019 onwards. This is before the date on which the individual grievance was lodged. If so, a decision taken at that point cannot have been influenced by a subsequent grievance.

3.2.2 On 13 March 2020, did Mr Suckram record the Claimant as being on sick leave when he was in work resulting in him receiving half pay.

192. We have found no facts from which we could infer that Mr Suckram's mistake about the hours worked by the Claimant in March 2020 was influenced by the allegations of discrimination about previous promotion applications made in the formal grievance.

3.2.3.1 Did Lina Banionyte refuse to provide the Claimant with the written outcome of an investigation into an assault allegation; causing increased stress and worsening of the Claimant's mental health condition?

193. By the time Ms Banionyte's involvement ended, she had not prepared a written outcome to her investigation. We do not find that she knew of the contents of the formal grievance. There was therefore no detrimental treatment from Ms Banionyte as a result of this protected act.

3.2.3.2 Did Lina Banionyte inform the Claimant by telephone that there had been a potential breach of the Code of Conduct by his assailant but refused to put it in writing?

194. We have found that Ms Banionyte did inform the Claimant by telephone that there was a potential breach of the Code of Conduct by Ms Francis. This was what she had been told by Ms Dhillon and was to be considered as part of a disciplinary investigation. It would not be appropriate for Ms Banionyte to put this in writing. In any event, she was not specifically asked to do so in terms by the Claimant. There is no basis for inferring that the failure to do so was influenced by a protected act.

3.2.4 Did Lina Banionyte turn the Claimant's assault case against him and put him through unfair disciplinary action on 7 April 2021?

195. It was not Ms Banionyte's decision that the Claimant's conduct in June 2019 towards Carol Francis should be the subject of a disciplinary investigation. This was a decision reached by others on advice from Ms Dhillon.

<u>Summary of successful discrimination, harassment and victimisation allegations</u>

196. The successful discrimination and harassment allegations are as follows:

    a. Direct religious discrimination on 8 November 2019 by Mr Suckram saying to the Claimant 'seems you suddenly became a Muslim' (issue 1.3.3.2).

b. Direct religious discrimination on 8 and 9 November 2019 by Ms Harve in failing to investigate the Claimant's complaint about this comment (issue 1.3.6.2).

c. Harassment related to religion on 8 November 2019 by Mr Suckram ignoring Occupational Health recommendations as to light work and as to a four-week phased return to work (issue 2.1.3).

d. Direct religious discrimination on 8 and 9 November 2019 by Ms Harve ignoring the Claimant's complaint about Mr Suckram's failure to implement Occupational Health recommendations regarding his health and wellbeing (issue 1.3.6.1).

Jurisdiction

197. We have found that there was harassment by Mr Suckram on 8 November 2019 in relation to refusing to follow Occupational Health advice, both as to a phased return to work and as to being placed on light duties. There was also direct religious discrimination by Mr Suckram in the comment he made to the Claimant about his faith. There was also direct religious discrimination by Ms Havre in failing to investigate the Claimant's complaint about the comment made by Mr Suckram, and in relation to the failure to follow Occupational Health advice.

198. It took until 30 June 2021 for the Claimant to initiate the Early Conciliation process. This is a period of almost 20 months. There was then a further period of almost a month between 11 August 2021 and 9 September 2021. Therefore, the Claimant's Tribunal complaints about events on 8 November 2019 fall outside the primary three- month time limit provided by Section 123 Equality Act 2010.

199. We need to consider whether it would be just and equitable to extend time so as to provide the Claimant with a remedy in these proceedings for this discrimination. We need to consider all the circumstances, and in particular the extent to which the Respondent would be prejudiced by extending time and the explanation for the Claimant's delay in issuing proceedings.

200. So far as the prejudice to the Respondent is concerned, there is inherent prejudice caused by the passage of time in terms of the ability of Mr Suckram to recall precise details of what was said during the Return to Work meeting on 8 November 2019. However, the extent of that prejudice must be balanced against the following features. First, it is clear from the contemporaneous documents that the Occupational Health recommendations were not followed. Resolving this factual issue is not dependent on witness recollection. Second, the Claimant made a contemporaneous complaint about both the failure to follow Occupational Health advice and about the derogatory comment in his email of 8 November 2019, which were never investigated. These were not even investigated as part of the long delayed individual grievance outcome. Third, Mr Suckram promised to type out his record of the relevant conversation shortly after it took place but did not do so. Fourth, the alleged derogatory comment was raised by the Claimant in an email with Mr Suckram on 3 December 2019 (within four weeks of the incident) and denied by Mr Suckram in his email response. Fifth, even if proceedings had been issued promptly, there would have been a substantial delay in any event before the Final Hearing took place. It has taken over two years from when these proceedings

were issued for the Final Hearing to take place. The additional impact on memory of the further delay is marginal.

201. In addition, the Respondent argues that it has been hampered in defending the proceedings by the effect of a cyber attack in October 2020. However, no detail has been provided about the particular impact of the cyber attack on the allegations we have upheld. It is clear that emails have still been preserved from the relevant time. No relevant category of missing records has been identified which might have assisted the Respondent in meeting the particular allegations which have succeeded.

202. We need to consider any explanation provided by the Claimant for the delay in issuing proceedings. His witness statement did not specifically provide one. He was not asked for one in the course of his oral evidence. However, in submissions he said that he was waiting until matters had been investigated internally. He was entitled to expect the matters raised in his 8 November 2019 email would be investigated as part of the individual grievance he had issued the previous month. As in fact subsequently occurred, the Respondent aimed to address all of his complaints about how he had been treated in the grievance outcome. An email containing his allegation about the derogatory comment was sent to Mr Cole to consider as part of his investigation.

203. In addition, the following further explanations for the Claimant's delay arise from the factual findings we have made:

a. In January 2020, the Claimant was told that his individual grievance would be paused to await the outcome of the collective grievance.

b. In March 2020, the Government imposed a national lockdown. This meant that internal HR processes were paused. It also meant that the Claimant's caring role become substantially more difficult as a result of the health protocols he would have been required to follow.

c. There was a lack of clarity as to when the collective grievance would be resolved; and there was a reasonable basis for the Claimant to be unclear on whether specific complaints about Mr Suckram would be considered in the collective or the individual grievance.

d. The Claimant was absent from work on sick leave from March 2021 to the date of his resignation in October 2022. During this time, it is clear from the Occupational Health records that he was not well enough to return to work due to ongoing mental health issues, which are described in serious terms.

204. We note that the Claimant was a member of a trade union throughout the period and had engaged their services to represent him in relation to his workplace difficulties. However, his trade union representative was off on long term sickness absence from December 2019 (shortly after the 8 November 2019 incident). It is unclear when he returned. We also note the Claimant had threatened tribunal proceedings as early as April 2017. There is no suggestion that he had been given incorrect advice as to Tribunal time limits.

205. Balancing all these factors, notwithstanding the extent of the delay, we conclude that it would be just and equitable to extend time to enable the proven allegations to be the subject of a remedy in the Employment Tribunal**.**

Employment Judge Gardiner
Dated: 9 February 2024