



EMPLOYMENT TRIBUNALS

Claimant: Dr Christopher Oyediran

Respondent: Nottingham University Hospitals NHS Trust

Record of an Attended Hearing at the Employment Tribunal

Heard at: Nottingham

Heard on: 15, 16, 17 18 and 19 January 2024

In Chambers: 22 – 23 January 2024

Before: Employment Judge M Butler

Members: Mrs L Lowe
Mr R Jones

Appearances:

Claimant: In person

Respondents: Mr C Baran, Counsel

RESERVED JUDGMENT

1. The unanimous Judgment of the Tribunal is that the claims of detriments on the ground of making protected disclosures, direct race discrimination and failure to make reasonable adjustments for disability are not well founded and are dismissed.

REASONS

Background

1. The Claimant submitted his claim form on 10 March 2022 following a period of early conciliation between 28 February and 9 March 2022. In that claim form, in addition to the claims mentioned in the Judgment above, the Claimant brought claims of harassment on the grounds of race and various financial claims and, on the basis that he claimed to be an employee of the Respondent, his claim was amended with permission of Employment Judge Adkinson on 9 February 2023 to include automatic unfair constructive dismissal on the ground of making protected disclosures. At a further Preliminary Hearing before Employment Judge Heap on 19 January 2023, the Judge held that the Claimant was not an employee of the Respondent within the meaning of section 230(1) Employment Rights Act 1996 (ERA) and his claims for notice pay, unfair dismissal and a redundancy payment were struck out. The claim of harassment on the grounds of race was also struck out as having no reasonable prospect of success. The complaints of unauthorised deductions from wages and for other payments and holiday pay were dismissed on withdrawal by the Claimant.
2. The Claimant describes himself as Black African and in February 2021 was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD).
3. The Respondent denies all of the claims.

The Issues

4. There was an agreed list of issues which is at pages 120-125 of the hearing bundle. We have appended that list to this Judgment.
5. We note that the issues under the heading "Time Limits" were not pursued by the Respondent, Mr Baran confirming that the Respondent was not taking any time points in relation to the claims.

The Evidence

6. We heard evidence from the Claimant and for the Respondent from Dr Navin Bedi, Consultant in Emergency Medicine, Miss Amber Bristow, formerly Deputy Head of Service for the Emergency Department and now Clinical Director of the Urgent and Emergency Directorate, Dr Carol Roberts, Associate Medical Director, Dr Varun Kumar, Consultant in Emergency Medicine, Dr Faisal Faruqi, Consultant in Emergency Medicine, and Professor Frank Coffey, Director of the Department of Research and Education in Emergency Medicine, Acute Medicine and Major Trauma. All witnesses produced witness statements and were cross-examined.
7. There was an agreed bundle of documents supplemented by some further

documents during the course of the hearing. The main bundle of documents comprised 530 pages and references to page numbers in this Judgment are to page numbers in that bundle.

The Factual Background

8. The Respondent is a large NHS Trust serving Nottingham and the surrounding area mainly from Queens Medical Centre and City Hospital. The Claimant was born on 2 April 1988 and was employed by the Respondent from August 2013 as a Trainee Doctor and then as a Doctor. He left the Respondent's employment in around 2017 but returned as a Locum Doctor and was accepted onto the Respondent's Medical Bank on 14 February 2020. He worked at both Queens Medical Centre and City Hospital.
9. On 17 February 2021, the Claimant was assessed by a Consultant Psychiatrist who diagnosed ADHD. The Claimant confided in a fellow Doctor, Dr Jamieson, that he had been diagnosed as suffering from ADHD and Dr Jamieson told Miss Bristow sometime before November 2021 adding that he did not know whether he should have mentioned this because he was not sure whether the Claimant had told him in confidence or not. As a result, Miss Bristow did not share the information with anyone. The Claimant confirmed this diagnosis in an email to Professor Coffey on 10 December 2021 (page 353-355).
10. On 25 May 2021, the Claimant claims to have made a protected disclosure to Dr Darren Aw regarding the death of an elderly patient (list of issues 5.1) (page 38).
11. On 23 June 2021, the Claimant claims to have made a protected disclosure to Dr Faruqi and Dr Jamieson regarding unsafe handover practices (list of issues 5.3) (page 121).
12. On 2 July 2021, concerns were raised about the Claimant's work at City Hospital. In summary, colleagues alleged, inter alia, that the Claimant almost always attended late so missing handovers, was difficult to contact when he was needed to attend to patients, displayed a verbally aggressive attitude to staff and failed to provide adequate care to patients.
13. By an email dated 1 July 2021, the Claimant alleges he made a protected disclosure to Dr Amy Binnion regarding the treatment of two patients with respiratory problems (list of issues 5.2) (page 258).
14. On 2 July 2021, Dr Binnion replied to the Claimant's concerns and also raised the issues regarding the concerns that had been raised to her (page 257). In particular, Dr Binnion made reference to the criticism of the Claimant's manner towards staff as being rude and aggressive and asked why he had been unable to spend time reviewing sick patients. The Claimant responded to Dr Binnion's email on 6 July 2021 copying in his response to Victoria Solley and Steve Cantellow of the Respondent's HR Department (page 264). The Claimant sought to respond to the concerns that had been raised about him and attempted to explain from his point of

view, what had actually happened. He concluded his email by saying “... *This feedback has been a lot to take on but I appreciate it nonetheless. This has really brought me back down to earth following a period where I felt I was actually doing pretty well at my job*”.

15. In response was Ms Solley’s email to the Claimant of 5 July 2021 (page 270) wherein she outlined the concerns raised as follows:

- Staring on time (missing handover).
- Not attending alerts/2222’s in a timely way or at all.
- Abrupt/dismissive behaviour towards colleagues.
- Failing to answer bleep or phone.
- Lack of presence in clinical areas.
- Asking Juniors not to contact you unless it was urgent.

16. Miss Solley had suggested a meeting to discuss these issues and the Claimant responded at length (page 265) largely disputing the criticisms of him and explaining some of the work he had to undertake which was perhaps unseen by the staff who had complained about him.

17. On 16 July 2021, there was a meeting between the Claimant, Ms Solley and Mr Cantellow at which notes were taken (page 284). The notes give more detail of the concerns and complaints made about the Claimant and record that the Claimant explained his late arrivals, thereby missing handovers, as being due to his partner returning home late. The summary of the meeting (page 285) records the following 5 points:

- Lack of understanding about what is required overnight?
- Jokes misinterpreted.
- Communication.
- Lack of responsiveness.
- Supporting junior colleagues.

18. In his evidence, the Claimant now disputes that these notes are an accurate reflection of the matters discussed. A consequence of the meeting was the Respondent’s concern for the Claimant’s workload as a result of which Ms Solley emailed the Emergency Department Rota Co-ordinator on 20 July 2021 (page 287) asking that *the Claimant “not be booked for anything more than 4 nights in a row and give him the contractual downtime please”*.

19. On 9 August 2021, Ms Jessica Bailey of the Emergency Department emailed Miss Bristow saying in relation to a shift overnight that the Claimant *“went on his break at 4.30am and had not been seen since”*.
20. On 8 September 2021, having spoken to Dr Jabbar, Emergency Department Consultant, the Claimant asked for a pay rise to be moved up to the Higher Registrar Locum rate (page 291). The email was sent to a number of people who had involvement with the Claimant. Dr Faruqi replied, *“There are many concerns raised against his attitude and behaviour with juniors and nursing staff. I think we should organise a meeting and discuss before making any further decisions”* (page 291).
21. Miss Bristow replied that *“... he is clearly working at a Senior Registrar level. But I am worried about his wellbeing”*. She suggested a meeting to discuss these issues (page 291). The Claimant suggests that one of the detriments he suffered was that the email from Dr Faruqi referred to above suggested that there be a disciplinary meeting. It is plainly apparent from the context of this email that that is not the case and the Claimant accepted in cross-examination that Dr Faruqi was merely replying to the email about the Claimant’s request for a pay rise.
22. On 25 September 2021 there was a complaint about the Claimant which we believe to have been made by the night shift Duty Matron. The matron said the Claimant had been obstructive and antagonising and hung up the phone on her whilst she was speaking (page 295).
23. On 7 October 2021, concerns were raised about the Claimant after he was observed by an overnight Consultant as being *“unobtainable for a couple of hours overnight and this has been observed in particular by paed’s Nurses in the past”* (page 300).
24. On 10 November 2021, Dr Bedi was appointed as the Claimant’s appraiser (page 315).
25. On 15 November 2021, further concerns were raised about the Claimant. In an email from an Advanced Clinical Practitioner to Professor Coffey, Miss Bristow and Dr Jabbar (and others) he was described as *“... extraordinarily lazy, sitting at the desk on his phone for the majority of the shift and doing minimal work, was belligerent, and extremely rude to staff. When asked to do small tasks such as review ECG’s he would refuse and throw the ECG back at the staff member and declined to help with a difficult canular as the patient was not in his team (he was asked to float in majors when not working in hot). On several occasions when asked to review patients in hot, he declined to do so”* (page 316). This prompted Professor Coffey to email Miss Bristow as follows: *“This is a recurring theme. Does he need to stop doing Locum’s until addressed, as he is clearly not right at the moment”* (page 317). The following day, in response to the preceding emails, Dr Khawaja, Emergency Department Consultant, emailed Professor Coffey, Miss Bristow and Dr Jabbar as follows:

“With a heavy heart, I would support what’s been said. There is persistent decline in the performance of professional conduct. Several incidents have been reported where he shouted at juniors and nursing staff with no obvious reason. He does not take initiative well at work, gets aggressive when approached and disappears on almost every shift for 2 to 4 hours with no reason. I have been approached by several tearful nurses reporting him refusing him to do simple tasks like ECG signing. All of this has been reported verbally several times.

My worry is that he is bringing negative energy to rest of team while at work. My suggestion would be that he needs to be spoken to by someone senior and these issues needs (sic) to highlight (sic) it is not possible to run the floor with him around” (page 318).

Miss Bristow replied to that email saying:

“Thanks for this feedback. I am writing to let you know that Frank and I will meet with Chris to discuss this. I worry that there seems to be something going on and he may need our support which we will sort but he needs to know that this behaviour is not acceptable and perhaps our department is not for him to continue working in as a Locum if we do not see an immediate improvement” (page 319).

26. On 7 December 2021, the Claimant arranged his appraisal with Dr Bedi which was due to take place on 10 January 2022 (page 322).
27. The Claimant worked the nightshift in the Emergency Department on 8 and 9 December 2021. There were a number of complaints about him from colleagues working the same shifts. In particular, Ms Hartshorn, Emergency Department Sister, complained that the Claimant could not be contacted so she called Dr Kumar who came into the Emergency Department to review, inter alia, ECG’s and went with Dr Kumar to try to find the Claimant. When he was contacted the Claimant seemed stressed saying, *“What’s this all about, for God’s sake I have only gone for a coffee”*. The three of them spoke privately in another room and before the conversation started the Claimant said he needed a few minutes to calm down as he was very angry. When he returned, and when Ms Hartshorn explained why his presence was necessary in the department, the Claimant said, *“I’m not talking to the likes of you”*. This was confirmed by Dr Kumar in his evidence who also told the Claimant at this point that he could not talk to colleagues in that way. Dr Kumar suggested that the Claimant went to work in the Covid Isolation Ward but, despite having worked there on a number of occasions before, the Claimant said he had not been fit tested or had a risk assessment so did not have the correct PPE to do so. The Claimant also alleges that this comment was a protected disclosure (list of issues 6.1.8).
28. Dr Kumar reported these incidents to Dr Jabbar in an email at 2.18am on 9 December 2021 (page 330). This highlighted the Claimant’s frequent absences from the department he was supposed to be working in and said,

"I find him clinically up to level to work as middle grade. He is a competent Registrar, but over the last few months there has been (sic) several interpersonal and communication issues with nurses and other clinicians.

I am concerned about his mental wellbeing. He appeared stressed with labile mood overnight through the shift. I had to deal with several complaints from staff about this. I personally discussed issues with him and spent time".

In this email Dr Kumar highlighted the Claimant's lack of visibility in the work area, his need for anger management and the fact that he had suddenly at 1.30am said he did not want to work in the Isolation Area as he had not been fit tested when he had worked in isolation many times before (page 330).

29. There were other complaints on the same shift. One staff member said she had asked if she could pass through an area which had been blocked by the Claimant who was with a patient. The staff member explained she was transferring a patient but the Claimant allegedly replied loudly *"I don't really care, why would I move for someone like you"* and *"I am more important"* (page 332).
30. Further complaints regarding the Claimant were highlighted in an email from Professor Coffey to Dr Jabbar, Miss Bristow, Dr Faruqi, Dr Kumar and others (pages 333-341). Professor Coffey described the attachments to the email as being *"a litany of complaints"*.
31. The Claimant commenced his next nightshift at 8.00pm on 9 December 2021. Professor Coffey met with the Claimant sometime after 9.30pm when he advised the Claimant that a number of complaints had been made against him and they would need to arrange a meeting to address them and hear his side of the story. The Claimant then became defensive and agitated. He denied that he had said to a member of staff that he was more important than her calling it a false allegation. Professor Coffey suggested that he may be working too many shifts which was impacting on his health leading to inappropriate behaviours but the Claimant strenuously denied this again becoming very agitated. It was agreed that the Claimant would then continue working his shift alongside Professor Coffey in the Fracture Clinic but within half an hour he told Professor Coffey that he could not carry on working and in conversation with Professor Coffey demanded payment for the entire shift which was agreed. Professor Coffey summarised the matters discussed with the Claimant in an email to Mr M Timson, HR Business Partner which was copied to certain other personnel (page 370).
32. At 3.44am on 10 December the Claimant sent a long email to Professor Coffey copying in Dr Bedi. In the first paragraph he said, *"I'd like to make clear from the get-go that I in no way feel I am being targeted or victimised"*. He also made mention of ADHD (page 353). His email was essentially a rebuttal of the allegations made against him and notified to him by Professor Coffey a few hours earlier. The email concluded:

"As I said to you before I left, I know I have my flaws and am very much capable

of reflection. If there are legitimate issues people have with the way I work, do let me know and we can come up with a solution what (sic) works best for both myself and the Trust. If on the other hand, all this ends up boiling down to rumours and conjecture, given the disruption it has caused to my working life, I'd like to know what steps the Trust plans to take to remedy things especially in light of the CQC report released a few months ago. If you need to involve HR, Victoria Solley was my point of contact last time this occurred" (page 355).

33. At 3.25pm on 10 December 2021 Professor Coffey replied to the Claimant's email which included, inter alia, the following comments:

"On reflection and discussion with the Senior Team in ED, we have decided that it would be best for you not to work in the ED at QMC, until we have investigated the complaints and had the meeting with HR that I spoke about. I have cc'd Miles Timson our Divisional HR Lead.

We appreciate the hard work you do and some of the Consultants have expressed an opinion that you might be taking on too much. There is a genuine concern for your health and a feeling that some of the behaviours described by different staff members, in a number of testimonies, might result from the pressure you are under".

34. On 12 December 2021, further concerns were reported about the Claimant, principally alleging he had been away from the work area for long periods of time and delayed in attending to patients (pages 479 and 481).

35. On 16 December 2021, Mr Timson wrote to the Claimant confirming he would like to arrange a meeting to discuss the matters that had been raised and confirming that, if he wished, he could be accompanied to that meeting. Mr Timson asked the Claimant to give dates of availability for the meeting confirming that it would be with himself or one of his colleagues with Professor Coffey or Miss Bristow also in attendance (page 364). The following day, the Claimant responded saying he was off sick and attaching a private fit note (pages 362 and 363). The Claimant said in his email to Mr Timson, *"Once back to fitness, I'll be in touch with regards to scheduling a date for the meeting. I'll be bringing my solicitor, Angela Shore, along with me"*. The private fit note said the Claimant was suffering from work related stress.

36. On 22 December 2021, the Claimant had a further exchange of emails with Mr Timson (page 360). The Claimant had asked what the proposed meeting would be about and added:

"In the time since my suspension, I've decided it's probably best for everyone if I move on from NUH.

I had a similar meeting in July with Miss Solley and Dr Cantelow. I accepted at times my speech can become pressured when I try to explain things, and this can be interpreted as aggression..... the entire ordeal was extremely taxing on my

mental health and I have no intention of reliving it”.

37. On the same date, the Claimant forwarded a copy of his ADHD assessment report to Dr Bedi, Miss Bristow, Professor Coffey and Mr Timson (page 518).
38. The Claimant did not attend a meeting with any of the Respondent’s Officers and in his evidence confirmed he refused to do so as a result of what had happened to him and the way he had been treated in July 2021. Having indicated to Dr Bedi that he would like to delay his appraisal, he did not ever contact him again to rearrange it.
39. Dr Keith Girling is the Medical Director of the Respondent and the Responsible Officer under the Medical Professions (Responsible Officers) Regulations 2010. As the Claimant was engaged by the Trust as a Bank Doctor, Dr Girling was his Responsible Officer but this did not mean he was responsible for conducting the Claimant’s appraisal. Indeed, he could not do so.
40. On 3 March 2022, Dr Girling received a copy of letter that Dr Richard Clarkson, Medical Director and Responsible Officer at Sherwood Forest Hospitals NHS Trust had sent to the Claimant’s Locum Agency. This letter set out concerns that Dr Clarkson had about the Claimant’s behaviour whilst engaged through the Locum Agency to work in the Emergency Department at Kings Mill Hospital in Mansfield. These concerns were exactly the same as the ones raised by staff at Queens Medical Centre and reported to Professor Coffey. It further transpired that, despite having a fit note stating the Claimant was unfit for work due to work related stress, he had commenced working at Kings Mill Hospital as a Locum Doctor on 21 December 2021. Dr Girling decided that it was inappropriate for him to continue as the Claimant’s Responsible Officer and he wrote to the Claimant confirming that he would not be his Responsible Officer going forward (page 438).
41. On 7 February 2022, the Respondent received a letter from the Claimant’s solicitors making the claims which are now before the Tribunal together with those which have already been withdrawn.
42. Following this, the Claimant continued to refuse to engage with the Respondent but sent a number of aggressive and threatening communications to various members of staff at the Respondent which he admitted in evidence, confirmed his regret for doing so and offered his apologies.
43. In relation to the specific issues before us, based on the oral and written evidence and on the balance of probabilities, we find the following facts:
 - 43.1. The Claimant made protected disclosures to the Respondent as identified in the list of issues at paragraphs 5.1, 5.2 and 5.3. None of the other claimed protected disclosures are qualifying disclosures under section 43B ERA as they were not made in the public interest.
 - 43.2. The Claimant was not indefinitely suspended without pay (List of Issues 9.1).

43.3. Dr Girling did not refuse to appraise the Claimant (List of issues 9.2).

43.4. Dr Kumar did tell Professor Coffey he was concerned about the Claimant's attitudes and behaviours and that, in his opinion, the Claimant should not be working at the Respondent but this was reasonably based upon the complaints made by colleagues about the Claimant and Dr Kumar's own observation of his conduct. This did not amount to a detriment to the Claimant (List of Issues 9.3).

43.5. At no time did Dr Faruqi request that the Claimant be made to attend a disciplinary meeting (List of Issues 9.4).

43.6. The Claimant was not treated less favourably because of his race.

43.7. The Respondent knew of the Claimant's disability from 10 December 2021. The Respondent did not fail to make reasonable adjustments because of the Claimant's condition of ADHD.

The Law

44. Section 43B ERA defines "Qualifying Disclosure" as:

"Any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following-

(a)

(b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

(c)

(d) That the health or safety of any individual has been, is being or is likely to be endangered".

45. Section 47B ERA provides in relation to protected disclosures:

"(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure".

46. Section 48 ERA provides:

"(1A) A worker may present a complaint to an Employment Tribunal that he has been subject to a detriment in contravention of section 47B.

(2) On a complaint under subsection (1A) It is for the employer to show the ground on which any act or deliberate failure to act, was done".

47. Section 13 of the Equality 2010 (EqA) provides:

(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....”

48. Section 136 provides:

“(1) This section applies to any proceedings relating to a contravention of this Act.

(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”.

49. Section 20 EqA provides:

“20 (1) Where this act imposes a duty to make reasonable adjustment on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

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

21 (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty within relation to that person”.

50. Schedule 8 EqA provides:

“20(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know –

(a)

(b) In any case referred to in part 2 of this schedule that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement”.

51. We were also referred to a number of authorities by the parties and these are discussed below insofar as we deem them relevant to our conclusions.

Submissions

52. Both parties made oral submissions and provided written summaries of them. We do not rehearse those submissions in detail here but confirm we took them fully into account in reaching our conclusions.

Discussion and Conclusions

53. We firstly consider the claim that the Respondent failed to make reasonable adjustments. The Claimant states that, because of his ADHD, he found it difficult to concentrate when writing up his notes in the area referred to throughout the hearing as “the majors”. This is an area adjacent to or within a ward or clinical area which is effectively a base for staff working within that area. There is quite heavy staff and patient traffic passing through this area and the Claimant says this made it difficult for him to concentrate. Accordingly, he would try to find a quiet space in which to write up his notes.

54. The PCP relied upon by the Claimant is the Respondent’s requirement for Doctor’s to write up their notes in the majors area. The Respondent denies there is any such PCP and, when pressed by Mr Baran in cross-examination, the Claimant conceded that there was no such PCP. In the absence of such a PCP, there can be no breach of the Respondent’s duty to make reasonable adjustments and this claim must fail.

55. The single allegation of direct race discrimination made by the Claimant is that he was “suspended” without pay by Professor Coffey on 10 December 2021. He claims this was less favourable treatment compared with Dr Ahmad and Dr Khawaja. There are clearly issues in relation to using these two Doctors as comparators. It is established law that the circumstances of the comparators must not be materially different to that of the person who claims to have been discriminated against. In this case, however, Dr Ahmad’s circumstances were materially different in that he was employed by the Respondent whereas the Claimant was a Locum Doctor. In relation to Dr Khawaja, he was a Locum Doctor and could stand as a comparator if the Claimant was treated less favourably than him. The problem for the Claimant is that there is no evidence that there were ever any complaints about Dr Khawaja and, indeed, the Claimant said he was not aware of any complaints about Dr Khawaja. Accordingly, neither Doctor can be used as a comparator.

56. The Claimant did not pursue an argument that he was treated less favourably than a hypothetical comparator and made no attempt to define the hypothetical comparator. Such a comparator would have been a Locum Doctor who was not Black African about whom there were complaints and who, when the Respondent was dealing with those complaints, was treated more favourably than the Claimant by not having shifts cancelled.

57. The Tribunal had great difficulty in understanding how the Claimant could be found to have been treated less favourably when Professor Coffey cancelled his shifts pending an investigation into the many complaints which had been received about the Claimant. There are two reasons for this. Firstly, Professor Coffey acted in accordance with the Claimant's Terms and Conditions for Temporary Medical Bank Workers which makes clear that the Claimant is a bank worker "*who works assignments on adhoc basis to meet a temporary need....*" (page 218). Further, these terms state "*In particular, you have no entitlement to guaranteed or continuous work*" (page 219). Secondly, in cross-examination, the Claimant said in relation to this claim, "*There is nothing I can point to as someone treating me less favourably because I am Black*". Mr Baran referred us to the decisions in ***Amnesty International v Ahmed [2009] IRLR884*** and ***R v JFS [2009] UKSC15*** in relation to the "reason why" the Claimant was treated as he was. From the Claimant's own evidence, discrimination in relation to this cancelling of shifts is not obvious and the reason for less favourable treatment (assuming there was any such treatment) is not immediately apparent so it is necessary to explore the mental processes, conscious or subconscious of the alleged discriminator to discover what facts operated on his mind and we must consider whether the Claimant's race operated on Professor Coffey's mind. It is our view that there is no evidence at all that race played any part in Professor Coffey's decision to cancel the Claimant's shifts pending an investigation into the complaints against him. Applying the burden of proof under section 136 EqA in light of ***Igen v Wong [2005] ICR 931***, the burden of proof does not shift from the Claimant to the Respondent. Indeed, we cannot find that there was even a remote possibility that the decision made by Professor Coffey was based on the Claimant's race. The claim of direct race discrimination must fail.
58. The Claimant did argue that he was treated less favourably as the Respondent's conduct policy was not followed correctly in respect of the complaints about his conduct. It was common ground between the parties that, although the Claimant was a Bank Doctor, the policy did apply to him. Specifically, in his submissions, the Claimant said that there should have been an informal meeting to discuss the complaints and HR should not be in attendance and, further, that he should not have been excluded until the Medical Director or Case Manager had considered whether there was a case to answer and reasonable and proper cause to exclude.
59. Professor Coffey did cancel the Claimant's booked shifts but, as we mention above, there was no guarantee that the Claimant would be given any shifts in the first place. The reality is that Professor Coffey did not need reasonable and proper cause to exclude the Claimant but we find that he did have such cause in light of the Claimant's conduct towards his colleagues. Further, in relation to a meeting, whether formal or informal, the Claimant made it perfectly clear that he would not attend any meeting and simply ceased to engage with the Respondent on any level. In any event, Professor Coffey did meet with the Claimant while he was on shift and the Claimant emailed him shortly afterwards indicating he did not consider he was being targeted or victimised (page 353) but that is precisely what he alleged in his submissions. This kind of inconsistency does not assist the Claimant's case and nor does his admission that he could not discern any discriminative conduct on

the part of Professor Coffey.

60. In relation to the Claimant's claim of suffering detriments as a result of making protected disclosures, the Respondent accepts that the disclosures at paragraphs 5.1, 5.2 and 5.3 in the List of Issues are protected disclosures as are those at paragraphs 6.1.1, 6.1.7 and 6.1.8. We accept those admissions albeit we have doubts about the disclosure at paragraph 6.1.8 given that the Claimant had on several occasions worked in the Isolation Unit without a fit test or risk assessment and seems to have raised the issue with Dr Kumar to avoid being instructed to continue working there on that particular shift. In relation to the remaining five protected disclosure claims by the Claimant we do not accept that they were made as protected disclosures. The circumstances in which they were made are somewhat vague and the Claimant is not assisted by the fact that he did not record the disclosures, which he says all related to patient safety, on the Respondent's computer system. In our view, the Claimant was not acting in the public interest if he made these disclosures which, in our view, were merely points of information made to the supervising consultant.
61. We also take account of the fact that, as with direct race discrimination, the Claimant made absolutely no mention of having made protected disclosures prior to instructing solicitors. Only then were these disclosures mentioned some two months after the Claimant's first shifts were cancelled.
62. The Tribunal also had some difficulty in that it was not clear to us which detriments were allegedly caused by the individual disclosures.
63. Much of the Claimant's argument centred around his allegation that there had been some sort of conspiracy against him at the behest of a small number of staff. We have already considered the Claimant's email to Professor Coffey at which he actually denied that this was the case and this was one of a few occasions where the Claimant committed to writing but denied it was actually the case. We have considered in some detail above the significant number of complaints made against the Claimant at the Respondent's City Hospital Campus, its Queens Medical Centre Campus and at another NHS Hospital, Kings Mill Hospital, which is operated by a separate Health Authority. The complaints bore a remarkably similar pattern and particularly that the Claimant would go missing on shift for significant periods of time and could not be found and was rude to staff. At none of the hospitals mentioned above was the Claimant's clinical judgment ever questioned. As very similar complaints were made about the Claimant at three different hospitals in the space of six months this could be considered as being something that speaks for itself. However, liability will arise if the protected disclosure is a material factor in the Respondent's decision to subject the Claimant to a detriment. This means that the influence on the Respondent's treatment of the Claimant must be more than trivial (***Fecitt v NHS Manchester (Public Concern at Work Intervening)* [2012] ICR372CA**).
64. If we understand the Claimant's case correctly, he at times seeks to impart

knowledge of his disclosures to those to whom they were not directly made. This is particularly the case with Professor Coffey. But, as Mr Baran points out following ***Malek v Cenkos Securities Plc [2018] UKEAT/0100/17/RN***, knowledge and motivation of someone else should not be attributed to an innocent decision maker when considering liability.

65. The Claimant also spent some time attempting to persuade us that he was not guilty of the allegations at the centre of the complaints against him which were not, in any event, properly investigated. Of course, the Respondent will say, and we accept, that the Claimant's shifts were cancelled in order to investigate the complaints but the Claimant refused to attend any meetings. The Claimant's justification for such refusal was that he had previously met with HR in July 2021 and found it to be a most unsatisfactory experience. The allegations made against him at City Hospital were strenuously denied by him and he did attend a meeting with HR and only now, over two years later, does he seek to persuade us that the notes of that meeting are inaccurate. We do note, however, that as a result of those complaints it seems he was just asked to reflect on his behaviour and conduct and no disciplinary action of any kind was taken against him.
66. The allegation that the Claimant was suspended without pay as a result of making protected disclosures must fail for a number of reasons. Firstly, there is no evidence produced to us that Professor Coffey, who made the decision to cancel the Claimant's shifts pending an investigation, knew anything about the disclosures. Secondly, the Claimant was not suspended without pay. Professor Coffey, rightly in our view, made the decision to cancel the Claimant's shift for what he anticipated would be a short period of time, based on the significant number of complaints made against the Claimant which made it extremely difficult to envisage he could have a trouble free working arrangement with his colleagues. In our view, Professor Coffey's proposal to hold a meeting with HR present was a reasonable one and had absolutely nothing to do with the fact that the Claimant had made protected disclosures.
67. Mr Baran submits that we do not have to make findings of fact as to whether the Claimant behaved in the way that was complained about and we accept this submission. Our role is to determine why the Respondent took the action it did and, in light of the significant number of complaints about the Claimant, the rationale for cancelling his shifts was a reasonable one.
68. The second detriment relied upon by the Claimant is that Dr Keith Girling, Medical Director, refused to appraise him. As we have discussed above, this is simply not the case. Dr Girling was the Claimant's Responsible Officer. Whilst it may be that part of his duties extended to overseeing the appraisal functions within the Respondent, he could not carry out individual appraisals of clinical staff. At no time was Dr Girling asked to carry out an appraisal nor did he decline to do so. Dr Bedi had agreed to appraise the Claimant and that appraisal was initially deferred at the Claimant's request. Dr Bedi then suggested a date in January 2022 which did not go ahead because the Claimant had indicated he was not going to continue

working at the Respondent and he made no attempt to rearrange the appraisal. There was thus no detriment concerning appraisals.

69. The third detriment relied upon by the Claimant is that Dr Kumar told Professor Coffey that he was concerned about the Claimant's attitudes and behaviours and that, in his opinion, as a result the Claimant should not be working at the Respondent. We have already recorded that Dr Kumar witnessed first hand the Claimant being rude to a member of the nursing staff. He thus saw at first hand one of the things that other staff were complaining about. But, even after witnessing this rudeness, Dr Kumar recorded what had happened in an email and made suggestions as to what the Claimant needed to do to avoid further complaints. It was not until the remaining complaints were read by Dr Kumar that he fully appreciated the extent of them and did say that he thought the Claimant should not be working at the Trust. However, we note one important factor in relation to what Dr Kumar said in his email to Professor Coffey. He said that it was his opinion that the Claimant should not continue working there. Dr Kumar, whilst Senior to the Claimant, had no authority to make this opinion a reality and it was only an opinion. It was not acted upon by anyone. The Claimant had already had shifts cancelled by Professor Coffey and Dr Kumar's comments did not influence any other actions taken in regard to the Claimant.

70. The final detriment relied upon by the Claimant is Dr Faruqi requesting that the Claimant be made to attend a disciplinary hearing. The Claimant accepted in evidence that Dr Faruqi's email said no such thing. The suggestion that there be a meeting was a suggestion that senior staff involved with the Claimant need to consider the Claimant's request for a pay rise in light of the complaints against him. This was not a detriment.

71. For the above reasons, the claims are not well founded and are dismissed.

Appendix 1 – Agreed List of Issues – attached.

Employment Judge M Butler

Date: 29 February 2024

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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