EMPLOYMENT TRIBUNALS

Claimant: Mr S Smith

Respondent: Tameside & Glossop Integrated Care NHS Foundation Trust

Heard at: Manchester Employment Tribunal

On: **19-23 February 2024**

Before: Employment Judge Leach, Mrs Eyre, Mr Lancaster

REPRESENTATION:

Claimant: Mr Campion of Counsel
Respondent: Mr Searle of Counsel

The unanimous judgment of the Tribunal having been sent to the parties on 7 March 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

A. Introduction

1. The claimant was employed by the respondent NHS Trust between May 2017 and April 2023 in the position as Head Chef.

2. The claimant makes various complaints under the Equality Act 2010. The relevant protected characteristic is race, specifically colour. The claimant is black. The respondent denies all complaints made.

B. The Issues

3. A list of issues was annexed to case management orders from 5 April 2023 and the parties confirmed these remained the issues that we needed to decide on.

1. ***Time limits***

1.1 Given the date the claim form was presented and the effect of early conciliation, any complaint about something that happened before 5 February 2022 may not have been brought in time. In relation to the allowed amendment the relevant date is 15 December 2022.

1.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

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

2.1 Did the respondent do the following alleged things:

2.1.1 Myles Kitchiner (MK) failing to properly investigate the complaints made to him on 26 July 2021 that people had told the claimant that Jamie Beaumont ("JB") had made racist comments in the staff room and they had reported it.
2.1.2 On 11 April 2022 MK denying at the meeting that the claimant had made a report to him the meeting on 26 July 2021 that JB had made racist comments.
2.1.3 Myles Kitchiner failing to properly investigate the complaint that JB had made racist incidents in the restaurant and that members had reported racist comments to Caroline Hargreaves.
2.1.4 the Respondent failing to properly investigate the complaint that JB had made racist comments following the grievance outcome of 11 July 2022.
2.1.5 on 9 March 2023 Richard Timperley (RT) making the following comments
a. "you should let go of the past and move on,"
b. "If you come back into the department with a negative attitude" and
c. "If you are coming back to whip the backs of individuals, you have issue with."

2.2 If so, was that unwanted conduct?

2.3 Was it related to race?

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

2.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

3. ***Direct race discrimination (Equality Act 2010 section 13)***

3.1 What are the facts in relation to the following allegations:

3.1.1 That the claimant was instructed to carry out project work on 11 April 2022.
3.1.2 That the claimant was instructed to carry out project work in the switchboard area on 19 April 2022.
3.1.3 That on 22 February 2023 the claimant was instructed that he would have to carry out project work on my return to work as "it would upset the operations in the kitchen" if he returned to head chef duties in the kitchen.

3.2 Did the claimant reasonably see the treatment as a detriment?]

3.3 If so, has the claimant proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances of a different race was or would have been treated? The claimant says /he was treated worse than Jamie Beaumont.

3.4 If so, has the claimant also proven facts from which the Tribunal could conclude that the less favourable treatment was because of race?

3.5 If so, has the respondent shown that there was no less favourable treatment because of race?

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

4.1 Did the claimant do a protected act as follows:

4.1.1 The claimant's verbal complaint of racism at the meeting on 26 July 2021 which is set out paragraph 19 of his further details of claim document;

4.1.2 The claimant's verbal complaint of racism at the meeting on 11 April 2022 as set out at paragraph 27 of his further details of claim document.

4.2 Did the respondent do the following things:

4.2.1 Instruct the claimant to carry out project work on 11 April 2022.
4.2.2 Instruct the claimant to carry out project work in the switchboard area on 19 April 2022.
4.2.3 Instruct the claimant to carry out project work on my return to work as "it would upset the operations in the kitchen" if he returned to head chef duties in the kitchen on 22 February 2023
4.2.4 RT make comments made at the meeting on 9 March 2023 as set out in para 2.1.5 above.

4.3 By doing so, did it subject the claimant to detriment?

4.4 If so, has the claimant proven facts from which the Tribunal could conclude that it was because the claimant did a protected act or because the respondent believed the claimant had done, or might do, a protected act?

4.5 If so, has the respondent shown that there was no contravention of section 27?

5. ***Remedy for discrimination or victimisation***

5.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

5.2 What financial losses has the discrimination caused the claimant?

5.3 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

5.4 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

5.5 Did the respondent or the claimant unreasonably fail to comply with it?

5.6 If so is it just and equitable to increase or decrease any award payable to the claimant?

5.7 By what proportion, up to 25%?

5.8 Should interest be awarded? How much?

C. The Hearing

4. The claimant gave evidence on his own behalf and he brought along a former colleague of his, Calum Bergin, whose evidence is that he witnessed another employee make a racially offensive remark about the claimant. The claimant also brought along Mr Coulding who is a Unison Branch Secretary and helped the claimant during some of the internal processes that we refer to below.

5. The respondent called 2 of the claimant's previous managers (Miles Kitchener and Richard Timperley) as well as Mr Veale, a deputy director of the respondent trust who heard and decided on an internal grievance brought by the claimant in 2022.

6. In accordance with case management orders, the parties prepared and agreed a paginated file (bundle) of documents for this final hearing. References below to page numbers are to this file.

D. Findings of Fact

<u>Events predating the first Complaint.</u>

7. The date of the events given rise to the earliest complaint is 26 July 2021. We have been provided with evidence about events predating this. It is helpful to summarise our findings of relevant facts predating July 2021 as it explains the position of the parties as of 26 July 2021.

7.1 May 2017 – commencement of the claimant's employment with the respondent .
7.2 November 2018-January 2019. Claimant was absent due to sickness – sciatica.
7.3 January 2019 – May 2019. Continuation of the sickness absence because the claimant was injured in a road traffic accident.
7.4 May 2019. Return to work (phased return over 5 weeks). The Deputy Head Chef (Jamie Beaumont – JB) had been covering Head Chef duties and continued to do so in the kitchen, at least during the phased return period.

7.5 Following his return to work the claimant was primarily engaged with office/admin duties. We note that was the position during a phased return to work (the claimant's own evidence confirms this) and it remained the position for the remainder of the year. The claimant continued to suffer from sciatica and also bad headaches, which may have been linked to the treatment that he was receiving for the sciatica.

7.6 The claimant was referred to occupational health in December 2019, principally to explore whether the claimant needed to remain on restricted duties.

7.7 In a report dated 3 January 2020 the occupational health department reported that there was no need to continue with restricted duties for the claimant.

7.8 In January 2020, the respondent decided to create an additional head chef position. The respondent had been considering creating an executive chef position (which we understand would have been more senior than the head chef role) but that consultation was put on hold. Instead, 2 head chef roles (at the same level of seniority) were created. The claimant was informed of this decision in a meeting on 7 January 2020, with the facilities manager at that time, Caroline Hargreaves. The respondent had decided to focus on a retail food offering, for staff, visitors and patients. One of the head chef roles would focus on patients and the other on the respondent's developing retail side.

7.9 The claimant raised a grievance about this. It was a change that impacted on his job and he had not been consulted in advance of the decision being made. By decision dated 27 February 2020, his grievance was upheld although this was something of a pyrrhic victory. The decision was not reversed. The claimant was given a choice between the 2 head chef positions (patient or retail) and told that there would be consultation before the introduction of future changes affecting the kitchen.

7.10 23 March 2020 Claimant was suspended pending a disciplinary investigation into allegations about the claimant's conduct; that it was having a negative impact on the department and also an allegation that he had beached confidentiality.

7.11 This investigation took a long time. External HR consultants were appointed. They provided a report dared 29 October 2020 (pages 149-185).

7.12 The report was not provided to the claimant (who remained suspended) until 7 December 2020. On or shortly after receipt of the report the claimant became ill, experiencing high levels of anxiety and began a long period of sickness absence, not being well enough to return to work until March 2021. The claimant attributes this to his long period of suspension and lack of clarity about the investigation and the allegations he faced.

7.13 A further report followed – an internal management report (which in the main was a commentary on the investigation that the external consultants had carried out). This was intended for review and consideration at a disciplinary hearing.

7.14 Whilst a date for a disciplinary hearing was set, this did not take place. A decision was taken (principally by the respondent's deputy HR director at the time, Kathryn Mooney) that it would be preferable to put

together a "*supportive RTW plan addressing all the issues and with very robust parameters about standards to be reached and when."* This quote is from a message from Kathryn Mooney dated 17 March 2021 (page 207). In that message KM also notes the involvement of the claimant's trade union and an option of dismissing the claimant because of a relationship breakdown, but that option having been discounted. It is clear from this message that the respondent had decided on managing the claimant through its performance improvement policy.

7.15 On 18 March 2021, Unison's regional organiser (Sue Glithero) wrote to KM on the claimant's behalf. Whilst welcoming the decision to drop the disciplinary process and put in place a support plan for the claimant, she highlighted the claimant's ongoing concerns about the staffing structure in the kitchen particularly the 2 head chef roles and the division of responsibilities.

7.16 The claimant also raised concerns with the respondent's occupational health department (OH) (noted in a report from OH dated 23 March 2021 – page 211) about statements from staff that were in the investigation report including comments from some staff that they would leave if the claimant retuned. This report also noted that the claimant was scheduling a return to work in early April 2021 after he had used up his accrued annual leave; but also noted that the claimant was waiting to receive a return-to-work plan including a phased return and plan of integration back into the catering department.

8. The events summarised above, resulted in an unhappy working relationship between claimant and respondent on the claimant's return to work in April 2021. Through a combination of suspension and sickness absence, the claimant had been out of the workplace for a year; the claimant (not unreasonably) did not consider that a new structure involving 2 head chefs had been fully thought through and had not been properly implemented. In addition we heard evidence from the claimant (which we accept) that he considered the outcome of the long period of suspension and investigation to be very unsatisfactory for him. He had not had an opportunity of a hearing to clear his name. He had been told instead that there was no disciplinary/misconduct case but that an improvement plan was in place. Yet he had been provided with evidence of work colleagues being critical of him, but then not given a right of reply.

9. Relationships did not improve following a return to work in April. Little progress was made with a support or improvement plan for the claimant. We have seen a one-page document (page 213) called "Simon Smith Action Plan April 2021" with 11 tasks listed on there but entries against each task of "not started." There is no updated version of this document.

10. On 23 April 2023, the claimant was issued with a formal sickness warning due to the sickness absence that flowed on from the long period of suspension. The claimant became absent again due to illness.

11. That is the position that Myles Kitchener (MK) the new Catering Manager came in to. His employment started on 12 July 2021. He met the claimant on 26 July 2021.

Meeting of 26 July 2021.

12. This was intended as a return-to-work meeting. The claimant had recently had a long period of absence due to sickness between 21 June 2021 to 25 July 2021. This meeting was therefore the first time that MK had met the claimant.

13. The claimant recorded this meeting using his mobile phone. He did not tell MK that he was doing so. It is agreed that the meeting lasted about 2.5 hours. We have no doubt that the meeting was a difficult one for both parties. We have not been provided with a transcript of the meeting other than a very small part of the meeting that we refer to next. However, having heard from both attendees, we are sure that the claimant informed MK of his employment history in detailed and strong terms, referencing the significant and unresolved issues that we have referred to.

14. MK was overwhelmed by the amount of information and the strength of feeling from the claimant.

15. The small part of the meeting that we have received a transcript for, was about 1.5 hours into the meeting. We have a page and a half of transcript. We estimate this took up about 2 minutes of a 2.5-hour meeting. But it is the crucial part of the meeting as far as this case is concerned because it refers to the possibility that a racially offensive comment about the claimant was said.

16. The transcript extract we have seen, records a discussion between the claimant and MK about whether the other head chef (JB) would be willing to work with the claimant and the strongly expressed views by MK that JB would be expected to. The claimant then says:-

"It gets worse than that because as I say people tell me that Jamie has made racist comments…."

17. The claimant did not tell MK who had told him this and did not detail the racist comment or comments that he was told had been made. The claimant also then told MK that the comments had been reported and not actioned.

18. MK immediately replied that was unacceptable; that he would need to see the reports and he would action the reports straight away.

19. The discussion continued and when it did the claimant effectively said that he did not think that JB would have made racist comments.

20. The transcript extract then notes that the claimant commented that he had been told by HR to stay quiet. We do not find that the claimant was saying he had been told to stay quiet about racist comments. On his return, the claimant was told to look forwards and we find that the reference to "keeping quiet" was the claimant's interpretation of the advice given to him. It cannot be a reference to being told by HR to keep quiet about racist comments as he had not told HR about any racist comment. Even though he had been told following his return to work in April 2022 that racially offensive comments may have been made, this was the first occasion he told anyone in a management role at the respondent that JB might have made a racist comment.

We also note here that the claimant did not refer to this again until April 2022 – another 8 or 9 months away.

21. Having regard to the transcript provided as a whole, we are satisfied that MK did not take away from the meeting an action point that he was to investigate allegations that a racist comment was made or an allegation that the comment had been reported previously and nothing done about it.

22. We are supported in this finding by the following:

22.1 The extent of the meeting, and our finding that an abundance of complaints and issues were raised.
22.2 The claimant's comments that followed– that the claimant "*did not buy it*" – did not think JB would make racist comments.
22.3 The absence of any detail provided by the claimant. Had the claimant wanted MK to follow up he could (and would) have provided him with the name of the person who told the claimant; or at least a commitment to come back with the name, having spoken with that person (Calum Bergin (CB)). As it was, MK had no evidence to realistically begin an investigation.
22.4 The claimant sent a follow up email later that same day (26 July 2021) as a follow up to the meeting with MK. This makes no reference to this part of the discussion or any action point. If this had been considered by the claimant as an important point of the meeting he would have referred to it in the follow up email, particularly if he understood that further action was going to be taken.
22.5 There was a TEAMS discussion between the claimant and MK on 15 September 2022. The issue was not mentioned. Had the claimant expected action on this point, that was an obvious opportunity for him to query what was happening. He did not

23. Although this was a return to work meeting that day ended up with the claimant leaving work. A further long period of absence followed - from 26 July 2021 to end November 2021.

<u>Claimant's return to work at end of November 2021.</u>

24. On or shortly after the claimant's return, the other head chef (JB) became absent. Necessarily, the claimant was primarily based in the kitchen during December and January 2022. This was the first time that the claimant was based back in the kitchen since his suspension in March 2020. Initially he was there as an observer but then quickly became operational. JB was absent and the respondent needed a head chef in the kitchen; there was no prospect of a clash between the claimant and JB.

25. Other than a few days absence for family reasons and annual leave, the claimant worked throughout December and up to 25 January 2022, based almost exclusively in the kitchen.

26. On 10 January 2022, the claimant was given a stage 2 formal warning for absence. This followed his absences in 2021.

27. On 26 January 2022, the claimant became absent again due to pain in his lower back which he attributed to completion of his kitchen duties. This resulted in ongoing absence until his return on 14 February. However on his return he was sent home pending an OH report.

28. At about this time – beginning of February 2022, JB returned to work from his absence and resumed working in the kitchen.

29. We have considered whether this was a cynical attempt to keep the claimant away from the kitchen but we find that it was not. We have considered here the claimant's email of 8 February 2022 particularly (page 240). In this email the claimant referred to medical advice received about an 8-week full recovery period and an insistence that the incident that the claimant said led to his injury was officially reported on the respondent's RIDDOR system or record. The claimant also noted that he should have been placed on administrative duties following the incident and that the respondent had put his health at risk. The respondent's position on being told by the claimant a few days after this that he was coming back to work, was understandably cautious.

30. The OH report subsequently provided and dated 11 March 2022 (pages 250-251) noted that the claimant reported the mild lower back pain resolved 2 days following the incident. This is at odds with the claimant's letter of 8 February 2022 and the length of his sickness absence.

31. The claimant did not return to work until 11 April 2022. After the claimant and respondent received the report from OH, the claimant had 3 week's booked annual leave.

32. MK held a return-to-work meeting with the claimant on 11 April 2022 – or attempted to. The meeting took on a more formal process as claimant insisted he attend with a TU representative he had arranged to be present. MK in turn arranged for a representative or witness to be present. We accept the evidence provided by MK that the claimant again raised historic issues during this meeting that the claimant still considered had not been resolved.

33. Again the claimant secretly recorded the meeting. The other attendees (including the claimant's own representative) were not aware that they were being recorded. We are aware from a later investigation that none of the attendees recalled the claimant bringing up a complaint that a racist comment had been made. But it is now known from the recording that reference was made as follows:-

> "*Miles I came to you and explained that I felt racist incidents. You've not investigated that. I came to you and had that conversation with you on 26 you wrote it down.*
>
> *MK Sorry*
>
> *And said you were looking into it.*

MK I'm sorry but you never ever said that.

34. The respondent's position (specifically MK) is that he did not remember this part of the discussion of 11 April. This troubled us. We could read the extract from the transcript and saw for ourselves what was said. To be clear, the evidence of MK is not just that he does not remember the claimant raising an issue at the meeting on 26 July 2021 about a racist comment being made but that he does not remember the claimant raising on 11 April 2022 that he had raised the racist comment on 26 July 2021 and does not remember his response on 11 April that he did not remember.

35. We decided (unanimously) to accept MK's evidence on this point. These are our reasons:-

35.1 MK's version is supported by the recollection of the other 2 attendees at the meeting on 11 April (including eh claimant's own TU representative) as noted in interviews that took place as part of a later grievance investigation.

35.2 We heard and assessed MK's evidence. He was far from a polished witness. He was flustered at times when giving evidence and clearly uncomfortable with the process. But we all agree that he was a truthful witness.

36. At the meeting on 11 April 2022, MK gave the claimant some office-based tasks to do on his return to work. The claimant was resistant but the claimant's TU representative persuaded the claimant to go to the office and carry out the duties he had been provided. This included work on a new electronic menu system. As part of this work (and to enable the claimant to carry it out effectively) arrangements had been made for a training call between an IT trainer and the claimant.

37. Following the meeting (and on the recommendation of his TU representative) the claimant went to an allocated office. There were some connections issues with the IT Trainer and the session was therefore arranged for later that day. However, the claimant said that the office lighting brought on a migraine and so he went home early. The claimant was then absent until 19 April 2022

38. The return-to-work meeting on 19 April was not successful either. Notes of this meeting are at page 255. We have also considered the evidence of MK and the claimant as well as the terms of the claimant's grievance.

39. It is striking to us that during the meeting on 19 April the claimant complained that he had been given no access to water and no access to a toilet on 11 April 2022 (see for example grievance hearing notes at page 274). The claimant subsequently complained about the location of the desk he was asked to work from on 19 April 2022. It was in more of an open plan space than the desk he had been asked to work from on 11 April- the claimant referred to it as a public space but we do not find that it was. It was in an open plan area, close to a switchboard but it was a recognised working area for staff members. The claimant will have known (1) that it was a temporary workplace>also, the respondent could not reasonably ask the claimant to return to the same office that he had been located in on 11 April as the claimant had complained that the lighting in that office had made him ill. The claimant did not make that

complaint about the work location provided on 19 April and we conclude that whilst it might not have been as private, the lighting in that area must have been more suitable for him.

40. We find the claimant has exaggerated the conditions he was put in on 11 April and 19 April 2022. He did so to his employer at the time and during his grievance and has done so again in these proceedings.

41. Whilst the claimant was unhappy about the work arrangements on what should have been his first day back, the administrative tasks he was asked to do were part of his role. We have considered whether he was given these tasks to keep him away from the operational side of his role (the kitchen). But the evidence does not support this. This was first day back only. Other than a spell in the kitchens for 7 weeks or so claimant had not effectively worked in the kitchens for about 2 years. The electronic menu system introduction or update was within the claimant's job role. There were also update and training requirements for the claimant to complete.

42. The commencement of that project was not smooth in April. but the claimant's reluctance/resistance to being involved in the project did not help either. In our experience it is not unusual at the start of project involving an IT programme, for there to be a few "bumps" along the way. Arrangements had been made for the claimant to meet with an IT trainer so that he could be told about the software for the new menu system. Neither MK nor any other employee of the respondent, intended for there to be IT issues requiring the training to be rearranged. MK intended the training to take place when scheduled, for the claimant to be trained up in the new menu system and for the claimant to complete an item which had been on MK's list of tasks that needed completing.

43. . This was the first occasion for about 5 months when 2 head chefs were in work at the same time. We accept that office based or administrative tasks will have fallen behind as the one chef in work would necessarily focus on the kitchen operations, ensuring food for the hospital was prepared and served daily.

44. The claimant became absent due to sickness later on 19 April 2022. He did not return to work before he was dismissed in May 2023.

<u>The claimant's grievance.</u>

45. Whilst absent due to sickness, the claimant presented a grievance dated 16 May 2022.

46. In his grievance the claimant raised various historical issues concerning the division of the head chef role and the suspension and disciplinary/performance issues of 2020. Also:-

46.1 for the first time, the claimant raised formally a grievance about a racist comment being made. He detailed this in 2 documents accompanying his grievance – a "recent events" document (at page 263) and an "additional statement" document (page 265).

46.2 The claimant's grievance included complaints about the way he was treated when returning from sickness absence, including his treatment on return to work in February 2022 and on 11 and 19 April 2022. The claimant's complaints about the way he was treated on return from sickness absence included a complaint that he had been treated less favourably because of his race, stating that JB (who is white) was not treated in the same way when he returned from sickness absence.

47. Our focus has been on these aspects of the grievance that are relevant to the complaints and issues.

48. The additional statement document notes that the claimant was told by Calum Bergin (CB) in April 2021 that a racist comment had been made. According to the claimant's grievance document (at page 266) CB also told him that he (CB) had reported the incident to Caroline Hargreaves although:

48.1 CB gave evidence at this Tribunal hearing. He did not say that he had reported the racist comments to Caroline Hargreaves.

48.2 According to Caroline Hargreaves' email of 29 June 2022 (page 281) it was not reported to her.

49. The grievance was investigated by Mike Veale (MV), deputy director of Estates and Facilities.

50. MK was interviewed. He told MV that he had no recollection of racist comments having been mentioned. His version was accepted by MV.

51. Although the claimant had recorded conversations and these were relevant to the matters being investigated, he chose not to share these with MV and so MV did not have the benefit of this evidence when deciding the outcomes to the grievance.

52. One of MV's decided outcomes was a decision that the allegation about a racially offensive comment having been made, must be investigated. MV had spoken with CB during his investigation who told MV that a racist comment had been made. The grievance investigation did not include an investigation of the allegation itself; only an investigation as to whether the claimant had previously raised a complaint about a racially offensive comment having been made.

53. The respondent's treatment of the claimant on 11 and 19 April 2022 was also investigated. In his grievance meeting the claimant accepted that he was provided with the task of putting together a recipe database but said he had "*no details, no database, no training.*" The claimant also raised the issue of the location that he was returned to. The grievance found that when the claimant informed the respondent that the first location was not suitable, a second location was found. It acknowledged that the second location was a busy area of the office but the desk allocated to the claimant on that day was one where another member of staff had been permanently based; it was a recognised work location in regular use by the respondent's employees. Further,

it was also noted that the claimant was not prevented from going to the kitchen to obtain information.

The grievance appeal.

54. The claimant appealed the grievance outcome by letter dated 21 July 2022 – page 290. Again, our focus has been on the parts relevant to the complaints in this case.

55. In his appeal, the claimant complained that that he provided details, dates and contexts when the issue of race discrimination had been raised but that Mr Veale had too readily accepted the version of events provided by MK. Again, the claimant chose not to provide details of the recorded transcripts. He has not explained why and I am afraid we consider there is merit to Mr Searle's submission that the claimant was storing the information for these proceedings rather than assisting with the internal investigation into his grievance.

56. The date of the grievance appeal outcome document is 8 December 2023**.**

The Investigation into the complaint of racist comment being made.

57. Whilst the grievance outcome was provided in July 2022 and the appeal outcome in December 2022, Mr Veale on his own evidence did not commission this until 14 February 2023. Further, we have no documentary evidence of the investigation being commissioned and Mr Campion, through his questions and submissions on behalf of the claimant, has questioned whether it was even commissioned on 14 February 2023.

58. Before we explain our relevant findings about the investigation itself, we note the outcome of the grievance in July 2022 to cause an investigation into the allegation against JB and our finding that it was always from that outcome, the intention of the respondent – particularly MV – that this investigation should occur.

59. Moving to the investigation itself, this was carried out by Richard Timperley (RT) and an HR manager called Julie Ritchie (JR).

60. The first page of the investigation report notes that its author is RT. But RT attended the Tribunal and gave evidence that he was not the author. We accept RT's evidence. We find that JR was the author. We also note reference within the report (at page 441 of the bundle) to "*the investigation team* " which is a reference to the 2 of them. This is supported by the fact that it was JR – not RT who spoke with one of the witnesses, Phil Gordon. The file note of that call is at page 784. We also note that RT and JR interviewed JB and CB together.

61. The investigation report records that the investigation team tried, unsuccessfully, to contact 2 kitchen porters who were potential witnesses but who had left the respondent's employment. Whilst it is not explicit from the wording of the report, we find that it was JR rather than RT who attempted to contact 2 kitchen porters named by CB. Her attempts were not successful.

62. We have considered whether other witnesses should have been interviewed. Given the attempts to find the porters named by CB we are not critical of the respondent not interviewing a wide range of porters. That would go beyond an investigation into this alleged misconduct. It would have turned the investigation in to more of an enquiry into the culture of the kitchen and whether discrimination or harassment was or was not being challenged.

63. We also considered ourselves whether the investigation team should have interviewed the claimant himself. Perhaps if RT had been conducting the investigation himself then we might have expected him to speak with the claimant given RT had only then recently started his employment with the respondent trust and the limited knowledge he had. However, we are satisfied that JR had sufficient knowledge of the allegations and complaint. There was no need for the investigation team to interview the claimant, who was not a witness to the alleged incident itself. There was no need either for any detail to be set out in a commissioning report. The investigating team knew that they needed to investigate an allegation that JB had made a racist comment in March or April 2020.

64. The investigation report notes that consideration was given to interviewing Janet Tinsley (JT) another member of the kitchen staff but that it was decided not to. CB had reported that JT was witness to (or participant in) a discussion in the kitchen staff room about the comment allegedly made by JB. No one has said that she was a witness to the comment itself. We are however critical (from the evidence we have) of the decision not to interview Janet Tinsley. There is logic to the decision not to interview her – in that she was not a witness to the alleged misconduct itself, but to a discussion at a later time or date, about the alleged misconduct. But our unanimous view is that her evidence could have been helpful, particularly given the unsuccessful attempts to contact the porters. For example, she may have had a clear memory of what those porters had said.

65. We note here one aspect of the evidence that troubled us. CB was interviewed on 6 April 2023. The notes of that interview are the first record in the bundle that CB reported the racially offensive comment (or said that he did) to Phil Gordon. Yet the notes of Julia Ritchie's discussion with PG record that call took place on 15 March 2023.

66. We have considered what the explanation is for this. We have not heard from JR. We have decided the most likely explanation is that CB had already said that he had reported it to PG, when he was interviewed during the grievance investigation; that JR was aware of this and that is why she was able to conduct her telephone discussion with PG on 15 March 2023.

67. This concern arises from a tardy approach by the respondent. No notes of the first interview with CB (which was in mid-2022) have been provided; there was no follow up with PG at that time and no reference to this in the grievance outcome.

<u>Why was the disciplinary investigation delayed until 2023?</u>

68. We find that almost all of the delay between the grievance outcome in July 2022 and the disciplinary investigation in March and April 2023, to be explained by the

claimant's appeal against the grievance outcome. The appeal outcome was not provided until December 2022. We accept to some extent that NHS strike action then impacted on the start of the disciplinary investigation. MV gave evidence about how that took his own time and attention away.

69. We are critical of this. There was no reason to await the appeal outcome before carrying out the disciplinary investigation. The strike action should not have diverted anyone's attention either from the commitment to investigate. The respondent had been informed of a serious allegation and it needed investigating as soon as reasonable possible. However, although critical of the reasons, we are satisfied that these were the reasons.

70. We have seen enough evidence to know that this respondent takes time in its internal HR processes. Mr Campion put forward arguments that the timing of actions in the investigation coincided with steps taken in these Employment Tribunal proceedings – in other words that it was only the commencement and prosecution of this claim, that led to the respondent taking action. We do not agree.:-

70.1 As noted above, we find that the respondent was from July 2022 intent on investigating the complaint.

70.2 We find that the appeal was the reason for the delay until December 2023 even though it should not have been.

70.3 The timings referred to by Mr Campion in terms of delivery of the further particulars and the date of the Preliminary hearing leading to actions quickly taken by the respondent. We are quite sure that the respondent's processes are not so fleet of foot to have reacted as such. From what we have seen in this case the respondent's processes are slow in their progress and completion to the considerable determent of the affected employees and the respondent itself.

<u>Findings about RT's meetings with the claimant.</u>

71. RT's employment with Respondent began in June 2022. The claimant was already by that date, absent due to sickness and didn't come back to work. RTs only direct involvement with the claimant was therefore 2 meetings with him. 22 February 2023 and 9 March 2023.

<u>22 February 2023</u>

72. Notes of this meeting are at page 377. It is clear from these notes that the claimant wanted to discuss his grievances of the previous 3 years. RT wanted to discuss with the claimant a return-to-work plan. This plan was a structured one. It included an initial period for the claimant to catch up with training including some new training that RT had introduced to the catering department and other chefs had by then completed.

73. As for location to undertake the training, the claimant was provided with options including an option of undertaking the training from home. There were other tasks identified on the planned return and it was said to him that he would be phased back into main kitchen duties over the duration of the plan. The plan was for 8 weeks. It was

sent to him as a draft for his consideration and copied to the claimant's trade union representative.

74. We have considered the evidence of Mr Coulding that RT had told the claimant that he did not want to upset the current operations in the kitchen with the claimant's return. This comment is not reflected in the notes of the discussion although RT does accept that he spoke about phasing the claimant back in to the kitchen and about a need to build relationships (notes of the meeting at 378 and 379).

75. We accept RTs evidence that he dealt with a comment from the claimant that the claimant wanted an immediate and full time return to the kitchen and that he told the claimant that would not be appropriate. He told the claimant that there had been some changes in the kitchen – strategies were being put in place and he was not prepared to disturb the process with an immediate return to the kitchen and before the claimant had received training.

76. We accept that the return-to-work plan as drawn up and explained to the claimant was a plan for the claimant to be up to speed with training, new legislation and changes/new strategies to the kitchen and that over the course of the 8-week plan, the claimant would be working in the kitchen but not immediately and not full time.

77. As well as a draft return to work plan, RT had also shared with the claimant the job descriptions of the 2 head chef roles. The claimant wanted to discuss these before considering further the return-to-work plan. A further discussion was arranged for 9 March.

Meeting on 9 March 2023

78. RT described the meeting as a difficult one. We need to make findings about whether certain things were said by RT:-.

"if you are just coming back to whip the backs of individuals you take issue with then you should not come back."

79. RT denies that he said this but accepts that he did make a comment which included the word "whip." RT's version is that he assured the claimant that the culture of the kitchen had changed and people were "*not whipped if they made a mistake."*

80. In terms of an allegation of harassment based on race, there is really nothing between the versions as it is the use of the word whip or whipped that gives rise to the complaint. There is not dispute that was said.

81. RT's evidence is that the use of the term "*whip or whipped*" was addressed directly in the meeting when JR interjected to say RT would not have meant anything by that term although she would not have used it.

82. Having regard to the versions of events of both the notes of this meeting at 418 are poor.

83. However looking at the notes of the 2 meetings we think the RT version is the more likely. A theme of the claimant was that he had been disciplined for petty allegations like ordering 500 potatoes. Whilst the notes of both meetings appear to be far from complete we find it more likely that words were said to provide reassurance to the claimant rather than indicating what the claimant must not do when he returns.

84. The other 3 comments that form parts of the claimants complaints are:-

"try and move forward productively." "*Let go of the past and move on*," and "*if you come back into the department with a negative attitude.*"

85. The notes of 9 March do not refer to any of these comments. Having considered the notes of both meetings we have decided that comments along these lines were made but at the meeting of 22 February. Those notes refer to the following:

RT: I get there has been stalling with progression and your confidence but today is about how we can get you back and moving forward. I am enthused by your enthusiasm for the job but we do have to be constructive with this. I can't Influence the past and neither can you but please be assured that will work on this together.

86. The notes are not verbatim and it is clear from our findings on the term "whip" that important parts may be missed out. It may be that a term such as don't be negative" was used. Our assessment of the evidence about these 2 meetings is that RT was trying to support the claimant in a return to work, His efforts were genuine.

RT's knowledge of the claimant's previous grievances.

87. We accept RT's version of events on this. Particularly so having considered the extent of JRs involvement in the disciplinary investigation in March/April 2023 and the fact that she (rather than RT) would have been able to commence that process with existing knowledge of the allegation and details.

E. Submissions

88. We heard submissions from both Mr Campion and Mr Searle which have helped us in our task of making findings of fact, identifying and considering relevant authorities and in reaching our conclusions.

F. The Law

Time limits

89. Section 123 EqA provides that complaints may not be brought after the end of 3 months "*starting with the date of the act to which the complaint relates"* (s123(1)(a) EqA. This is modified by section 140B – providing for early conciliation.

90. Section 123(1)(b) provides that claims may be considered out of time, provided that the claim is presented within *"such other period as the employment tribunal thinks just and equitable."*

91. As for the exercise of the power under section 123(1) we note the following passage from paragraph 25 of the judgment of Leggat LJ in Abertawe Bro Morgannwg University Local Health Board v. Morgan 2018 EWCA Civ 640

> *the discretion given by section 123(1) of the Equality Act 2010 to the employment tribunal to decide what it "thinks just and equitable" is clearly intended to be broad and unfettered. There is no justification for reading into the statutory language any 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.*

92. The EqA itself does not set out what Tribunals should take into account when considering whether a claim, which is presented out of time, has been presented within a period which it thinks is just and equitable. We note the following:-

a. **British Coal v. Keeble UKEAT 496/96** in which the EAT advised, when considering whether to allow an extension of time on just and equitable grounds, adopting as a checklist the factors referred to in s33 of the Limitation Act 1980. These are listed below:-

- the length of and reasons for the delay;
- the extent to which the cogency of the evidence is likely to be affected by the delay;
- the extent to which the party sued had co-operated with any requests for information.
- the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action.
- the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

b. **Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] ICR 283, EAT**. This case noted that the issue of the balance of prejudice and the potential merits of the (in that case) reasonable adjustments claim were relevant considerations to whether to grant an extension of time.

c. In **Adedeji v. University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ. 23** noted that Tribunal's should not rigidly adhere to the Keeble checklist (above*). "The best approach for a Tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just*

and equitable to extend time including in particular … "the length of and the reasons for the delay". If it checks those factors against the list in Keeble, well and good but I would not recommend taking it as the framework for its thinking." (from para 38 of the Judgment).

Harassment– section 26 Equality Act 2010 ("EqA")

93. Section 26 (1) states:

" *A person (A) harasses another (B) if –*

(a) A engages in unwanted conduct relating 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

94. The EAT decision in **Richmond Pharmacology Limited v. Dhaliwal [2009] IRLR 336** emphasised the need for Employment Tribunals when deciding allegations of harassment to look at three steps, namely:-

a. Whether the respondent had engaged in unwanted conduct

b. Whether the conduct had the purpose or effect of violating the claimant's dignity or creating an adverse environment

c. Whether the conduct was on the grounds of the applicable protected characteristic?

95. We have applied these three steps.

Direct Discrimination – section 13 Equality Act 2010 ("EqA")

96. Section 13 states:

"A person (A) discriminates against another if, because of a protected characteristic, A treats B less favourably7 than A treats or would treat others."

97. An important question for us is whether the claimant's race was an effective cause of the respondent's treatment of the claimant. As was made clear in the case of **O'Neill v. St Thomas More Roman Catholic School [1996] IRLR 372** the relevant protected characteristic need not be the only cause of the treatment in question.

98. We also note the following:-

a. the House of Lords in **Nagarajan v London Regional Transport [1999] ICR 877, HL**, held *"discrimination may be on racial grounds even if it is*

not the sole ground for the decision……..If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out." (judgment of Lord Nicholls)

b. Paragraph 3.11 of the EHRC Employment Code which states that *'the characteristic needs to be a cause of the less favourable treatment, but does not need to be the only or even the main cause.'*

99. Section 13 provides that direct discrimination occurs where an individual is treated *"less favourably"* than another. It is generally necessary therefore to identify a comparator who does not share the claimant's protected characteristic, although claimants can rely on a hypothetical comparator (the term "or would treat others" within the wording of section 13 makes this clear).

100. Section 23(1) EqA requires that there is *"no material difference"* between the claimant's position and his/her comparator's position. Case law makes clear that the comparator's circumstances do not have to be the same in all respects; rather they have to be the same (or nearly the same) in those circumstances which are relevant to the claimant's claim. (see for example the decisions of the House of Lords in **Shamoon v. Chief Constable of the Royal Ulster Constabulary 2003 ICR 337** and **MacDonald v. MOD; Peace v. Mayfield School 2003 ICR 937**).

Victimisation

101. Section 27 Equality Act 2010 is relevant here. It prohibits a person (the claimant) from being subjected to a detriment by another person (the res[pendent) because the claimant had done a "Protected Act."

102. A protected act is defined at section 27(2) which provides as follows.

"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.

103. Where a claimant has shown that he has been subjected to a detriment, the Tribunal has to consider whether that detrimental treatment was because of the protected act rather than whether the treatment would not have happened "but for" the protected act. On this point, we note the Court of Appeal's comments in **Greater Manchester Police v Bailey [2017] EWCA Civ 425** particularly at paragraph 36. .

Burden of Proof

104. We are required to apply the burden of proof provisions under section 136 EqA when considering complaints raised under the EqA.

105. Section 136 states:

> *(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are any facts from which a court could decide in the absence of any other explanation, that a person (A) has 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."*

106. We have also considered the guidance contained in the Court of Appeal's decision in **Wong v. Igen Limited [2005] EWCA 142**. This case concerned the test as set out in discrimination legislation that pre-dated the EqA but the guidance provided in there remains relevant. It is the annex to the judgment particularly that provides guidance. (the amended Barton guidance).

107. We also note that there can be occasions, particularly where a claimant is relying on a hypothetical comparator (as with some of the allegations here) where it is appropriate to dispense with the first stage of the burden of proof test and to focus on the second stage, the reason why the Respondent treated the claimant in the way that it did. See for example the EAT Judgment in **Laing v. Manchester City Council [2006] IRLR 748 (**paragraphs 73 to 77**)**. However we also note the EAT's caution against Tribunals adopting this approach too readily - in the recent case of **Field v. Steve Pye and Co (KL) Limited [2022] EAT 68** and particularly paragraphs 43-46.

108. Finally, on the issue of burden of proof, we are mindful of guidance from case law indicating that something more than less favourable treatment may be required in order to establish a prima facie case of discrimination; see for example **Madarassey v. Nomura International [2007] ICR 867,** where the following was noted in the judgment:

> "*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

G. Discussions and Conclusions

1. ***Time limits***

1.1 Given the date the claim form was presented and the effect of early conciliation, any complaint about something that happened before 5 February 2022 may not have been brought in time. In relation to the allowed amendment the relevant date is 15 December 2022.

1.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

109. We have decided that it is just an equitable to consider and determine those complaints that occurred before 5 February 2022. We have now heard all of the evidence about them and no concerns were expressed about the cogency of the evidence. We are therefore in a position to make findings, the parties having had a fair hearing. We have decided that in those circumstances, it is just and equitable to provide the parties with an outcome.

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

110. We set out below our findings on the 5 issues under 2.1 with specific reference, where relevant, to the issues at 2.2 to 2.5

2.1 Did the respondent do the following alleged things:

2.1.1 Myles Kitchiner (MK) failing to properly investigate the complaints made to him on 26 July 2021 that people had told the claimant that Jamie Beaumont ("JB") had made racist comments in the staff room and they had reported it.

111. As is clear from our findings of fact (paras 21 and 22) the meeting on 26 July 2021 did not end with an intention that MK was to investigate the vague allegations that the claimant had mentioned mid-way through that long meeting. The claimant did not take away from that discussion an understanding that an investigation was going to happen.

2.1.2 On 11 April 2022 MK denying at the meeting that the claimant had made a report to him the meeting on 26 July 2021 that JB had made racist comments.

112. MK did deny that that these things had been said. That denial was unwanted by the claimant (issue 2.2).

113. MK's denial was because he did not remember that the claimant had said that it had been reported to him that JB had made racist comments. His denial was not relevant to the claimant's race (issue 2.3). We do not therefore need to consider 2.4 and 2.5.

> *2.1.3 Myles Kitchener failing to properly investigate the complaint that JB had made racist incidents in the restaurant and that members had reported racist comments to Caroline Hargreaves.*

114. According to the written evidence, CB had initially told the claimant that he had reported the issue to Caroline Hargreaves although CB denies he said this. His evidence was (and remains) that he reported his concerns to Phil Gordon. Otherwise, this complaint is that there was a failure by MK to investigate the alleged comment by JB and is effectively the same as the issue at 2.1.1 above, as are our conclusions.

> *2.1.4 the Respondent failing to properly investigate the complaint that JB had made racist comments following the grievance outcome of 11 July 2022.*

115. The respondent investigated the complaint. The issue here is whether the investigation was a proper (which we understand in this context means "sufficient") investigation. We have 2 criticisms of the investigation (1) the delay (2) the failure to interview Janet Tinsley.

116. The delay should not have happened. The delay was unwanted by the claimant (issue 2.2) But the reason for the delay (the conduct) was not related to race (issue 2.3). The respondent was waiting for the outcome of the grievance appeal. The nature of the conduct raised by CB (an allegation that a racist comment was made) was irrelevant. The respondent would have waited for the grievance appeal whatever the nature of the complaint to be investigated and regardless of the claimant's race.

117. We have made our findings clear about the quality of the investigation. Whilst we find that more investigation should have occurred (see para 64 above) the respondent's decision not to interview a witness was not related to the claimant's race (issue 2.3). The respondent decided not to interview a witness because they genuinely considered that witness would not assist. The claimant's race was irrelevant to that decision as was the nature of the complaint to be investigated.

118. We do not need to consider issues 2.4 and 2.5.

> *2.1.5 on 9 March 2023 Richard Timperley (RT) making the following comments*
> *"you should let go of the past and move on,"*
> *"If you come back into the department with a negative attitude" and*
> *"If you are coming back to whip the backs of individuals, you have issue with."*

119. We refer to our findings of fact as to what words were said (paras 71 to 85) . The comments were made when RT was trying to support the claimant's return to

work. They should not have been unwanted (issue 2.2) and if they were, it was not reasonable for the claimant to have regarded them as unwanted comments. Further, the comments made were not in any way related to the claimant's race (issue 2.3). They were related to the claimant's absence and RT's genuine attempts to help the claimant return to productive employment within the catering department.

120. We do not need to consider issues 2.4 and 2.5.

> *2.2 If so, was that unwanted conduct?*
>
> *2.3 Was it related to race?*
>
> *2.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?*
>
> *2.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.*

121. We have dealt with these issues in our responses above.

3. ***Direct race discrimination (Equality Act 2010 section 13)***

> *3.1 What are the facts in relation to the following allegations:*
>
> *3.1.1 That the claimant was instructed to carry out project work on 11 April 2022.*
> *3.1.2 That the claimant was instructed to carry out project work in the switchboard area on 19 April 2022.*
> *3.1.3 That on 22 February 2023 the claimant was instructed that he would have to carry out project work on my return to work as "it would upset the operations in the kitchen" if he returned to head chef duties in the kitchen.*

122. See our findings of fact. On each of these occasions the claimant was provided with administrative duties as part of a return-to-work plan. On 22 February 2023 he was provided with a draft proposal. On 11 and 19 April 2021 it was really an instruction – although an instruction to carry out duties which were within the ambit of his role.

> *3.2 Did the claimant reasonably see the treatment as a detriment?*

123. Clearly the claimant did see the treatment as a detriment. The issue whether it was reasonable.

124. We are unanimous in finding that throughout the circumstances we have been asked to consider, the claimant has been affected by what he regarded as unresolved issues relating to the creation of the second head chef role, the long-drawn-out disciplinary process and his consequent long period of suspension. In each return-to-work meeting, the claimant insisted on going back to these themes. The relationship with his employer was a deeply unhappy one and the claimant considered the return-to-work proposals in 2022 and early 2023 in this context. The respondent's actions are partly responsible for this breakdown in relations. The steps taken by the respondent, particularly (1) the initial role change without any consultation (2) the long period of investigation and suspension in 2021 (3) in late 2021/early 2022, providing the

claimant with information from work colleagues which was critical of the claimant, then not allowing the claimant a right to respond and suddenly withdrawing the allegations (4) the absence of positive steps to assist the claimant on his return to work in March 2021 (see para 8 above) all contributed to a breakdown in relations

125. Had the relationship been a healthy one and had the claimant been tasked with a particular project which fell within his remit, we are sure that the claimant would have got on with the task. Unfortunately, he did not and was resistant to manty instructions and proposals in the arrangements for his return to work.

3.3 If so, has the claimant proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances of a different race was or would have been treated? The claimant says /he was treated worse than Jamie Beaumont.

126. In terms of the named comparator. – JB returned to work in February 2022 when the claimant was not in the workplace. He went into the kitchen. The same applied to the claimant at the end of November 2021. When the claimant returned to work on that occasion, JB was absent and it was necessary therefore to require the claimant to return straight to the kitchen. That is what happened. The claimant did not return to work straight away in the kitchen on occasions when he had had prolonged absence, JB was working in the kitchen as a head chef and there were outstanding administrative and training tasks. The claimant's race was not relevant to the decision on those occasions not to return the claimant straight into the kitchen.

3.4 If so, has the claimant also proven facts from which the Tribunal could conclude that the less favourable treatment was because of race?

127. No- having regard to our conclusions above.

3.5 If so, has the respondent shown that there was no less favourable treatment because of race?

128. We do not need to reach conclusions on this issue.

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

4.1 Did the claimant do a protected act as follows:

4.1.1 The claimant's verbal complaint of racism at the meeting on 26 July 2021 which is set out paragraph 19 of his further details of claim document;

4.1.2 The claimant's verbal complaint of racism at the meeting on 11 April 2022 as set out at paragraph 27 of his further details of claim document.

129. The claimant referred to his understanding that CB had earlier made a complaint that JB had made a racist comment**.**

130. Mr Searle made submissions that the claimant's reference to CB's comments did not amount to a protected act; particularly that the claimant's comments on 26 July 2021 and 22 April 2022 did not amount to an allegation under section 27(2)(d). Having considered the evidence and the submissions of Mr Campion and Mr Searle, we

decided that a statement that another person had alleged a breach of the Equality Act 2010 could fall within section 27(2)(d) and, if it did not in this case, it fell under section 27(2)(c).

4.2 Did the respondent do the following things:

4.2.1 Instruct the claimant to carry out project work on 11 April 2022.
4.2.2 Instruct the claimant to carry out project work in the switchboard area on 19 April 2022.
4.2.3 Instruct the claimant to carry out project work on my return to work as "it would upset the operations in the kitchen" if he returned to head chef duties in the kitchen on 22 February 2023
4.2.4 RT make comments made at the meeting on 9 March 2023 as set out in para 2.1.5 above.

4.3 By doing so, did it subject the claimant to detriment?

4.4 If so, has the claimant proven facts from which the Tribunal could conclude that it was because the claimant did a protected act or because the respondent believed the claimant had done, or might do, a protected act?

Response to 4.2 to 4.4

131. We refer to our findings of fact above about the arrangements being made for the claimant's return to work in April 2022 and February/March 2023. The claimed detrimental acts at 4.2 did occur in part – as our findings make clear.

132. The respondent's actions were part of a genuine attempt to assist a return to work and, as part of the intended return to work process, to require the claimant to carry out tasks that were part of his role. These actions were not (and should not have reasonably been seen as) detriments.

133. None of the alleged detriments complained of was done to the claimant because he told MK (in July 2021 and/or April 2022) that CB had told him that JB may have made a racist comment. That allegation had nothing to do with the instructions given to the claimant by MK and RT at the return-to-work meetings.

4.5 If so, has the respondent shown that there was no contravention of section 27?

134. Given the decisions about 4.1 to 4.4, a decision about 4.5 is not necessary.

Employment Judge Leach

Date: 3 May 2024

REASONS SENT TO THE PARTIES ON

14 May 2024

FOR THE TRIBUNAL OFFICE

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