



EMPLOYMENT TRIBUNALS

Claimant: Mr M A Ghani

Respondent: NHS South Central and West Commissioning Support Unit

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Southampton

On: 29 April to 7 May 2024

Before: Employment Judge Gray
AND Members Mrs Potter and Mr Wakeman

Appearances

For the Claimant: In person
For the Respondent: Mr Randle (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

- the complaints of religion or belief related harassment, or direct religion or belief discrimination, are dismissed on withdrawal.
- the complaints of race related harassment, or direct race discrimination, and victimisation, all fail and are dismissed.

REASONS

1. This is the final hearing of the claim submitted by Mr Ghani on the 22 February 2022 which complained of discrimination on the grounds of race and religion or belief.
2. The Claimant notified ACAS of the dispute on 12 January 2022 and the certificate was issued on 14 February 2022.
3. This six-day final hearing was to determine matters of liability only.
4. This claim has been the subject of five case management preliminary hearings:
 - a. 8 October 2022 before Employment Judge Bax. At that the issues and proposed final hearing timetable were agreed.
 - b. 18 July 2023 before Employment Judge Livesey.
 - c. 31 July 2023 before Employment Judge Livesey, which resulted in the Judgment ... "The allegations contained within the Case Summary of 8 October 2022 at paragraphs 2.2.11 and 3.1.11 are dismissed as relating to discussions which took place on a without prejudice basis and all associated evidence will be inadmissible at the final hearing of the matter."
 - d. 6 September 2023 before Employment Judge Dawson which adjourned the final hearing that had been listed to start on the 4 September 2023.
 - e. 11 September 2023 before Employment Judge Dawson.
5. For reference at this final hearing, we were presented with:
 - a. An agreed bundle of 790 pages.
 - b. A supplemental bundle of 81 pages from the Claimant.
 - c. Cast List.
 - d. Chronology.
 - e. Two witness statements from the Claimant of which pages 29 and 30 of his first witness statement were deleted by agreement.
 - f. Witness statements on behalf of the Respondent:

- i. John O'Connell (JO)
 - ii. Katherine Try (KT) (formerly Ms Woolley)
 - iii. Kevin James (KJ)
 - iv. Liam Williams (LW)
 - v. Chantel Biddle (CB)
 - g. Written closing submissions from both parties which were then topped up with oral closing submissions.
6. During the final hearing the parties made various applications to submit further documents, and these were determined at the time for the reasons given at the time.
 7. The conclusion of the various applications was the addition of two further emails submitted by the Claimant which were added on day two to the supplemental bundle as page 82 (email dated 3 May 2016 timed at 17:40) and page 83 (email dated 24 May 2022 timed at 9:29), and a copy of the Claimant's 2015 document to HR (added on day three as pages 84 and 85). The Claimant also referred to further medical documents along with his closing submissions, but as submitted by Respondent's Counsel these related to matters arising after the relevant period for matters concerning jurisdictional time limits, so did not assist us in respect of that issue.
 8. The other documents were not admitted with agreement of the parties, because copies were already within the agreed bundle, it was concluded they were not relevant to the issues to be determined, or they were the Claimant's comments on the Respondent's witness statements, and these were matters for him to put in cross examination.
 9. A hearing timetable was agreed with the parties reflecting that proposed by Employment Judge Bax, but also allowing for the Respondent to interpose its witnesses, initially to reflect their availability, and then to assist the Claimant. The Claimant was also provided with regular and immediate breaks as and when requested, to help him manage his heart palpitations.
 10. The Claimant applied after the lunch recess on day three of the final hearing to convert the hearing to hybrid, so that he could attend remotely. The Respondent objected submitting the Claimant had not presented any evidence to support why such a format would be better for him and in line with the overriding objective. The Claimant's application was refused as he was unable to present anything in support of his application at that time, and it was possible in the alternative to continue with the Respondent's witnesses instead of the Claimant resuming his evidence, which would assist the Claimant to day five by which time his wife would be able to return to support him.

11. Closing submissions were concluded by late afternoon on the final day of the final hearing (day six), so Judgment was reserved.
12. The issues to be determined in respect of matters of liability were confirmed with the parties at the start of this final hearing as being those agreed with Employment Judge Bax, and are recorded as follows (noting 2.2.11 and 3.1.11 were previously dismissed by Employment Judge Livesey):

1. **Time limits**

- 1.1 The claim form was presented on 22 February 2022. The claimant commenced the Early Conciliation process with ACAS on 12 January 2022 (Day A). The Early Conciliation Certificate was issued on 14 February 2022 (Day B). Accordingly, any act or omission which took place before 13 October 2021 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.
- 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 (plus early conciliation extension) of the act or omission 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 (plus early conciliation extension) of the end of that period?
 - 1.2.4 If not, were the claims made within a further period that 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. **Direct race and or religion or belief discrimination (Equality Act 2010 section 13)**

- 2.1 The Claimant describes himself as Pakistani Muslim. He says he was treated badly due to nationality, religion and accent.
- 2.2 Did the Respondent do the following things:
 - 2.2.1 In July 2015 refused the Claimant permission to work on flexi-time and compress his hours or permit him to work

- from home, after he made a formal request in writing; (Stacey Iannaccone and Charlotte Adamson and Fiona)
- 2.2.2 In about August 2016 and in about March 2017 the Claimant made oral requests to Ms Woolley to compress his hours of work from home to help manage his family because he had 5 children and needed to support his wife. These were refused. (Stacey Iannaccone and Charlotte Adamson and Fiona)
- 2.2.3 In about September 2015 the Claimant gave notice to take leave during Eid. Ms Woolley responded by saying words to the effect of, 'oh really can your moon come out in an organised manner.' At first Ms Woolley told the Claimant he would have to come into the office on Eid day. He said he would cover them from home. Ms Woolley walked off and then returned and said just leave it and would not speak to him for the next few days.
- 2.2.4 In about Autumn 2015, Ms Woolley made the Claimant take unpaid leave when his wife was unwell and he needed to look after his children. Other team members were permitted to take carers leave.
- 2.2.5 In January 2016 whilst off sick and having a spell in hospital with pneumonia, the Claimant spoke Ms Woolley and said he would be back in April. She said, 'I will believe it when I see it.' the Claimant was told that someone else in the office had the same condition and was back in 4 weeks.
- 2.2.6 The Claimant had been due to take leave in January 2016, but he was taken ill with pneumonia. On the Claimant's return to work in April 2016, he asked if he could re take annual leave he was meant to have in January whilst he was on sick leave. Ms Woolley said, 'Are you going to do that now, that's fine I am going to put you on an attendance management plan.'
- 2.2.7 The Claimant was put on an attendance management plan from April 2016 by Ms Woolley. The Claimant asked why he was being put on a plan when others in similar circumstances or had taken more sick leave were not. Ms Woolley told him that 'he should be minding his own business'.
- 2.2.8 Rather imposing the usual 6 month attendance plan, Ms Woolley imposed a 12 month plan on the Claimant.
- 2.2.9 Between 2015 and 2018, the Claimant was required to attend the Wycombe office every day whereas Charlotte Adamson and other white colleagues were allowed to work from sites near their homes. When the Claimant raised he was being treated differently, Ms Woolley said 'Abbas this is your problem that you talk more about others, you need to focus on yourself.'
- 2.2.10 In 2016 and 2018 the Claimant attended occupational health assessments and recommendations were made but they were not put into place.

2.2.11 ***[Dismissed]***.

2.2.12 In October 2018 the Claimant was discouraged from apply for a senior post 8B. Ms Woolley said, 'Abbas you can barely manage your current post, so if I was you I would not apply.'

2.2.13 In December 2018, the Claimant was not shortlisted for a Band 8B post, namely for the senior development manager post.

2.2.14 In February 2019 the Claimant was unwell in the client office he was told Ms Woolley not to go into the customer site office as they don't want me there. She said, "Someone senior in the CCG called Emma and the expectation was that someone in the CSU came over to the CCG and take me away, you also told me not to go there as they do not want you there " after this he was not allowed in the CCG office and was told me to go to the Wycombe office every day?. When he objected he asked, 'that if tomorrow they say we don't want a black man in our building will you stand by with them? There was no answer given.

2.2.15 In August 2019 he secured a secondment to Buckinghamshire Council. Before applying Ms Woolley said he could go. After he secured it Ms Woolley said that he could accept it. A few weeks later she said why don't you leave and go there and work instead. Shortly afterwards she changed her mind and refused permission to go on the secondment. Other staff's requests were approved (Zoe Pink and Charlotte Adamson)

2.2.16 In September 2019 the Claimant spoke to Chantel Biddle and explained what happened with Buckinghamshire and he had been made to look a fool. She said it was not her problem and Ms Woolley could change her mind.

2.2.17 In November 2021, the Claimant applied for a secondment to Bedfordshire NHS Trust. The post was offered to him. His manager, Ms R McCafferty said she did not have a problem with it, but there was a ban on secondment and he would need to make a proposal to senior managers. It was sent to head of service, a friend of Ms Woolley and he was told there was a ban on secondment. At this Charlotte Adamson was granted an extension to her secondment.

2.2.18 The Claimant has been denied the opportunity to secure promotions namely in August 2021 for the post of Intelligence Partner the Claimant was interviewed shortly afterwards. He was not given an outcome of the interview.

2.2.19 In December 2021, after finding out someone else had been appointed, he asked why he had not been given feedback, the feedback given to the Claimant for the August 2021 position was inadequate and consisted of him being told by Kevin James, 'Leaders give direction managers give directions' this was done to dissuade him from applying for a further 8b role vacant at that time, which

was due to close a week later and had been opened by Mr James. A less experienced colleague, Jack Willis, was appointed into that vacant role.

2.2.20 The process of the Claimant's grievance of December 2021 was unreasonably delayed. The outcome the Claimant wanted was to be permitted to go on the Bedfordshire secondment, but the delay essentially prevented it.

2.2.21 After bringing the claim the Claimant was told by Mr James that he was being given a secondment with a pay rise, which he undertook. The Claimant applied for a more senior post in May/June 2022 and was not selected for interview.

2.3 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The Claimant says he was treated worse than (to be provided by way of further information) and/or a hypothetical comparator.

2.4 If so, was it because of race and/or religion or belief?

2.5 Is the Respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected to race or religion or belief?

3. Harassment related to race and/or religion or belief (Equality Act 2010 s. 26)

3.1 Did the Respondent do the following things:

3.1.1 In July 2015 refused the Claimant permission to work on flexi-time and compress his hours or permit him to work from home, after he made a formal request in writing; (Stacey Iannaccone and Charlotte Adamson and Fiona)

3.1.2 In about August 2016 and in about March 2017 the Claimant made oral requests to Ms Woolley to compress his hours of work from home to help manage his family because he had 5 children and needed to support his wife. These were refused. (Stacey Iannaccone and Charlotte Adamson and Fiona)

3.1.3 In about September 2015 the Claimant gave notice to take leave during Eid. Ms Woolley responded by saying words to the effect of, 'oh really can your moon come out in an organised manner.' At first Ms Woolley told the Claimant he would have to come into the office on Eid day. He said he would cover them from home. Ms Woolley walked off and

then returned and said just leave it and would not speak to him for the next few days..

- 3.1.4 In about Autumn 2015, Ms Woolley made the Claimant take unpaid leave when his wife was unwell and he needed to look after his children. Other team members were permitted to take carers leave.
- 3.1.5 In January 2016 whilst off sick and having a spell in hospital with pneumonia, the Claimant spoke Ms Wooley and said he would be back in April. She said, 'I will believe it when I see it.' the Claimant was told that someone else in the office had the same condition and was back in 4 weeks.
- 3.1.6 The Claimant had been due to take leave in January 2016, but he was taken ill with pneumonia. On the Claimant's return to work in April 2016, he asked if he could re take annual leave he was meant to have in January whilst he was on sick leave. Ms Wooley said, 'Are you going to do that now, that's fine I am going to put you on an attendance management plan.'
- 3.1.7 The Claimant was put on an attendance management plan from April 2016 by Ms Woolley. The Claimant asked why he was being put on a plan when others in similar circumstances or had taken more sick leave were not. Ms Woolley told him that 'he should be minding his own business'.
- 3.1.8 Rather imposing the usual 6 month attendance plan, Ms Woolley imposed a 12 month plan on the Claimant.
- 3.1.9 Between 2015 and 2018, the Claimant was required to attend the Wycombe office every day whereas Charlotte Adamson and other white colleagues were allowed to work from sites near their homes. When the Claimant raised he was being treated differently, Ms Woolley said 'Abbas this is your problem that you talk more about others, you need to focus on yourself.'
- 3.1.10 In 2016 and 2018 the Claimant attended occupational health assessments and recommendations were made but they were not put into place.
- 3.1.11 **[Dismissed]**.
- 3.1.12 In October 2018 the Claimant was discouraged from apply for a senior post 8B. Ms Woolley said, 'Abbas you can barely manage your current post, so if I was you I would not apply.'
- 3.1.13 In December 2018, the Claimant was not shortlisted for a Band 8B post, namely for the senior development manager post.
- 3.1.14 In February 2019 the Claimant was unwell in the client office he was told Ms Woolley not to go into the customer site office as they don't want me there. She said, "Someone senior in the CCG called Emma and the expectation was that someone in the CSU came over to the CCG and take me away, you also told me not to go there as they do not

want you there ” after this he was not allowed in the CCG office was told me to go to the Wycombe office every day?. When he objected, he asked, ‘that if tomorrow they say we don’t want a black man in our building will you stand by with them? There was no answer given.

- 3.1.15 In August 2019 he secured a secondment to Buckinghamshire Council. Before applying Ms Woolley said he could go. After he secured it Ms Woolley said that he could accept it. A few weeks later she said why don’t you leave and go there and work instead. Shortly afterwards she changed her mind and refused permission to go on the secondment. Other staff’s requests were approved (Zoe Pink and Charlotte Adamson)
- 3.1.16 In September 2019 the Claimant spoke to Chantel Biddle and explained what happened with Buckinghamshire and he had been made to look a fool. She said it was not her problem and Ms Woolley could change her mind.
- 3.1.17 In November 2021, the Claimant applied for a secondment to Bedfordshire NHS Trust. The post was offered to him. His manager, Ms R McCafferty said she did not have a problem with it, but there was a ban on secondment, and he would need to make a proposal to senior managers. It was sent to the head of service, a friend of Ms Woolley, and he was told there was a ban on secondment. At this Charlotte Adamson was granted an extension to her secondment.
- 3.1.18 The Claimant has been denied the opportunity to secure promotions namely in August 2021 for the post of Intelligence Partner the Claimant was interviewed shortly afterwards. He was not given an outcome of the interview.
- 3.1.19 In December 2021, after finding out someone else had been appointed, he asked why he had not been given feedback, the feedback given to the Claimant for the August 2021 position was inadequate and consisted of him being told by Kevin James, ‘Leaders give direction managers give directions’ this was done to dissuade him from applying for a further 8b role vacant at that time, which was due to close a week later and had been opened by Mr James. A less experienced colleague, Jack Willis, was appointed into that vacant role.
- 3.1.20 The process of the Claimant’s grievance of December 2021 was unreasonably delayed. The outcome the Claimant wanted was to be permitted to go on the Bedfordshire secondment, but the delay essentially prevented it.
- 3.1.21 After bringing the claim the Claimant was told by Mr James that he was being given a secondment with a pay rise, which he undertook. The Claimant applied for a more senior post in May/June 2022 and was not selected for interview.

- 3.2 If so, was that unwanted conduct?
- 3.3 Did it relate to the Claimant's protected characteristic, namely race or religion?
- 3.4 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?
- 3.5 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.

4. Victimization (Equality Act 2010 s. 27)

- 4.1 Did the Claimant do a protected act as follows:
 - 4.1.1 Brought this claim;
- 4.2 Did the Respondent do the following things:
 - 4.2.1 After bringing the claim the Claimant was told by Mr James that he was being given a secondment with a pay rise, which he undertook. The Claimant applied for a more senior post in May/June 2022 and was not selected for interview.
- 4.3 By doing so, did the Respondent subject the Claimant to detriment?
- 4.4 If so, was it because the Claimant had done the protected act?

13. During the final hearing the Claimant withdrew his allegation relating to the moon comment (2.2.3 and 3.1.3). The Claimant confirmed this was the only allegation he made in respect of religion or belief, so these complaints were dismissed on withdrawal.

FINDINGS OF FACT

- 14. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after considering the factual and legal submissions made by and on behalf of the respective parties.
- 15. The Respondent is contracted by the NHS to provide an analytical service such as data processing and performance management for customers in the NHS, including Clinical Commissioning Groups ("CCGs"). The Respondent's Analytics Team operates out of different offices.

16. The Claimant commenced employment with the Respondent on the 1 May 2015. His contract of employment confirms his job title at that time as Team Manager Principal Analyst (Band: 8A) (page 116 of the bundle). We understand this role is now called an Intelligence Manager.
17. The Employment contract is signed by the Claimant on the 5 May 2015 (page 125). It confirms his hours of work as being 37.5 hours a week (page 116).
18. The Claimant was the team manager for the Buckinghamshire team. The team worked from an office in High Wycombe, and this was the Claimant's contracted place of work (page 116 of the bundle).
19. The Claimant remains employed by the Respondent.
20. The Claimant describes himself as Pakistani Muslim. As confirmed in the agreed list of issues, he says he was treated badly due to nationality, religion, and accent.
21. During the evidence the Claimant confirmed that only one aspect of one of the allegations related to religion or belief (the moon comment (allegations 2.2.3 and 3.1.3)) and this was withdrawn by him. The religion or belief complaints were then dismissed on withdrawal.
22. KT who managed the Claimant at most of the times material to this claim and is the accused in the majority of allegations the Claimant makes, covered the areas of Buckinghamshire, Oxfordshire, Berkshire West and Bedfordshire for the Respondent ("BOB").
23. The first allegation chronologically (2.2.1 and 3.1.1) is that in July 2015 KT refused the Claimant permission to work on flexi-time and compress his hours or permit him to work from home, after he made a formal request in writing. He compares himself to Stacey Iannaccone and Charlotte Adamson and Fiona.
24. The Claimant says ... "In July 2015 I requested flexi working request and it was refused by Katherine Woolley. I was never given an explanation, I know in ET they will say oh "Business Reason" Business reason is perfect way and excuse to discriminate people."
25. During the cross examination of the Claimant, we were referred to page 376 of the hearing bundle being an email from the Claimant dated 7 July 2015 to KT that requested two alternative work options. The first option was over five days (with Monday and Friday changing his place of work to Aylesbury) and the second over four days, with longer hours over the four days and not working Fridays. The Claimant considered this to be the formal request in writing, with other requests being verbal.

26. KT says (paragraph 7) ... "I do not remember Abbas submitting a formal request to change his hours in July 2015 or at any other time, but I do recall that we had informal discussions about his home situation, and I verbally agreed that he could work more flexibly by adjusting his working hours in the office to start at 10:15 and finish at 18:15. However, he continued to struggle to be in the office by 10.15 or to let me know in a timely manner that he was not coming into work that day."
27. KT confirmed that she recalled the Claimant's start time when he first commenced work for the Respondent was 8 am.
28. KT confirmed that after the email in July 2015 they had agreed the Claimant could start at 10am, then when that did not work, it was then agreed as 10:15am.
29. In cross examination the Claimant agreed that KT had permitted him to start at the later time of 10:15 when needed.
30. As to working from home, KT explained that the Claimant had started in May 2015, so was only a couple of months into the role, and she did remember some requests, but doesn't remember the details. KT explained that at the time the Claimant started his employment he was interviewed by her and a director at that time who didn't like people working from home. Therefore, they had an informal agreement where employees could work one day a fortnight from home, but there was no formal policy. KT could not recall any discussions at that time with the Claimant about the way Charlotte (the comparator) was allowed to work from home.
31. The Claimant had commenced the role on the 1 May 2015. The email in July 2015 does not make a request to work from home. A change to start times was agreed after the email.
32. During the hearing, we were presented with a copy of a document that the Claimant says he produced for HR in 2015 (pages 84 and 85) that was then included in an email dated 28 June 2016 that the Claimant sent to HR (email dated 28 June 2016 at 14:49 to Samantha Stanley (page 190)). The Claimant confirmed in cross examination that this was a copy of a document he had produced in 2015.
33. It was noted by the Tribunal that paragraph 6 of that document (page 85) appeared to refer to matters post April 2016 as the Claimant appeared to assert in his witness statement that this issue occurred after he had sick leave for pneumonia in 2016. This would then be contrary to what the Claimant had said, about it being a document he prepared in 2015.

34. The Claimant was asked about that in his oral evidence, and he confirmed that he made the same allegation in November 2015, concerning similar matters and the same person.
35. There is no reference to such a specific allegation in this claim or the Claimant's witness statements. His first statement at pages 6, 7 and 24 for example refers to matters in 2016 only.
36. This mismatch between the evidence the Claimant presents to us now and what he says was written by him in 2015 demonstrates in our view an inaccuracy in his recall.
37. This is also reflected in respect of the moon allegation, being made by the Claimant in this claim, but there being no reference to it in the 2015 document the Claimant produces as being most contemporaneous to the incident (pages 84 and 85), and then that allegation being withdrawn by the Claimant during this hearing.
38. The 2015 document does refer to flexi working issues in paragraph 3 of that document (page 84) ... "My partner due to trapped nerve could not move from bed and was in severe pain and I requested time of as carers leave as I had children to look after ***[this relates to the fourth allegation and matters in August / September 2015]*** ... During this time I requested flexi time so I could start late finish late and sometime work from home I gave example of how charlotte does it due to her kids. Katherine said Charlotte is part time and I am full time so I can't have that flexibility. Then she made an excuse we had long standing arrangement with charlotte and Stacey before the CSU that we will give them flexible. This is untrue as NHS contract gives the flexibility to all employees and employees can ask for that and are entitled to work from home every fortnightly for half day. Anyway I was not given the same flexibility and in the end I gave up idea of that as Katherine was unhappy about that. I told Katherine that I was being treated differently and her response was that since I am at higher band so that's why she is treating me differently. I said to her that should not be the case as all employees should be treated equally. This is the point where Katherine behaviour changed more because I explained my rights to her".
39. The Claimant does not refer in his 2015 document to an issue specific to July 2015 about a request to work on flexitime and compress his hours or permit him to work from home being refused after he made a formal request in writing.
40. Considering the next allegations (2.2.2 and 3.1.2) that in about August 2016 and in about March 2017 the Claimant made oral requests to KT to compress his hours or work from home to help manage his family because he had 5 children and needed to support his wife. These were refused. (Stacey Iannaccone and Charlotte Adamson and Fiona).

41. The Claimant does not directly address what he asked for in about August 2016 and in about March 2017 in his witness statements.
42. He says ... "Between 2015-18 They did not let me work flexi at all and when they did they temporarily cause my mother wasn't well they would want me to email them when I came in and what time I left this was only done to me as there was no trust just because I am Pakistani."
43. Further ... "There were number of times I made requests verbally as we used to sit in the same row and sometimes on next desk so although they were verbal requests but they were real actual formal request as I needed my manager to give me flexi time but all of them were refused until 2019 when after OH doctor's recommendation they had to give but then made me send check in and check out emails which was not done to others and asked where was I even I was in clients office. This was in contrast to my comparator who were trusted as they were not pakistani."
44. As these were verbal discussions over 7 years ago, it is understandable that accurate and full recall is limited. It was therefore surprising that the Claimant asserted in his oral evidence that his memory of matters was very reliable.
45. KT's recall of such matters is set out in paragraphs 8 and 9 of her statement:

"8 At the same time, we discussed informal requests for him to compress his hours, work from the Aylesbury office and work from home. These options were not viable alternatives because:

(a) compressing Abbas' hours would have not benefitted Abbas or SCW. He was already struggling to work his usual contracted hours of 37.5 hours over 5 days. It was not a realistic adjustment as inevitably he would be required to work longer days over a shorter week;

(b) the office at Aylesbury was our client's (CCG) office space and it was limited in capacity. We could not change Abbas' place of work and SCW did not own the CCG premises. Only SCW staff involved in specific CCG work areas were permitted to work regularly from the CCG office, and usually it would be members of the Contracting and Performance Teams, rather than Analytics (which is the team in which Abbas was based). If staff were required to attend meetings with the CCG, like Abbas was from time to time, then they would be granted to use of their office space (and indeed Abbas was granted the same rights); and

(c) working from home was not usual practice at this time (pre-Covid19). However, there was an informal policy to allow staff to work 1 day a fortnight at home if they wanted to, and it was open to Abbas to make use of this policy.

9 Abbas and I frequently had discussions about how he could work more flexibly to suit his home life, but I don't remember him making any formal flexible requests. We did adjust Abbas' hours on an informal basis to ease the difficulties he had managing his contractual hours of work. We agreed he could work one day per week from home, one day from the CCG office (to conduct CCG work or meetings) and three days from High Wycombe."

46. KT addresses the comparators relied upon by the Claimant in paragraph 10 of her witness statement. All of them are identified as having material differences to the Claimant as to their job roles, hours of work and relationships with the clients. The Claimant refers specifically to Charlotte and Stacey in his 2015 document.

47. About Charlotte KT says ... "Charlotte was one of my direct reports. She was initially a band 7 who supported the Performance function of Buckinghamshire CCG. She worked part-time and was later placed on secondment to Oxford CCG as a Band 8A in 2020. Charlotte's role was specifically concerned with performance analytics, and she worked very closely with our clients. Charlotte's role was focussed on producing the monthly performance report specifically for Buckinghamshire CCG, whereas the remit of Abbas' role was much wider. Charlotte therefore worked mainly from the CCG's Aylesbury office and came to the High Wycombe office once a week. It was common practice for staff in similar roles to Charlotte in other geographies in SCW to be based in client offices. Charlotte occasionally worked from home subject to the original guidelines set out at paragraph 8(c)."

48. About Stacey KT says ... "Stacey was employed as a band 5 and later promoted to a band 6 in BOB. She never worked as a band 8A and so she was in a much more junior role compared to Abbas. Stacey worked term-time/parttime, whereas Abbas was full time. Contrary to Abbas, whose role involved the duties set out at paragraph 5, Stacey mainly worked on producing routines reports for the CCG. In 2018, the CCG requested that she work on a specific project from the Aylesbury office 1 day a week. There was also a period when Stacey agreed to increase her hours to provide maternity cover for another member of staff. It was agreed she could do those hours from home due to exceptional circumstances."

49. About Fiona (the other person named in the allegation) KT says ... "Fiona worked in the contracting team, and she was not part of my team. I did not know her directly. As the contracting team managed CCG contracts, it was often necessary for Contracts Officers to work at the client's offices. I have learned as part of this tribunal process that Fiona was employed as a band 6 and was contracted work part time, only 30 hours per week. She was more junior than Abbas, who as I have said worked full time."

50. KT gives a much fuller and consistent account of matters in respect of these allegations, and we accept what she says.
51. The third allegation (2.2.3 and 3.1.3), as still pursued, is that in about September 2015 the Claimant gave notice to take leave during Eid. At first KT told the Claimant he would have to come into the office on Eid day. He said he would cover them from home. KT walked off and then returned and said just leave it and would not speak to him for the next few days.
52. The Claimant confirmed in cross examination, after it was highlighted to him that his 2015 document did not refer to the moon comment aspect of the original allegation, that he knows the allegation is not proven in respect of the moon comment, and if KT says under oath that she did not say it, then he would withdraw that allegation. KT confirmed in cross examination that she did not say it. The Claimant then confirmed that allegation and so all the complaints of religion or belief harassment or direct discrimination were withdrawn.
53. In the 2015 document for HR the Claimant says ... "On 22nd September I sent email to Katherine informing her that I will be off for 24th November ***[this is a typographical error repeated and then corrected in the Claimant's witness statement, it should be September]*** due to religious festival Eid. For annual leave I am supposed to give one day notice for one days leave. She got upset over this said to me I can't take off cause there is a meeting on that day. I said to her it's our religious day and I have given the correct notice and explained its dependent on the moon hence could not book in advance. She was upset over this and said in front of David Boothroyd that I should be at the meeting instead of taking day off angrily. On the other hand she happily gave time off on a shorter notice to other team members like Ben Morris."
54. KT says (paragraphs 12 to 14 of her witness statement) that she had already booked leave for September 2015, agreeing that the Claimant would cover her. The Claimant then asks for the leave that week and KT was displeased having already agreed the Claimant would cover her. KT denies walking off, and explains she made an exception for the Claimant, accommodating his leave request at short notice. KT denies she refused to talk to him for the next few days after it.
55. The Claimant asserted that it was not true that he had been asked to cover KT's leave as she had not produced any emails to show that being agreed.
56. However, we accept what KT recalls which is more consistent with the 2015 written account, the Claimant referencing within that, that KT says to him he should be at the meeting. This is something she would say if she had expected him to be covering her leave.

57. Also, what is not clear from the Claimant's allegation and evidence is that the leave was permitted. It was a short notice request that was accommodated, so appears to be more favourable treatment.
58. Considering the fourth allegation (2.2.4 and 3.1.4) that in about Autumn 2015, KT made the Claimant take unpaid leave when his wife was unwell, and he needed to look after his children. Other team members were permitted to take carers leave.
59. The Claimant's allegation and his first witness statement (at page 5) suggest he was only allowed unpaid leave; however, he acknowledged in cross examination that he also had one days paid leave when shown the leave forms in the hearing bundle.
60. KT Says (paragraph 15) ... "Abbas alleges that I refused him access to carers leave when his wife was unwell in August 2015. From what I can remember his wife had a bad back and was struggling to get out of bed and tend to their children. Abbas wanted to take 2 weeks off work in the short term and he applied for carer's leave. However, Abbas' situation did not qualify for carer's leave under SCW's leave policy. His request amounted to "emergency domestic leave". I granted him three days unpaid leave and on a discretionary basis, 1 day's paid leave the forms for which are contained at pages 130 and 131 of the bundle."
61. The mismatch between what the Claimant alleges and states in his witness statement when compared to the contemporaneous documents demonstrates in our view that he does not have a very good recall of matters.
62. With reference to the Respondent's "OTHER LEAVE POLICY" the Claimant did not have sufficient service to qualify for carers leave (page 772 – paragraph 6.1) ... "Employees must have a minimum of 26 weeks service with the Organisation before being considered for extended carers leave.". The Claimant accepted this in cross examination as by August 2015 he had around 4 months of service so did not qualify.
63. What KT did is consistent with the Respondent's policy (page 772 – paragraph 5.2) ... "5.2 A Manager may grant 1 paid day (or part of a day) to deal with the domestic or dependant emergency. A further day can be agreed with the line manager depending on the circumstances. However, the total number of days will not exceed more than 3 days in any rolling 12 month period. It may also be considered by the line manager whether during the time off, the employee can work from home, or change their working hours where possible. If a longer period of time away from work is required to deal with the emergency, it may be necessary to consider Carer's leave (Section 6) which would be discussed with the Line Manager."

64. At paragraph 16a of her witness statement, KT addresses the comparator relied upon by the Claimant ... "... On or around 2014 Charlotte's husband was taken seriously unwell with cancer of the pituitary gland which required surgery. Charlotte took ad hoc days off under the "emergency domestic cover" policy to care for him. She did not take carer's leave. After the initial period of emergency leave, Charlotte was able to work around her caring requirements as she was part time, swapping her days off if required. She did not receive any additional pay from SCW. Abbas' request for leave was based on the need to organise emergency childcare arrangements and to attend to his wife's short term back ailment. The circumstances were different and as Abbas was full time, we could not swap his working days to allow him to accommodate his leave request, as we could for Charlotte."
65. We accept what KT says, which is consistent with the Respondent's policy, as compared to what the Claimant writes at page 6 of his first witness statement which appears to be no more than an assertion as to what he believed.
66. It is next alleged (2.2.5 and 3.1.5) that in January 2016 whilst off sick and having a spell in hospital with pneumonia, the Claimant spoke to KT and said he would be back in April. She said, 'I will believe it when I see it.' the Claimant was told that someone else in the office had the same condition and was back in 4 weeks.
67. The Claimant refers to this at page 6 of his first witness statement ... "When I said I will be back on such and such date she said, "I will believe it when I see it"". During his oral evidence the Claimant clarified that he would say to KT that he would be back when the current sick note ran out. This was something said on more than one occasion. Although during cross examination KT could not recall saying what she is accused of, she acknowledged she may have thought it.
68. With reference to an email from KT dated 29 March 2016 (page 183 of the main bundle and page 10 of the supplemental) she writes ... "... In addition, Abbas' last sick note ran out on 22nd March. He informed me by e-mail on 23rd that he would not be in and the sick note will follow. This is despite the fact that I spoke to him on 22nd and he said he would be in the next day. He is now saying that I will get the sick note today and that it runs out on 30 March. He says he will be in the office on 31st March. ... I am now extremely frustrated at the whole situation so any further advice on action I can take even if he does return on Thursday would be welcome!"
69. It is clear that even if KT did think it, there are reasons completely removed from the Claimant's case as to why, relating to and because of the Claimant's lack of clarity and reliability about his return-to-work date.

70. Considering allegations 2.2.6 and 3.1.6. The Claimant had been due to take leave in January 2016, but he was taken ill with pneumonia. On the Claimant's return to work in April 2016, he asked if he could re take annual leave he was meant to have in January whilst he was on sick leave. KT said, 'Are you going to do that now, that's fine I am going to put you on an attendance management plan.'

71. KT denies making such a remark (paragraph 18 of her witness statement).

72. It is also clear from the emails from HR to the Claimant dated 24 June 2016 (page 192) and dated 28 June 2016 (page 191) that this is a matter triggered by them:

a. At page 192 ... "... I got in touch with Katherine a few weeks ago because your levels of absence have triggered for absence management to take place and requested for her to stage the process in line with our Sickness Absence Policy. (the standard trigger to start absence management is 4 occasions/12 days)."

b. At page 191 ... "... Every month I pull off a report displaying all of the absences in the CSU and notify managers of which staff have triggered for absence management so that they can start the process. This may have not been such a regular occurrence in the past, but since I have picked up providing HR Support for various areas across the South, Central and West patch, this is now the standard and the expectation is now and going forward for staff who met the absence triggers to be managed appropriately in line with our Sickness Absence policy as a fair and consistent process."

73. This is also something actioned before the Claimant asks KT about his leave. In the email at page 193 dated 23 June 2016, the Claimant writes:

"I asked my manager today to book the leave and she said I was off sick anyway. I have explained this to her but this request has not gone down well with her. She did agree that I can take time off when I reminded her I was unwell but she was not very happy and said we will start formal proceeding for the time I have had off when I was sick with pneumonia and hospitalised. Recently my mother was unwell who is disabled and hospitalised for last one month. I took carers leave and my annual leave for 5 days and 2 weeks unpaid leave which I asked if I could use my annual leave but request was denied.

I feel like by asking my right for annual leave I have triggered formal process against me which is unfair. I should not be treated unfairly just because I am main carer of a disabled dependent and If I had to take time off due to medical issues for which sick notes were provided."

74. HR then confirm in the email on 24 June 2016 that they asked KT to start the process a few weeks before, so that would put the request by HR to KT to start the process, before the Claimant raises the leave request with KT.
75. Also, we note about the Claimant's email that he refers to unfairness because he is the main carer of a disabled dependent. There is no reference to unfairness because of his race.
76. What HR says is also consistent with what happened to the Claimant as it is not in dispute that by November 2015 the Claimant had reached the trigger threshold for a stage 1 attendance management review, but it was not actioned at that point.
77. The Claimant was put on an attendance management plan from April 2016 by KT (allegations 2.2.7 and 3.1.7). The Claimant asked why he was being put on a plan when others in similar circumstances or had taken more sick leave were not. KT told him that 'he should be minding his own business'.
78. The Claimant could not name anyone from 2016 that was treated more favourably than him, by having the same or greater absence at that time, but not being put on an attendance management plan. The Claimant relies upon Chris Price, Matthew Bryan and KT. All of these are after the incident he complains of, and as well as the when, are also different in material ways as explained by KT in her evidence:
79. At paragraph 22 of the witness statement of KT:
- "22 I understand that Abbas relies on Chris Price, Matthew Bryan and me as his comparators.
- (a) Chris Price: I am not aware of Chris' personal circumstances, but when preparing my witness evidence SCW's HR team made me aware of his sickness record (a copy of which is at page 765). This document stipulates that the only absences Chris had occurred after Abbas filed his claim and he did not have sickness absence at the time Abbas alleges.
- (b) Matthew Bryan: Again when preparing my witness evidence, SCW's HR team has made me aware that in 2019, whilst working as a Reporting Analyst (band 5) Matthew had 3 months off work due to the flu. As Abbas had had a number of short-term sickness absences, compared to Matthew's long-term absence (which was over 4 weeks) he was subject to a different SCW absence procedure (pages 738 to 739). Matthew's sickness record is attached (page 764). In July 2021, whilst working as a Senior BI Analyst (band 6) Matthew had a 2- weeks compassionate leave following the death of his mother. His circumstances were different to Abbas'.

(c) Me: I had two periods of absence in 2017 due to a back problem. I suffered from a slipped disk and had 3 weeks off work in January followed by 6 weeks off following surgery in April. This triggered an Occupational Health Assessment and an Attendance Management Plan was discussed with my line manager. We discussed whether it was possible to have adaptations to my desk and if I should have a phased return to work. Both of which were impractical for my circumstances (I worked from 4 different offices on a regular basis so did not have a specific desk). As my attendance prior to this problem had been good there was not felt to be a risk of re-occurrence, no further action was taken.”.

80. In cross examination KT denied making the exact comment attributed to her by the Claimant, suggesting she may have said to the Claimant that he should focus on his own attendance and own work and not focus on people outside of the team, and that other peoples' sickness levels are not something that should be discussed due to data privacy. We accept what KT says about this.
81. The Claimant also alleges (allegations 2.2.8 and 3.1.8) that rather than imposing the usual 6-month attendance plan, KT imposed a 12-month plan on the Claimant.
82. KT confirmed in her oral evidence what she understood about attendance plans and that the Claimant was on stage 1. With reference to page 745 of the bundle (part of the Respondent's policy document), KT clarified that there are no such things as a 6-month or 12-month attendance plan. There is a 12-month rolling improvement period where targets are set. KT confirmed that she would usually engage with employees monthly on how they are doing against target.
83. The Claimant had had multiple absences for different reason at that point to trigger the process. The Respondent's HR had instructed KT to start the process.
84. We accept what KT says about this matter which is consistent with the Respondent's policy.
85. The Claimant alleges that between 2015 and 2018, he was required to attend the Wycombe office every day whereas Charlotte Adamson and other white colleagues were allowed to work from sites near their homes. When the Claimant raised he was being treated differently, KT said 'Abbas this is your problem that you talk more about others, you need to focus on yourself.', (allegations 2.2.9 and 3.1.9).
86. KT addresses this allegation in paragraphs 23 to 26 of her witness statement. KT explains how there were reasons other than race for the different treatment. The Aylesbury office ... "... belonged to CCG, not SCW and Abbas was not employed by the CCG. Abbas alleges I said "Abbas, your problem is that you talk more about others, you need to focus on yourself". I do not recall making

this comment. But I told Abbas repeatedly that I could not solely authorise him to work permanently from CCG's Aylesbury office because it just simply wasn't within my remit and there was no business case for me to present to the client that would enable him to do so. I did however agree for him to work from the Aylesbury office 1 day per week CCG on the basis that a proportion of his work did include work for CCG.”.

87. About the named comparator KT says ... “Paul Smith ... supported the Performance function of Buckinghamshire CCG. His role was specifically concerned with performance analytics, and he worked very closely with our client. He reported to Charlotte Adamson. He worked full time from the CCG office 3 to 4 days a week and from High Wycombe office 1 to 2 days a week. It was common practice for staff in similar roles to Paul to be based in client offices.”.
88. It is not in dispute that the Claimant was able to work from the Aylesbury office for one day a week from 2019, but the Claimant then asserts he had to send KT signing in and signing out emails, which was not something others had to do. This is not an allegation within this claim, but the Claimant does assert this was a difference on the basis of colour within his closing submissions.
89. KT was challenged about this in cross examination, and she accepted she didn't ask others to do such sign in emails at that time, but she says she was trying to make sure the Claimant was attending on time. We have accepted the evidence of KT about the Claimant's punctuality and reliability as set out above, so this does explain what she was doing, and it not being related to or because of the Claimant's race or colour.
90. The Claimant also alleges (allegations 2.2.10 and 3.1.10) that in 2016 and 2018 he attended occupational health assessments and recommendations were made but they were not put into place.
91. KT says in paragraph 27 of her witness statement ... “In 2016, Abbas was referred for an occupational health assessment triggered by frequent short-term sickness absences. The assessment took place on 30 March 2016 (a copy of the report is at pages 178 to 180). It was recommended that Abbas return to work on a phased basis during May 2016, which we implemented.”.
92. Then at paragraphs 28 and 29 of KT's witness statement she states that at the end of 2018, the Claimant was referred for another occupational health assessment which took place in February 2019 (pages 216 to 217) ... “... Following that assessment, myself, Hazera (Abbas' line manager) and Samantha Stanley (HR) discussed the recommendations in the report and concluded that they were just generic recommendations, and they were not specific to Abbas, or his role, to assist him. ... We wanted a more comprehensive medical assessment of Abbas to review and consider other

support or adjustments that would be more specific to him, with input from Abbas. ... we did agree with Abbas that he could work 1 day a week from home, 1 day from CCG's Aylesbury office and 3 days from the High Wycombe office to accommodate what he had requested by way of support. Abbas was happy with this."

93. At paragraph 30c of her witness statement KT refers to the named comparator, Steve Pickering ... "... Steve was based in the High Wycombe office and sat with the analytics team. I recall that he had a simple back support on his chair, however I am not aware if this was implemented due to occupational health recommendations."
94. It was during the Claimant's oral evidence that the specifics of this allegation were confirmed. His focus was on the non-provision of an air purifier (page 154, August 2016) and a stress risk assessment not being conducted (page 163, June 2019).
95. About the air purifier we note that the OH report refers to it being recommended as something management may wish to consider providing if it is operationally feasible (page 155). The Respondent concluded that it was not operationally feasible (it being suggested to us the cost could be up £1,000). As an alternative it was suggested to the Claimant at the time that it could provide a humidifier, or the Claimant could bring his own air purifier from home. The Claimant did not consider either option suitable.
96. The Claimant asserted that Mr Pickering had a special chair provided (asserting the costs of that and other equipment would be more than £300 (the Claimant's second statement, page 3) but he did not substantiate that assertion. It is not consistent with KT's recall of matters, and we accept what she says.
97. We accept the evidence of the Respondent on this matter as to the reason why an air purifier was not provided, it not being operationally feasible.
98. As to the stress risk assessment it is not in dispute that OH wrote to the Claimant's GP to obtain further information about the Claimant's condition. The GP report was completed on the 14 August 2014 (page 168). At the conclusion of evidence and closing submissions it was no longer in dispute that the Claimant did not give permission to release that report. It was chased by KT in an email to the Claimant dated 13 March 2020 (page 260). It is not in dispute that the Covid national lock down then occurs.
99. We accept the evidence of the Respondent on this matter as to the reason why the stress risk assessment was not done, they wanted more medical information to assess the position, and this was not released to them. The Covid national lock down then interrupted matters.

100. It is also fair to note that the Respondent did make adjustments as recommended by OH, such as the phased return and a change to the Claimant's working location.
101. It is then alleged (allegations 2.2.12 and 3.1.12) that in October 2018 the Claimant was discouraged from applying for a senior post 8B. KT said, 'Abbas you can barely manage your current post, so if I was you I would not apply.'. Connected to this is the next allegation (allegations 2.2.13 and 3.1.13) that in December 2018, the Claimant was not shortlisted for a Band 8B post, namely for the senior development manager post.
102. This relates to a job role in Eastleigh. KT says at paragraph 31 of her witness statement ... "I do not recall the specifics of the post he was applying for but know it was based in Eastleigh. I deny saying to him "you can barely manage your current post, so if I was you I would not apply". Whilst I can't remember our conversation word for word, I imagine I would have questioned how he intended to travel to Eastleigh, as he was already struggling to get to the office at High Wycombe on time, which was situated closer to his home. If I said this, it would have related to my concerns over Abbas' struggles to meet the travel commitments for his current role and it had nothing to do with his race of religion. However, be that as it may, I believe would have also said to him that it wasn't a bad idea to go for an interview, even if it would just help him to identify any areas for him to work on to progress. I would not have told him not to apply or sought to dissuade him from applying for the role.".
103. We accept what KT tells us she recalls, as the Claimant did apply for the role. It was also not her decision whether he was shortlisted or not.
104. CB confirmed that it was her decision whether the Claimant was shortlisted for this role or not and she says he wasn't because the candidate had to be based full time in Eastleigh. We accept what CB says about the role. The geographical location requirement of the role was understood by the Claimant. The Claimant in his email expressing interest in the role (page 213) writes ... "... I just need to highlight that I am based in Buckinghamshire and have a family so if the role requires me to be in Eastleigh every single day then that will not work for me. I would need some flexibility in terms of location, I am happy to travel for the meetings in various locations but doing the whole days in Eastleigh will be an issue". CB in her email to the Claimant in reply to a chaser email from the Claimant (page 213) confirms ... "Unfortunately you were not shortlisted for this role as it is necessary for this position to be based in Eastleigh".
105. The Claimant submitted a conditional expression of interest which could not be accommodated based on the geographical requirements of the role. There is nothing to suggest such a decision relates to the Claimant's race or is because of his race.

106. The Claimant alleges (allegations 2.2.14 and 3.1.14) that in February 2019 he was unwell in the client office and he was told by KT not to go into the customer site office as they don't want him there. She said, "Someone senior in the CCG called Emma and the expectation was that someone in the CSU came over to the CCG and take me away, you also told me not to go there as they do not want you there" after this he was not allowed in the CCG office and was told me to go to the Wycombe office every day?. When he objected he asked, 'that if tomorrow they say we don't want a black man in our building will you stand by with them? There was no answer given.

107. KT addresses these allegations in paragraphs 37 to 41 of her witness statement:

"37 In 2019, I understand Abbas attended CCG's satellite office based at Amersham Hospital and at some point during the day he collapsed at the CCG office. The CCG phoned SCW and spoke with their Account Manager, Emma Torrevil, to explain that Abbas had collapsed and the CCG regarded him too unwell to safely drive himself home. The CCG asked for someone at SCW to collect Abbas from the CCG office. By the time news of his situation had reached me, Abbas had been picked up by ambulance and taken to Stoke Mandeville for treatment.

38 Following this incident, and given the concern expressed by the CCG in the original phone call, I was worried about Abbas working from the site in the future until a risk assessment had been carried out regarding his fitness to be in their offices. My experience was that the office was not well used and there was a risk that Abbas would be lone working at a site that did not belong to SCW, and with no SCW colleagues and limited CCG colleagues in attendance. I spoke with Abbas about the incident and relayed the CCG's concerns. I explained that for the time being he could not attend their Amersham office whilst the risk assessment was pending. I told Abbas that we needed to carry out a risk assessment, both for his and SCW's benefit. It was important that we did this because if Abbas attended the CCG's offices and collapsed again, we couldn't guarantee that anyone would be on site to help him and that was simply an unsafe scenario for Abbas.

39 To add further context, Abbas had collapsed in the High Wycombe office on one previous occasion to this. He had also collapsed in the town centre whilst on his lunch break where he was taken by ambulance to Stoke Mandeville and we did not know that had happened until much later after the event.

40 Abbas claims that after this incident 'he was not allowed in the CCG office and was told to go to the Wycombe office every day' this is correct in the context that he was not authorised to attend the Amersham office until a satisfactory

risk assessment had been carried out. But this decision had nothing to do with Abbas' race or religion.

41 I do not recall Abbas' saying to me in response to him not being able to work from Amersham 'if tomorrow they say we don't want a black man in our building will you stand by with them?'. His non-attendance at the Amersham site had nothing to do with his race, it was purely down to a health and safety matter. I would have done the same thing for any other employee in his situation."

108. KT provides a very full account of this matter and what she says is consistent with emails between the Claimant and his then line manager Hazera Forth at that time (pages 229 and 230). We accept what KT says.

109. In August 2019 the Claimant asserts he secured a secondment to Buckinghamshire Council. Before applying KT said he could go. After he secured it, KT said that he could accept it. A few weeks later she said why don't you leave and go there and work instead. Shortly afterwards she changed her mind and refused permission to go on the secondment. Other staff's requests were approved (Zoe Pink and Charlotte Adamson) (allegations 2.2.15 and 3.1.15).

110. At paragraph 43 of her witness statement KT says ... "In August 2019, Abbas had expressed an interest in working at BCC and that he had seen a post that he wished to apply for. The post was advertised as a fixed term contract with an external organisation. I felt it was a good opportunity for Abbas and so I responded and said yes, worth applying' (page 570). Abbas and I had a number of discussions about this, as he had told me that BCC was one of his preferred employers in Aylesbury."

111. In cross examination KT confirmed that she remembered encouraging the Claimant to go for interview as it was somewhere he wanted to work. KT explained that she had in her head it was a fixed term contract and that she doesn't recall a conversation about it being a secondment. However, we note from the email that the Claimant sent to KT at the time (dated 20 August 2019 at page 570) he does ask if it is worth applying for secondment roles within the Council. KT does reply that it would be worth applying. KT acknowledged if she had understood it was a secondment at the time, she would have been clearer about the approval process needed, as she couldn't approve them. However, she would also have expected the Claimant to be aware of the process as he was also a manager.

112. Although KT's recall is inconsistent with the email the Claimant sends her at the time, with the Claimant referring to it being secondment roles, and KT saying she believed it was a fixed term role, we accept what she says as to it not being in her gift to approve it. Her email to the Claimant says it is worth applying, not that she approves his secondment.

113. As KT says in her witness statement at paragraph 44 ... “As a senior Manager I would have been able to recommend members of my team for secondment if the secondment aligned with the terms of SCW’s secondment policy (pages 516 to 523). However, the decision on the secondment would need to be approved by a director.”.
114. This is supported by CB as set out in paragraphs 20 to 23 of her witness statement. CB in her role as Associate Director of Intelligence Services, was ultimately responsible for considering the Claimant’s secondment request. Relevant factors include resource needs and costs of cover if seconded. CB says she refused the Claimant’s secondment request ... “... as it was not in line with the conditions of SCW’s secondment policy. In particular, the secondment would only fulfil one of the three requirements set out in SCW’s secondment policy, namely offering Abbas individual development. The secondment offered no benefit to SCW as BCC was not an NHS trust and therefore there would be no follow-on work for SCW. Additionally, SCW would have needed to backfill Abbas’ role with agency staff on a temporary basis. This would have been a large cost to the SCW and would be something we would generally seek to avoid.”.
115. What was decided is also consistent with the Respondent’s Secondment Policy, in particular paragraph 1.1 of that (page 519) ... “This policy facilitates the secondment of the CSUs staff both internally within the CSU and externally within the wider NHS and exceptionally with other non NHS Bodies”.
116. The Council was not an NHS body.
117. We have been presented evidence by LW as to material differences between the Claimant and his named comparators Z Pink and C Adamson (paragraphs 19, 20, 22 and 23 of his witness statement and expanded upon in his oral evidence). Both of their secondments were with existing key customers/clients, the Claimant’s was not. Both comparators had the potential to leave or move to direct employment with the customer/client’s which would have been commercially disadvantageous to the Respondent.
118. It is alleged by the Claimant (allegations 2.2.16 and 3.1.16) that in September 2019 the Claimant spoke to CB and explained what happened with Buckinghamshire and he had been made to look a fool. She said it was not her problem and KT could change her mind.
119. CB addresses this allegation in paragraphs 26 and 27 of her witness statement:
- “26 I strongly deny Abbas’ statement that when Abbas spoke to me about the decision to refuse the secondment that I stated “this was not my problem and

that Katherine could change her mind if she wanted to". As set out above, it was my decision to consider and ultimately refuse Abbas' secondment request, therefore I disagree that I would have said that it was not my problem. I also disagree with Abbas' statement that Katherine changed her mind. Katherine was not the ultimate decision maker in terms of considering Abbas' secondment request and in my view, it was not clear that Abbas expected to remain employed by SCW if he accepted the role. I also deny that this comment was in any way discriminatory.

27 I do not recall Abbas stating during this conversation that he had been made to look like a fool. As explained above, in any situation, full details of the secondment on offer, or terms of release would need to be understood and agreed by both parties before anything could or would ever be confirmed. This had not yet been confirmed with Abbas."

120. The Claimant alleges (allegations 2.2.17 and 3.1.17) that in November 2021, he applied for a secondment to Bedfordshire NHS Trust. The post was offered to him. His manager, Ms R McCafferty said she did not have a problem with it, but there was a ban on secondment, and he would need to make a proposal to senior managers. It was sent to head of service, a friend of KT and he was told there was a ban on secondment. At this Charlotte Adamson was granted an extension to her secondment.

121. As a matter of evidence, it was clarified by the parties that the Bedfordshire secondment related to the East of England Ambulance service, which was not part of Bedfordshire NHS trust. The Claimant agreed in cross examination that at the time of applying for that KT had retired. He also accepted that there had been a tightening of the secondment policy by that point, where the exceptional circumstances requirement was applied to external entities as well as non-NHS as is confirmed in an email dated 14 October 2020 (pages 268 and 269).

122. The Claimant's secondment application did not engage exceptional circumstances as to why it should be approved (as explained by LW in paragraph 11 of his witness statement). By comparison C Adamson's secondment extension was with a key client, so did do so.

123. The Claimant alleges that he has been denied the opportunity to secure promotions namely in August 2021 for the post of Intelligence Partner the Claimant was interviewed shortly afterwards. He was not given an outcome of the interview (allegations 2.2.18 and 3.1.18). Further and connected, that in December 2021, after finding out someone else had been appointed, he asked why he had not been given feedback, the feedback given to the Claimant for the August 2021 position was inadequate and consisted of him being told by Kevin James, 'Leaders give direction managers give directions' this was done to dissuade him from applying for a further 8b role vacant at that time, which

was due to close a week later and had been opened by Mr James. A less experienced colleague, Jack Willis, was appointed into that vacant role (allegations 2.2.19 and 3.1.19).

124. The Claimant was one of two candidates shortlisted for this role. KJ sets out in his witness statement (paragraphs 9 and 10) the assessment process of the successful candidate and the Claimant. The documents presented to us support a higher scoring for the successful candidate and the involvement of Michelle Skilling's alongside KJ in that process. The Claimant did not demonstrate in evidence with his cross examination of KJ that the scores given to him, and the successful candidate, were related to or influenced by the person's race.
125. KJ says in paragraph 14 of his witness statement that in ... "December 2021, I learned that unfortunately, there had been a delay in providing feedback when Abbas got in touch to request feedback for why he was not appointed to the Somerset Intelligence Partner role in August 2021. I thought HR provided feedback to all unsuccessful applicants, however I found out several months later that this had not been the case."
126. Then at paragraph 15 of his statement ... "Having been alerted to this, on 7 December 2021, I called Abbas to explain the reasons why he was not appointed to the role of Somerset Intelligence Partner in August 2021 and I encouraged him to work on the gaps in his experience so that he was prepared for future opportunities to progress. I recall saying to Abbas "Leaders give direction, managers give directions" as it is a phrase I use when delivering feedback to unsuccessful candidates who have applied for more senior, strategic roles but are still thinking and acting in an operational manner. This comment was said in the context of explaining how Abbas was not yet a strategic thinker and this skill was needed to take the business/team where it needed to go in the Somerset Intelligence Partner role. I viewed the feedback as constructive, as I informed Abbas what he needed to work on to secure possible senior roles in the future. At no point did dissuade or look to dissuade Abbas from applying for further 8B vacancies or any other roles. At the time, I believe that Abbas had taken my feedback well and in the manner in which it was intended. Abbas did not give me the impression when we spoke that he found my feedback unsatisfactory or inadequate."
127. It is not in dispute there was a delay in communicating the outcome. However, the Claimant confirmed in his oral evidence that he did start the application process before he then sought feedback in December 2021. The Claimant in his oral evidence acknowledged that the feedback call was at least several minutes in duration, but he did not explore the feedback with KJ, instead he says he enquired if KJ had any vacancies in his team. The Claimant said that he then decided against proceeding with the Intelligence Partner application he had already started.

128. We accept the evidence of KJ in this matter which is more consistent with the account given by the Claimant in his oral evidence to this hearing.
129. The Claimant alleges (allegations 2.2.20 and 3.1.20) that the process of his grievance of December 2021 was unreasonably delayed. The outcome the Claimant wanted was to be permitted to go on the Bedfordshire secondment, but the delay essentially prevented it.
130. In his oral evidence the Claimant confirmed that he only complains about the grievance being unreasonably delayed and not the appeal.
131. The grievance was raised on the 14 December 2021 with an outcome on the 2 March 2022. There is therefore nearly three months between the two, but was that an unreasonable delay?
132. The Claimant's grievance is very detailed (pages 472 to 481). After it is submitted it is then explored with the Claimant whether he wants it to be dealt with informally. By the 4 January 2022 the Claimant confirms that he wants the grievance dealt with formally and it is then on the 10 January 2022 enquiries are made to find someone to hear the formal grievance (page 333). By the 24 January, J. Oakley was appointed to chair the Claimant's grievance hearing which is scheduled for 26 January 2022 (pages 350 to 351).
133. It is then on the 9 February 2022 that J. Oakley writes to the Claimant confirming the issues and that the meeting had been adjourned to enable her to interview relevant persons. She confirmed at this stage that due to the need to speak to various persons, it would not be possible to complete the grievance within the indicated timescale in the policy (10 days from hearing) (letter at pages 361 to 363). The Claimant does not object to this course, the letter noting the Claimant agrees to it (page 362). J. Oakley interviews 10 different individuals through the grievance process (page 463). The Claimant also sends her further documentation to consider (email dated 16 February 2022, page 437). The outcome is then provided at a hearing on the 2 March 2022 (page 457). The Claimant does not correspond with J Oakley saying he needs a response to his grievance by a particular time.
134. Having carefully considered the grievance process undertaken we do not find the Claimant has proven on the balance of probability that there was unreasonable delay.
135. The claim form was presented on 22 February 2022. The Early Conciliation process with ACAS ran from the 12 January 2022 to the 14 February 2022. Accordingly, any act or omission which took place before 13 October 2021 (which allows for any extension under the Early Conciliation

provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.

136. It was understood from the Claimant's evidence and submissions that he principally argues connection as the reason matters are in time. In his oral evidence the Claimant made numerous references to being subjected to continuous discrimination and that that was the reason he asserted it was discrimination. For example, when asked in cross examination if he accepted there were two distinct periods to his claim, those allegations against KT and CB (2015 to 2019) and then those against others after KT and CB had left (November 2021 onwards), that he did not accept that, saying they are continuous, as they don't allow flexitime for 4 years and that affects health.
137. It was put to the Claimant in cross examination that he had not provided any explanation why he couldn't have brought his claim for matters up to 2019 before he did. The Claimant responded that he had health anxiety and that he was trying to deal with matters internally, he had a child who was one years old, and the way his health was at that time, he blamed himself as he had got unwell, but thought if his attendance improved then he would be treated better. However, after that period he then applied for a post and they did not let him go on secondment, and he says he saw things repeating, and from that he knew they were not going to let him go on secondment and he believed that matters were not going to be resolved internally. Also, that policies had continued and that is what brought him to the Tribunal.
138. What we would observe from this is the Claimant is asserting a continuous state of affairs rather than evidencing such a thing.
139. The Claimant relies upon the bringing of this claim as his protected act for the purposes of his victimisation complaint.
140. The Claimant then alleges (allegations 2.2.21, 3.1.21 and 4.2.1) that after bringing the claim the Claimant was told by KJ that he was being given a secondment with a pay rise, which he undertook. The Claimant applied for a more senior post in May/June 2022 and was not selected for interview.
141. The Claimant clarified that the detrimental part of this allegation is not being selected for interview.
142. This particular allegation was the focus of requests at the start of the final hearing by the Claimant to add additional documents, which was opposed by the Respondent. In considering that application with the parties it was confirmed that KJ asserted the reason the Claimant was not selected, after reviewing anonymised CVs (or as he clarified in his oral evidence, the Respondent's HR style forms like that at page 630 of the bundle), was because ... "HIOW was an extremely political and toxic environment that was going

through its own significant change and, as such, it required a highly experienced Intelligence Partner, capable of acting with full autonomy, and with a displacement of being able to manage aggressive and hostile customers. For a number of months, the only candidates applying for the role were those looking to step up from an Intelligence Manager position. As such, they were completely unqualified to work at that level within such an environment, and as a result, following a review of anonymised CVs, none were put through to interview.”, (paragraph 31 of KJ’s witness statement).

143. KJ during cross examination explained that he had done a “control F” search against job titles in the documents sent to him by HR as PDFs. If the candidate did not have a job title reference at the level of Intelligence Partner or equivalent, he would not consider them for interview for the role. The Claimant’s form, along with the other forms received at that time, did not have that level of job role so were not selected.

144. We were not provided with the copies of the actual HR PDFs KJ looked at. Instead, the hearing bundle contained a copy of the Claimant’s form from an earlier exercise.

145. The Claimant asserted two key things about KJ, that he would have known it was his form when looking at it, and a reference KJ makes about the Claimant having personality issues was without foundation. The Claimant asserts this to promote that KJ made the decision he did because of the Claimant’s race, or because of his protected act.

146. The email dated 11 August 2022 at page 607 of the bundle as written by KJ is critical of the Claimant ... “Under no circumstances would I repeat bringing him into one of my regions as an interim. In terms of an OD plan, I believe that his personality is the issue – and there isn’t any training to address that.”.

147. KJ acknowledged in cross examination that he had not raised any of these matters with the Claimant. It is not in dispute that other than the email there are no other documents about such matters presented to us, save for reference to the Claimant’s application for a substantive Intelligence Partner role at that time of secondment, about which KJ says in the email ... “During the period of the secondment he applied for the substantive IP role, but didn’t get past the shortlisting. With a complete lack of strategic focus, no customer engagement, and what came over as a lack of care for his team, it was obvious that he is a long way from that step up – if indeed he ever is.”.

148. About this matter we have a copy of the Claimant’s interview record (pages 396 to 399). It is signed off by Michelle Skillings who KJ confirmed was the Head of Performance at the relevant CCG (the key stakeholder) and it was her view also about the Claimant in the marking process. The document as

presented to us and explained by KJ provides an independent verification of what KJ tells us.

149. KJ confirmed in cross examination that he did not want to get rid of the Claimant, and he was asked how that squares with his comment ... "Under no circumstances would I repeat bringing him into one of my regions as an interim". KJ clarified that for him the issue was retaining headcount for the client at that time. That appears to have been his focus rather than managing the Claimant's shortcomings as he perceived them. With KJ approaching matters in this way with the Claimant, it is understandable that the Claimant was concerned as to what he read in KJ's email dated 11 August 2022.

150. KJ confirmed that he was not aware of the Claimant's claim form until after he had left the Respondent's employment which was sometime after the decisions he made about the interviews. The Claimant has not presented any evidence to challenge that what KJ tells us is not correct, and we accept what KJ says.

THE LAW

151. The Claimant is alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA").

152. The Claimant complains that the Respondent has contravened a provision of part 5 (work) of the EqA. The Claimant alleges direct discrimination and harassment related to race (having withdrawn the allegations related to religion or belief). He also claims victimisation.

153. The protected characteristic relied upon is race as set out in sections 4 and 9 of the EqA.

154. The Claimant's complaints relating to race are presented as both harassment and/or direct discrimination. With reference to section 212(1) of the EqA the definition of detriment does not include conduct which amounts to harassment. It is therefore appropriate to first determine if a dual pleaded allegation is harassment and if not, to then determine if it is direct discrimination.

Direct discrimination – section 13 Equality Act 2010

155. For a claim for direct discrimination, under section 13(1) of the EqA 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.

156. Direct discrimination claims require a comparison as between the treatment of different individuals i.e., individuals who do not share the protected characteristic in issue. In doing so there must be no material difference between the circumstances relating to each individual (section 23 EqA). The Tribunal therefore must compare 'like with like'.

157. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that 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. However, this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
158. In respect of the burden of proof, there is a two-stage process for analysing the complaint. At the first stage, the Claimant must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent had committed an unlawful act of discrimination against the Claimant. At the second stage, if the Claimant is able to raise a prima facie case of discrimination following an assessment of all the evidence, the burden shifts to the Respondent to show the reasons for the alleged discriminatory treatment and to satisfy the tribunal that the protected characteristic played no part in those reasons (*Igen -v- Wong [2005] EWCA Civ 142* as affirmed in *Ayodele -v- CityLink Ltd [2018] ICR 748*).
159. We also note the recent decision of *Efobi v Royal Mail Group Ltd (2021) ICR 1263* which confirmed that the reverse burden of proof remains good law under the EqA.
160. Also, considering *Madarassy v Nomura International Plc [2007] ICR 867*, Mummery LJ stated: “The Court in *Igen v Wong* expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent “could have” committed an unlawful act of discrimination. 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 act of discrimination”.
161. The burden of proof does not shift to the Respondent simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that the Respondent had committed an unlawful act of discrimination (*Madarassy*). “Could conclude” must mean that “a reasonable Tribunal could properly conclude” from all the evidence before it. This would include evidence adduced by the Claimant in support of the allegations of discrimination. It would also include evidence adduced by the Respondent contesting the complaint.
162. In *Igen* the Court of Appeal cautioned tribunals ‘against too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground’ but made it clear that a finding of ‘unexplained unreasonable conduct’ is a primary fact from which an inference can properly be drawn to shift the burden.

Harassment related to race and/or religion or belief – section 26 Equality Act 2010

163. Section 26 provides:

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

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

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

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

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

164. The Claimant needs to establish, under section 26 EqA, unwanted conduct relating to his race and or religion or belief ((1)(a)), which had the effect of violating his dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him ((1)(b)).

165. In deciding whether the conduct had the effect set out in (1)(b), the Tribunal must take into account the Claimant's perception, other circumstances, and whether it was reasonable for the conduct to have that effect ((4)). The Tribunal must find that a remark, even if offensive or unwanted, for some clear and identifiable reason, related to the protected characteristic (**Tees Esk and Wear Valleys NHS Foundation Trust (appellant) v Aslam and another (respondents) [2020] IRLR 495**).

166. The section (1)(b) test, as a result of section (4), has an *objective element*, i.e., if the Tribunal finds that it was not *reasonable* for the conduct to be regarded as having a derogatory effect, the claim must fail (**Pemberton v Inwood [2018] ICR 1291**).

Victimisation – section 27 Equality Act 2010

167. Section 27 provides:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

168. As Respondent's Counsel reminds us in his written closing submissions a detriment is made out if a reasonable worker would or might take the view that the treatment was in all the circumstances "to his detriment": An unjustified sense of grievance is not a detriment (*Jesudason v Alder [2020] ICR 1226*). As to the question of causation between the protected act and the treatment, the protected act must be more than simply causative of the treatment (in the "but for" sense), it must be a real reason (*Chief Constable v Bailey: [2017] EWCA Civ 425*).

Time Limits

169. Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable.

170. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.

171. Section 123(3)(b) of the EqA, failure to do something, is to be treated as occurring when the person in question decided upon it. Where there is no evidence to the contrary, s.123(4) of the EqA 2010 provides a default means by which the date of the 'decision' can be identified, either when there is an

inconsistent act or alternatively the expiry of the period in which the employer might reasonably have been expected to do it.

172. An ongoing situation or continuing state of affairs amounting to discrimination was considered in **Hendricks v Metropolitan Police Commissioner [2003] IRLR 96**. It is not sufficient to rely on an alleged overarching or floating discriminatory state of affairs without that state of affairs being anchored by discrete acts of discrimination.
173. As Respondent's Counsel reminds us in his written closing submissions one relevant (albeit not necessarily conclusive) factor for determining whether conduct extends over a period, is whether the same or different persons are involved in the conduct complained of (**Aziz v FDA [2010] EWCA Civ 304**).
174. We note the principals from the cases of **British Coal v Keeble [1997] IRLR 336 EAT**; **Robertson v Bexley Community Service [2003] IRLR 434 CA**; and **London Borough of Southwark v Afolabi [2003] IRLR 220 CA**;
175. We note the factors from section 33 of the Limitation Act 1980 which are referred to in the **Keeble** decision:
- a. The length of and the reasons for the delay.
 - b. The extent to which the cogency of the evidence is likely to be affected by the delay.
 - c. The extent to which the parties co-operated with any request for information.
 - d. The promptness with which the claimant acted once he knew the facts giving rise to the cause of action.
 - e. The steps taken by the claimant to obtain appropriate professional advice.
176. We note that the Court of Appeal in the **Afolabi** decision confirmed that, while the checklist in section 33 of the Limitation Act provides a useful guide for tribunals, it need not be adhered to slavishly. The checklist in section 33 should not be elevated into a legal requirement but should be used as a guide. The Court suggested that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time and they are: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).
177. It is also clear from the comments of Auld LJ in **Robertson** that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard ... "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot

hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule".

178. We also note though the recent decision of HHJ Taylor in **Mr N Jones v The Secretary of State for Health and Social Care 2024 EAT 2** (paragraphs 30 and 31) and not relying upon ... "... the comments of Auld LJ at paragraph 25 of *Bexley Community Centre (t/a Leisure Link) v Robertson* [2003] EWCA Civ 576, [2003] IRLR 434, that time limits in the Employment Tribunal are "exercised strictly" in employment cases and that a decision to extend time is the "exception rather than the rule" as if they were principles of law. ... The propositions of law for which Robertson is authority are that the Employment Tribunal has a wide discretion to extend time on just and equitable grounds and that appellate courts should be slow to interfere. The comments of Auld LJ relate to the employment law context in which time limits are relatively short and makes the uncontroversial point that time limits should be complied with. But that is in the context of the wide discretion permitting an extension of time on just and equitable grounds."

179. We are also reminded by Respondent's Counsel in his written closing submissions that when considering the 'just and equitable' test the "best approach" is for the Tribunal 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'" (**Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23**). Further, with reference to **Keeble** that the prejudice each party would suffer as a result of granting or refusing an extension, will involve a consideration of the obvious prejudice of having to meet a claim that would otherwise be defeated by a limitation defence and 'forensic prejudice', which may be suffered where, for example, there are fading memories. Forensic prejudice will be crucially relevant in the exercise of discretion and may well be decisive (**Miller v Ministry of Justice (Appeal No. UKEAT/0003/15)**).

Matters of Evidence

180. Respondent's Counsel in his written closing submissions refers us to the dicta of Leggatt J in **Gestmin SGPS SA v Credit Suisse (UK) Limited [2013] EWHC 3560**, which provides some insight into the potential unreliability of historic oral evidence unsupported by documentation. ... "The relevant principles are as follows:

- a. We are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are;
- b. Memories are fluid and malleable, being constantly rewritten whenever they are retrieved;

- c. External information can intrude into a witness's memory as can his or her own thoughts and beliefs; both can cause dramatic changes in recollection;
- d. Memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory is already weak due to the passage of time."

THE DECISION

- 181. Considering each of the allegations made.
- 182. Based on the way the evidence has been presented to us in this case it is appropriate to consider the first and second allegations together. They are:
 - a. In July 2015 KT refused the Claimant permission to work on flexi-time and compress his hours or permit him to work from home, after he made a formal request in writing; and
 - b. In about August 2016 and in about March 2017 the Claimant made oral requests to KT to compress his hours or work from home to help manage his family because he had 5 children and needed to support his wife. These were refused.
- 183. These two allegations as asserted by the Claimant are inconsistent with and not supported by the evidence presented:
 - a. The Claimant requested by email dated 7 July 2015 to vary his hours (start and finish times) over the five-day week and also his work location to Aylesbury on a Monday and Friday. Or alternatively, to compress his hours over four days a week, not working Fridays. There is no request in writing to work from home.
 - b. What the Claimant requests in that email is not agreed to by KT, but a later start time is, the Claimant is therefore given flexibility around his hours.
 - c. The Claimant's 2015 HR grievance document (pages 84 to 85 of the supplemental bundle) does not make reference to an issue concerning such a refusal on or around July 2015.
 - d. The Claimant does not directly address what he asked for in about August 2016 and in about March 2017 in his witness statements.
 - e. KT gives a much fuller and consistent account of matters, and we accept what she says. There are material differences between the Claimant and

the comparators he names, as to hours of work, work tasks, and the level of client relationship, that in our view clearly demonstrate the difference in treatment is for reasons other than the Claimant's race.

- f. We accept the reasons KT has presented. There is no evidence presented to suggest these decisions relate to race or to infer that it was because of race.

184. In about September 2015 the Claimant gave notice to take leave during Eid. KT responded by saying words to the effect of, 'oh really can your moon come out in an organised manner.' At first KT told the Claimant he would have to come into the office on Eid day. He said he would cover them from home. KT walked off and then returned and said just leave it and would not speak to him for the next few days.

- a. The Claimant withdrew the moon comment allegation during this final hearing.
- b. About the remainder of this allegation, we accept what KT recalls which is more consistent with the 2015 written account, the Claimant referencing that KT says to him he should be at the meeting. This is something she would say if she had expected him to be covering her leave.
- c. Also, what is not clear from the Claimant's allegation and evidence is that the leave was permitted. It was a short notice request that was accommodated, so appears to be more favourable treatment.
- d. We accept the reasons KT has presented. There is no evidence presented to suggest these decisions or comments relate to race or to infer that it was because of race.

185. In about Autumn 2015, KT made the Claimant take unpaid leave when his wife was unwell, and he needed to look after his children. Other team members were permitted to take carers leave.

- a. The explanation provided by KT about this allegation is consistent with the Respondent's Other Leave policy. It is also a more complete and accurate account than the Claimant's, confirming the Claimant had one days paid leave as well as three days unpaid leave. There are also material differences between the Claimant and his named comparator.
- b. We accept the reasons KT has presented. There is no evidence presented to suggest these decisions relate to race or to infer that it was because of race.

186. In January 2016 whilst off sick and having a spell in hospital with pneumonia, the Claimant spoke to KT and said he would be back in April. She said, 'I will believe it when I see it.' the Claimant was told that someone else in the office had the same condition and was back in 4 weeks.

- a. KT denies making such comments, but even if they were made (or thought) by KT, such comments are in our view clearly caused by the way the Claimant is communicating with KT about his absence as can be seen by what is recorded in KT's email dated 29 March 2016 (page 183).
- b. We accept the reasons KT has presented. There is no evidence presented to suggest these comments relate to race or to infer that it was because of race.

187. The Claimant had been due to take leave in January 2016, but he was taken ill with pneumonia. On the Claimant's return to work in April 2016, he asked if he could retake annual leave he was meant to have in January whilst he was on sick leave. KT said, 'Are you going to do that now, that's fine I am going to put you on an attendance management plan.'

- a. KT denies making such a comment and we accept what she says which is consistent with the documents contemporaneous to that time. Respondent's HR confirm in their email sent on 24 June 2016 that they asked KT to start the process a few weeks before, so that would put the request by HR before the Claimant raises the leave request with KT. Also, we note the Claimant in his email at that time refers to unfairness because he is the main carer of a disabled dependent. There is no reference to unfairness because of his race.
- b. What Respondent's HR says is consistent with what happened to the Claimant at that time, as it is not in dispute that by November 2015 the Claimant had reached the trigger threshold for a stage 1 attendance management review, but it was not actioned at that point.
- c. We do not find the Claimant has proven what he alleges on the balance of probability.

188. The Claimant was put on an attendance management plan from April 2016 by KT. The Claimant asked why he was being put on a plan when others in similar circumstances or had taken more sick leave were not. KT told him that 'he should be minding his own business'.

- a. The Claimant was put on a stage 1 attendance plan at this time. The Claimant had hit the triggers to do so by November 2015, then had more sickness and the Respondent's HR instructed KT to start the process.

The Claimant does not identify anyone at the time being treated more favourably than him (despite that being a key context for this allegation), instead comparing himself to others who had absences after him. KT has presented evidence of material differences between them and the Claimant which we accept.

- b. We also accept what KT says as to what she recalls she may have said to the Claimant at that time and her focus was to direct him to focus on his own work and attendance rather than other people's sickness which was a private matter.
 - c. We accept the reasons KT has presented. There is no evidence to suggest these decisions or comments relate to race or to infer they are because of race.
189. Rather than imposing the usual 6-month attendance plan, KT imposed a 12-month plan on the Claimant.
- a. KT denies this, explaining that there was a 12-month rolling trigger period. We accept what she says, which is consistent with the attendance policy.
 - b. We do not find the Claimant has proven what he alleges on the balance of probability.
190. Between 2015 and 2018, the Claimant was required to attend the Wycombe office every day whereas Charlotte Adamson and other white colleagues were allowed to work from sites near their homes. When the Claimant raised he was being treated differently, KT said 'Abbas this is your problem that you talk more about others, you need to focus on yourself.'
- a. This allegation does overlap with the first 2 allegations that focus on flexible working requests. KT has presented reasons why this happened and provides details of material differences between the Claimant and the comparators. Also, what she recalls saying to the Claimant, which is not what the Claimant alleges she said.
 - b. As we have found in respect of the first two allegations and as also applies here, KT gives a much fuller and consistent account of matters, and we accept what she says. There are material differences between the Claimant and the comparators he names, as to hours of work, work tasks, and the level of client relationship, that in our view clearly demonstrate the difference in treatment is for reasons other than the Claimant's race.

- c. We accept the reasons KT has presented. There is no evidence presented to suggest these decisions or comments relate to race or to infer that it was because of race.

191. In 2016 and 2018 the Claimant attended occupational health assessments and recommendations were made but they were not put into place.

- a. It was clarified by the Claimant in his oral evidence that this allegation related to the provision of an air purifier and the undertaking of a stress risk assessment aspects of the OH recommendations.
- b. The air purifier was recommended (subject to it being operationally feasible (page 155)) in August 2016.
- c. The Stress Risk Assessment was suggested in June 2019 (page 163).
- d. The Respondent has presented evidence, which we accept, as to why these things were not done, for the air purifier it was not operationally feasible and for the stress risk assessment it was awaiting the GP report, it not being provided and then the Covid national lock down intervening.
- e. Further, there were recommended adjustments that were implemented, being a phased return, and changes in work location.
- f. The Claimant has not discharged the burden of proof here, to show that these things were not put in place for a reason related to his race or to infer it was because of his race.

192. Based on the way the evidence has been presented to us in this case it is appropriate to consider the next two allegations together. They are:

- a. In October 2018 the Claimant was discouraged from apply for a senior post 8B. KT said, 'Abbas you can barely manage your current post, so if I was you, I would not apply.'
- b. In December 2018, the Claimant was not shortlisted for a Band 8B post, namely for the senior development manager post.

193. These two allegations as asserted by the Claimant are inconsistent with and not supported by the evidence presented. The Claimant has not proven on the balance of probability that KT says what he alleges she says. The Claimant was not shortlisted but that is because the Claimant submitted a conditional expression of interest which could not be accommodated based on the geographical requirements of the role. There is nothing to suggest such a decision relates to race or to infer it is because of the Claimant's race.

194. In February 2019 the Claimant was unwell in the client office he was told by KT not to go into the customer site office as they don't want him there. She said, "Someone senior in the CCG called Emma and the expectation was that someone in the CSU came over to the CCG and take me away, you also told me not to go there as they do not want you there" after this he was not allowed in the CCG office and was told me to go to the Wycombe office every day?. When he objected he asked, "that if tomorrow they say we don't want a black man in our building will you stand by with them? There was no answer given.

- a. KT provides a very full account of this matter and what she says is consistent with emails between the Claimant and his then line manager Hazera Forth at that time (pages 229 and 230). We accept what KT says.
- b. The Claimant has not proven what he alleges on the balance of probability and there is no evidence presented to suggest the decisions or comments that were made relate to race or to infer that it was because of race.

195. Based on the way the evidence has been presented to us in this case it is appropriate to consider the next two allegations together. They are:

- a. In August 2019 he secured a secondment to Buckinghamshire Council. Before applying KT said he could go. After he secured it Ms Woolley said that he could accept it. A few weeks later she said why don't you leave and go there and work instead. Shortly afterwards she changed her mind and refused permission to go on the secondment. Other staff's requests were approved (Zoe Pink and Charlotte Adamson).
- b. In September 2019 the Claimant spoke to CB and explained what happened with Buckinghamshire and he had been made to look a fool. She said it was not her problem and KT could change her mind.

196. The Claimant has not proven what he alleges on the balance of probability. KT says it is worth applying, not that he had been approved for secondment. CB is the person who refuses permission for the secondment, not KT, and CB's reasons are consistent with the Respondent's secondment policy. The applications of the named comparators who were approved for secondment are materially different to the Claimant's as to client/customer relationships and commercial advantageousness. We also accept CB's recall of what she says was communicated to the Claimant about the secondment refusal, which is consistent with the facts found as to the secondment process.

197. Based on the chronology in this claim it is appropriate for us to consider time limit matters at this point. The claim form was presented on 22 February 2022. The Early Conciliation process with ACAS ran from the 12 January 2022

to the 14 February 2022. Accordingly, any act or omission which took place before 13 October 2021 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint. This means that the first 15 of the 20 allegations pursued at this final hearing are potentially out of time, unless connected to something in time, or if not, where it is just and equitable to extend time.

198. We have not found in any of those 15 allegations (as detailed above) that the Claimant has discharged the relevant burden of proof. We do not therefore need to determine the time limit jurisdictional matters. We would observe though that the Claimant's recall about matters from 2015 to 2019 has been unreliable, particularly when compared to KT's recall and the contemporaneous documents. In our view with such evidential prejudice being demonstrated (in that the Claimant focuses on negatives only without relaying the full context, or provides very little specific detail, or is inconsistent with the contemporaneous documents), when compared to the lack of reason presented by the Claimant for the delay in issuing proceedings, it would have resulted in it not being just and equitable to extend time for any of those 15 allegations had any of them been proven.

199. In November 2021, the Claimant applied for a secondment to Bedfordshire NHS Trust. The post was offered to him. His manager, Ms R McCafferty said she did not have a problem with it, but there was a ban on secondment, and he would need to make a proposal to senior managers. It was sent to head of service; a friend of KT and he was told there was a ban on secondment. At this Charlotte Adamson was granted an extension to her secondment.

- a. About this matter we find that the Claimant's secondment application did not engage exceptional circumstances as to why it should be approved (as explained by LW in paragraph 11 of his witness statement). By comparison C Adamson's secondment extension was with a key client, so did do so.
- b. There is no evidence presented to suggest these decisions relate to race or to infer that it was because of race.

200. Based on the way the evidence has been presented to us in this case it is appropriate to consider the next two allegations together. They are:

- a. The Claimant has been denied the opportunity to secure promotions namely in August 2021 for the post of Intelligence Partner the Claimant was interviewed shortly afterwards. He was not given an outcome of the interview.

- b. In December 2021, after finding out someone else had been appointed, he asked why he had not been given feedback, the feedback given to the Claimant for the August 2021 position was inadequate and consisted of him being told by Kevin James, 'Leaders give direction managers give directions' this was done to dissuade him from applying for a further 8b role vacant at that time, which was due to close a week later and had been opened by Mr James. A less experienced colleague, Jack Willis, was appointed into that vacant role.

201. These two allegations as asserted by the Claimant are inconsistent with and not supported by the evidence presented. The Claimant has not proven on the balance of probability that save for the delay; the feedback provided was as he alleges. There is nothing to suggest that the refusal to promote him nor the delay in providing the feedback relates to race or to infer it is because of the Claimant's race.

202. The process of the Claimant's grievance of December 2021 was unreasonably delayed. The outcome the Claimant wanted was to be permitted to go on the Bedfordshire secondment, but the delay essentially prevented it.

- a. Having carefully considered the grievance process undertaken we do not find the Claimant has proven on the balance of probability that there was unreasonable delay.

203. After bringing the claim the Claimant was told by KJ that he was being given a secondment with a pay rise, which he undertook. The Claimant applied for a more senior post in May/June 2022 and was not selected for interview.

- a. The Claimant clarified that the detrimental part of this allegation is not being selected for interview.
- b. KJ explained his selection process and the need for intelligence partner or equivalent experience. No one had it at that time. So, no one was offered an interview.
- c. The Claimant asserts KJ would have known it was his application form and also asserts KJ knew of his claim to the Tribunal. KJ denies these things. We accept the reason KJ gives for the selection for interview decisions, and we accept he did not know about the Claimant's Tribunal claim at that time.

204. For all those reasons the complaints of race related harassment, or direct race discrimination, and victimisation, all fail and are dismissed.

Employment Judge Gray
Dated 28 May 2024

Judgment sent to Parties on
15 June 2024 By Mr J McCormick

For the Tribunal Office