



EMPLOYMENT TRIBUNALS

Claimant: Mr Kennedy Homodza

Respondent: Camden and Islington NHS Foundation Trust

Heard at: London Central Employment Tribunal (via CVP)
On: 16th- 20th October 2023 and 6th November (in chambers)

Before: Employment Judge Singh
Ms G Carpenter
Mr D Shaw

Representation

Claimant: Mr J Edwards (of Counsel)

Respondent: Ms H Patterson (of Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows;

Unfair dismissal

1. The complaint of unfair dismissal is not well-founded and is dismissed.

Race discrimination

2. The complaint of direct race discrimination is not well-founded and is dismissed.
3. The complaint of race related harassment is not well-founded and is dismissed.
4. The complaint of victimisation is not well-founded and is dismissed.

REASONS

Background

1. The Claimant was employed by the Respondent as Band 5 Nurse from 7th September 2018, until his employment ended, by way of resignation, on the 1st May 2021. The Claimant is originally from Zimbabwe.
2. In June 2020, the Claimant transferred from the ward he was previously working in, Laffan Ward to another ward, the Sunderland Ward, at the St Pancras Hospital. He is supervised by Mr Dave Raghoonundun.
3. The Claimant claims that at the Sunderland Ward, there was a clique of staff who were all from the Yoruba tribe in Nigeria. The Claimant claims that because he was not from that group, he was not part of the clique and suffered a number of detriments.
4. The Claimant claims that there was unfair allocation of duties and shifts by the Charge Nurse, Ms Elizabeth Oyewole, who was from the Yoruba tribe and a part of the clique. The Claimant alleges that she favoured other members of the clique when it came to allocation of work.
5. The Claimant claims that he was bullied because he reported staff errors. The Claimant claims that this bullying was because he was not part of the clique.
6. The Claimant claims that he made complaints about this treatment but these were not heeded and instead he suffered further detriments.
7. The Claimant claims that derogatory comments were made about him by members of the clique.
8. The Claimant claims on the 7th December 2020, the clique members made false allegations about the Claimant using the email address of another member of staff, Khadija.
9. The Claimant claims that Ms Oyewole also refused to allocate him a locker because he was not Yoruba and a member of the clique.
10. On 22nd November 2020, the Claimant alleges that he was shouted at by Ms Oyewole regarding how he completed a handover with her.
11. The Claimant states that he raised his concerns on several occasions with Ms Oyewole and with the ward manager, Mr Michael Duggan. Mr Duggan is Ms Oyewole's and Mr Raghoonundun's superior.
12. The Claimant claims that these complaints were ignored. He then raises a complaint with Mr Duggan's superiors, Mr Itai Chikomo and Mr Neil Wells, on the 21st December 2020.

13. The Claimant claims this complaint was ignored as well. He writes again on the 4th January 2021 to say he is unhappy and wishes to transfer to another ward.
14. The Claimant claims that this was also ignored and he therefore resigned his employment on the 22nd March 2021. He continued working however until the end of his employment on the 2nd May 2021.
15. A further incident takes place after his resignation, but before his employment ended, in April 2021. Two members of staff refuse to follow his instructions.
16. The Claimant's complaints are about race discrimination. He alleges that he was treated differently on the ward because he is not from the Nigerian Yoruba tribe. He also alleges he suffered victimisation because he raised complaints about his treatment. He alleges he was forced to resign because of the treatment he was receiving and the fact that his complaints were ignored.

Claims and Issues.

17. The parties were both legally represented and had agreed a list of issues prior to the start of the hearing. They were as follows;

Constructive Dismissal

18. Has the Claimant brought the claim for constructive unfair dismissal within time taking into account any extension of time for taking part in Acas Early Conciliation?
19. If not, was it reasonably practicable to do so?
20. If not, has the claim been brought within such further period as the Tribunal considers reasonable?
21. Was the following a term of the Claimant's contract of employment?

The Claimant has stated that the contractual term relied upon is the express and implied term requiring the Respondent to provide a safe working environment for the Claimant.

22. Did the Respondent commit a fundamental breach of those terms? The Claimant alleges that the accumulation of the following acts amounted to a breach of the Claimant's employment contract:
 - i. From July 2020 the Claimant was subjected to bullying, harassment and victimisation by the Charge Nurse, Elizabeth Oyewole and other nurses from the Yoruba tribe working on the Claimant's ward:

Case No: 2204752/2021

- a) Sometime after November 2020, the Charge Nurse, Elizabeth Oyewole, said the Claimant was a “snitch” for reporting medication errors.
 - b) On 6 April 2021, Olu Sanusi (aka Olu Taibat) and Jean Ndingambote both Health Care Assistants, refused to take instructions from the Claimant.
 - c) On 25 March 2021, Ismail Lawal told the Claimant “you have to stop bleaching” in front of other colleagues.
 - d) On or around May 2020 until the end of 2020, the Charge Nurse, Elizabeth Oyewole refused to allocate bank shifts to the Claimant.
 - e) The Charge Nurse, Elizabeth Oyewole distributed work unfairly by giving the Claimant complex cases. The Claimant alleges that this issue was ongoing throughout the Claimant’s time on the Sutherland ward.
 - f) On 7 December 2020, the Charge Nurse, Elizabeth Oyewole instructed Kadja Mansaray to email Michael Duggan to make false allegations concerning the Claimant’s conduct.
 - g) The Charge Nurse, Elizabeth Oyewole, refused to allocate a locker to the Claimant stating that there were none available. The Claimant alleges that this issue was ongoing throughout the Claimant’s time on the Sutherland ward.
 - h) Around August 2020, Olu Sanusi (aka Olu Taibat) said “why are you here, Sunderland Ward is for Yorubas only, why don’t you go back to Highgate [Ward]”.
- ii. At a meeting in December 2020, the Claimant informed the Charge Nurse, Elizabeth Oyewole that he was being subjected to bullying, harassment and victimisation by Olu, Ismail, Kadja, Julius and Elizabeth herself, but no action was taken.
 - iii. The Claimant informed his line manager Michael Duggan, that he was being subjected to bullying, harassment and victimisation but he failed to respond. In particular:
 - a) The Claimant informed Michael Duggan that Olu Sanusi and Jean Ndingambote, Health Care Assistants, refused to take instructions from him. The Claimant does not recall the date that he reported this to Mr Duggan.
 - b) The Claimant informed his manager that the Charge Nurse, Elizabeth Oyewole, had treated the Claimant less favourably with regard to shift allocation and work. The Claimant alleges that he reported his on multiple occasions but does not recall particular dates.

Case No: 2204752/2021

- iv. The Claimant reported to Michael Duggan, the Ward Manager, and the Charge Nurse, Elizabeth Oyewole, during a meeting his concern that the allocation of patients amongst the team on the ward was unsafe but no action was taken. The Claimant does not recall the date of this meeting.
- v. The Claimant reported medication errors to his line manager, Michael Duggan, that were not being reported to Pharmacy and Mr Duggan to no steps to redress them.
- vi. On 21 December 2020, the Claimant emailed Neil Wells, the Senior Service Manager and Itai Chikomo, the Head of Nursing, raising concerns regarding his ward and no action was taken.
- vii. On 4 January 2021, the Claimant wrote to Michael Duggan, Ward Manager, Neill Wells, Senior Service Manager and Itai Chikomo, Head of Nursing, to request a transfer from his department due to victimisation, discrimination, bullying and harassment but the Claimant did not receive a response.

23. Was the Claimant entitled to resign, in all the circumstances, in response to such a breach?

24. If so, did the Claimant resign in response to that fundamental breach or did the Claimant waive the right to resign?

25. If the Claimant was constructively dismissed, was the dismissal in any case fair?

Direct discrimination on the grounds of race

26. Has the Respondent treated the Claimant less favourably than it treated or would treat others? The Claimant alleges that the following acts or omissions of the Respondent constitute discrimination on the grounds of race?

- i. On or around May 2020 until the end of 2020, the Charge Nurse, Elizabeth Oyewole refused to allocate bank shifts to the Claimant.
- ii. The Charge Nurse, Elizabeth Oyewole distributed work unfairly by giving the Claimant complex cases. The Claimant alleges that this issue was ongoing throughout the Claimant's time on the Sutherland ward.
- iii. Around December 2020 during ward handover the Charge Nurse, Elizabeth Oyewole said to Anthonia, "you are my sister, we are both from Nigeria so if we fight, we should make up because we are both from Nigeria" (referring to the Claimant).

Case No: 2204752/2021

- iv. Sometime after November 2020, the Charge Nurse, Elizabeth Oyewole, said the Claimant was a “snitch” for reporting medication errors.
- v. Around August 2020, Olu Sanusi (aka Olu Taibat) said “why are you here, Sunderland Ward is for Yorubas only, why don’t you go back to Highgate [Ward]”.
- vi. On 7 December 2020, the Charge Nurse, Elizabeth Oyewole instructed Kadja Mansaray to email Michael Duggan to make false allegations concerning the Claimant’s conduct.
- vii. On 25 March 2021, Ismail Lawal told the Claimant “you have to stop bleaching” in front of other colleagues.
- viii. On 6 April 2021, Olu Sanusi (aka Olu Taibat) and Jean Ndingambote, both Health Care Assistants, refused to take instructions from the Claimant.
- ix. The Charge Nurse, Elizabeth Oyewole, refused to allocate a locker to the Claimant stating that there were none available. The Claimant alleges that this issue was ongoing throughout the Claimant’s time on the Sutherland ward.

27. Has the Claimant brought the claim in respect of the above allegations of discrimination within time taking into account any extension of time for taking part in Acas Early Conciliation?

28. If not, would it be just and equitable to extend the time limit for the Claimant to do so?

29. If there has been less favourable treatment, was the reason for such treatment the protected characteristic of race?

30. In respect of the allegations of discrimination on the grounds of the Claimant’s race, the comparators relied on by the Claimant are the nurses on the ward of Yoruba origin-

- Elizabeth Oyewole
- Olu Sanusi (aka Sanusi Taibat)
- Ismail Lawal
- Adekunle Adeniran
- Julius Ayeni

Victimisation

31. Did the Claimant do a protected act? The Claimant alleges that the following were protected acts:

Case No: 2204752/2021

- i. On 9 December 2020 the Claimant complained to Dave Raghoonundun and Michael Duggan that he was not being given shifts and that Elizabeth Oyewole was behind this;
- ii. On 21 December 2020, the Claimant emailed Itai Chikomo and Neill Wells to complain about problems on the ward;
- iii. On 23 December 2020, the Claimant spoke with Itai Chikomo on the telephone and complained of unequal distribution of work and shifts; underhand payments being made by the charge nurse, a dysfunctional clique and race discrimination.
- iv. On 4 January 2021 the Claimant emailed his manager, Michael Duggan, to complain of staff conduct;
- v. On 4 January 2021, the Claimant emailed Itai Chikomo, Neill Wells and Michael Duggan to complain of bullying and harassment on the ward and requested a transfer to another ward.
- vi. During several supervision meetings with Michael Duggan, the Claimant complained about Elizabeth Oyewole's lack of professionalism, ill treatment of patients by Elizabeth and Ismail, being discriminated against by Elizabeth in allocation of duties, rota.
- vii. On several occasions the Claimant spoke with Michael Duggan and complained of patient allocation, clique forming in the ward, harassment and intimidation by Elizabeth Oyewole, medication errors, bullying, patient care, drug errors, medication overdose, staff conduct.
- viii. On 04 January 2021, the Claimant wrote an email to Michael Duggan reminding him that he has written a few emails to him concerning staff conduct, patient allocation, drug errors and medication overdose.
- ix. On 6 April 2021, the Claimant emailed Michael Duggan complaining that staff refused to accept tasks from him.
- x. On 6 April 2021, the Claimant emailed Michael Duggan and reported that Jean Ndimgambote refused to accept work allocated to him whilst the Claimant was leading the team.

32. Do the alleged protected acts fall within the scope of protected acts listed in section 27(2) of the Equality Act 2010?

33. Insofar as the protected act relied on constitutes allegations made by the Claimant, is the Claimant prevented from relying on those allegations because they were false and not made in good faith?

34. Has the Respondent subjected the Claimant to a detriment because he had done a protected act? The Claimant relies on the following alleged detriments:

- i. Sometime after November 2020, the Charge Nurse, Elizabeth Oyewole, said the Claimant was a “snitch” for reporting medication errors.
- ii. On 6 April 2021, Olu Sanusi (aka Olu Taibat) and Jean Ndingambote (a black French man), both Health Care Assistants, refused to take instructions from the Claimant.
- iii. On 25 March 2021, Ismail Lawal told the Claimant “you have to stop bleaching” in front of other colleagues.
- iv. On or around May 2020 until the end of 2020, the Charge Nurse, Elizabeth Oyewole refused to allocate bank shifts to the Claimant.
- v. The Charge Nurse, Elizabeth Oyewole distributed work unfairly by giving the Claimant complex cases. The Claimant alleges that this issue was ongoing throughout the Claimant’s time on the Sutherland ward.
- vi. On 7 December 2020, the Charge Nurse, Elizabeth Oyewole instructed Kadja Mansaray to email Michael Duggan to make false allegations concerning the Claimant’s conduct.
- vii. The Charge Nurse, Elizabeth Oyewole, refused to allocate a locker to the Claimant stating that there were none available. The Claimant alleges that this issue was ongoing throughout the Claimant’s time on the Sutherland ward.
- viii. Around August 2020, Olu Sanusi (aka Olu Taibat) said “why are you here, Sunderland Ward is for Yorubas only, why don’t you go back to Highgate [Ward]”.

35. Has the Claimant brought the claim in respect of the above allegations of victimisation within time taking into account any extension of time for taking part in Acas Early Conciliation?

36. If not, would it be just and equitable to extend the time limit?

Harassment

37. Did the Respondent act as follows:

- i. On 25 March 2021, Ismail Lawal told the Claimant “you are too fat, after COVID-19 finishes, you should start going to the gym” in front of other members of staff.
 - ii. On 22 November 2020 the Charge Nurse, Elizabeth Oyewole shouted at the Claimant asking why he had not completed the handover.
 - iii. On December 2020, the Charge Nurse, Elizabeth Oyewole screamed at the Claimant “I am the Deputy Manager of this place; I do not get handover from anybody that is not qualified staff” and said she wanted to fight the Claimant.
 - iv. The Claimant informed his manager, Michael Duggan, that Elizabeth Oyewole had screamed at him and said she wanted to fight him, but no action was taken.
38. If the Respondent did any or all of those things, did such action or inaction amount to unwanted conduct related to the Claimant's race?
39. If so, did the conduct have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, having regard to all the circumstances and whether it is reasonable for it to have that effect?
40. Has the Claimant brought the claim in respect of the above allegations of harassment within time taking into account any extension of time for taking part in Acas Early Conciliation?
41. If not, would it be just and equitable to extend the time limit?

The hearing

42. The hearing had originally been listed for 6 days but, due to lack of available judges had to be curtailed to 4 days. It was agreed that the time available would be used only to deal with the merits and, if the Claimant was successful with any part of the claim, remedy could be dealt with at a later hearing.
43. Neither party had an issue with the shorter length and agreed that submissions would be in writing to assist the tribunal.
44. The tribunal heard evidence from the following witnesses
- a. The Claimant
 - b. Mr M Duggan
 - c. Mr I Chikomo
 - d. Mr N Wells
 - e. Ms E Oyewole
 - f. Ms O Sanusi
 - g. Mr I Lawal

45. There was also a bundle of 307 pages and a chronology which was of assistance.

The law

Constructive dismissal

46. The Claimant resigned his employment on the 22nd March 2021 and it terminated with effect on the 2nd May 2021. The onus is on the Claimant to establish that his resignation amounted to a constructive dismissal.

47. So far as relevant, Section 95(1) of the Employment Rights Act 1996 (“ERA”) provides that an employee is dismissed if and only if

“(c) the employee terminates the contract under which he is employed...in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.”

48. The circumstances in which an employee is entitled to terminate a contract without notice by reason of the employer’s conduct are to be judged according to the common law. A claimant must establish a repudiatory breach of contract by the respondent.

49. In *Malik –v- BCCI SA* [1997] IRLR 462 HL this was described as occurring where the employer’s conduct so impacted upon the employee that, viewed objectively, the employee could properly conclude that the employer was repudiating the contract.

50. The Claimant is required to prove that:-

- a. There was an actual or anticipatory breach of a contractual term by the respondent;
- b. That the breach was sufficiently serious (fundamental) to justify his resignation;
- c. That he resigned in response to the breach and not for any other reason; and
- d. That he did not delay too long in resigning.

51. The Claimant’s argument in this case is that by behaving towards him as it did and allowing him to be subject to the acts of discrimination, the Respondent was in breach of the implied term of mutual trust and confidence.

52. The implied term of trust and confidence was described by the House of Lords in *Malik –v- BCCI SA* [1997] IRLR 462 HL as a term that

“the employer shall not, without reasonable and proper cause conduct itself in a manner calculated and [or] likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.”

53. If the Claimant is able to establish that he was constructively dismissed, it turns to the Tribunal to consider if the dismissal was unfair or not.

Direct discrimination

54. Section 13 of the Equality Act 2010 states

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

55. In **Shamoon v Chief Constable of the Royal Ulster Constabulary** (2003) ICR 337, Lord Nicholls in the House of Lords (NI) said that the Tribunal should focus on the primary question which was why the complainant was treated as he or she was? The issue essentially boiled down to a single question: did the complainant, because of a protected characteristic, receive less favourable treatment than others? At paragraphs 7 of his judgment we find the following passage:

"Thus the less favourable treatment issue is treated as a threshold which the Claimant must cross before the tribunal is called upon to decide why the Claimant was afforded the treatment of which she is complaining.

56. And further at paragraph 11:

"Employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others."

57. In **Nagarajan v London Regional Transport** (1999) ICR 877, a case concerned with the definition of direct discrimination under the previous legislation of the Race Relations Act 1976 (which referred to treatment 'on racial grounds'), the House of Lords considered the proper approach to dealing with discrimination cases. In that case Lord Nicholls said:

"a variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds... had a significant influence on the outcome, discrimination is made out'. The crucial question, in every case, was 'why the complainant received less favourable treatment..?'"

58. In **Chief Constable of West Yorkshire Police v Khan** (2001) ICR 1065 the House of Lords made it clear that in a case of alleged subjective discriminatory treatment the test to be adopted

was: a tribunal must ask itself why did the alleged discriminator act as he or she did? What, consciously or unconsciously, was his or her reason?

59. In the case of **Stockton on Tees Borough Council v Aylott** [2010] ICR 1278, CA, Mummery LJ (at paragraph 49) said:

'Direct discrimination claims must be decided in accordance with the evidence, not by making use, without requiring evidence, of a verbal formula such as "institutional discrimination" or "stereotyping" on the basis of assumed characteristics. There must be evidence from which the employment tribunal could properly infer that wrong assumptions were being made about that person's characteristics and that those assumptions were operative in the detrimental treatment.'

Harassment

60. Section 26 of the Equality Act 2010 states that

(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.

61. In **Richmond Pharmacology v Dhaliwal** [2009] ICR 724, EAT, Mr Justice Underhill P gave guidance on the elements of harassment as defined under the Race Relations Act 1976 (which was in slightly different terms to section 26 EA 2010). Underhill LJ revised that guidance as it applies to section 26 in the case of **Pemberton v Inwood** [2018] ICR 1291, CA, as follows (at paragraph 88):

"In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of subsection (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances—subsection (4)(b)..... The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

62. In **GMB v Henderson** [2017] IRLR 340, the Court of Appeal said that in deciding whether the unwanted conduct 'relates to' the protected characteristic the Tribunal would need to give consideration to the mental processes of the putative harasser.

Victimisation

63. Victimisation is set out in section 27 of the Equality Act 2010

- (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.

64. In a victimisation claim there is no need for a comparator. The Act requires the tribunal to determine whether the claimant had been subject to a detriment because of doing a protected act. As Lord Nicholls said in **Chief Constable of the West Yorkshire Police v Khan [2001] IRLR 830**:-

“The primary objective of the victimisation provisions...is to ensure that persons are not penalised or prejudiced because they have taken steps to exercise their statutory right or are intending to do so”.

65. The Tribunal has to consider (1) the protected act being relied on; (2) the detriment suffered; (3) the reason for the detriment; (4) any defence; and (5) the burden of proof.

66. To get protection under the section the claimant must have done or intended to or be suspected of doing or intending to do one of the four kinds of protected acts set out in the section. The allegation relied on by the claimant must be made in good faith. It is not necessary for the claimant to show that he or she has a particular protected characteristic but the claimant must show that he or she has done a protected act. The question to be asked by the Tribunal is whether the claimant has been subjected to a detriment. There is no definition of detriment except to a very limited extent in Section 212 of the Act which says “Detriment does not ... include conduct which amounts to harassment”. The judgment in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285** is applicable.

67. The protected act must be the reason for the treatment which the claimant complains of, and the detriment must be because of the protected act. There must be a causative link between the protected act and the victimisation and accordingly the claimant must show that the respondent knew or suspected that the protected act had been carried out by the claimant, see

South London Healthcare NHS Trust v Al-Rubeyi EAT0269/09. Once the Tribunal has been able to identify the existence of the protected act and the detriment the Tribunal has to examine the reason for the treatment of the claimant. This requires an examination of the respondent's state of mind. Guidance can be obtained from the cases of **Nagarajan v London Regional Transport [1999] IRLR 572**, **Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830**, and **St Helen's Metropolitan Borough Council v Derbyshire [2007] IRLR 540**. In this latter case the House of Lords said there must be a link in the mind of the respondent between the doing of the acts and the less favourable treatment. It is not necessary to examine the motive of the respondent see **R (on the application of E) v Governing Body of JFS and Others [2010] IRLR 136**. In **Martin v Devonshires Solicitors EAT0086/10** the EAT said that:

"There would in principle be cases where an employer had dismissed an employee in response to a protected act but could say that the reason for dismissal was not the act but some feature of it which could properly be treated as separable."

68. In establishing the causative link between the protected act and the less favourable treatment the Tribunal must understand the motivation behind the act of the employer which is said to amount to the victimisation. It is not necessary for the claimant to show that the respondent was wholly motivated to act as he did because of the protected acts, **Nagarajan**. In **Owen and Briggs v James [1982] IRLR 502** Knox J said:-

"Where an employment tribunal finds that there are mixed motives for the doing of an act, one or some but not all of which constitute unlawful discrimination, it is highly desirable for there to be an assessment of the importance from the causative point of view of the unlawful motive or motives. If the employment tribunal finds that the unlawful motive or motives were of sufficient weight in the decision making process to be treated as a cause, not the sole cause but as a cause, of the act thus motivated, there will be unlawful discrimination."

69. In **O' Donoghue v Redcar and Cleveland Borough Council [2001] IRLR 615** the Court of Appeal said that, if there was more than one motive, it is sufficient that there is a motive that is a discriminatory reason, as long as this has sufficient weight. Conscious motivation is not a prerequisite for a finding of discrimination. It is therefore immaterial whether a discriminator did not consciously realise they were prejudiced against the complainant because the latter had done a protected act. An employer can be liable for discrimination or victimisation even if its motives for the detrimental treatment are benign.

Burden of Proof

70. Section 136 of the Equality Act 2010 states:

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

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But sub-Section (2) does not apply if (A) shows that (A) did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.

(5) This Section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to –

(a) An Employment Tribunal.”

71. Guidance has been given to Tribunals in a number of cases. In *Igen v Wong* [2005] IRLR 258 and approved again in **Madarassy v Normura International plc** [2007] EWCA 33.

72. To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against him. If the claimant does this, then the respondent must prove that it did not commit the act. This is known as the shifting burden of proof. Once the claimant has established a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), the burden of proof shifts to the respondent to disprove the allegations. This will require consideration of the subjective reasons that caused the employer to act as he did. The respondent will have to show a non-discriminatory reason for the difference in treatment. In the case of **Madarassy** the Court of Appeal made it clear that the bare facts of a difference in status and a difference in treatment indicate only a possibility of discrimination: “They are not, without more, sufficient material from which a tribunal ‘could conclude’ that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination”.

73. In the case of **Strathclyde Regional Council v Zafar** [1998] IRLR36 the House of Lords held that mere unreasonable treatment by the employer “casts no light whatsoever” to the question of whether he has treated the employee “unfavourably”.

74. In **Law Society and others v Bahl** [2003] IRLR 640 the EAT agreed that mere unreasonableness is not enough. Elias J commented that

“all unlawful discriminatory treatment is unreasonable, but not all unreasonable treatment is discriminatory, and it is not shown to be so merely because the victim is either a woman or of a minority race or colour...Simply to say that the conduct was unreasonable tells nothing about the grounds for acting in that way ... The significance of the fact that the treatment is unreasonable is that a tribunal will more readily in practice reject the explanation given for it than it would if the treatment were reasonable.”

75. A Tribunal must also take into consideration all potentially relevant non-discriminatory factors that might realistically explain the conduct of the alleged discriminator.

Findings

76. Many of the issues overlapped. Acts which were pleaded under direct discrimination were also acts which the Claimant claimed had breached the implied duty of mutual trust and confidence in relation to his constructive dismissal argument.

77. The primary issue for the tribunal to determine was whether or not those acts had actually occurred. Almost all the acts were disputed by the Respondent. It was therefore necessary to make findings of fact regarding the incidents in the first instance.

78. In relation to many elements, the tribunal did not consider the Claimant a credible witness. A number of the allegations the Claimant made were contradictory to the documentary evidence.

79. Some of the allegations were clarified by the Claimant during his cross examination and when he explained what he was unhappy about, it was clear that this did not form the basis of an Employment Tribunal claim.

80. In contrast, the Respondent's witnesses were more consistently clearer. This was particularly the case with Ms Oyewole. Although she seemed to have a firm demeanour, the tribunal believed that her responses to the questions under cross examination were honest and straightforward. Nonetheless, credibility was determined for each response that each witness gave and not on a general basis.

81. I will deal with the claim for direct discrimination first of all as it covered most of the allegations. The findings of fact in relation to those allegations carry over to some of the other complaints and I will refer back to them as appropriate.

Direct discrimination

On or around May 2020 until the end of 2020, the Charge Nurse, Elizabeth Oyewole refused to allocate bank shifts to the Claimant.

82. We found that this act did not occur.
83. The Claimant's allegation revolved around additional shifts that staff could be given. Ordinary shifts were allocated to all staff based on their contracted hours. If there were any spare hours, they would be distributed amongst staff. This was a benefit to staff as they would receive additional pay for working these bank shifts.
84. We heard evidence from Mr Duggan who confirmed that there was, initially, no procedure or rule as to how these shifts were doled out. Ms Oyewole said that she call or email around staff to find out who was free in order that the shifts could be allocated.
85. The Claimant claimed that Ms Oyewole favoured the other Yoruba staff when allocating these shifts. He alleged that they would get first choice and only if they refused where they offered to non-Yoruba staff.
86. The wording of the allegation here however wasn't that there was an unequal distribution of the shifts. The Claimant's allegations in the list of issues was that Ms Oyewole refused to allocate any bank shifts to him at all.
87. As stated above, the Claimant's evidence was contradicted by the documents. We were provided with copies of the shifts/rotas and it was clear from a sample in the period May 2020- December 2020 that the Claimant was allocated some hours above his contracted hours.
88. As such, his argument that Ms Oyewole refused to allocate bank shifts to him was plainly untrue. The Claimant did not say that he had been allocated the shifts by someone else so only Ms Oyewole could have done this.
89. As there was no detriment and no less favourable treatment, this claim failed.

The Charge Nurse, Elizabeth Oyewole distributed work unfairly by giving the Claimant complex cases. The Claimant alleges that this issue was ongoing throughout the Claimant's time on the Sutherland ward.

90. This allegation centred on the type of work that the nurses did on the ward.
91. The Claimant alleged that he was given the most complex cases or difficult patients to work with by Ms Oyewole, where as the Yoruba staff were given easier patients.
92. The issue regarding this allegation was that Mr Duggan confirmed that Ms Oyewole did not actually distribute the work. That responsibility fell to Mr Duggan and the Claimant's supervisor Dave Raghoonundun.
93. There was no allegation that Mr Duggan or Mr Raghoonundun treated any staff differently because they were not Yoruba,

94. Further, the Claimant took us through one of the documents showing the allocation of patients. It was clear from the this that the reason the Claimant was given more complex cases was because of his seniority and experience. The other patients given to other band 5s (whether Yoruba or not) were of similar complexity.
95. On that basis, the Claimant could not establish that there had been any less favourable treatment and this claim also failed.

Around December 2020 during ward handover the Charge Nurse, Elizabeth Oyewole said to Anthonia, "you are my sister, we are both from Nigeria so if we fight, we should make up because we are both from Nigeria" (referring to the Claimant).

96. This complaint was difficult for the tribunal to understand. It was not apparent how this could be discrimination in any of its forms under the Equality Act 2010.
97. The Claimant and his representative were unable to explain how this would be less favourable treatment or harassment.
98. Leaving that to one side, the tribunal in any event found that this act did not occur. Ms Oyewole denied making any such comment and, as stated, we found her to be a credible witness.
99. In contrast, the Claimant could not give any specific details about this alleged comment. He was unable to confirm when it was said, where, or if anyone else was present. This added to the doubt the tribunal already had about the comment.
100. The tribunal therefore found that this claim failed.

Sometime after November 2020, the Charge Nurse, Elizabeth Oyewole, said the Claimant was a "snitch" for reporting medication errors.

101. The Claimant alleged that shortly after joining the ward he reported that some of the other staff were making errors in the medications they were giving to patients. The Claimant alleges that when Ms Oyewole found out about this she called him a snitch. The Claimant alleges that this was because he was not a member of the Yoruba tribe and not in the clique.
102. Whilst it was accepted that the Claimant had raised medication errors we did not find that he had been called a snitch by Ms Oyewole. Ms Oyewole denied the comments.
103. The Claimant was unable to provide specific details again about the comment. Under cross examination his position changed regarding the number of times the comment had been made.
104. One thing against the Claimant was that around that time he raised several issues with his line manager. In all his complaints he never once

mentioned this comment and the tribunal decided that if the comment had been made, the Claimant would have included it.

105. The tribunal did not find the Claimant credible in relation to this comment and therefore found that it did not happen.
106. Further, the Claimant did not show that this would amount to less favourable treatment. It was clear that other staff would be upset if someone reported them for more making medication errors. There was no evidence that a Yoruba member of staff would have been treated any differently or better.
107. This complaint therefore failed.

Around August 2020, Olu Sanusi (aka Olu Taibat) said “why are you here, Sunderland Ward is for Yorubas only, why don’t you go back to Highgate [Ward]”.

108. The Claimant claimed that this comment was made shortly after joining Sunderland Ward. He alleged Ms Sanusi was telling him to go back to his previous ward and that he wouldn’t be accepted at Sunderland Ward.
109. Ms Sanusi was questioned about this comment and she denied saying it. Again, we found her to be a much more credible witness than the Claimant and preferred her evidence on this.
110. Again the Claimant had not included this comment in the contemporaneous complaints he had made. This again made us doubt that the comment had been made.
111. As we found that this comment had not been made, this complaint also failed.

On 7 December 2020, the Charge Nurse, Elizabeth Oyewole instructed Khadija Mansaray to email Michael Duggan to make false allegations concerning the Claimant’s conduct.

112. The Claimant alleged that Ms Oyewole persuaded another member of staff to make an allegation about the Claimant in order to get him into trouble.
113. This allegation was denied by Ms Oyewole. As stated, we found her to be credible in relation to this allegation, compared to the Claimant.
114. There was a gaping hole in the evidence as the Claimant could not produce the email that he was complaining about. The absence of that email cast doubt on this event having occurred.
115. As the tribunal found there had been no act of less favourable treatment, this claim failed.

On 25 March 2021, Ismail Lawal told the Claimant “you have to stop bleaching” in front of other colleagues.

116. The Claimant complained that this comment was made to him and was derogatory as it referred to his lighter skin tone.
117. Mr Lawal denied making such a comment and he came across a credible witness.
118. During his questioning about the comment, the Claimant alleged that there had been 3 people witnessing it being made but could not say who. We also noted that the Claimant did not include this in any of the emails he was sending to his superiors at the time. This was a very serious allegation about a very hurtful comment and we cannot accept that the Claimant would have overlooked raising it if it had happened.
119. The tribunal found that this comment was not made and as there was no less favourable treatment, this complaint also failed.

On 6 April 2021, Olu Sanusi (aka Olu Taibat) and Jean Ndingambote, both Heath Care Assistants, refused to take instructions from the Claimant.

120. The Claimant alleges that he asked 2 members of staff to carry out his instructions and they refused.
121. The tribunal accepted that these acts did occur. In relation to Ms Sanusi, she admitted that she had done this.
122. However, we did not find that these amounted to less favourable treatment. In relation to Ms Sanusi she gave very frank evidence about the fact that she only works to the time her shift is due to end. This was because she had other responsibilities. She did not do work after the end of her shift and this was the reason she refused to carry out the instructions of the Claimant. The tribunal believed her and found that a Yoruba member of staff would have been treated the same way.
123. In relation to Mr Ndingambote, he was not a member of the Yoruba tribe and not a part of the clique that the Claimant was complaining about. The Claimant therefore did not persuade us that he had been treated differently because he was not Yoruba. There was no evidence that a Yoruba tribe member would have been treated more favourably by Mr Ndingambote.
124. The claim in relation to this allegation failed.

The Charge Nurse, Elizabeth Oyewole, refused to allocate a locker to the Claimant stating that there were none available. The Claimant alleges that this issue was ongoing throughout the Claimant’s time on the Sutherland ward.

125. The Claimant claimed that he was not provided with a locker because he was not a Yoruba tribe member. The Claimant claimed that this was deliberate act by Ms Oyewole.
126. During the Claimant's cross examination, it became apparent that this claim was factually incorrect. The Claimant admitted that he had actually been given a locker when presented with photographs which showed one with his initials on it.
127. This claim therefore failed as there was no act of less favourable treatment.
128. None of the Claimant's claims for direct discrimination were successful as the tribunal found that the alleged acts of discrimination had not occurred.

Victimisation

129. The Claimant alleged that he had made 10 complaints that amounted to protected acts for the purposes of a victimisation claim. The Claimant alleged that he had been subjected to detriments because of those.
130. The Claimant relied upon the following complaints as protected acts.
- i. On 9 December 2020 the Claimant complained to Dave Raghoonundun and Michael Duggan that he was not being given shifts and that Elizabeth Oyewole was behind this;
 - ii. On 21 December 2020, the Claimant emailed Itai Chikomo and Neill Wells to complain about problems on the ward;
 - iii. On 23 December 2020, the Claimant spoke with Itai Chikomo on the telephone and complained of unequal distribution of work and shifts; underhand payments being made by the charge nurse, a dysfunctional clique and race discrimination.
 - iv. On 4 January 2021 the Claimant emailed his manager, Michael Duggan, to complain of staff conduct;
 - v. On 4 January 2021, the Claimant emailed Itai Chikomo, Neill Wells and Michael Duggan to complain of bullying and harassment on the ward and requested a transfer to another ward.
 - vi. During several supervision meetings with Michael Duggan, the Claimant complained about Elizabeth Oyewole's lack of professionalism, ill treatment of patients by Elizabeth and Ismail, being discriminated against by Elizabeth in allocation of duties, rota.
 - vii. On several occasions the Claimant spoke with Michael Duggan and complained of patient allocation, clique forming in the ward, harassment and intimidation by Elizabeth Oyewole, medication errors, bullying, patient care, drug errors, medication overdose, staff conduct.
 - viii. On 04 January 2021, the Claimant wrote an email to Michael Duggan reminding him that he has written a few emails to

him concerning staff conduct, patient allocation, drug errors and medication overdose.

- ix. On 6 April 2021, the Claimant emailed Michael Duggan complaining that staff refused to accept tasks from him.
- x. On 6 April 2021, the Claimant emailed Michael Duggan and reported that Jean Ndingambote refused to accept work allocated to him whilst the Claimant was leading the team.

131. For a complaint to be a protected act for the purposes of a victimisation claim, there needs to be an allegation that someone has contravened the Equality Act 2010. In short, there must be an allegation that someone has carried out an act of discrimination. This can be an implied allegation.

132. The protected acts can be divided into two types- the ones by email and the verbal complaints.

The email complaints

133. None of the email complaints made any explicit mention of race discrimination. The Claimant's case is he was aware that he was being singled out because he was not a Yoruba member, but strangely, he does not say this openly in any of the complaints he relies upon.

134. As stated, the allegation does not have been express. In order for the tribunal to find that there is an implied allegation of discrimination, we should consider whether it is reasonable, based on all the information available to them, for the Respondent to understand that the Claimant is implying that discrimination is occurring or has occurred or is likely.

135. For the first potential protected acts by email (21st December 2020), the tribunal could also not find that an allegation of discrimination could one be implied based on the surrounding information available to the Respondent. Whilst it was clear that the Claimant was complaining about perceived detrimental treatment, there was no mention of this treatment being because of a clique or because the Claimant was not Yoruba.

136. In the next complaint, the email on the 4th January 2021, the Claimant complains about bullying and harassment. This email doesn't explicitly mention discrimination but had been preceded by a telephone call (on the 23rd December 2020 with Mr Chikomo) in which we accept that the Claimant mentioned race discrimination. Following that information being provided to them, we find that the Respondent would have been able to understand that the Claimant was implying in his subsequent complaints that he was being subjected to race discrimination.

137. The tribunal therefore accepted that the email complaints from the 4th January 2021 would meet the requirements to be protected acts under the Equality Act 2010.

Verbal complaints

138. The tribunal accepts that on the 23rd December 2020, the Claimant spoke to Mr Chikomo that he mentions that he was concerned that a

clique was forming and raised complaints about race discrimination. Mr Chikomo accepted this in his evidence. This would therefore amount to a protected act.

139. The 2 other verbal complaints were more vague. The Claimant claimed that he raised issues about his treatment at work with Mr Duggan on several occasions during supervision meetings and outside them.
140. When questioned, it became apparent that the Claimant deemed any informal conversation with Mr Duggan as a supervision meeting. This explained why there was no record of any such meeting.
141. However, Mr Duggan denied these conversations had taken place and that the Claimant had explicitly or impliedly made complaints about discrimination. Given the Claimant could not give specific details about the conversations, we found that they did not occur.

Detriments

142. Given we found that protected acts had occurred, we then turned to consider whether the Claimant had been subjected to detriments because of those protected acts.
143. Some of those detriments have already been found to have not occurred, as above. They were as follows:
 - a. The “snitch” allegation
 - b. The “bleaching” allegation
 - c. The allegation regarding bank shifts
 - d. The allegation about distribution of work.
 - e. The allegation regarding Khadija Mansaray
 - f. The locker allegation
 - g. The “go back to Highgate” allegation.
144. The only remaining alleged detriment that we found had occurred was the incident with Ms Sanusi and Mr Ndimgambote on the 6th April 2021. As stated, we do accept that the two individual declined to follow the Claimant’s instructions.
145. However, we did not find that there was a causal relationship between this act and the protected acts.
146. In relation to Ms Sanusi, she gave an explanation for her actions which the tribunal accepted. This was unrelated to the fact that the Claimant was Yoruba and, for the purposes of this complaint, was unrelated to the fact that the Claimant had made any complaint.
147. Mr Ndimgambote did not give an explanation but there was no evidence to link his actions with any of the protected acts. In fact, it appeared he would not have been aware of the complaints that the Claimant had made at all. The Claimant had made them to his superiors and there was no suggestion by the Claimant that knowledge of the protected acts was passed to Mr Ndimgambote.

148. As the Claimant could not establish a link between the detriments and the protected acts, his complaint of victimisation failed.

Unfair Dismissal

149. The Claimant resigned his employment. As there was no express dismissal, he would need to show that he was constructively dismissed in order to be able to proceed with a claim for unfair dismissal.

150. A constructive dismissal occurs when a person resigns because of a fundamental breach of contract by the employer. This can be a breach of an implied or an express term.

151. In this case, the Claimant relied upon the term to provide a safe working environment for him. The Claimant claimed this was an express and an implied term.

152. The tribunal accepts that there would be an implied term that a safe working environment should be provided for staff by an employer.

153. We then turned to look at whether this had been breached. The Claimant relied upon a number of alleged acts which he said accumulated together to form a breach.

From July 2020 the Claimant was subjected to bullying, harassment and victimisation by the Charge Nurse, Elizabeth Oyewole and other nurses from the Yoruba tribe working on the Claimant's ward

154. The first act the Claimant relied upon was the bullying and harassment he had suffered at the hands of Ms Oyewole and the other Yoruba nurses.

155. As stated above, we found that none of these had occurred. As such, these could not form part of an accumulation of acts which breach the requirement to provide a safe working environment.

At a meeting in December 2020, the Claimant informed the Charge Nurse, Elizabeth Oyewole that he was being subjected to bullying, harassment and victimisation by Olu, Ismail, Kadja, Julius and Elizabeth herself, but no action was taken.

156. The Claimant next alleged that the implied term had been breached in December 2020, when he informed Ms Oyewole of the bullying and harassment and she had taken no action.

157. Factually, the tribunal found that this did not occur. Ms Oyewole denied that the Claimant had raised such complaints with her.

158. The Claimant could not provide any specific details to help verify the incident. Further, he could not explain why he would raise the complaints with Ms Oyewole if she was one of the perpetrators. The Claimant had other superiors he could turn to if he wanted to make complaints to it was not reasonable to believe he would go to Ms Oyewole.

159. The tribunal therefore found that this incident had not occurred and could not be part of any accumulated acts.

The Claimant informed his line manager Michael Duggan, that he was being subjected to bullying, harassment and victimisation but he failed to respond.

160. The Claimant next alleged that he had reported incidents to Mr Duggan and that he had failed to respond. The tribunal accepted that if complaints had been made and ignored this could potentially breach the implied term to provide a safe working environment.

161. The first of the complaints to Mr Duggan that the Claimant relied upon was about the actions of Ms Sanusi and Mr Ndingambote. The tribunal noted that these incidents occurred on the 6th April 2021. The Claimant had already submitted his notice on 22nd March 2021. As the incidents being complained about occurred after the date of resignation, the complaint to Mr Duggan must have also been post-resignation. As such, this could not have contributed to the Claimant's dismissal and therefore would not be relevant for the purposes of a constructive dismissal claim.

162. The second set of complaints to Mr Duggan related to Ms Oyewole treating the Claimant less favourably in relation to shift and work allocation.

163. Although the tribunal had already decided that Ms Oyewole had not treated the Claimant unfavourably in relation to shift allocation or work, it accepted that the Claimant could have still submitted a genuine complaint that he believed he was being treated unfavourably. If Mr Duggan had ignored him then this could potentially breach the implied term that required the Respondent to ensure there was a safe working environment for the Claimant.

164. In relation to both complaints the Claimant said that he made the complaints on multiple occasions but could not provide details of them.

165. In relation to the complaint that there was unfair allocation of shifts, we found that the Claimant did raise this on at least one occasion. There was a file note of the 5th December 2020 at page 138. In the note, Mr Duggan confirms that the Claimant raised concern about shift allocation.

166. However, it was not accepted by the tribunal that Mr Duggan did not respond to this or ignored the Claimant's concerns. There was a meeting about it, so clearly Mr Duggan responded. Mr Duggan also set out in that meeting an action to tackle the Claimant's concerns- he would himself take over the shift allocation. In cross examination the Claimant confirmed

that he was satisfied with Mr Duggan's response. This complaint therefore could not succeed.

167. Similarly, we accepted that the Claimant raised work allocation with Mr Duggan on at least one occasion and again Mr Duggan responded to this. In the email at page 140 of the bundle, of the 9th December 2021, Mr Duggan explains that work allocation is based on experience and Band levels.

168. As such, the Claimant's argument about Mr Duggan not responding was not correct and this could not form part of any accumulation of acts.

The Claimant reported to Michael Duggan, the Ward Manager, and the Charge Nurse, Elizabeth Oyewole, during a meeting his concern that the allocation of patients amongst the team on the ward was unsafe but no action was taken. The Claimant does not recall the date of this meeting.

169. The next complaint was that the Claimant had reported to Mr Duggan and Ms Oyewole that the allocation of patients amongst the team on the ward was unsafe but no action was taken. The Claimant could not recall the date of this meeting.

170. When discussing this concern in cross examination, the Claimant confirmed that he wasn't actually concerned about the unequal distribution of complex work. The Claimant confirmed that his complaint, was about the fact that Ms Oyewole did not have any patients allocated to her.

171. Mr Duggan explained, that Ms Oyewole and Mr Raghoonundun were not allocated patients directly because they undertook a supervisory role. They were allocated nurses to supervise instead.

172. Leaving aside the question as to whether this issue, and the ignoring of it being raised would be a breach of the implied term, the tribunal first had to decide whether or not the Claimant had raised the issue with Mr Duggan and Ms Oyewole.

173. Both denied any such meeting took place. The Claimant could not provide any details of this meeting. Given we felt Mr Duggan and Ms Oyewole were credible witnesses, we found that this meeting had not take place and this issue had not been raised (and therefore could not have been ignored). This also could not form part of any accumulated acts.

The Claimant reported medication errors to his line manager, Michael Duggan, that were not being reported to Pharmacy and Mr Duggan to no steps to redress them.

174. The Claimant claimed that he had reported medication errors to Mr Duggan they were not reported to the Pharmacy and no steps were taken to redress them.

175. Only one occasion of the Claimant reporting a medication error was accepted by Mr Duggan. Mr Duggan stated that the Claimant had raised this in September 2020. Mr Duggan explained how he had dealt with the issue; by investigating and then speaking to the staff member involved. The tribunal accepted his evidence on this and therefore found that steps were taken to redress this concern.
176. A further example was in the bundle at page 167. The Claimant had emailed about a medication error on the 9th January 2021. Mr Duggan responded on the 15th January to confirm he had looked into the issue and addressed the person responsible about it. Again, there was therefore evidence that Mr Duggan was dealing with reports by the Claimant and this allegation therefore did not have any merit.
177. In relation to whether or not there was a failure by Mr Duggan to report the errors to the pharmacy, Mr Duggan explained that if a member of staff spots a medication error, it is their responsibility to raise the issue with the Trust by logging a Datix report. It therefore was clear that the responsibility to report to Pharmacy was with the Claimant and he had not done this.
178. The Claimant could provide no evidence that he had made Datix reports and admitted he hadn't in cross examination, even though he was aware that was the correct procedure.
179. The tribunal found therefore that there had not been a failure by Mr Duggan to report concerns to the Pharmacy as there was no burden on him to do so.
180. Further, the tribunal considered that if the Claimant had himself not thought the medication issues were serious enough to be reported via Datix, a failure by Mr Duggan to do the same was unlikely to be a breach of the duty to create a safe working environment. This complaint therefore did not have any merit either and could not form part of any accumulated acts.

On 21 December 2020, the Claimant emailed Neil Wells, the Senior Service Manager and Itai Chikomo, the Head of Nursing, raising concerns regarding his ward and no action was taken.

181. The Claimant's next alleged breach was that on the 21st December 2020, he had emailed Neil Wells (Senior Service Manager) and Itai Chikomo, Head of Nursing, to raise concerns regarding the ward and no action was taken.
182. The Claimant had emailed both on that date. In his email (at page 145) he stated that 4 members of staff had resigned in a 6 month period and said that there were problems that needed to be escalated as his manager was not supportive.
183. In his witness evidence the Claimant said that the concerns he had raised were about victimisation, discrimination, harassment and bullying and he requested a move from the ward, but the email we were presented with did not contain any of this.

184. Mr Wells wrote to the Claimant the next day to acknowledge his concerns. Mr Wells states in that email that he is going on holiday shortly and that Mr Duggan is already on leave but asks what he can do to help the Claimant.
185. The Claimant stated in cross examination that he did not respond to Mr Wells. Instead he contacted Mr Chikomo. Mr Chikomo spoke to the Claimant on the 23rd December 2020. Mr Chikomo listened to the Claimant's concerns and said he would share them with Mr Wells and also his superior, Robert Murray.
186. In that phone call, the Claimant raised the following concerns
- a. About a clique forming amongst Nigerian staff members.
 - b. Staff recommending others for recruitment, based on who can fit in the clique
 - c. The clique getting 4 white members of staff to leave.
 - d. A band 3 member crying during a supervision and stating she felt suicidal because of the clique.
 - e. Bank shifts not being distributed fairly and people receiving bribes for them.
 - f. Low moral because of the clique.
 - g. Unreported drug errors.
 - h. That had raised the issues with Mr Duggan who had not done anything.
187. Mr Chikomo records the details of the conversation in an email to Mr Wells and Mr Murray on the 24th December 2020 (page 180).
188. In that email, Mr Chikomo expresses how serious the concerns are.
189. There is an email from Mr Murray in the bundle (page 144) where he sets out a number of steps to investigate the Claimant's concerns. He asks Mr Wells and Mr Chikomo to look into why staff have left to understand whether the Claimant's concerns are well founded. He also requests that they respond to the Claimant once investigations have concluded, in order to reassure him that they were taking steps to tackle any issue raised.
190. Later that day, Mr Wells states that he had a conversation with Ms Oyewole and asks if there are any problems on the ward. In that conversation she mentions that the Claimant is a problem and is trying to split the team (page 183). Given there is conflicting information about whether there is a division on the ward and the cause of it, it was understandable in the tribunal's view that the Respondents wanted to investigate further to determine the truth of the matter.
191. Following the phone call on the 23rd December, Mr Chikomo also goes on leave until the end of January 2021. The Christmas break period also begins.
192. The next act in the sequence is on the 4th January 2021, the Claimant emails Mr Duggan, Mr Wells and Mr Chikomo to say that he wants to

transfer to a different ward. He states in that email (page 165) that he was bullied on Sutherland Ward and doesn't feel safe.

193. It is important to note that this is the first record of any complaint by the Claimant of bullying and not feeling safe. His previous concerns- about medication errors and allocation of work and shifts, have not articulated that he felt bullied or unsafe.
194. Mr Wells had a meeting with Mr Duggan on the 5th January 2021. The notes of that meeting are in the bundle at page 161. The purpose of the meeting is to discuss the Claimant's concerns. The meeting notes show they discuss the shift and work allocation, which is one of the issues the Claimant raised with Mr Chikomo. This indicated to the tribunal that the Claimant's concerns are being responded to.
195. In his evidence, Mr Duggan states that in that meeting, he and Mr Wells agreed that Mr Chikomo would be taking the matter further when he returned from leave (at the end of January)
196. Following the meeting with Mr Duggan, Mr Wells replies to the Claimant on the 6th January 2021 to say that he is looking into the issues raised and will be in touch shortly. Again, the tribunal felt that this was evidence that the Respondent was dealing with the Claimant's complaints.
197. Mr Wells says that the Claimant can contact him at any time if he wanted to discuss things further, but we note the Claimant made no further contact with Mr Wells.
198. Mr Wells sends a further email on the 15th January 2021 (page 168) to say that he had not forgotten about the Claimant and was waiting for Mr Chikomo to return so that the issues can be looked into further.
199. Mr Murray contacts Mr Wells on the 18th January 2021 (page 173). In that email he states that he is wary of the delay in the issues being responded and wants to ensure that Mr Chikomo deals with it as soon as he returns from leave.
200. In that email Mr Murray asks if there has been any further information from the Claimant. There is nothing in the bundle to suggest that the Claimant had provided further information. However, there is correspondence between the Claimant and Mr Duggan where he reports errors on the ward. It is clear therefore that the Claimant was able to communicate but chose not to provide further information about the issues he raised in December 2020.
201. This is important as the tribunal considered whether there Respondent's delay in responding to the Claimant's concerns amounted to a fundamental breach of the contract. The tribunal concluded that the fact that the Claimant did nothing to chase the Respondent or provide further information meant that the breach could not have been a repudiatory one. We found it difficult to accept that if there was an unsafe working environment being created by the Respondent's failure to respond promptly that the Claimant would not chase the Respondent or provide

further information. Further, the Claimant continues to work and gave no explanation as to why he would do so if the environment was unsafe.

202. The Claimant even emails Ms Oyewole on the 23rd January 2021 about an issue on the ward. If he felt an unsafe working environment was being created by him being bullied by Ms Oyewole, why would he be communicating with her and continuing to work with her?
203. Mr Chikomo's evidence was that he returned from his leave later than expected (8th February 2021) due to covid restrictions. He had not done any work whilst on leave, but Mr Wells had carried out an investigation in his absence. This is evidenced by an email at page 184 of the bundle from 22nd December where Mr Wells updates Mr Murray about the people he has spoken to.
204. Mr Chikomo contacts Ian Fishwick, Head of Learning and Development, on the 16th February 2021 (page 179). Mr Chikomo explained that he had made Mr Fishwick aware of the Claimant's concerns before he had gone on leave and wanted to discuss with Mr Fishwick how they could use training and team building to address the issues.
205. Mr Fishwick responds (page 191) to discuss suggestions to tackle the issues raised by the Claimant.
206. Again this was accepted by the tribunal as evidence that the Respondent was dealing with the Claimant's issues.
207. On the same day (16th February 2021), Mr Chikomo meets with Mr Duggan to discuss the Claimant's issues. The notes of the meeting are at page 186 of the bundle.
208. Mr Wells emails the Claimant on the 22nd February 2021 to update him that Mr Chikomo is back from leave and would like to meet to discuss the issues raised. He asks for the Claimant's availability.
209. The Claimant confirmed that he did not respond. He did not provide any satisfactory or reasonable reason for choosing not to respond. This led to the panel drawing two conclusions.
210. Firstly, any perceived delay by the Respondent is mitigated by the fact the Claimant did not respond when asked to. The Claimant cannot on the one hand claim that he felt his complaints were not being dealt with and at the same time leave his employer in limbo when they do get in contact with him.
211. Secondly, the Claimant not responding makes it even more difficult for him to complain that he felt there was an unsafe working environment. As stated, during this period the Claimant was continuing to work. If there was an unsafe environment, any reasonable person would have responded as soon as possible when their employer contacted them.
212. This led the panel to conclude that there had not been a breach of any implied term to ensure a safe working environment by the Respondent failing to respond to the complaints the Claimant raised on the 21st

December 2020. They clearly had reacted and were taking the complaints seriously and the time taken to respond appears reasonable in light of the fact the Claimant did not consider it an urgent matter.

213. This act also could not form part of any accumulation which amounted to a breach of the Claimant's contract.

On 4 January 2021, the Claimant wrote to Michael Duggan, Ward Manager, Neill Wells, Senior Service Manager and Itai Chikomo, Head of Nursing, to request a transfer from his department due to victimisation, discrimination, bullying and harassment but the Claimant did not receive a response.

214. The final alleged breach was the Claimant stating he wished to transfer and not receiving a response.

215. The facts surrounding this are dealt with in part in the section above. It is accepted that the Claimant sent an email saying he wanted to transfer on the 4th January 2021.

216. However, as stated above, the Claimant makes no reference to bullying, victimisation, discrimination or harassment in his email. Nor had he mentioned it in his previous email of complaint, nor in the conversation with Mr Chikomo.

217. The allegation must therefore be curtailed and limited to the actual request for a transfer and the Respondent's response to that only.

218. The Respondent raised issue during the hearing as to whether the Claimant's request for a transfer was genuine. In his email he stated that he needed help to do this, but the Respondent pointed out that the Claimant was aware how to obtain a transfer since he had recently just done one from Highgate Ward to the Sutherland Ward.

219. The Claimant's response was that an ordinary transfer would be done if a similar position within the same hospital was available. He stated there was not a similar position so in order to obtain a transfer he would need additional support from management.

220. We accept the fact that the Respondent did not respond to this part of the Claimant's email. No one picked up the transfer request with the Claimant.

221. The tribunal therefore then went on to consider whether that was a fundamental breach of the implied term to create a safe working environment.

222. Again, we considered that the Claimant's failure to press this issue meant that there was not a potentially unsafe working environment. If there had been, we would have expected the Claimant to have pressed this issue more.

223. This lines up with our findings that the alleged acts of direct discrimination and harassment had not occurred. The fact they didn't meant that there was nothing to create an environment where the Claimant felt unsafe.
224. As stated, the Claimant continued to communicate with his line manager, Mr Duggan. He does not at any time remind him of the request for a transfer. He also did not respond to Mr Wells when he offered to speak to him at any time, nor did he respond to Mr Chikomo's request to meet.
225. As such, we found this did not form part of any accumulated acts which breached the implied term to create an unsafe working environment.
226. As the Claimant had not been able to show there was a fundamental breach of his employment contract, his constructive dismissal argument failed. As such, he could not pursue a claim for unfair dismissal.

Harassment

227. The Claimant also claimed that he had been subjected unwanted conduct related to his race/ethnicity, which had the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading offensive or humiliating environment.
228. Again, we considered firstly whether the acts had actually occurred.
- On 25 March 2021, Ismail Lawal told the Claimant "you are too fat, after COVID-19 finishes, you should start going to the gym" in front of other members of staff.*
229. Mr Lawal denied making this comment and we found him to be a credible witness. In cross examination Mr Lawal commented that it was inconceivable that he would make such a comment given he himself is larger than the Claimant. We accepted that it seemed implausible.
230. The Claimant could provide no specific details of the comment and did not come across as credible. As such, the tribunal decided that this comment had not occurred.
231. Further, it was unclear how such a comment was related to race or ethnicity. There was nothing inherent in the comment related to the fact that the Claimant was not a Yoruba.
232. The claim in relation to this comment therefore failed.

On 22 November 2020 the Charge Nurse, Elizabeth Oyewole shouted at the Claimant asking why he had not completed the handover.

233. The tribunal found that this comment could not have occurred. The Claimant was very specific with the date, but the shift roster we were

shown in evidence showed that the Claimant and Ms Oyewole were not working shifts that would require them to complete a handover.

234. Ms Oyewole denied making the comment in any event and said that if she had had an issue with the Claimant's actions, she would not have addressed it in this way.

235. The tribunal preferred her evidence to the Claimant's. This claim therefore failed.

On December 2020, the Charge Nurse, Elizabeth Oyewole screamed at the Claimant "I am the Deputy Manager of this place; I do not get handover from anybody that is not qualified staff" and said she wanted to fight the Claimant.

236. This was a very serious allegation and required a great deal of time to get to the crux of the matter.

237. The Claimant's evidence that the incident took place over two instances. Firstly, when he was not present for a handover due to being called away to attend a patient tribunal. The Claimant said that Ms Oyewole shouted at him on the ward.

238. The Claimant then went on to say that there was a meeting in Mr Duggan's office in which Ms Oyewole's threatened to fight the Claimant.

239. The Claimant was questioned about the second instance and explained that Ms Oyewole said that she used to fight boys when she was younger and that this made him fear that she would strike him.

240. The Claimant's evidence regarding this allegation shifted during his questioning. As stated, it initially started as a single incident and then was split into 2. The Claimant initially had said that Ms Oyewole offered to fight him and then said that she only stated she used to fight boys when she was younger. There was also inconsistency as to whether the Claimant had reported the incident to Mr Duggan or whether he had actually witnessed it in his own office.

241. Ms Oyewole denied both incidents and Mr Duggan had no recollection of them.

242. It again seemed inconceivable that such a serious incident would occur and the Claimant would not report it in writing to someone. The Claimant had reported much less serious incidents so why would he not report this. This cast doubt in the tribunal's mind that the incident had occurred.

243. Added to the Claimant's inconsistency and the fact that we considered Mr Duggan and Ms Oyewole to be credible witnesses, the tribunal found that this incident had not occurred.

244. The claim in relation to this therefore failed.

245. Further, it was not clear how the actions of Ms Oyewole, if they had occurred, were related to race in any way or the fact that the Claimant was not Yoruba.

The Claimant informed his manager, Michael Duggan, that Elizabeth Oyewole had screamed at him and said she wanted to fight him, but no action was taken.

246. This allegation was related to the above one. As stated, the Claimant explained in cross examination that Mr Duggan had actually witnessed the incident. If that was true, why did he need to report it to him? The two statements were contradictory.

247. As the tribunal had found that the incident with Ms Oyewole had not occurred, the Claimant could not have reported it to Mr Duggan. This claim therefore also failed.

248. None of the Claimant's claims for harassment were successful therefore.

Employment Judge **Singh**

24th April 2024

Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

20 June 2024

.....
.....
FOR THE TRIBUNAL OFFICE