



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4107190/2023**

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**Held in Glasgow via Cloud Video Platform (CVP) on 29 & 30 April 2024, 1 & 2  
May 2023 and 22 & 23 August 2024**

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**Employment Judge McCluskey  
Member Dr S Singh**

**Mr P Aneke**

**Claimant  
Represented by:  
Ms N Bennett -  
Lay Representative**

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**JSL Care Ltd**

**Respondent  
Represented by:  
Mr K Sonaike -  
Counsel**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The unanimous judgment of the Tribunal is that:

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1. The complaint of direct race discrimination is not well founded and is dismissed.
2. The complaint of victimisation is not well founded and is dismissed.

### **REASONS**

#### **Introduction & Issues**

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1. The claimant brings complaints of direct race discrimination and victimisation. The complaints are resisted by the respondent. A draft list of issues had been set out in the note of the case management preliminary hearing which took place on 1 February 2024. At the outset of the final hearing the parties confirmed that these were agreed as the final list of issues for determination by the Tribunal.

2. The claimant is black African. The agreed list of issues set out that the alleged act of direct race discrimination relied upon is the claimant's dismissal. The name of the claimant's actual comparator was identified in the list of issues as SG, a white registered general nurse (RGN) employed by the respondent.  
5 On the third day of the hearing, the claimant's representative applied to include a hypothetical comparator in the agreed list of issues. This was not opposed, and the list of issues was updated accordingly. It was also agreed, due to the length of the evidence, that the hearing would be converted to a hearing on liability only, with a separate remedy hearing to be listed if needed.
- 10 3. The agreed list of issues set out that the protected acts for the victimisation complaint are (a) making an allegation of race discrimination on 21 July 2023 when the claimant appealed the decision to dismiss him and (b) starting the ACAS early conciliation process on 13 October 2023 prior to presenting this claim to the Tribunal. The act of victimisation relied upon is the respondent's  
15 reporting of the claimant to the Nursing and Midwifery Council (NMC) on or around 2 November 2023.
4. The claimant gave evidence on his own behalf. Ms Angela Linning, Care Home Manager at Bonnyholm Gardens Nursing Home and Mr David Scott Shearer, owner and Director of the respondent gave evidence on behalf of  
20 the respondent. At the case management preliminary hearing on 1 February 2024, an order was made for witness statements. The Tribunal read the witness statements in advance of hearing oral evidence from each of them. The claimant gave additional evidence in chief, by way of oral evidence to the Tribunal, with the agreement of the Tribunal.
- 25 5. There was a joint bundle of productions extending to 471 pages. Both parties added various documents to the bundle during the hearing.
6. A second member was present at the final hearing dates on 29 & 30 April 2024, 1 & 2 May 2024. He was unavailable for the continued hearing dates due to illness. Parties confirmed that they wished to continue and for the claim  
30 to be determined by the Employment Judge and remaining member, Dr Singh.

**Findings in fact**

7. The claimant was employed by the respondent and worked as a Registered General Nurse (RGN”) at their Bonnyholm Gardens Nursing Home from 1 May 2023 to 17 July 2023.
- 5 8. The respondent owns and runs two nursing homes, including the one where the claimant worked. The respondent is a government approved employer, holding an Employer Sponsor Licence allowing them to bring skilled workers to the United Kingdom for the purposes of work. During the claimant’s employment and both before and after his employment, around half of the  
10 claimant’s staff were black and minority ethnic.
9. The respondent paid for and provided visa sponsorship, through an agency, to allow the claimant to work for the respondent. The respondent also agreed and paid for the claimant’s accommodation costs for six months as he was relocating to Glasgow.
- 15 10. The respondent knew the claimant’s race and colour before he was employed. The respondent spent a considerable amount of money on recruitment fees, legal fees and accommodation costs to secure his services.
11. The claimant underwent an induction process when his employment commenced. For one week, he shadowed existing nurses on a  
20 supernumerary basis to learn the routines of the home. Thereafter the claimant commenced night shift working.
12. During the claimant’s employment, concerns were raised by staff about his conduct. Concerns were also received from residents. The staff members and  
25 residents who raised concerns are referred to by their initials only, together with job title where relevant. Their names are not relevant to the issues to be determined.
13. On 6 June 2023 staff member BP who is both a RGN and a Deputy Manager of the respondent, raised concerns with the claimant about his conduct. BP prepared a handwritten record of a conversation noting the concerns and the  
30 actions expected of the claimant to improve his conduct. The claimant did not

agree with BP's concerns. The claimant declined to sign the record of what had been discussed and the improvements required of him. The claimant told BP that the points raised were "*irrelevant and inaccurate*" (page 60).

14. On 6 June 2023 BP also completed an incident form about diabetic medication a resident had received from the claimant. BP raised that the medication given was incorrect. BP noted that the correct medication had been handwritten on the resident's medication record sheet but may not have been clear enough. The resident was checked over and further advice sought from the GP. No adverse consequences for the resident were found (page 55). BP asked the claimant to complete the witness section of the incident form and return to BP. The claimant did not do so.
15. On 7 June 2023 PE, who is both a RGN and a Deputy Manager, met with the claimant. PE asked him why he had refused to sign the handwritten record of conversation BP had given to him. The claimant told PE that it was "*irrelevant and inaccurate*" (page 61).
16. PE asked the claimant why he had not signed and returned the witness section of the incident form about the diabetic medication he had given to the resident. The claimant became defensive and accused other staff of changing the medication on the medication record sheet to make it look like the claimant had made a mistake (page 61). After inquiry by the respondent, they were satisfied that the claimant had made a drug error and that the witness section of the incident form had not been completed by him.
17. PE told the claimant another issue had been brought to their attention where a resident had an issue with his catheter and NHS24 had been called. The claimant was asked why he had not documented anything in the daily notes. The claimant was adamant that he had written something in the daily notes. After inquiry by the respondent, they were satisfied that no notes had been written by the claimant.
18. On 9 June 2023 PE met with the claimant. In advance of the meeting the claimant emailed PE to ask why the meeting had been called. PE replied that it was an informal meeting to offer support and guidance on how to prevent

further incidences (page 65). At the meeting the respondent raised with the claimant that they were concerned by the claimant's lack of accountability regarding recent concerns (page 71). As one outcome of the meeting, the claimant was offered further work shadowing with a staff member (page 71).

5 19. After this meeting the respondent continued to be concerned about the claimant's conduct. On 20 June 2023 staff member BN wrote to the senior management about the claimant. They said *"Tonight I have had staff come to me with concerns on how they are been treated and talked to me that they feel disrespected and undermined at work as they continue with their duties....*

10 *Some staff are requesting for their shifts to be moved... for the sake of their peace of mind as well as their mental health"* (page 74).

20. Throughout the rest of June 2023 and the beginning of July 2023, the respondent received around ten written complaints about the claimant from numerous staff members and from residents. The complaints set out serious

15 concerns they had about the claimant's care of residents including clinical matters, and the way in which the claimant was speaking to residents and other staff. They reported that the claimant was behaving in a confrontational and intimidating manner towards them and towards the residents (page 75 – 80).

20 21. The respondent wrote to the claimant inviting him to attend a meeting on 5 July 2023 with Ms Linning and Mr David Scott Shearer, a director of the respondent. The purpose of the meeting was to discuss the respondent's clinical and management concerns about the claimant (page 91). The respondent identified the clinical concerns in an email to the claimant as:

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- a. Allegedly failing to respond appropriately and in a timely manner regarding the catheter of a resident and allegedly accusing staff of pulling out the catheter;
  - b. Insulin error for a resident and allegedly accusing management of falsifying documentation. Not completed appropriate documentation;

- c. Allegedly not commencing feed of a resident at prescribed time. Failure to monitor the resident appropriately overnight following paramedic visit;
- d. Allegedly not administering PRN medication in timely manner to two residents (page 90).
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22. The claimant was unable to attend the meeting arranged for 5 July 2023. The meeting was re-scheduled to 17 July 2023. The claimant requested that he receive a copy of all evidence to be relied on by the respondent, to be provided to him on the day, one hour in advance of the meeting. Arrangements were made by the respondent to do so.
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23. On 13, 14 and 15 July 2023 the respondent received many more written complaints about the claimant from staff and residents. The complaints set out further concerns they had about the claimant, including serious concerns about the claimant's administration of medication to residents. One complaint had been signed by four staff members and described the claimant as *"abrupt, argumentative and dismissive, we all feel that we are no longer comfortable speaking to him on a one to one basis as he is very devious, takes no accountability for his actions and denies saying things"* (page 94).
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24. On 17 July 2023 the claimant attended a meeting with Ms Linning and Mr Shearer. The claimant was provided with the relevant residents' files, incident forms and the statements received from staff and residents. Five of the complaints received were from staff members who are black. Other complaints were received from staff members who were not white and came from a variety of ethnic minority backgrounds.
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25. During the meeting, the respondent discussed their concerns about the claimant's conduct with him. This included the allegations about the clinical concerns identified in writing to the claimant on 5 July 2023 and the more recent concerns raised by staff and residents.
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26. During the meeting the claimant was taken through the residents' files, incident forms and the written statements received from staff and residents.
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The claimant was given an opportunity to respond to the concerns. The meeting lasted around three hours. The claimant did not agree with any of the respondent's concerns. The claimant asserted that medical records had been fabricated or altered. The claimant did not agree that he held any responsibility or accountability for any of the concerns raised about his care of residents or the way he interacted with staff and residents.

27. The entries in the residents' health records had been looked into by experienced staff including the Deputy Managers. The respondent was satisfied that there had been no fabrication or alteration of medical records. There were numerous statements from experienced staff with concerns about the claimant, relating to clinical and non-clinical matters. The statements were consistent with each other. After looking into matters, the respondent trusted what the staff were reporting to them about the claimant.

28. The respondent was very concerned about the claimant's conduct. The respondent was very concerned that the claimant showed no insight or willingness to take any responsibility or accountability for his actions. For these reasons Mr Shearer decided to terminate the claimant's employment with immediate effect. His dismissal was confirmed by a letter of the same date. Mr Shearer also decided at that time that he had to make a referral to the NMC because of the claimant's conduct and because he showed no insight or willingness to take any responsibility or accountability for his actions.

29. The claimant was given a right of appeal against the decision to dismiss him. By email dated 21 July 2023 the claimant submitted his appeal (page 464). The basis of his appeal was that he had not been provided with any documentation or witness statements from staff or residents to support the allegations made about the clinical concerns. He also said, "*As the only black nurse you employed, I believe I have been racially discriminated against*" (page 103). This was the first time the claimant had made an allegation of race discrimination to the respondent.

30. Ms Linning acknowledged the claimant's appeal. In relation to the allegation of race she wrote that he had "*not mentioned this in your previous meetings*

*or employment please provide evidence of this allegation through your appeal letter”* (page 463). The claimant did not respond with any information, or challenge Ms Linning’s statement that he had not previously raised the issue of race discrimination.

- 5 31. The claimant’s appeal was considered by Mr John Shearer, Managing Director. Mr J Shearer wrote to the claimant with the appeal outcome on 13 October 2023 (page 469). Mr J Shearer was satisfied that the claimant had been provided with the relevant files and the statements received from staff and residents and given an opportunity to respond to these at the meeting on 10 17 July 2023. Mr J Shearer identified that the claimant had himself referred to some of that documentation during the meeting on 17 July 2023. The decision to dismiss the claimant was upheld.
- 15 32. Mr J Shearer wrote in his outcome letter that the claimant had given no indication of having been racially discriminated against at the meeting on 17 July 2023 or submitted any evidence which would allow him to investigate this. Mr J Shearer decided to give the claimant a further opportunity to write to him about his allegation of racism and asked him to respond by 20 October 2023 (page 469). The claimant did not do so.
- 20 33. On 1 November 2023 Mr Shearer reported the claimant’s conduct, for which he had been dismissed, to the NMC (page 468). Mr Shearer understood that the referral was necessary for the respondent to fulfil its reporting obligations to the NMC.
- 25 34. There was a delay in making the referral because Mr Shearer forgot about it. It was on his to do list but at the time he was working a lot of hours per day managing the business, including dealing with the Care Inspectorate, the bank and other matters relating to the homes.
- 30 35. The claimant’s notification to ACAS on 13 October 2023 reminded Mr Shearer of the claimant. This was a reminder for him to take the action he had already decided to take when he dismissed the claimant, because of his understanding that he was obliged to report conduct of this nature to the NMC.



**Observations on the evidence**

36. This judgment does not seek to address every point upon which the parties gave evidence. If we have not mentioned a particular point, it does not mean that we have overlooked it. It is not included simply because it is not relevant to the question of whether the claim succeeds or fails. Any references to page numbers are to the paginated bundle of productions.
37. The standard of proof is on a balance of probabilities. This means that if we consider that, on the evidence, an event's occurrence was more likely than not, then we are satisfied that it occurred. Likewise, if we consider that, on the evidence, an event's occurrence was more likely not to have occurred, then we are satisfied that it did not occur.
38. We did not find the claimant to be a particularly credible or reliable witness. The claimant contradicted himself on various occasions during his evidence. Some examples are set out below. He maintained a position in evidence that where documents, including the health records of residents, did not support his position the documents had been fabricated or altered by the respondent to sabotage him.
39. On the other hand, we found the respondent's two witnesses to be both credible and reliable. They gave answers which were straightforward. They made concessions in evidence where appropriate. We formed the impression that they were doing their best to assist the Tribunal. Their evidence was supported by documentary evidence. The entries in the residents' health records had been looked into by experienced staff including the Deputy Managers. There were numerous statements from experienced staff with concerns about the claimant, relating to clinical and non-clinical matters. We accepted the respondent's evidence that, after looking into matters they trusted what their staff were reporting to them about the claimant, on clinical and non-clinical matters.
40. An example of an issue as to credibility and reliability of the claimant arose in relation to what had happened at the meeting on 17 July 2023. In evidence in chief, the claimant asserted that he had not been told about any of the various

complaints and concerns raised about him and had not seen any of the documents before his dismissal.

41. However, in cross-examination the claimant subsequently admitted that he had a lengthy meeting of over three hours with Ms Linning and Mr Shearer on 17 July 2023 during which they had gone through all the allegations and (he asserted) they had refused to let him leave until they had been through all the allegations. We preferred the evidence of the respondent, as subsequently conceded by the claimant, that the claimant had been told about the various complaints and concerns that had been raised about him and had had an opportunity to review and comment on the documents. This occurred during the meeting on 17 July 2023.

42. Another example was where the claimant said in evidence that he had received no training at all for the role. He subsequently admitted that he had an induction and shadowing period at the start of his employment. A further example was when the claimant said in evidence that he had written a statement on the incident form about the diabetic medication he had given to a resident. He then contradicted himself in evidence by saying he had not completed a statement because (he asserted) he had not made an error. We preferred the evidence of the respondent that the claimant had not written such a statement. We did not however accept, as the claimant asserted, that he had not made the error. We were satisfied that the respondent investigated the matter and concluded that an error had been made by the claimant.

43. There were various other incidences where there was a conflict in the evidence between the claimant and the respondent. For example, the claimant said in evidence that he had complained about race discrimination verbally to Angela Linning in her office during his employment and again during the meeting on 17 July 2023. The evidence of Ms Linning was that the claimant had not made such a complaint to her during his employment or during the meeting on 17 July 2023. Mr Shearer who also attended the meeting on 17 July 2023 said that no such complaint had been made.

44. We preferred the evidence of the respondent that no complaint about race discrimination had been made by the respondent during his employment or at the meeting on 17 July 2023. We were satisfied that the first complaint of race discrimination was made by the claimant in his letter of appeal against dismissal on 21 July 2023. When Ms Linning responded to the claimant's appeal (mentioning race discrimination), she stated that he had "*not mentioned this in your previous meetings or employment please provide evidence of this allegation through your appeal letter*" (page 463). The claimant did not respond with any information, or challenge Ms Linning's statement that he had not previously raised the issue. On balance we think it is likely that if the claimant had previously raised allegations of race discrimination, he would have responded to say so to Ms Linning. He did not do so, nor did he respond to her letter at all.

### Relevant law

#### 15 *Direct race discrimination*

45. Section 13 EqA states: "*Direct Discrimination (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*".

46. The burden of proof in claims under EqA is set out in section 136 EqA.

#### 20 *Victimisation*

47. Section 27 EqA states "*Victimisation (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*".

*Burden of proof*

48. Section 136(2) EqA states: “*Burden of proof (2) If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. (3) But this provision does not apply if A shows that A did not contravene the provision.*”
49. The burden of proving the facts referred to in section 136(2) EqA lies with the claimant. If this subsection is satisfied, then the burden shifts to the respondent to satisfy subsection 136(3) EqA.
50. This is described in case law as a two-stage process. The claimant must first establish a first base or prima facie case by reference to the facts made out. If he does so, the burden of proof shifts to the respondent at the second stage. If the second stage is reached and the respondent’s explanation is inadequate, it is necessary for the Tribunal to conclude that the claimant’s allegation is to be upheld. If the explanation is adequate, that conclusion is not reached (*Igen v Wong [2005] IRLR 258; Madarassy v Nomura International Plc [2007] IRLR 246*).
51. A claimant can rely on an actual or hypothetical comparator for the purposes of establishing less favourable treatment. There must be no material difference in the circumstances of the claimant and comparator (section 23 EqA). In deciding how a hypothetical comparator would have been treated, the Tribunal is entitled to have regard to the treatment of real individuals (see, for example, *Chief Constable of West Yorkshire Police v Vento [2001 IRLR 124]*).
52. However, a difference in treatment and a difference in protected characteristic is not enough to establish that the difference in treatment was caused by the difference in protected characteristic; “something more” is required (*Madarassy v Nomura International [2007] IRLR 246*). The Tribunal needs evidence from which it could draw an inference that race was the reason for the difference in treatment.

53. It is a well-established principle that Tribunals are entitled to draw an inference of discrimination from the facts of the case. The position is set out by the Court of Appeal in *Igen v Wong* [2005] ICR 931 (as approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] IRLR 870). The *Igen* case was  
5 decided before EqA was in force, but the guidance remains authoritative, particularly in light of the *Hewage* case.

### Submissions

54. The claimant's representative made oral submissions. The respondent's representative provided the Tribunal and the claimant's representative with a  
10 written skeleton argument and made oral submissions with reference to these. The claimant's representative had an opportunity to read the skeleton argument before making her oral submissions. We carefully considered the submissions of both parties during our deliberations. We have dealt with the points made in submissions, where relevant, when setting out the facts, the  
15 law and the application of the law to those facts in reaching our decision. It should not be taken that a submission was not considered because it is not part of the discussion and decision recorded.

### Discussion and decision

55. The claimant's dismissal occurred on 17 July 2023. ACAS Early Conciliation  
20 started on 13 October 2023 and ended on 6 November 2023. The claim form was presented on 3 December 2023. The act of victimisation relied upon occurred on 1 November 2023 when the claimant was referred to the NMC. There were no issues identified as to time bar of the claims.

#### *Direct race discrimination complaint*

25 56. As identified in the agreed list of issues the race discrimination asserted is the claimant's dismissal on 17 July 2023.

57. We have concluded that the evidence is not sufficient for the burden of proof to pass to the respondent, but that even if it were, the respondent has satisfied us that race discrimination played no part whatsoever in the claimant's  
30 dismissal.

58. We considered all the evidence, from all sources, when deciding whether the claimant has established, on the face of it, a case of race discrimination. We reminded ourselves that there is a vital distinction between “facts” or evidence and the respondent’s “explanation”. Whilst there is a relationship between the two, they are not to be confused. It is only the respondent’s explanation which cannot be considered at the first stage of analysis. The respondent’s explanation becomes relevant if the burden of proof passes to the respondent.
59. We concluded that the claimant had not established on the face of it a case of race discrimination. There were multiple concerns raised by staff and residents about his conduct, both clinical and non-clinical tasks. Although the claimant’s evidence was that residents’ medical record documents had been fabricated or altered by staff to sabotage him, this did not stand up to scrutiny. This was the case in the inquiry carried out by the respondent at the time (which did not find any fabrication or sabotage) and in the claimant’s evidence to this Tribunal about medical records, which was contradictory in some key respects as set out already.
60. Although the claimant’s evidence to the Tribunal was that all the complaints by staff and residents were motivated by his colour, because he is black, again this did not stand up to scrutiny. We heard evidence that five of those staff members who had complained were black. There were multiple complaints about the way the claimant interacted with staff, conducted himself and performed his duties. The statements were consistent with each other. The claimant’s evidence was that the statements were wrong, that he was in charge of the shift and had authority to interact and conduct himself as he wished and that the staff did not respect his authority.
61. We concluded that he had not. We concluded that, whilst not impossible, it was not likely that other black staff members would be making complaints about the claimant because he was also black. We concluded that the sheer volume and nature of the complaints by all staff and residents led us to a conclusion that it was not likely that the complaints were being made because of the claimant’s colour. We concluded that the claimant’s response to the complaints, both to the respondent at the time and to this Tribunal, that they

were wrong or fabricated, was unlikely given the sheer volume and nature of them.

5 62. Looking at those matters in the round, and ignoring for the moment the respondent's explanation, we could not conclude that there had been unlawful discrimination. The test in section 136(2) EqA is not satisfied and the claim therefore fails.

10 63. Even if we had found that the burden of proof had passed to the respondent, they would have persuaded us on the balance of probabilities that it had an explanation for the claimant's dismissal which had nothing whatsoever to do with his race. The respondent's explanation was essentially: the sheer volume and seriousness of the complaints which it concluded were genuine and the claimant's inability to take any responsibility or accountability for his actions.

15 64. The respondent looked into the complaints both clinical and non-clinical. The Deputy Managers of the respondent had been involved and had concluded that there were clinical errors. The respondent had sought at first to address these informally with the claimant and had offered further work shadowing. The claimant in response sought to deflect responsibility for his actions to others, which the respondent concluded after inquiry was not justified. The respondent was faced with what Ms Linning described in evidence as *"in all my time as a nurse, I have never been in receipt of so many complaints from so many sources as I did with [the claimant]"*. We concluded on the evidence that after looking into matters the respondent accepted the complaints as having merit. The respondent was also concerned that the claimant showed no insight or willingness to take any responsibility or accountability for his actions. We concluded that it was for these reasons that that respondent dismissed the claimant and that it was not because of his race or colour.

25 65. No evidence was led by the claimant about the named comparator SG. As the list of issues had been updated, we considered the question of comparator based on a hypothetical comparator. We did hear some evidence about a white RGN (not SG) who had received a disciplinary warning, but not dismissed, for a drug error. The claimant sought to argue that his treatment,

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namely dismissal, was less favourable than that of this white RGN. The respondent's evidence, which we accepted, was that the white RGN had been disciplined for one error only for which she had taken responsibility. This was an entirely different situation to that of the claimant, about whom there were multiple concerns both clinical and non-clinical, and who had shown no insight or taken any responsibility for his actions. We concluded that a hypothetical comparator in the same material circumstances as the claimant, but for the protected characteristic of race, would also have been dismissed for the reasons given by the respondent.

10 *Victimisation*

66. It is accepted by the respondent that the following amounted to protected acts under section 27(2) EqA: a) making an allegation of race discrimination on 21 July 2023 when the claimant appealed the decision to dismiss him and (b) starting the ACAS early conciliation process on 13 October 2023 prior to presenting this claim to the Tribunal.
67. The act of victimisation relied upon is the respondent's reporting of the claimant to the NMC on 1 November 2023. The date in the list of issues is 2 November 2023 but the report was made the day before by Mr Shearer.
68. We concluded that the reporting of the claimant to the NMC was not an act of victimisation by the respondent for having done one or both protected acts.
69. The claimant relies on proximity of time. He contacted ACAS on 13 October 2023 to commence early conciliation and the NMC referral was submitted by the respondent on 1 November 2023. We accepted the evidence of Mr Shearer as to the timing of the referral.
70. Firstly, the four issues referred to the NMC were all clinical matters raised with the claimant on 17 July 2023 and for which he had been dismissed. The respondent had been very concerned about these matters and that the claimant had shown no insight or responsibility for them, which together had resulted in the decision to dismiss. Further, Mr Shearer understood that the



referral was necessary for the respondent to fulfil its reporting obligations to the NMC.

71. Secondly, we accepted Mr Shearer's evidence that the delay occurred entirely because of how busy he was at the time. His evidence was that the ACAS notification reminded him of the referral he had already decided needed to be done. We concluded that the reason for the referral was the claimant's conduct and Mr Shearer's decision that he had to make a referral to the NMC because of the claimant's conduct. We concluded the reason for the referral was not because of the claimant's appeal on 21 July 2023 or his contact with ACAS on 13 October 2023.
72. Section 26 EqA states that a person (A) victimises another person (B) if A subjects B to a detriment "because" B does a protected act,
73. Both representatives referred us to the cases of *Chief Constable of West Yorkshire Police v Khan [2001] UKHL48* and *Peninsula Business Service Limited v Baker UKEAT/0241/16/RN*. We accepted the respondent's submissions that these cases are authority for the proposition that section 26 EqA is not a 'but for' test and it is not a 'triggered by' test. The question is why did the alleged discriminator act as he did. The reason why the alleged discriminator acted as he did is a question of fact.
74. We accepted Mr Shearer's evidence about the notification from ACAS that "*it did obviously remind me of [the claimant]*", but that this was a reminder for him to take the action he had already decided to take because of the claimant's conduct. We accepted his evidence that the reason for reporting him to the NMC was entirely due to the claimant's conduct in his role and lack of accountability and Mr Shearer's understanding that he was obliged to report conduct of this nature to the NMC. We concluded on balance that it was more likely than not that this was the reason why Mr Shearer acted as he did.

75. Accordingly, we could not conclude that the NMC referral amounted to victimisation. The test in section 26 EqA is not satisfied and the claim therefore fails.

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**Employment Judge: J McCluskey**  
**Date of Judgment: 02 September 2024**  
**Entered in register: 02 September 2024**  
**and copied to parties**

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