EMPLOYMENT TRIBUNALS

Claimant: Mr A Nti

Respondent: University Hospitals Sussex NHS Foundation Trust

Heard at: Southampton **On:** 29, 30, 31 July and 1, 2 August (in chambers) 2024

Before: Employment Judge Dawson, Ms Date, Ms Goddard

Appearances

For the claimant: Mr Neckles, lay representative

For the respondent: Mr Jones, counsel

JUDGMENT

The claimant's claims are dismissed.

REASONS

1. By a claim form presented on 30 December 2020, the claimant presented claims of discrimination on the grounds of race and disability, victimisation and being subjected to a detriment because of having made a protected disclosure.

2. The claim relates to the period of 2020, being, of course, the time when the covid pandemic was at its height.

3. At a case management hearing on 24th March 2020, a list of issues was finalised and sent to the parties and they were told that if they thought that the list inaccurately reflected the issues as agreed at the hearing they were to notify the tribunal by 24 April 2023. Neither party disputed the list of issues.

4. At the outset of this hearing, the tribunal went through the issues with the parties, effectively on a line by line basis, and both parties agreed that the issues remained as set out, although the respondent explained that the reason why it did not accept that the claimant had made public interest disclosures was because it did not accept that the claimant reasonably believed that the disclosures were in the public interest.

5. Having, thereafter, read the claimant's witness statement, the tribunal was concerned that the witness statement appeared to be advancing a claim of failure to make reasonable adjustments, which did not appear in the list of issues or the claim form. The claimant's representative confirmed that the claimant was not advancing such a claim and did not make any application to amend the claim form. The respondent's counsel also raised the question of whether the claimant was relying upon two or three public interest disclosures (and protected acts) and the claimant's representative confirmed that the claimant was only relying upon the two identified in the list of issues.

6. The issues for us to determine, therefore, are those identified in the case management order sent to the parties following the hearing on 24 March 2023. That list of issues is set out in the appendix hereto but it is useful to note at this stage that in respect of every different type of claim brought, the claimant relies upon the same four detriments/ acts of less favourable treatment / acts of unfavourable treatment as follows:

    a. failure to consider/deal with the claimant's grievance complaint of 17 January 2020 effectively- the alleged failure being the delay in carrying out and concluding the investigation and the outcome;

    b. failure to acknowledge/accept the claimant's disability of atrial fibrillation;

    c. entertaining and making adverse findings against the claimant in the outcome to his grievance; and

    d. failure to protect the claimant from Covid 19 risks.

    For the sake of convenience we refer to these acts as the detriments.

Conduct of the hearing

7. A limit on the word count of the parties' statements had been set at the hearing on 30 November 2022. In respect of the claimant's statements the agreed limit had been 5000 words. According to a word count run automatically on a PDF reader, the claimant's statements ran to 25,706 words. The respondent's statements had been limited to 10,000 words for four witnesses or a pro rata reduction if it called less than four witnesses. According to the same word count tool the respondent's witnesses ran to 7415 words. Thus both parties were in breach of the tribunal's orders, the claimant somewhat more egregiously than the respondent. Neither side objected to the other's position and the tribunal allowed the witness statements in as written.

8. A timetable had been set for the hearing of the claim at the case management hearing on 30 November 2022. It anticipated that the respondent would call evidence first. The parties jointly requested that the claimant and his witness gave evidence first, which the tribunal agreed to.

9. At the outset of the hearing, the tribunal explained that the timetable would be strictly adhered to and insofar as five hours had been allowed for each parties' witnesses to give evidence, that had to allow for breaks (excluding lunch breaks) and tribunal questions and re-examination.

10. The claimant's representative made an application that his witness, Mr George, be called out of order (and be interposed during the respondent's witnesses) because he was away until the afternoon of the second day of the hearing. In those circumstances, the claimant requested that Mr George give evidence on the afternoon of the second day. The respondent did not resist that application and tribunal agreed to it.

11. On the morning of the second day of the hearing, the claimant's representative made an application that the tribunal should not sit beyond 1 p.m. on that date. The representative told us that he was appearing as a defendant in proceedings in the High Court in Grenada. It was somewhat unsatisfactory that the tribunal had not been put on notice that that application was to be made but Mr Neckles submitted that the respondent's witnesses could be dealt with in 3.5 hours rather than the five hours which had been allocated within the timetable.

12. Having considered the overriding objective the tribunal accepted the claimant's application and gave oral reasons for doing so. Those reasons are not reproduced in this judgment, neither party having requested written reasons. If either party wants reasons they can apply for them within 14 days of this judgment being sent to them. In brief summary, the tribunal granted the application on the basis the if the respondent's witnesses would be completed within 3.5 hours the overall loss of time was not significant, but the tribunal reiterated its earlier point that such time was to deal with the whole of the respondent's evidence, including re-examination and tribunal questions and allowing for breaks.

13. In the event, Mr Neckles took slightly longer than the 3 ½ hours allowed in respect of the respondent's witnesses, but not significantly so and it was not necessary for the tribunal to guillotine either party.

14. The tribunal received a bundle running to 686 pages and the respondent did not object the addition of two further pages from the claimant. Except where stated, references to page numbers below are to the bundle. The tribunal heard from:

    a. the claimant,

    b. Mr George, a witness for the claimant, who is a GMB trade union representative and who had supported the claimant from December 2019,

    c. Ms Gericke, now Deputy Chief Nurse for the respondent but at the relevant time Head of Nursing for Practice Development and Education; she had investigated and resolved the claimant's grievance,

    d. Bethany Smith, HR Business Partner for the respondent but, at the relevant time, Employee Relations Manager

The Law

Public Interest Disclosure

15. Section 47B Employment Rights Act 1996 deals with detriment on grounds of making protected disclosures and provides that:

> (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure
>
> (1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—
>
> (a) by another worker of W's employer in the course of that other worker's employment, or
>
> (b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.
>
> (1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.
>
> (1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

16. Under section 43A of the Act a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

17. Under Section 43C(1) a qualifying disclosure becomes a protected disclosure if it is made to the worker's employer (which is accepted in this case).

18. Under section 48(2) of the Act, on a complaint to an employment tribunal it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

Disclosure of Information

19. S43B Employment Rights Act 1996 provides

> (1) In this Part a *"qualifying disclosure"* means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
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> (e) that the environment has been, is being or is likely to be damaged, or
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed

20. In *Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436*. The Court of Appeal held "The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a "disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in sub-paragraphs (a) to (f)]". Grammatically, the word "information" has to be read with the qualifying phrase, "which tends to show [etc]" (as, for example, in the present case, information which tends to show "that a person has failed or is likely to fail to comply with any legal obligation to which he is subject"). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as

is capable of tending to show one of the matters listed in subsection (1). The statements in the solicitors' letter in *Cavendish Munro* did not meet that standard" (para 35).

Reasonable Belief

21. The test on belief in the public interest was set out the case of *Chesterton Global v Nurmohamed* where it was stated that the tribunal must ask;

    - whether the worker believed at the time he was making the disclosure that it was in the public interest and,

    - if so, whether that belief was reasonable.

22. More than one view may be reasonable as to whether something is in the public interest

23. Moreover an employee can attempt to justify the belief after the event by reference to matters which were not in his head at the time as long as he had a genuine belief at the time that the disclosure was in the public interest. Moreover that belief does not have to be the predominant motor.

24. The tribunal could find that the particular reasons why the worker believed the disclosure to be in the public interest did not justify his belief but nevertheless find it have been reasonable for different reasons. All that matters is that the subjective belief was objectively reasonable (*Nurmohamed* paragraph 29).

25. The worker must have a reasonable belief that the disclosure is in the public interest but that does not have to be the worker's predominant motive for making the disclosures (*Nurmohamed* paragraph 30).

26. In considering whether the belief was reasonable factors include

    - the numbers in the group whose interests the disclosure served

    - the nature of the interests affected

    - the extent to which they are affected by the wrongdoing.

    - the nature of the wrongdoing

    - the identity of the wrongdoing

Detriment due to Protected Disclosure

27. In *Fecitt v NHS Manchester* [2012] ICR 372, the Court of Appeal held that the test of whether an employee has been subjected to a detriment on the ground that he had made a protected disclosure is satisfied if, "the protected disclosure

materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower”

Discrimination- General Principles

28. The following are relevant sections from the Equality Act 2010.

13 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.

26 Harassment

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—

      a. violating B's dignity, or

      b. creating an intimidating, hostile, degrading, humiliating or offensive environment for B

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

   a. the perception of B;

   b. the other circumstances of the case;

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

5) The relevant protected characteristics are—

   age;

   disability;

   gender reassignment;

   race;

   religion or belief;

sex;

sexual orientation.

109 Liability of employers and principals

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

136 Burden of proof

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

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

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

Causation

29. In considering questions of causation, in *Nagarajan* [1999] IRLR 572, the House of Lords held that that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case was, 'why the complainant received less favourable treatment … Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?'

30. In *Shamoon v Chief Constable RUC* [2003] IRLR 337, the House of Lords held "No doubt there are cases where it is convenient and helpful to adopt this two-step approach to what is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? But, especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason-why issue. The two issues are intertwined" (paragraph 8).

The Burden of Proof and drawing of inferences

31. In *Madarassy v Nomura International plc* [2007] IRLR 246, the Court of Appeal held, at paragraphs 56-57,

> "The court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.
>
> 57 'Could conclude' in s.63A(2) must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by s.5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.

32. In *Hewage v Grampian Health Board* [2012] UKSC 37, the Supreme Court held "Furthermore, as Underhill J pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352 (para 39) it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

33. In *Bahl v The Law Society* [2004] IRLR 799,e the Court of Appeal held

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> …

It has been suggested, not least by Mr de Mello in the present case, that Sedley LJ was there placing an important gloss on Zafar to the effect that it is open to a tribunal to infer discrimination from unreasonable treatment, at least if the alleged discriminator does not show by evidence that equally unreasonable treatment would have been applied to a white person or a man.

101

In our judgment, the answer to this submission is that contained in the judgment of Elias J in the present case. It is correct, as Sedley LJ said, that racial or sex discrimination may be inferred if there is no explanation for unreasonable treatment. This is not an inference from unreasonable treatment itself but from the absence of any explanation for it. However, the final words in the passage which we have quoted from Anya are not to be construed in the manner that Mr de Mello submits. That would be inconsistent with Zafar. It is not the case that an alleged discriminator can only avoid an adverse inference by proving that he behaves equally unreasonably to everybody. As Elias J observed (paragraph 97):

'Were it so, the employer could never do so where the situation he was dealing with was a novel one, as in this case.'

Accordingly, proof of equally unreasonable treatment of all is merely one way of avoiding an inference of unlawful discrimination. It is not the only way. He added (ibid):

'The inference may also be rebutted – and indeed this will, we suspect, be far more common – by the employer leading evidence of a genuine reason which is not discriminatory and which was the ground of his conduct. Employers will often have unjustified albeit genuine reasons for acting as they have. If these are accepted and show no discrimination, there is generally no basis for the inference of unlawful discrimination to be made. Even if they are not accepted, the tribunal's own findings of fact may identify an obvious reason for the treatment in issue, other than a discriminatory reason.'

We entirely agree with that impressive analysis. As we shall see, it resonates in this appeal

34. In *Birmingham City Council and another v Millwood* UKEAT/0564/11/DM the EAT considered the question of whether an inadequate explanation for treatment would cause the burden of proof to shift. Langstaff J said

> "**[25].**..We approach this question by remembering that the purpose of the provisions is to identify a proper claim of discrimination, recognising that it is highly unlikely in the real world that there will be any clear evidence that that has occurred. The inference will have to be drawn if a claim for discrimination is to succeed at all. Though a difference in race and a difference in treatment to the disadvantage of the complainant is insufficient and something more is required, Mr Beever was prepared to accept that where as part of the history that the tribunal was examining an employer had at the time of the alleged discriminatory treatment given an explanation for it which a tribunal was later to conclude was a lie, that might, coupled with the difference in race and treatment, justify a reversal of the burden of proof. We agree.
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> **[26]** What is more problematic is the situation where there is an explanation that is not necessarily found expressly to be a lie but which is rejected as opposed to being one that is simply not regarded as sufficiently adequate. Realistically, it seems to us that, in any case in which an employer justifies treatment that has a differential effect as between a person of one race and a person or persons of another by putting forward a number of inconsistent explanations which are disbelieved (as opposed to not being fully accepted), there is sufficient to justify a shift of the burden of proof. Exactly that evidential position would have arisen in the days in which *King v Great Britain-China Centre* [1991] IRLR 513, [1992] ICR 516 was the leading authority in relation to the approach a tribunal should take to claims of discrimination. Although a tribunal must by statute ignore whether there is any adequate explanation in stage one of its logical analysis of the facts, that does not mean, in our view, to say that it can and should ignore an explanation that is frankly inadequate and in particular one that is disbelieved.

Institutional Discrimination

35. The Court of Appeal in *Aylott v Stockton on Tees Borough Council* [2010] EWCA Civ 910 stated "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 ET could properly infer that wrong assumptions were being made about that

person's characteristics and that those assumptions were operative in the detrimental treatment, such as a decision to dismiss" (paragraph 47)

36. In *Efobi v Royal Mail Group Ltd* [2019] IRLR 352, the Court of Appeal held

> I would accept that in a case where there is positive evidence of a culture of discrimination within an organisation this may be material and carry some weight, although even then the evidence is likely to be of very limited value. In *Chief Constable of Greater Manchester v Bailey* [2017] EWCA Civ 425, [2017] TLR 96, para [99], Underhill LJ made these observations with respect to a similar argument advanced in that case:
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> > 'Authoritative material showing that discriminatory conduct or attitudes are widespread in the institution may, depending on the case, make it more likely that the alleged conduct occurred, or that the alleged motivations were operative. Or there may be some more specific relevance: in the present case, for example, it is not implausible that the fact that the GMP had been the subject of two recent reports of racist conduct or attitudes by its members might have served to increase the sensitivity or embarrassment which the tribunal found had influenced ACC Sheard's thinking. But such material must always be used with care, and the tribunal must in any case identify with specificity the particular reason why it considers the material in question to have probative value as regards the motivation of the alleged discriminator(s) in any particular case: as Elisabeth Laing J put it, there is no "doctrine of transferred malice". It is clear that the Tribunal's reasoning does not pass that test.'
>
> In this case not only was there no evidence of widespread discrimination but the ET specifically dismissed, and in robust terms, the claimant's contention that there had been what he termed 'systemic discrimination' in the recruitment process. Nor was there alleged to be any link between the managers who were found to have harassed and victimised the claimant and the recruiters and line managers who considered his applications; they were in an entirely different department. The fact that the victimisation was a consequence of his complaining to the tribunal was nothing to the point. In my judgment in these circumstances it would have been wrong for the ET to have given weight to the fact that others in the organisation discriminated against him. Certainly the tribunal cannot be criticised for failing to do so."

Disability Discrimination

37. Disability is defined in section 6 of the Equality Act 2010. A person has a disability if they have a physical or mental impairment and that impairment has a substantial and long term adverse effect on their ability to carry out day-to-day activities.

38. “Substantial” means more than minor or trivial (section 212 (1) Equality Act 2010)

39. Paragraph 5 of Schedule 1 Equality Act 2010 provides:

(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.

(2) “Measures” includes, in particular, medical treatment and the use of a prosthesis or other aid.

40. In *Aderemi v London and South Eastern Railway* [2013] ICR 591, Langstaff P stated

> “It is clear first from the definition in section 6(1)(b) of the Equality Act 2010, that what a Tribunal has to consider is an adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which a Claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading “trivial” or “insubstantial”, it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other'. (paragraph 14)

41. The approach in determining whether a person has a disability is to consider:

— Whether the person has a physical or mental impairment;

— Whether the impairment affects the person's ability to carry out normal day-to-day activities;

— The effect on such activities must be 'substantial';

— The effects must be 'long term'.

Goodwin v The Patent Office [1999] ICR 302

42. In respect of a claim for discrimination arising from disability, under section 15(1) of the Equality Act 2010 a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

43. Under section 15(2), this does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

44. The proper approach to section 15 claims was considered by Simler P in the case of *Pnaiser v NHS England* at paragraph 31. She held:

> (a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
>
> (b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
>
> (c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport* [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her skeleton).
>
> (d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable

treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in *Land Registry v Houghton* UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that 'a subjective approach infects the whole of section 15' by virtue of the requirement of knowledge in s.15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26–34 of *Weerasinghe* as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages – the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of s.15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.

(i) As Langstaff P held in *Weerasinghe*, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of 'something arising in consequence of the claimant's

> disability'. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment.

45. In *Private Medicine Intermediaries Ltd v Hodkinson*, HHJ Eady QC held

> **[24]** The protection afforded by s 15 applies where the employee is treated "unfavourably". It does not necessitate the kind of comparison required by the use of the term "less favourable treatment" as in other forms of direct discrimination protection; neither is it to be understood as being the same as "detriment". "Unfavourable treatment" suggests the placing of a hurdle in front of, or creating a particular difficulty or disadvantage for, a person because of something arising in consequence of their disability. It will be for an ET to assess, but treatment that is *advantageous* will not be unfavourable merely because it might have been *more* advantageous.

Findings of Fact

46. It is trite, but perhaps worth stating, that tribunals can only decide cases on the evidence which has been presented to them. As set out in the case law referred to above, questions about institutional racism or other biases may be relevant but such institutional practices have to be proved, simply to state that they exist is not sufficient. Likewise, we accept that all people have unconscious biases, but that, of itself, is not sufficient for a claim of discrimination to succeed. For a claim of discrimination to succeed it is necessary for there to be facts from which a tribunal could decide that the unconscious bias has translated into a contravention of the Equality Act 2010. Of course, in analysing the evidence and deciding whether there are facts from which we could conclude that a contravention of the Equality Act 2010 has occurred, we must bear in mind the fact that people have unconscious biases and ask ourselves whether the reasons or motivations for any acts or omissions included such biases, even if the alleged discriminator was unaware of them.

47. The claimant had been employed by the respondent since 2004, at least latterly, as a Charge Nurse.

48. The respondent's Resolution Policy deals with grievances and contains the following relevant paragraphs:

> 6.6.4 The agreed resolution should be proportionate to the concern and resolve matters for all parties concerned. If an issue remains unresolved at the informal stage, staff may follow the formal process at Appendix A.
>
> …
>
> **Appendix A Procedure for dealing with concerns where informal resolution has not been possible**
>
> **…**

(ii) Submitting a formal concern

All formal concerns must be submitted in writing. If an employee wishes to lodge an issue for resolution, at this level they may use the template Resolution Form at Appendix 2. This should be sent to the manager. If the staff member feels unable to discuss the matter with their manager or if the issue relates to their manager then they should send the form to the next more senior manager. Advice from HR may be sought. It is recognised that setting out a concern or issue in writing may not be easy. Assistance may be sought from a Staff Side Representative or other Companion or by accessing the Trust's Support Services if required.

The manager should provide written confirmation of receipt of the formal written concern to the staff member within 7 calendar days of receipt.

(iii) Formal meeting to understand the concern

The manager should then make arrangements to hold a meeting with the staff member and their Companion within a further 14 calendar days of confirming receipt of the written concern. A representative from the HR department will also be present at the meeting to provide advice and support on process. The arrangements for this meeting will be confirmed in writing. The purpose of this meeting is to…

(iv) Investigation into the concern

Where a decision is deferred pending further fact finding or investigation, the manager will write to the staff member indicating a timescale in which the fact finding or investigation will be completed. The timescale will depend upon the nature and complexity of the investigation required but will be a maximum of 8 weeks in line with the Trust's Investigation Policy. If the investigation timescale needs to be extended, this should be notified to the member of staff in writing giving reasons. All other provisions of the Trust's Investigations Policy should be adhered to.

…

A meeting to confirm the outcome of the investigation and to give a final decision regarding the concern raised will be arranged as soon as possible and within 2 weeks of the investigation concluding. The decision and detailed reasons why will be confirmed in writing to the staff member within 7 calendar days of the meeting.

(Pages 319 – 324, emphasis original)

49. The history of the claimant's employment was not an entirely happy one and in 2011 allegations were made against him which had led to a colleague being dismissed for racially motivated discrimination against the claimant.

50. On 17 January 2020, the claimant emailed the chief executive of the respondent raising a grievance. His covering email stated:

> Find attached my complaint which I consider to be extremely serious, not only because of its exceptional nature, because of its elongated duration.
>
> I invite you to take immediate measures to ensure that I am suitably protected, having regard to the nature of my disability. Whilst I continue to now struggle because of the consequences of the adverse treatment which I have been subjected to over what is an unreasonable length of time, I ask that you take serious measures to investigate my complaint and to ensure that I am not subjected to further hardship or victimised as a result.

(Page 95)

51. The grievance itself set out an introduction in which the claimant stated that he was disabled and from an African background and then had a section headed "Chronology of complaints and treatments". The claimant then made a number of complaints dating back to November 2011 and continuing up to 9 December 2019. His complaints were about the way his manager, David McKenna, had treated him but also stated "conspired effort by others must either be complicit directly or else be in the know or loop without exposing the plot (intent)" (page 99, sic). He stated that he had been the victim of disability discrimination and racial discrimination and said that he was at his wits end, his condition was being adversely affected and his health was suffering immensely.

52. The grievance made no reference to any matters which affected anybody else in the trust and was entirely about the claimant's own position. It ended with the statement:

> I have come to the unfortunate realisation that the treatments which I am complaining of, may be directed against me deliberately in the hope that I am driven out prematurely or that I suffer serious health failure otherwise.
>
> The Trust must therefore take immediate actions to cease the treatments I am complaining of, which has not been ongoing for a good many years.

53. Thereafter, as the claimant agreed, a meeting took place on 28 January 2020. There are no minutes of that meeting but it is referred to within the minutes of another meeting at page 124 of the bundle and in an email of 30 January 2020 at page 681 of the bundle. The claimant says that at that meeting he was told that the process would be to deal with the grievance informally but he did not agree to that. Ms Smith, who was at the meeting, says that the claimant expressed that he wanted his concerns to be addressed informally via a facilitated meeting and it was discussed that could go ahead on 25 February 2020.

54. The question of whether there was an agreement to proceed informally is relevant to the question of delay. Where different witnesses have different

recollections of what happened at the time, it is now well established that, generally, contemporaneous documents provide the best way of ascertaining what actually happened.

55. On 29 January 2020, Ms Smith wrote to the claimant and Mr George, among others, stating:

> I understand from Rufus [Mr George] that Albert [the claimant] is reflecting on our meeting yesterday and will be making a decision regarding the options available, these being:
>
> - Exploring an informal resolution initially in the way of a facilitated meeting with David. If the informal resolution is not satisfactory for a formal grievance to proceed.
>
> - To bypass the informal process and for a formal grievance to proceed.

56. Ms Smith repeated those options in an email on 2 February 2022 to which, on 3 February, the claimant replied "Am prepared to try option one…"

57. As we set out below, the terms of reference which were ultimately agreed by the claimant and Mr George in respect of the formal grievance, also referred to it being agreed that the matter would be dealt with informally at the meeting on 28 January 2020.

58. In those circumstances, having regard to those documents, we find that notwithstanding his evidence to the contrary, the claimant did initially agree to the grievance proceeding by way of informal resolution.

59. It is not in dispute that on 6 February 2020 the claimant was invited to a stage I long-term sickness absence meeting (page 101).

60. On 17 February 2020, Mr George, acting on behalf of the claimant, wrote to Bethany Smith saying that he had spoken to the claimant and he wanted to proceed to a formal investigation (page 110).

61. The respondent then agreed to continue on a formal basis and it was necessary for a further meeting to take place.

62. On 19 February 2020 Ms Smith wrote to Ms Gericke (who had been asked to conduct the grievance process) stating "the member of staff and their union representative have offered Tuesday 3rd March or Tuesday 24th March in Brighton." It is not in dispute that Mr George only carried out union business on alternative Tuesdays (being generally engaged as a nurse) and it was not disputed that the statement made by Ms Smith in that email was correct.

63. As part of the formal grievance process it was necessary for Terms of Reference to be agreed. There was a process of agreement between the claimant and the respondent and, on 3 March 2020, Mr George wrote to Ms

Smith attaching the Terms of Reference. In the first substantive paragraph they contained the statement "A meeting was held with Albert on 28 January 2020 to understand his concerns. An outcome of this meeting was that Albert felt he would like the concerns addressed *informally* via a facilitated meeting. Dates were shared with Albert and his union representative however on 17 February 2020 Albert confirmed that he felt this concerns could not be addressed informally and instead requested for a formal investigation under the Resolution Policy was to commence." (Our epmphasis).

64. Thus, it appears, the terms of reference were not agreed between the claimant and the respondent until 3 March 2020 and we find accordingly.

65. On 16 March 2020, Ms Gericke wrote to the claimant inviting him to a meeting on 24 March 2020 (page 121).

66. On 23 March 2020, the country went into the first national lockdown because of the pandemic.

67. A meeting then took place on 24th March 2020, the minutes of which are at page 123 of the bundle.

68. There was, we find, no dragging of the feet by the respondent up to 24 March 2020. The claimant had initially said that he wanted the grievance to be conducted informally and the respondent acted accordingly. The claimant had then changed his mind and the respondent, again, reacted appropriately. The claimant and his representative had only provided two dates for the grievance meeting. The earlier one of 3 March 2020 could not have taken place because the terms of reference had not been agreed by then. The respondent met with the claimant on the next date that he and his union representative were available.

69. The investigation meeting appears, from the minutes, to have been thorough and no complaint was made about it (indeed as we shall set out below, the claimant was happy that Ms Gericke had been appointed as the investigating officer).

70. On 25th March 2020, Ms Gericke wrote that because of the "greatest challenge the trust and the country have ever faced…" she would not be able to investigate the case as quickly as it deserved. She referred to an investigation meeting which she had cancelled but would reschedule and asked the claimant to send her copies of relevant documents.

71. It is not in dispute that the grievance was not, in fact, progressed from the end of March until June 2020.

72. In her witness statement Ms Gericke states that in April 2020, following national guidance to pause all workplace investigations, there was a communication from Helen Weatherill, director of HR at the trust, that all workplace

investigations and hearings should be suspended. Ms Gericke says that she, therefore, paused work on the claimant's investigation.

73. The respondent has not been able to provide a copy of that communication and Ms Smith was unaware of any communication having been made. Whilst we accept the evidence of Ms Smith that during the pandemic she was allocated different work to that which she would normally do, she also told the tribunal that if such an instruction had been sent she thought she would be aware of it. Nevertheless, it was Ms Smith's view that all grievances during that period were paused and we have been presented with no evidence that any grievances were continued in that period.

74. The parties refers to a document at page 240 of the bundle headed "National Social Partnership Forum statement on Industrial relations during the pandemic". The document states that employers will pause disciplinary and other employment procedures while the crisis lasts, except where the employee requests proceeding as it would otherwise cause additional anxiety. It states that where employees raise urgent grievances, for example concerning health and safety, then they should be considered within the normal timeframes but other grievances should be paused on the understanding that they may be taken up at a later date without detriment (page 241). The respondent appeared to argue that, in those circumstances, it could not continue with the claimant's grievance.

75. The claimant argues that was a fundamental misunderstanding of the national guidance because urgent grievances, such as the claimants, could be continued and should be continued. It is not necessary for us to make a finding of what the statement meant because we are concerned with the reasons for the respondent's actions, not whether it was in breach of the statement.

76. Moving away from the chronology for a moment, on 19 June 2020 Ms Gericke wrote to the claimant apologising for the delay to the grievance stating that she had not been able to fully investigate every aspect of his complaint because of the recent operational pressures at the trust. She did not say that she had been told not to investigate further, nor did she make any reference to the National Social Partnership Forum statement. She stated that she would interview Mr McKenna and another employee during the week commencing 29 June 2020 and sent the minutes of the meeting of 24th of March 2020 and asked the claimant to approve them (page 157).

77. We think that letter is more likely to reflect the real reason why the grievance was not progressed. It may be the case that, as a matter of fact, no grievances were progressed at that time, but there is no contemporaneous documentary evidence that the respondent invoked a decision not to proceed with grievances. We think that had there been such a decision, the respondent would have been able to provide us with a copy of it and Ms Gericke would have referred to it in her letter of 19 June 2020.

78. Having said that, the explanation within the letter of 19 June 2020 is entirely credible. It is easy to forget, at this remove in time, the difficulties which many organisations faced immediately after the first national lockdown. Hospitals were at the forefront of the need to move quickly in order to combat the pandemic. Ms Gericke explains in her witness statement that she had to ensure 200 nurses were upskilled to work on the wards to back-fill nurses deployed to areas such as intensive care, people had to be redeployed and she was responsible for deploying 250 nurses, she went back into clinical work which she had not undertaken for some time as a manager, she represented the "hub" at the Silver Command daily, 100 students were brought in to bolster the workforce who had to be given contracts and risk assessments. She describes the workload as being vast and unprecedented and we find that was the case.

79. In his evidence, the claimant asserted that he believed that his grievance was as important to deal with as those other matters which were filling Ms Gericke's day. Whilst that was undoubtedly his belief, we do not think it was unreasonable for his grievance not to have been a priority for Ms Gericke in the circumstances which she faced. Indeed, one can imagine significant criticism being directed at the respondent if, in the early months of the pandemic, it had prioritised an employee's grievance over ensuring there were sufficient nurses in intensive care to treat patients who were at risk of dying from covid. That is not the same as saying that the claimant's grievance was unimportant, it was not unimportant, but the timescale for resolution of the grievance has to be judged in the context of the national crisis which existed at the time.

80. Moving back to the chronology, on 2 May 2020 the claimant wrote to Helen Westwood, Senior Sister, referring to a previous discussion and stated that he had worked a shift in the red zone with "James", and was then made aware that nurses with pre-existing conditions were currently excluded from working in the red zone. He stated that he had a cardiac condition and was waiting for a cardiac procedure. He asked for an assessment by a speciality to alleviate any anxiety (pages 419-420).

81. The red zone was the area in the hospital where Covid patients were initially treated, if they were admitted they then went to a Covid ward.

82. At 08:30 the next morning, Ms Westwood referred the email on and on 11 May 2020 at 07:56 Mr McKenna, matron on the acute floor, stated that the claimant needed the BAME assessment to be updated (page 418).

83. In his cross-examination of Ms Gericke, the claimant's representative put to her that the claimant's last day of working in the red zone was 2 May 2020. That is consistent with the claimant's witness statement in which he says "the Respondent failed to protect me from their receipt of the Government Covid 19 Guidelines which would and did inform them that I was a person of colour at high risk of catching Covid 19 and therefore required immediate shielding, which in turn should and did preclude me from working in the Red Covid Zone. The Respondent only started affording me such protection after I had worked a shi[f]t in the Red Covid 19 Zone and because I had made my concerns known

that I was at risk of death from catching Covid 19 due to my reported heart condition of Arial Fibrillation" (paragraph 10, bottom of page 17).

84. The claimant told us in evidence that he had worked three shifts in the red zone. That appears to be inconsistent with his witness statement which refers to working "a shift" in the red zone, but little turns on whether he worked three shifts or one shift up to 2 May 2020. It is apparent that after the claimant contacted Ms Westwood, he was no longer required to work in the red zone.

85. The claimant did not contend in his witness statement that he was required to work in the red zone when white people with heart conditions such as his were not and such a proposition was not put to any of the respondent's witnesses. Moreover, although the claimant's statement refers to government Covid 19 guidelines that people of colour were at higher risk of catching Covid and required shielding, we were not taken to any such guidelines. Significantly, if such guidelines exist, we do not know the date of those guidelines.

86. There is an Excel spreadsheet at page 601-602 of the bundle, which the respondent says is a record of a completed risk assessment. It appears to show that a risk assessment was completed for the claimant on 12 May 2020. In evidence, the claimant initially admitted that was the case but subsequently denied it and said that he had misunderstood the question. The risk assessment itself is not in the bundle. We were told by Ms Smith that risk assessments carried out at that stage were carried out on paper by a manager. She then asked all of the managers to populate a spreadsheet so that HR was aware of the risk assessments which had been carried out.

87. Although it is somewhat unsatisfactory that we have not been given a copy of the risk assessment dated 12 May 2020, the evidence at page 602 clearly suggests that such a risk assessment was carried out. The alternative is that the document at page 602 has been deliberately manufactured to give a misleading impression but there is no evidence to support such an assertion. As we have said, it is not suggested by the claimant that he was working in the red zone after 12 May 2020 (or indeed after 2 May 2020).

88. On 10 June 2020, the claimant raised the second grievance to which this claim relates.

89. In that grievance the claimant expressed shock and amazement that Ms Gericke had been suddenly removed from carrying out the investigation of his grievance and asserted that underhanded steps were being taken to cover up or conceal the seriousness of what had happened to him. He said that more issues and bad treatment were still happening to him. He referred to his request to be protected from "red zone" work but says that he had been subjected to repeated investigations and "so called assessments". He went on to say that he was disappointed and angry that he had been made to go through a humiliating process in order to prove something which should already be on his employment file (page 137).

90. Although the claimant expressed his unhappiness at being subjected to "so called assessments" in respect of his request to be protected from red zone work, that unhappiness is, itself, further evidence of the fact that a risk assessment was carried out after he had asked to be removed from the red zone.

91. We find that a risk assessment was carried out on 12 May 2020.

92. The letter of 10 June 2020 also indicates that, at that time, the claimant was happy that Ms Gericke was carrying out the investigation which tends to suggest that he had not seen any evidence of prejudicial attitudes on her behalf. Indeed in the letter he states "she [Ms Gericke] seemed to have appreciated how serious the events I was complaining about. She was eager to carry out the Investigations, in the meantime suggested counselling service with Help, and I had confidence in her that she would at least not be a pushover for those whom I can equate within the trust to be "gatekeepers" whom want to keep things as they are and are willing to frustrate change." (sic).

93. The grievance goes on to state that the trust had completely failed to have and implement a mechanism in place to identify those at immediate risk, such as himself and that the trust should have had a policy to identify people like him who were at risk. He states that if he was white then the trust would have treated him more seriously and asks the trust to consider three points:

    a. whether he has a condition which amounts to a disability under the law,

    b. why there has been an outrageously long delay in conducting and concluding investigations,

    c. why the trust had failed to consider him and his condition as placing him at a higher risk due to Covid and therefore qualify to be shielded.

94. On 15 June 2020, Dr Findlay, Managing Director, Chief Medical officer and Deputy Chief Executive for the respondent wrote to the claimant stating that he acknowledged that there had been an unacceptable delay to the investigation and confirmed that Ms Gericke was still the investigating officer. He advised the claimant that if he had received a shielding letter from his GP it should be provided to management and said that a risk assessment had been carried out which had identified that he was in a high risk category and so moved to the green area.

95. It is not disputed that on 19 June 2020, a risk assessment was carried out in respect of the claimant which found that he was a high risk and limited his work to the green zone (page 247).

96. Ms Gericke then continued with her investigation after sending the letter of apology to which we have referred above on 19 June 2020.

97. She produced a management/investigation report which appears at page 210 of the bundle. The report is detailed. It sets out the allegations, sets out Mr McKenna's answer to those allegations as well as further information and provides conclusions. In answer to the allegations against him, Mr McKenna had made certain allegations against the claimant. They can properly be seen as an attempt by Mr McKenna to justify his actions. As can be seen from the report, Ms Gericke generally accepted Mr McKenna's explanations although she did make some criticism of him, including in relation to the way he had (or had not) conducted appraisals and his failure to carry out a better investigation into allegations which had been made against the claimant by Liz Bowies. Ms Gericke's report then went on to make findings which were adverse to the claimant, including at pages 228, 233 and 237 of the bundle.

98. Ms Gericke did not revert to the claimant to ask for his comments on Mr McKenna's allegations before she reached her conclusions. In evidence she accepted that was an error on her part. She told us that she was inexperienced in the conduct of grievances, this was the first one that she had conducted and that she was keen to get the report out as quickly as possible following the delays which we have outlined above. We have no reason to doubt Ms Gericke's evidence that this was the first grievance that she had conducted - we found her evidence to be disarmingly frank, she was willing to make concessions where appropriate and despite sustained and powerful cross examination, she was not shown to have misled the tribunal (or the claimant). We found her evidence to be truthful.

99. One of the points advanced to us by the claimant and Mr George was that Ms Gericke had accepted Mr McKenna's version of events (who was white) without asking the claimant for his comment on that version. They suggest that is, at least, evidence of unconscious bias in that she accepted the evidence of a white employee over a black employee without asking the black employee for his comment. We will return to that below when we reach conclusions.

100. One of the adverse findings which Ms Gericke made in respect of the claimant was that he became aggressive, abusive and threatening towards a Mr Doubleday following a disagreement about whether the claimant was taking an inappropriate break on 9 December 2020 (page 228). In reaching that conclusion she referred to evidence from Aaron Thompson contained in email dated 11 December 2019 that he had heard the claimant shouting loudly from the staff room/staff room corridor and that patients could have heard him (page 507). She also referred to evidence from Mr Doubleday that the claimant had been spitting his face (not deliberately but his spittle was hitting Mr Doubleday's face as he was so agitated), his nostrils were flaring and he was shaking with rage (511). She also referred to a statement from Clare Long who wrote an email dated 11 December 2019 stating that Albert was raising his voice and talking in an aggressive manner towards Mr Doubleday (page 514).

101. A further adverse finding was that the behaviour of the claimant did not always meet the standards set out in the Values & Behaviour Blueprint. In

reaching that conclusion Ms Gericke quoted a number of emails, including an email dated 21 July 2016, in which the Acting Unit Manager had said that a number of female staff members had complained that the claimant had been staring at them and making unnecessary trips to the staffroom, an email dated 10 December 2019 from James Leighton-Fry that he had spent most of the previous Saturday chasing the claimant around and that challenging him had become a real problem as when he was challenged he got offended but did not change his behaviour.

102. Ms Gericke also made an finding that Mr McKenna had genuine concerns about the claimant's capabilities which were well documented and in that respect she relied upon an email dated 15 November 2019 from Toni Rogers and a meeting between Mr McKenna and the claimant on 2 January 2019 to discuss a complaint made by Dr Yu.

103. The further adverse findings at page 237 are effectively repetitions of the earlier points.

104. We can well understand the claimant's unhappiness at the findings which were made in that report. They are findings of a serious nature and they are findings which the claimant had no opportunity to comment on. We find that the concession made by Ms Gericke that she was in error in not seeking the claimant's comments on those points was well made. We can also well understand the point made by the claimant that if those allegations were accurate, it is surprising that the respondent has never subjected him to disciplinary proceedings in respect of them.

105. Having said that, it was reasonable for Ms Gericke to believe that it was necessary to take account of those points in order to decide whether the allegations against Mr McKenna by the claimant were well-founded. The complaints made by the claimant in the grievance included a complaint that Mr McKenna had relayed to the claimant that a female colleague had complained that she felt sexually threatened when working with him, a complaint that the claimant was upset by the way he had been dealt with when he left the ward on 9 December 2019 in order to get some water and that the claimant was being bullied by Mr McKenna. The terms of reference raised allegations that because of the claimant's race, Mr McKenna had accused the claimant of administering the wrong fluid to a patient, accused him of loitering and inferred malicious intent without any justification, had caused the claimant unnecessary anxiety by emailing to ask him for a meeting because colleagues had made a number of complaints about him and that under the leadership of Mr McKenna a culture had been established whereby the claimant was seen as an acceptable target for abusive behaviour. Insofar as the claimant alleged that Mr McKenna had done those things and, further, had done them because of his race or disability, it was inevitable that the investigating officer would have to do consider whether there was any reasonable basis for the actions of Mr McKenna. We find that it was for that reason that she entertained and made adverse findings against the claimant in the outcome to the grievance.

106. It is also right to record (and we find) that Ms Gericke made criticism of Mr McKenna in certain respects and recommended that he be required to attend relevant HR workshops to refresh and update his management knowledge and skills. The report was not an uncritical acceptance of Mr McKenna's actions, although Ms Gericke did find that his actions were not because of the claimant's race or disability.

107. In accordance with that report, Ms Gericke met with the claimant on 20 October 2020 and went through her findings. She sent a letter the following day in which she confirmed that she had found that Mr McKenna's management of him had fallen below the standard she would expect, particularly regarding the management of the claimant's underlying health conditions and annual appraisals but she did not uphold the allegations because she did not believe they were substantiated. We understand that to mean that she did not believe that the failings by Mr McKenna were because of the claimant's race or disability.

108. The claimant appealed against that decision on 15 December 2020 (page 163) but the appeal was dismissed.

109. As part of her decision-making process, Ms Gericke told us that she made her own decision that the claimant was not disabled. Although she had sight of the relevant occupational health reports to which we will refer below, she also had a degree in cardiology and formed her own opinion that the claimant's symptoms arising out of his condition of atrial fibrillation did not amount to a disability. Close analysis of her report, however, does not show that she dismissed the disability discrimination claims because she thought the claimant was not disabled but because she concluded that the treatment of the claimant was not because he was disabled. Little turns on that distinction for the purposes of this case.

110. In respect of the claimant's assertion that he was disabled at the material times there are three relevant occupational health reports.

111. A report dated 14 June 2017 stated that the claimant's health condition would not meet the criteria for disability because although the symptoms had a substantial effect on his ability to undertake his daily activities, he had not experienced symptoms for a period of 12 months or more (page 409).

112. A report dated 9 August 2018 stated that the claimant's atrial fibrillation would be regarded as a disability since it had a significant effect on his ability to undertake general day-to-day activities.

113. The report dated 11 September 2018 stated that the claimant was not experiencing any significant issues with his atrial fibrillation but he was waiting for an appointment for ablation (page 413).

114. The claimant's disability impact statement stated that as he lived alone, whenever he had symptoms of breathlessness and tiredness it affected his

everyday tasks like climbing stairs, shopping, cooking, cleaning, dressing and doing anything around the house.

115. An entry in the claimant's GP records dated 7 August 2023 states that there had been a discussion with the claimant about his health and that the GP confirmed:

> AF was first diagnosed in 2009 and between 2016-2019 he had increasing symptomatic Atrial fibrillation that required cardiac intervention with Cardioversion, Ablation and then he needed ongoing oral prn treatment for persistent symptoms

116. It was agreed that prn medication refers to medication that is taken as needed. There is no other medical evidence before us.

117. It is fair to say, therefore, that there is little medical evidence in support of the claimant's assertion that he was disabled at the time, but there is no doubt that he suffered atrial fibrillation which required intervention. Although Ms Gericke explains in paragraph 25 of her witness statement that she thought that the claimant's condition did not meet the definition of disability because it was sufficiently managed, she does not really explain why she reached that conclusion.

118. Overall, we see little reason to doubt the claimant's description of his symptoms in his disability impact statement and accept it.

Analysis and Conclusions

Direct Race Discrimination

119. It is convenient to deal with the direct race discrimination claim first.

120. In terms of the first of the four allegations of detriment/ less favourable treatment:

a. The respondent concedes that there was a delay in dealing with his grievance from June onwards but not before that time. Having found that there was no central direction or decision to stop dealing with grievances due to the lockdown, we find that there was a delay in dealing with the grievance from 24 March 2020 onwards. Up until that point there was no delay, the respondent was properly and expeditiously responding to the claimant's change from an informal to a formal grievance and arranging a meeting once the terms of reference had been agreed.

b. It is correct that the respondent failed to acknowledge/accept that the claimant was disabled.

c. It is correct that the respondent entertained and made adverse findings against the claimant in the outcome to his grievance.

d. It is also correct that until 2 May 2020, the respondent failed to protect the claimant from covid 19 risks insofar as he was required to work in the red zone. There was no failure thereafter. The claimant was required to work not more than three shifts in the red zone and was not required to work in the red zone after he had drawn his heart condition to the respondent's attention.

121. We must consider whether the reason for those things was that the claimant was black African. The correct comparator is a person who was in the same position as the claimant, with the same heart condition, with the same employment history, at the same time, but who was white. We must consider whether there are facts from which we could conclude, in the absence of an explanation, that the respondent directly discriminated against the claimant.

122. Given the inferences that the claimant asks us to make about the grievance and the alleged bias of Ms Gericke, it is helpful to start with the findings which she made in respect of the grievance, since it is primarily from those that the claimant builds his case. The claimant says that she wrongly accepted a racist trope that black men are aggressive which is why she was willing to accept the reference to him being angry because of his flared nostrils. He says that Ms Gericke willingly accepted the account given by Mr McKenna who was white without going to the claimant for his comment, but she would not have done that if Mr McKenna was not white or the claimant was not black.

123. There is no factual evidence of institutional discrimination by the respondent in this case and there is no evidence that, even if there was such discrimination, Ms Gericke was affected by it. There is nothing more than assertion by Mr George in his witness statement. Mr George gave no objectively verifiable reasons for his views. Whilst it seems likely that Mr George's opinions were genuinely held, that is not sufficient evidence for us to conclude that institutional racist bias existed within the respondent.

124. It is wrong to suggest that Ms Gericke's conclusions turned on her acceptance of the description of the claimant having flared nostrils in the incident of 9 December 2020. There was other evidence about the claimant's behaviour on the day in question. We have set it out above. The evidence came not only from Mr McKenna but also from other colleagues of the claimant. We find that Ms Gericke decided that the claimant was being angry and aggressive because there was a substantial amount of evidence that he was being angry and aggressive. She did not, consciously or unconsciously, apply a stereotype to or about the claimant.

125. We also accept Ms Gericke's evidence that she did not revert to the claimant due to a combination of inexperience, the unique and substantial pressures to which she was subject at the time and the ultimate need to deal with the grievance urgently because of the delay which had been incurred. She had reasonably independent evidence (albeit documentary) on which she could make the decisions she made. There is no evidence that she had behaved in a discriminatory way during the investigation to the grievance, indeed the

claimant's view of her was quite to the contrary in June 2020. The investigation report was careful and detailed and made adverse findings against Mr McKenna. There is no evidence from which we could conclude that if Mr McKenna were black or the claimant were white, she would have reverted to the claimant before making her findings.

126. We have found that the reasons for the delay in carrying out and concluding the investigation and outcome to the grievance were those set out in the letter of 19 June 2020 and in Ms Gericke's witness statement. On 23 March 2020 the country went into a national lockdown which had an unprecedented effect on the NHS and an unprecedented effect on Ms Gericke's workload.. There is no evidence from which we could conclude that the delay would not have occurred if the claimant were white and we find that any person in the position of the claimant would have been treated the same way.

127. The third allegation of less favourable treatment is that it was because the claimant was black African that Ms Gericke entertained and made adverse findings against him in the outcome of the grievance. We find that the true reason why Ms Gericke entertained and made the adverse findings of fact that she did was because she thought it was necessary to do so in order to properly consider the claimant's grievance. We do not find that the burden of proof shifts to the respondent in this respect because there are no facts from which we could conclude, in the absence of an explanation, that the entertaining and making of adverse findings in the outcome of the grievance was because of the claimant's race. But even if the burden of proof does shift, we are entirely satisfied that the actions of Ms Gericke were in no way connected with the claimant's race. They were because she reasonably thought it was necessary to do so in order to properly consider the claimant's grievance.

128. We must then consider the reason for the failure by Ms Gericke to accept that the claimant was disabled. In this respect the evidence of Ms Gericke was that adjustments would be made for the claimant whether he was disabled or not. They would be made if the occupational health report recommended them. We have no reason to doubt that evidence and we accept it.

129. There is no evidence to suggest that if the claimant was white Ms Gericke would have decided that he was disabled. There is no evidence that the respondent is more likely to treat white people as disabled than black people and nor was that suggested. In any event, we accept that Ms Gericke felt able to reach her own conclusion that the was not disabled because his symptoms were sufficiently managed because the only medication that he was on was prn medication and yet he was able to carry out his day-to-day activities. The claimant's treatment in this respect was in no way connected with race.

130. Finally, in this respect, we must consider whether the respondent failed to protect the claimant from covid-19 risks because he was black. The claimant's complaint here is that he should have been immediately exempted from working in the red zone because he was from a BAME background and/or because of his atrial fibrillation. His complaint, is not, in reality, that he was

being treated less favourably than white people, white people were required to work in the red zone in the same way that he was. His complaint is that he was not treated more favourably than white people by being moved from the red zone because he was of a BAME background and/or because of his heart condition. The claimant has not asserted that white people with disabilities were moved more quickly or easily than he was and there is no evidence to that effect. In respect of this claim, there is simply no evidence from which we could conclude that the claimant, as a black person, was being treated in any way differently to a white person prior to 2 May 2020. Thereafter the claimant was moved from the red zone and there was no failure to protect him from Covid 19 risks.

131. In the circumstances, the claim of direct race discrimination fails.

Detriment because of a Protected Disclosure

132. The first question we must consider in this respect is whether either of the claimant's grievance letters amounted to protected disclosures.

133. The only point taken by the respondent in this respect is that the claimant did not reasonably believe, at the time of making the disclosures, that the information he was disclosing was in the public interest.

134. For the purposes of completeness, to the extent that it was necessary to do so, we would have found that both disclosures disclosed information and that the claimant reasonably believed that they tended to show that the respondent was failing to comply with its legal obligations under the Equality Act 2010 and that his health and safety was being or was likely to be endangered.

135. In terms of the question of reasonable belief in the public interest, the claimant's witness statement states as follows, "That the disclosures outlined above are in the public interest due to the fact that public policy legislation under the Health & Safety at Work Act 1974 and S.44 Employment Rights Act 1996 for which the Respondent have a legal duty as a public authority under S.149 of the same act to deter, prevent and eliminate taking place in the workplace and beyond with regards to third party interactions" (sic). The witness statement lacks any evidence about whether the claimant held that belief at the time he made his disclosures.

136. In our judgment, the disclosure on 17 January 2020 was entirely to do with the claimant's own personal position. There is nothing in the letter which suggests that he had any wider considerations in mind or that he was considering the public interest. We find that at the time he made it, he did not believe that the disclosure of the information in the grievance was made in the public interest

137. The claimant's grievance dated 10 June 2020 is somewhat different in that it contains the statement "What is shocking, is that the Trust completely

failed to have and implement mechanism in place to identify those at immediate risks such as myself. I would have expected the Trust to have been the one to have identified persons like me whom are at risk category. Instead, that was not the case. I was required to prove that I am at risk" (sic). On its face, that statement might suggest that the claimant did have in mind the wider public interest in making his disclosure. Again, however, the claimant gave no evidence to us that he had considered the public interest when making that disclosure. When the claimant was asked in evidence about why he thought the disclosure was in the public interest he stated that he was high risk and if he got Covid and walked in the street others may be infected. He suggested that because he had a heart condition and was black he was more likely to be infected and contagious.

138. The three questions which the claimant asked the respondent to look into at the end of the grievance were all about him, whether he had a disability, whether there had been outrageously long delays in conducting his grievance and why the trust had failed to consider him and his condition as placing him at a higher risk of Covid and qualifying him to be shielded. There were no questions which related to a general public interest.

139. We find that the statement that the trust had failed to have any mechanism to identify those at immediate risk was simply a statement designed to advance the claimant's position. On the balance of probabilities we think that the claimant did not consider the public interest at the time of his grievance and did not have a belief that the information was being disclosed in the public interest. Had the claimant considered the point, he may well have decided that his disclosure was in the public interest, however we find that he did not do so.

140. In case we are wrong on that point, however, we will deal with the question of whether the four detriments alleged occurred and, if so, whether they were because the claimant had made the alleged protected disclosures.

141. We have set out above our findings in relation to the detriments and we have found that they did occur.

142. We also find that all of the disclosures would have been a detriment to the claimant. A reasonable person in the position of the claimant would have felt that the failure to deal with his grievance before October 2020 was a detriment. Likewise, an employee in the position of this claimant, who felt that they were disabled, would reasonably feel they had been subjected to a detriment if the employer failed to acknowledge that disability. The adverse findings against the claimant in the grievance would be seen as a detriment by a reasonable employee and a reasonable employee with a heart condition would feel they had been subjected to detriment if they were asked to work in the red zone.

143. Thus the question becomes whether the detriments were done on the ground that the claimant had raised his grievances.

144. We have set out above why we find that the first three acts of detriment were done. We find that the fact that the claimant had raised his grievances did not have any influence on the decisions which were reached in relation to the grievance of 17 January 2020, or the delay in dealing with it, or the decision that he was not disabled.

145. In respect of the requirement for the claimant to work in the red zone, the decision was not one taken by Ms Gericke and there is no evidence that the person who rostered the claimant to work in the red zone had any knowledge of his grievances. There is no suggestion that the requirement that the claimant work in the red zone was anything other than normal shift rostering. We find that normal shift rostering was the reason for the claimant working in the red zone until 2 May 2020.

146. Thus these claims fail, firstly on the basis that the claimant did not make protected disclosures and secondly because the detriments to which he was subjected were not because of the grievances.

Disability Discrimination

147. Having regard to the findings below on whether the claimant was treated less favourably because of his disability or because of something arising from his disability, it is not strictly necessary for us to decide whether the claimant was disabled or not- even if he was disabled at the relevant times, we are satisfied that he was not treated less favourably or unfavourably because of his disability.

148. However, on the balance of probabilities we do conclude that the claimant was disabled at the material times. We do so because we see no reason to disbelieve his evidence which is set out in his disability impact statement and because his evidence is consistent with the occupational health reports from the time. Our analysis is as follows.

149. The claimant clearly had a physical impairment being atrial fibrillation.

150. On the claimant's evidence the atrial fibrillation had more than a minor or trivial effect on his day-to-day activities. Even if the claimant only had prn medication, the fact that his physicians saw fit to prescribe that medication for him suggests that there may be occasions when it was necessary to take it. If, on those occasions, the claimant did not take the medication then it is more likely than not that his ability to do day-to-day activities would be affected. Two of the three occupational health reports referred to there being a substantial adverse effect on day-to-day activities. Thus, on balance and in circumstances where the evidential basis is, we acknowledge, relatively thin, we find that it is more likely than not that the claimant's atrial fibrillation had more than a minor or trivial effect on his day-to-day activities.

151. The condition has lasted more than a year and was clearly likely to do so in 2020, the claimant's evidence, which we accept, was that he had already had one ablation procedure and it had not been wholly successful.

152. Thus we find that the claimant was disabled.

Direct Discrimination on the Grounds of Disability

153. The correct non-disabled comparator would be a person who was, in all material respects, in the same position as the claimant but who was not disabled.

154. There is no evidence from which we could conclude that a non-disabled person's grievance would have been dealt with any more quickly than the claimant's was. Again, and in any event, we accept Ms Gericke's explanation for the delay.

155. There is no evidence from which we could conclude that a non-disabled person would have had their alleged disability acknowledged. It is overwhelmingly likely that Ms Gericke would have decided that such a person was not disabled, in the same way that she decided that the claimant was not disabled.

156. There is no evidence that a non-disabled person would have avoided the adverse findings made in the grievance and, again, we find that they were entertained and made because Ms Gericke felt that it was necessary to do so in order to properly consider and answer the claimant's grievance.

157. There is no evidence that a non-disabled person would have been removed from the red zone before the claimant was.

158. In the circumstances, the claim of direct disability discrimination fails.

Discrimination arising from Disability

159. We have found that the respondent did the alleged detriments. They amounted to unfavourable treatment.

160. We accept that because of the claimant's atrial fibrillation he had an abnormal heart rhythm which caused tiredness, palpitations, feeling faint and breathlessness.

161. We are entirely satisfied that the delay to the claimant's grievance was nothing to do with the things which arose from his disability. We have already set out what caused the delay to the grievance- it was not those things.

162. We are also entirely satisfied that the things which arose from the claimant's disability were not the reason why the respondent failed to acknowledge/accept the claimant's disability. The reverse is true, it was

because Ms Gericke did not believe that the atrial fibrillation had a substantial impact on his day to day activities that she decided that he was not disabled.

163. We have set out the reason why adverse findings against the claimant were entertained and made in the outcome to the grievance and they are nothing to do with the things that arose from his disability.

164. It was not because of the things which arose from the claimant's disability that he was required to work in the red zone until 2 May 2020. As soon as he drew his health condition it to the attention of the respondent he was moved to the green zone.

165. Thus the claim of discrimination because of something arising from disability fails.

Harassment related to race and/or disability

166. The four detriments about which the claimant complains did amount to unwanted conduct.

167. They did not, however, relate to the claimant's disability and/or race for the reasons which we have given.

168. In those circumstances, this claim must also fail.

Victimisation

169. It is not in dispute that the claimant did protected acts as alleged.

170. We find, for the reasons we have given, that the respondent subjected to the claimant to the four detriments.

171. However, also for the reasons we have given, the reason that the respondent subjected the claimant to the detriments was not because he had done protected acts. To summarise, even if the claimant did shift the burden of proof in this respect, we are entirely satisfied that the delay in respect of the grievance was because of the effects of the covid pandemic, the failure to acknowledge/admit his disability was because Ms Gericke believed that he was not disabled, the entertaining and making of adverse findings in the outcome to the grievance was because Ms Gericke thought that doing so was necessary in order to properly deal with and answer the claimant's grievance and the failure to protect the claimant from Covid 19 risks was because of the application of the respondent's standard rostering processes.

Overall conclusions

172. In very brief summary and without prejudice to what we have said above:

a. The protected interest disclosure claims fail because the grievances were not raised in the public interest and the reason

for the way the claimant was treated was in no way because he had raised his grievances.

b. The direct race discrimination claims fail because there is no evidence from which we could conclude, in the absence of an explanation, that the claimant was treated as he was because he was black African. In any event we accept the explanations given to us by Ms Gericke as to the reasons for the delay to the grievance, her decision that he was not disabled and her entertaining and making adverse findings against him in the outcome to his grievance; those reasons were in no way connected to race,

c. The direct disability discrimination claim fails because there is no evidence from which we could conclude, in the absence of an explanation, that the claimant was treated as he was because he was disabled and, again, we accept the explanations given to us by Ms Gericke as to the reasons for the delay to the grievance, her decision that he was not disabled and her entertaining and making adverse findings against him in the outcome to his grievance.

d. The claim of discrimination because of something arising from disability fails because there is no evidence from which we could conclude, in the absence of an explanation, that the claimant was treated as he was because of something which arose from his disability. Further, we accept the explanations given to us by Ms Gericke as to the reasons for the delay to the grievance, her decision that he was not disabled and her entertaining and making adverse findings against him in the outcome to his grievance.

e. The harassment claim fails because there is no evidence from which we could conclude, in the absence of an explanation, that the conduct directed towards the claimant was related to his race or disability and, again, in any event we accept the explanations given to us by Ms Gericke for her actions.

f. The victimisation claim fails because although the claimant did a protected act, there is no evidence from which we could conclude that the acts of detriment to which he was subjected were because he had done the protected acts and, in any event, we accept the explanations given to us by Ms Gericke for her actions.

173. The claims, therefore, fail.

174. We conclude by recording our thanks to both parties' representatives who had clearly spent a considerable amount of effort in preparing their cases on behalf of their client.

Employment Judge Dawson

28 August 2024

Sent to the parties on:

18 September 2024

Jade Lobb

For the Tribunal Office:

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

APENDIX

List of Issues

1. **Time limits**

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the tribunal may not have jurisdiction.

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

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?

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

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

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

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

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

1.3 Was the detriment complaint made within the time limit in section 48 of the Employment Rights Act 1996? The Tribunal will decide:

1.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of?

1.3.2 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

1.3.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.3.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. **Protected disclosure ('whistle blowing')**

2.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

2.1.1 What did the claimant say or write? When? To whom? The claimant says he made disclosures on these occasions:

2.1.1.1 The Claimant's grievance letter to the Respondent's Chief Executive dated 17 January 2020;

2.1.1.2 The Claimant's grievance letter to the Respondent's Chief Executive dated 10 June 2020.

2.1.2 Were the discloses of 'information'?

2.1.3 Did he believe the disclosure of information was made in the public interest?

2.1.4 Was that belief reasonable?

2.1.5 Did he believe it tended t to well of course everyone is hard at work o show that:

2.1.5.1 a criminal offence had been, was being or was likely to be committed;

2.1.5.2 a person had failed, was failing or was likely to fail to comply with any legal obligation;

2.1.5.3 a miscarriage of justice had occurred, was occurring or was likely to occur;

2.1.5.4 the health or safety of any individual had been, was being or was likely to be endangered;

2.1.5.5 the environment had been, was being or was likely to be damaged;

2.1.5.6 information tending to show any of these things had been, was being or was likely to be deliberately concealed.

2.1.6 Was that belief reasonable?

2.2 If the claimant made a qualifying disclosure, was a protected disclosure because it was made to;

2.2.1 to the claimant's employer?

It is admitted that the disclosures were made to a 'Relevant Person' within the meaning of ss.43C to 43H Employment Rights Act 1996, having been made to the Respondent as his employer.

3. **Detriment (Employment Rights Act 1996 section 47B)**

3.1 Did the respondent do the following things:

3.1.1 fail to consider/deal with his grievance complaint of 17 January 2020 effectively, being the delay in carrying out and concluding the investigation and the outcome;

3.1.2 fail to acknowledge/accept his disability;

3.1.3 entertaining and making adverse findings against the Claimant in the outcome to his grievance; and

3.1.4 fail to protect the Claimant from Covid 19 risks;

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

3.3 If so, was it done on the ground that he had made the protected disclosure(s) set out above?

4. **Disability**

4.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

4.1.1 Whether the claimant had a physical or mental impairment. The claimant asserts that his disability is Atrial Fibrillation.

4.1.2 Did it have a substantial adverse effect on the claimant's ability to carry out day-to-day activities?

4.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

4.1.4 Would the impairment have had a substantial adverse effect on their ability to carry out day-to-day activities without the treatment or other measures?

4.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

4.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

4.1.5.2 if not, were they likely to recur?

5. **Direct disability and/or race discrimination (Equality Act 2010 section 13)**

5.1 The claimant describes himself as Black African.

5.2 Did the respondent do the following things:

5.2.1 fail to consider/deal with his grievance complaint of 17 January 2020 effectively, being the delay in carrying out and concluding the investigation and the outcome;

5.2.2 fail to acknowledge/accept his disability;

5.2.3 entertaining and making adverse findings against the Claimant in the outcome to his grievance; and

5.2.4 fail to protect the Claimant from Covid 19 risks;

5.3 Was that less favourable treatment? The Tribunal will have to decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated. The claimant has not named anyone in particular who they say was treated better than they were and therefore rely upon a hypothetical comparator.

5.4 If so, was it because of race/disability?

5.5 Is the respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected to race and/or disability?

6. **Discrimination arising from disability (Equality Act 2010 section 15)**

6.1 Did the respondent treat the claimant unfavourably by:

6.1.1 failing to consider/deal with his grievance complaint of 17 January 2020 effectively, being the delay in carrying out and concluding the investigation and the outcome;

6.1.2 failing to acknowledge/accept his disability;

6.1.3 entertaining and making adverse findings against the Claimant in the outcome to his grievance; and

6.1.4 failing to protect the Claimant from Covid 19 risks;

6.2 Did the following things arise in consequence of the claimant's disability? The claimant's case is that he had an abnormal heart rhythm causing tiredness, palpitations, feeling faint and breathless.

6.3 Was the unfavourable treatment because of any of those things?

6.4 Was the treatment a proportionate means of achieving a legitimate aim?

6.5 The Tribunal will decide in particular:

6.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;

6.5.2 Could something less discriminatory have been done instead;

6.5.3 How should the needs of the claimant and the respondent be balanced?

6.6 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

7. **Harassment related to race and/or disability (Equality Act 2010 s. 26)**

7.1 Did the respondent do the following things:

7.1.1 fail to consider/deal with his grievance complaint of 17 January 2020 effectively, being the delay in carrying out and concluding the investigation and the outcome;

7.1.2 fail to acknowledge/accept his disability;

7.1.3 entertaining and making adverse findings against the Claimant in the outcome to his grievance; and

7.1.4 fail to protect the Claimant from Covid 19 risks;

7.2 If so, was that unwanted conduct?

7.3 Did it relate to the claimant's protected characteristic, namely disability and/or race.

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

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

8. **Victimisation (Equality Act 2010 s. 27)**

8.1 Did the claimant do a protected act as follows:

8.1.1 The complaints made to the chief executive on

8.1.1.1 17 January 2020

8.1.1.2 10 June 2020;

8.2 Did the respondent do the following things:

8.2.1 fail to consider/deal with his grievance complaint of 17 January 2020 effectively, being the delay in carrying out and concluding the investigation and the outcome;

8.2.2 fail to acknowledge/accept his disability;

8.2.3 entertaining and making adverse findings against the Claimant in the outcome to his grievance; and

8.2.4 fail to protect the Claimant from Covid 19 risks;

8.3 By doing so, did the respondent subject the claimant to detriment?

8.4 If so, was it because the claimant had done the protected acts?

9. **Remedy**

<u>Detriment (s. 47B)</u>

9.1 What financial losses has the detrimental treatment caused the claimant?

9.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

9.3 If not, for what period of loss should the claimant be compensated?

9.4 What injury to feelings has the detrimental treatment caused the claimant and how much compensation should be awarded for that?

9.5 Has the detrimental treatment caused the claimant personal injury and how much compensation should be awarded for that?

9.6 Is it just and equitable to award the claimant other compensation?

9.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did either party unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the claimant and, if so, by what proportion up to 25%?

9.8 Did the claimant cause or contribute to the detrimental treatment by their own actions and if so would it be just and equitable to reduce the claimant's compensation? By what proportion?

9.9 Was the protected disclosure made in good faith? If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?

Discrimination or victimisation

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

9.11 What financial losses has the discrimination caused the claimant?

9.12 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

9.13 If not, for what period of loss should the claimant be compensated for?

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

9.15 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

9.16 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

9.17 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did either party unreasonably fail to comply with it. If so, is it just and equitable to increase or decrease any award payable to the claimant and, if so, by what proportion up to 25%?

9.18 Should interest be awarded? How much?