EMPLOYMENT TRIBUNALS

Claimant: **Mohamed Fofanah**
Respondent: **Priory Group**

Full Merits Hearing

Heard at: Bury St Edmunds (Hybrid)

On: 18 and 19 July, 5 September, 16 and 17 October 2023

7 November 2023 (in Chambers)

Before: Employment Judge Boyes
Mrs C.A. Smith
Mr. A. Hayes

Appearances

For the Claimant: In person

For the Respondent**:** Ms S. Harty, counsel

RESERVED JUDGMENT

The complaint of unauthorised deductions from wages relating to alleged deductions prior to the 10 June 2021 are out of time. The Tribunal therefore has no jurisdiction to determine these claims.

The complaint of unauthorised deductions from wages said to have occurred from 10 June 2021 are not well founded and are dismissed.

The complaints of direct race discrimination and direct discrimination on the basis of religion/belief (section 13 Equality Act 2010 ('EQA') as identified at 17.1.1, 17.1.2, 17.1.3 and 17.2 of the List of Issues are out of time and it is not just and equitable to extend time. The Tribunal therefore has no jurisdiction to determine these claims.

The complaints of direct race discrimination (section 13 EQA) relating to acts said to have happened from 10 June 2021 onwards are not well founded and are dismissed.

The complaints of harassment on the basis of race and religion/belief (section 26 EQA) as identified at 18.1 of the List of Issues relating to 17.1.1, 17.1.2, 17.1.3 and 17.2 of the List of Issues are out of time and it is not just and equitable to extend time. The Tribunal therefore has no jurisdiction to determine these claims.

The complaints of harassment on the basis of race (section 26 EQA) said to have happened from 10 June 2021 onwards are not well founded and are dismissed.

The complaint of breach of contract (notice pay) is not well founded and is dismissed.

REASONS

1. **I extend my sincerest apologies to the parties for the delay in providing this reserved judgment, which is as a consequence of health problems. I apologise for any concerns and inconvenience that the delay has caused. The delay is entirely my responsibility and not in any way caused by Mrs Smith or Mr Hayes.**

2. By a claim form presented on 30 September 2021, following a period of early conciliation from 9 September 2021 to 28 September 2021, the Claimant brought complaints of race discrimination, discrimination on the grounds of religion/ belief, unfair dismissal, breach of contract (notice pay) and unlawful deduction from wages

The Proceedings

3. The Claimant had insufficient service to bring a claim for unfair dismissal and the complaint was struck out on 1 September 2022 (Notice to Show Cause was sent by the Tribunal to the Claimant on 13 December 2021 and no response was received from the Claimant). He accepts that worked for the Respondent for less than two complete years.

4. There was not an agreed bundle at the start of the final hearing nor had a final list of issues been agreed. This was despite there having been two case management hearings and case management orders requiring this. Much of the first day of the final hearing was spent seeking to understand the concerns that the Claimant had with the draft list of issues and draft trial bundle both of which had been prepared by the Respondent. On further consideration of the draft list of issues only some minor amendments were required which did not alter the substance of the issues to be determined. In terms of the bundle prepared by the Respondent, the Claimant challenged the reliability of much of the documentary evidence in that bundle. We say more about this below. There was therefore a separate Respondent's bundle ["RB"] and Claimant's bundle ["CB"] before the Tribunal at the commencement of the final hearing. The Claimant then provided further documents to the Tribunal and the Respondent during the course of the final hearing. These were admitted.

5. The Claimant had prepared various documents for the hearing which were contained in his bundle of 63 pages. The bundle included documents entitled *Grounds of Resistance 2*, *Claimant List of Issues*, *Claimant Witness Statement*, *Claimant Schedule of Losses* and *Claimant Reasons for Schedule of Losses*. The Claimant's further particulars dated 23 August 2022, provided by the Claimant in response to a case management order, can be found at RB 46 to 55. Each of these documents contained aspects of the Claimant's account of events and submissions about his case. In order to be fair to the

Claimant, as he was unrepresented, we treated what was said in each of these documents as the Claimant's evidence, despite not all of what was said being contained in his witness statement. We also asked the Claimant further questions to clarify and expand upon his evidence in chief. He was then cross examined by the Respondent and asked further questions by the Tribunal.

6. Clement Mensah gave evidence for the Claimant. He gave his evidence by video. There was some difficulty arranging Mr Mensah's appearance both because of his availability and because of technical difficulties but he was finally able to give his evidence on 16 October 2023. He adopted his witness statement of the 18 July 2023. He was then cross examined by the Respondent and asked further questions by the Tribunal.

7. The Respondent relied upon the evidence of Suzanne Barnard, who was the Hospital Director at Grafton Manor when the Claimant was working there. She no longer works for the Respondent.

8. Suzanne Barnard gave her evidence by video. She adopted her witness statement, was cross examined by the Claimant and asked questions by the Tribunal. As the Claimant is a Litigant in Person, the Tribunal assisted him in formulating some of the questions that he had for the witness.

9. It was occasionally necessary, during the course of the hearing, to request that the Claimant be respectful towards the Respondent's representative. The Claimant informed us that he was not being disrespectful: rather his approach was caused by cultural differences.

10. Both parties provided written closing submissions augmented by further oral submissions.

11. Judgment was reserved.

The Complaints

12. The complaints to be dealt with by the Tribunal are as follows:

    12.1 Breach of contract (notice pay);

    12.2 Unlawful deductions from wages;

    12.3 Direct discrimination (section 13 Equality Act 2010) because of the Claimant's protected characteristic of race (the Claimant being black);

    12.4 Direct discrimination (section 13 Equality Act 2010) because of the protected characteristic of the Claimant's religion (the Claimant being Muslim); and

    12.5 Harassment (section 26 Equality Act 2010) related to race and/or religious belief.

The issues

13. The list of issues had not been agreed prior to the final hearing. However, they were agreed at the commencement of the final hearing and are as follows:

14. ***Jurisdiction-Time Limits***

14.1 Has the Claimant brought his discrimination claims within the required time limit?

14.2 Do any of the acts form part of a continuing act of discrimination. If not, is it just and equitable for the Tribunal to hear the Claimant's discrimination claims which relate to any acts that occurred before 10 June 2021?

14.3 Do any of the claimed deductions form part of a series of payments. Was it reasonably practicable for the Claimant to bring his breach of contract and unlawful deduction of wages claims within the statutory time limit?

14.4 If not, were the Claimant's unlawful deduction from wages and breach of contract claims nevertheless presented within such further period as the Tribunal considers reasonable?

15 ***Breach of Contract***

15.1 Did the Respondent breach the Claimant's Bank Worker Agreement by failing to pay the Claimant the required notice pay?

15.2 Is the Claimant entitled to renumeration resulting from that breach?

16 ***Unlawful deduction of wages***

16.1 Did the Respondent make any deductions from the Claimant's properly payable wages for the weeks: 13 March 2020, 20 March 2020, 19 February 2021, 26 February 2021, 5 March 2021, 12 March 2021, 19 March 2021, 26 March 2021, 2 April 2021, 9 April 2021, 16 April 2021, 28 May 2021, 4 June 2021, 11 June 2021, 18 June 2021, 25 June 2021, 2 July 2021, 9 July 2021, 16 July 2021, 6 August 2021 and 13 August 2021?

16.2 If so, were the deductions required or authorised under statute, or required or authorised under the Claimant's contract with the Respondent, or had the Claimant given his prior written consent to the deductions?

17 ***Direct Discrimination on the grounds of race and religion***

17.1 The Claimant identifies as Black and of African origin. The Claimant seeks to rely on the following as acts of race discrimination:

17.1.1 22 April 2020: the Claimant's colleague, Fabian Traub ("Mr Traub"), whilst allocating tasks to the Claimant, used the racial slur "*nigger*" to address the Claimant;

17.1.2 9 November 2020:

i. Anna Boyce told the Claimant *"shut up, when I talk, you do not talk*";
ii. The Respondent failed to discipline Anna Boyce following this incident;
iii. Without first discussing with the Claimant the incident between the Claimant and Anna Boyce, the Respondent decided not to book the Claimant on

further shifts; and

iv. was suspended and all his shifts cancelled following this incident.

17.1.3 14 January 2021: following an incident where a service user fell from his bed:

i. Mr Traub fabricated an incident report which resulted in the Claimant being suspended for 5 or 6 weeks without pay;

ii. Mr Traub was not disciplined for his conduct; and

iii. During the associated Bank Worker Review on 15 January 2021, Ian Holland-Hay, Director of Clinical Services, deliberately discouraged the Claimant from taking legal advice.

17.1.4 21 July 2021: the Claimant was lured back to work by Suzanne Barnard with an offer of double-time payment, so that Ms Barnard could orchestrate an incident where the Claimant was accused of sexual harassment, which led to a gross misconduct allegation being made against the Claimant.

17.1.5 August 2021: during the investigation meeting regarding the above incident between the Claimant and Anna Boyce, Ms Barnard:

i. was one-sided, with a determination to find the Claimant 'guilty';

ii. did not allow the Claimant to record the meeting; and

iii. wrongly alleged that a further black member of staff (BA) had raised concerns about sexually inappropriate behaviour by the Claimant.

17.1.6 20 August 2021: the Claimant was required to report the gross misconduct allegation to any new employers;

17.1.7 29 September 2021: the Respondent contacted the Claimant's university and informed them the Claimant was guilty of gross misconduct, without evidence; and

17.1.8 the fact that the Claimant was suspended from shifts every time a white colleague reported an issue relating to him and his concerns about this were not investigated, despite having been raised in meetings with Ms Barnard and Mr Holland-Hay.

17.2 The Claimant is Muslim. The Claimant seeks to rely on the following as acts of discrimination on the grounds of religion, namely that on 17 May 2020 (during the month of Ramadan):

17.2.1 a colleague complained about the Claimant performing his prayers whilst the Claimant was engaged in a one- to-one observation of a service user, causing the Claimant's shifts to be cancelled for 6/7 weeks; and

17.2.2 the Claimant was not immediately interviewed about performing his prayers during the one-to-one observation.

17.3 The Claimant seeks to rely on a hypothetical comparator.

17.4 Did the incidents listed above occur?

17.5 Did the incidents listed above amount to less favourable treatment of the Claimant, as compared to a hypothetical comparator, because of the Claimant's race or religion respectively?

18 Harassment

18.1 The Claimant seeks to rely on the incidents listed at 17.1.1 to 17.1.8 and 17.2.1 to 17.2.2 above.

18.2 Did the incidents listed at 17.1.1 to 17.1.8 and 17.2.1 to 17.2.2 above occur?

18.3 If so, were they related to the Claimant's protected characteristics of race or religion respectively?

18.4 Did the incidents listed at 17.1.1 to 17.1.8 and 17.2.1 to 17.2.2 above have the purpose or effect of violating the Claimant's dignity or creating a hostile, degrading, or offensive environment, taking into account the perception of the Claimant, the other circumstances of the case, and whether it is reasonable for the incidents to have had those effects?

Findings of Fact

General findings regarding evidence

Witness evidence

19. The Tribunal found some of the Claimant's evidence to be confusing and contradictory, including in relation to his account of certain events and the dates when certain incidents are said to have occurred. The Claimant's evidence on certain matters also shifted during the course of the hearing. For those reasons, the Tribunal considered certain aspects of his evidence to be unreliable. Further, on numerous occasions, rather than answering questions directly, the Claimant instead stated that a document that he was being taken to or asked about was not reliable. In forming this view of the Claimant's evidence, the Tribunal was mindful that the Claimant is unrepresented and so not familiar with Employment Tribunal procedure and practice. However, even taking that into account, it did not consider that this explained these shortcomings in the Claimant's evidence.

20. The Tribunal found Clement Mensah's evidence to be clear and consist and his evidence to be reliable. He answered questions directly and if he did not know something, or was not present when an alleged event occurred, he said so.

21. The Tribunal found Suzanne Barnard's evidence to be clear and both internally and externally consistent. Her evidence did not change. If she did not know something she said so. There was no evidence of her exaggerating her evidence. She provided explanations as to why she had acted in a

particular way at certain times. She no longer works for the Respondent. We found her evidence to be balanced and reliable.

Documentary evidence

22. The Claimant challenged the reliability of many of the documents provided by the Respondent that were in the bundle prepared by the Respondent. In essence, his case is that the Respondent cannot be trusted and these documents could have been tampered with or are inaccurate, unreliable and/or fabricated. On many occasions, when asked in cross examination about matters relating to documents, the Claimant's response was that the document or documents he was being asked about were not reliable or genuine. He did not, however, provide specific reasons as to why he considered this was the case. Rather he made bald assertions that they could not be relied upon, were probably fabricated or had been manipulated.

23. The documents challenged by the Claimant as unreliable include the Bank Working Agreement, the minutes of the bank worker review meetings ("BWR meetings"), the payslips provided by the Respondent, records of telephone calls and emails. The Claimant even questioned whether the copy of the claim form (ET1) that was in the Respondent's bundle was reliable, even though it was identical to the ET1 provided to the Tribunal by the Claimant.

24. We find that the Claimant has not shown, in respect of the documents relied upon by the Respondent, that any document has been fabricated or tampered with. His claims in that respect are entirely unexplained and unsubstantiated.

25. In terms of the reliability of the minutes of the various BWR meetings and records of telephone calls, it is clear from the way in which the documents are worded that they are not a contemporaneous note of what was said or a transcript taken from a recording. Rather they are a summary of what was said at the meeting or during the telephone call. We are of the view that not all of what was said in the meeting or telephone call is necessarily recorded in those minutes/records. We have borne that in mind when assessing that evidence particularly where the Claimant asserts that something was said that was not recorded in the minutes/note. However, having considered those documents in the round in the context of all of evidence before us, we accept that those minutes provide a summary of, and capture the gist of, what occurred at the meetings/telephone calls concerned. However, we have been cautious about relying upon these minutes when needing to assess the exact details of what was said where this is not corroborated by other evidence that we consider reliable. We do not however accept the Claimant's unsubstantiated assertion that the notes are fabricated or wholly unreliable. He has not demonstrated that there is any basis whatsoever for any such claims.

26. The Respondent did not issue the Claimant with paper payslips. The payslips were held on the Respondent's electronic system. It required access which the Claimant states he did not have throughout the time that he was working for the Respondent. At a case management hearing on the 2 August 2022, the Tribunal ordered that copies of those payslips be provided to the Claimant. The Claimant asserts that he has never previously seen those payslips

digitally. Further, he asserts that the payslips now provided are not reliable or authentic.

27. The Claimant has produced an email dated 28 April 2020 in which Chelsea Marks asked that he be given log in details for the system on which the payslips were held. We accept that he made such a request. However, he continued to work for the Respondent for around a further 16 months after that request and yet there is no further evidence of subsequent requests for access. The Claimant has therefore not shown, on the evidence before us, that he was unable to access his payslips electronically throughout the time that he worked for the Respondent. The Claimant has accountancy and finance qualifications. We consider it very unlikely that he would not have checked his payslips throughout the entirety of the remainder of the time that he worked for the Respondent.

28. The Claimant asserts that the amounts recorded in the payslips are inaccurate and do not necessarily reflect what he actually earned or the dates on which he worked. He has produced no documentary evidence to support this assertion.

29. The Claimant's case is that he can no longer provide this information because he is unable to access the bank account that his wages were paid in to. In live evidence, the Claimant was asked why he had not obtained copies of bank statements in order to evidence his claim that the payslips contained incorrect information. Initially, he said that he no longer uses that account because it was a temporary account. He said that he went to the bank to try to get copies of the statements but the bank could not provide him with these because he did not have identification with him. He did not follow this up. Later in evidence he was asked how he had arrived at the figures at page 241 of the Respondent's Bundle. He stated that he had looked at the payslips, looked at the times he was not paid and the money in his account to establish the dates. He was then asked why he had not provided those bank statements that he had looked at. He stated that it was difficult to check as he did not have the account any more. Given that the Claimant claims not to have had access to the bank account statements by the point that he was provided with the payslips, the Tribunal found the Claimant's evidence in this respect to be confusing and contradictory

30. We were not persuaded by the Claimant's reasons for being unable to provide bank statements to substantiate his claims. We saw no reason why he would have been unable to obtain copies of those statements from the bank even if the account concerned was now closed. Further, there is no evidence before us to show that he has sought to obtain proof of what he earned from HM Revenue and Customs. There is nothing before us to demonstrate that the payslips provided by the Respondent are in any way unreliable. His claims in that respect are entirely unsubstantiated.

31. For all of the above reasons, we find that the payslips are reliable documents and we place weight upon them.

Chronology of Events

32. The Claimant worked as a bank healthcare assistant at Grafton Manor. The Tribunal has not been provided with the exact date when he began that work

but it was on or around 20 March 2020. His last day of work was the 10 October 2021. He was employed under a bank working agreement issued on 3 January 2020 with a start date of 2 March 2020.

33. Whilst working for the Respondent the Claimant was studying for a nursing degree which he was due to finish in the autumn of 2023. Prior to that he was awarded a BA and MA in Accounting and Finance.

34. Grafton Manor is a residential brain injury unit run by the Respondent. There are 70 to 80 staff in total across all disciplines. Over half of the staff are nursing/care workers. They have permanent care staff and also use bank and agency workers. Suzanne Barnard's evidence, not disputed by the Claimant, was that a high proportion of the nursing/care staff are from ethnic minority groups.

The racial slur allegation (List of Issues - 17.1.1)

35. The Claimant states that on 22 April 2020, Fabian Traub used the racial slur "*nigger*" to address the Claimant. In live evidence, he confirmed that he did not report what Fabio said to the Respondent at any point. The Claimant states that he recalls saying to a female colleague who had been there three to four years at the time that it was definitely not an appropriate thing to say. She told him to be very careful as the management are white and if he raises a lot of questions they are going to come after him. He did not know what connections Fabian had and he had been working there for over 10 years.

36. In the document which is entitled 'Claimant Reasons for Schedule of Losses' [CB 21] the Claimant stated that Fabian Traub first used the racial slur and then allocated tasks for him to do. In live evidence, he stated that Fabian Traub first allocated the tasks to him and then used the racial slur. There was therefore a direct contradiction in the Claimant's evidence in this respect. When he was asked about this contradiction, he said that the events concerned happened a long time ago.

37. There was no mention of Fabian Traub making a racial slur at the meeting on 15 January 2021. This is despite the Claimant stating that Fabian Traub was trying to create issues for him and then, when asked at the meeting why he would do that, he replied that he did not know. He told the Tribunal that a female colleague counselled him against reporting it and so he did not raise it whilst in employment.

38. We find it surprising that the Claimant made no mention whatsoever of this claimed incident at the 15 January meeting as he had a clear opportunity to do so whilst discussing Fabian Traub.

39. There is also no mention in the claim form of the Fabian Traub making a racial slur. The Claimant said in live evidence that he did not mention it in his claim form because there was no more room to do so. When it was put to him that there was room on the claim form to include that information, he challenged the reliability of the claim form as reproduced in the Respondent's bundle. The Tribunal checked and the claim form in the Respondent's bundle was identical to the one lodged by the Claimant with the Tribunal.

40. The Claimant emphasised on several occasions how shocked he was by what Fabian Traub said to him. We would therefore have expected such a serious allegation to have been mentioned in the claim form. There was room to do so at section 8.2 (the box is half full of text) and also at section 15 (no text has been added). Despite this there appears to have been no reference to it until the Claimant provided further and better particulars on the 22 August 2022.

41. Considering all of the evidence before us in the round, and taking in to account the inconsistencies in the Claimant's evidence of what happened, his failure to subsequently mention any such racist slur having been made (either at the meeting of 15 January or at any subsequent point whilst he was working for the Respondent or in the claim form), the Claimant has not shown that Fabian Traub used the racist slur as claimed.

The allegation that a colleague complained about the Claimant praying on 17 May 2020, that the Claimant was not immediately interviewed about this causing the Claimant's shifts to be cancelled for 6/7 weeks (List of issues - 17.2)

42. It was identified in the List of Issues that the Claimant seeks to rely on the following as acts of discrimination on the grounds of religion, namely that on 17 May 2020 (during the month of Ramadan) a colleague complained about the Claimant performing his prayers whilst the Claimant was engaged in a one- to-one observation of a service user, causing the Claimant's shifts to be cancelled for 6/7 weeks.

43. The Claimant ticked the box claiming discrimination of the grounds of religious belief in the claim form but no further details are provided at sections 8.2 or section 15.

44. In the further particulars provided by the Claimant, he stated that the incident of religious discrimination occurred on 17 May 2020. He provides the following additional information about the claimed incident. He states that it was the month of Ramadan and he was fasting. It was prayer time and time to break his fast. He was doing a one to one observation with a patient and a patient was asleep. He sat on the chair facing the patient as well as performing his prayers. A white colleague saw him performing his prayer gestures and immediately complained to the night team leader. The next morning management was informed and immediately rang him to cancel all of his shifts which lasted for 6 to 7 weeks before he could get back to work. He states that a couple of white coworkers then made the incident a big issue. The Respondent should first have interviewed him before suspending him. Further, they should have created a room or space for prayers.

45. In the document entitled *Claimant Reasons for Schedule of Loss,* the Claimant states that after the investigation was carried out it was discovered that the worker lied as to what really happened. He states that it was also established that she hated Islam via her statement but nothing was done by management as she returned to work the next day as if nothing had happened.

46. In his witness statement [CB 9], the Claimant states that this incident occurred during Ramadan, when he was fasting, and the time of prayer had arrived. He was on observations and was outside the patient's room sat on a chair as the

patient was asleep. He prayed his Salat whilst sat on the chair. A white staff member saw him praying and went to management immediately and complained. He was called to the manager's office and all of his shifts were cancelled followed by suspension from work. Further he asserts that he was not immediately interviewed to establish what had happened. He put it to Suzanne Barnard that she told Chelsea Marks not to book him on shifts. No documents relating to any such investigation were before the Tribunal.

47. In live evidence, the Claimant stated that Suzanne Barnard told him that he should not be praying when doing one to one hourly observations and that is why the company a created prayer room.

48. In live evidence, Suzanne Barnard stated that a line manager was on site so the Claimant could have raised concerns if he had wished but that she was not sure how else to respond. When being cross examined by the Claimant, Suzanne Barnard asked the Claimant to show her where it was she said that he was not to book shifts, including that all his shifts were cancelled as a result of the alleged incident. The Claimant was not able to identify this. He drew the Tribunal's attention to an email from Chelsea Marks in which she stated that he could no longer book shifts pending a BWR meeting. However, this email was dated 9 November 2020 and did not relate to the alleged prayer incident of May 2020.

49. The Claimant was asked in cross examination why he had not mentioned the allegation concerned in his claim form. He stated that when filling in the form there was not much space, it was squashed on the page and he thought that that was probably the reason. He stated that there was a bank worker review relating to the incident. The Claimant referred to page CB 22. This is the document called the Claimant Reasons for Schedule of Loss in which the Claimant provided his account of what had happened. He then referred the Tribunal to the letter at RB 20 which was the invitation to a BWR meeting on 20 October 2020. The Claimant then stated that not all BWRs were arranged by letter: some were by telephone and he thought that might be what happened.

50. We have expected such a serious allegation to have been mentioned in the claim form. There was room to do so at section 8.2 (the box is half full of text) and also at section 15 (no text has been added). Despite this there appears to have been no reference to it until the Claimant provided further and better particulars on the 22 August 2022.

51. The only documentary evidence that refers to this incident are documents authored by the Claimant subsequent to the claim being lodged. There is no documentary evidence relating to any BWR prior to October 2020.

52. Payslips have been provided which cover from pay date 22 May 2020 to 3 July 2020 (the 7 weeks after the 17 May 2020). It appears from those payslips [RB 189-195] that the Claimant worked during each of those weeks. This is weighty evidence against the Claimant's claims that his shifts were cancelled for 6 to 7 weeks after an incident that occurred on 17 May 2020.

53. On the evidence before us we find that the Claimant worked during the 7 weeks following the alleged incident despite claiming that he was suspended.

There is no documentary evidence relating to any connected BWR and no mention of any such incident anywhere else in the documents including in the claim form (other than those authored by the Claimant subsequent to the lodging of these proceedings).

54. Consequently, we find that the Claimant has not shown that a colleague complained about the Claimant performing his prayers whilst the Claimant was engaged in a one- to-one observation of a service user, causing the Claimant's shifts to be cancelled for 6-7 weeks. We find that the Claimant has not shown that he was subject to a BWR due to any such incident.

BWR meeting - 20 October 2020

55. On 20 October 2020, the Claimant attended a BWR meeting chaired by Ian Holland-Hay to address concerns regarding mandatory e-learning modules. He agreed to complete the training concerned by 26 October 2020.

The allegation that the Claimant was told to shut up by Anna Boyce and subsequent events (List of Issues - 17.1.2)

56. On 6 November 2020, the Claimant was sent a letter requiring his attendance at a BWR meeting on 11 November 2020. It was stated in the letter that the reason for the review was to address concerns regarding arriving late for a handover and regarding clinical and professional practice. He was informed that if he did not provide a satisfactory response to the points raised then his bank worker agreement may be terminated and that he would not be given any further bank shifts until the BWR has been completed. Shifts booked for the 7 November and 8 November 2020 were cancelled in the meantime.

57. The Claimant attended the meeting chaired by Ian Holland-Hay. In the follow up letter to the meeting (which is incorrectly dated 6 November 2020), it is said that, on one occasion, the Claimant arrived late for a handover and was asked to complete a late arrival form by the charge nurse which he refused to complete because he did not accept that he was late and the nurse was out to get him. It is also said that he was rude and unprofessional in his manner and tone towards the nurse. The Claimant strongly denied that this was the case. At the meeting, the Claimant was told that he was to work on day shifts as a support measure for the time being, but that this was not permanent, rather only whilst the matter was investigated.

58. The Claimant states that Anna Boyce said to him *"shut up, when I talk, you do not talk*". Whilst the Claimant does not state on what date this occurred, our understanding from the evidence before us is that it said to have occurred on the shift that the Claimant was said to have arrived late. We have not been provided with a full account of the exchange. However, it is clear from the evidence before us that there was an exchange between the Claimant and Anna Boyce on the date that it was said that the Claimant was late and when she would not sign his form. The Claimant denied that he was disrespectful or did anything to justify such treatment. He asserts that his treatment was not fair.

59. It can be seen from the evidence before us that there was some friction between the Claimant and Anna Boyce and this was one of the concerns that resulted in the BWR meeting. Ms Barnard's evidence, which we accept,

was that Anna Boyce was intimidated by the Claimant and had been upset following a couple of incidents involving the Claimant around that time. We also accept, on the evidence before us, that two other members of staff and Anna Boyce raised concerns about the Claimant's manner towards Anna Boyce. On balance of probabilities, having considered all of the evidence before us and the context in which it is asserted that such a comment was made, we find that there was a confrontation involving the Claimant and Anna Boyce and that words to the effect of telling the Claimant to shut up were said as asserted by the Claimant.

60. Iain Holland-Hays stated that he had investigated the matter and found that the Claimant was in fact late as verified by several witnesses who were colleagues. On the evidence before us of the investigation that was conducted, we accept that this was the case. The outcome was that the Claimant was told to work days shifts rather than night shifts which it was said would offer continued support not only to the site but also to the Claimant.

61. We find that the Respondent did not discipline Anna Boyce when she told the Claimant to shut up (or words to that effect).

62. We find that the Claimant's shifts on 7 November and 8 November 2020 were cancelled pending the outcome of the BWR meeting. He was subsequently only able to book day shifts, although, some time later, he again began to work night shifts again. It can be seen from the Claimant's payslips (RB 214-217) that he subsequently worked during the rest of November 2020.

List of Issues – 17.1.3

63. On 14 January 2021, Suzanne Barnard wrote to the Claimant to invite him to a BWR meeting regarding concerns about an incident when a resident fell out of bed and DATIX not being completed in a timely manner. He was informed that if he did not provide a satisfactory response to the points raised then his bank worker agreement may be terminated and that he would not be given any further bank shifts until the BWR meeting had been completed.

64. Datix is a system used by staff to report any incidents and risks.

65. The incident concerned occurred on the 7 January 2021. The Claimant could not access the DATIX system to complete the necessary report of the patient's fall. It was therefore agreed, as a workaround, that Fabian Traub would complete the report using his DATIX access, with the Claimant dictating the relevant information for the report. They met to complete this report on 8 January 2021. They disagreed about what information should go in the report. Fabian Traub claimed that the version of events that the Claimant wanted to be recorded on the DATIX system differed from what the Claimant had told him on the evening of the incident. They argued about what should be included in the report but could not agree. Fabian Traub refused to include what he claimed was an amended version of events in his name on the computer. As they were unable to agree what the contents should be, Fabian Traub reported the matter. Fabian Traub also asserted that the Claimant made reference to involving solicitors if he wanted to go down that route.

66. On 15 January 2021, the Claimant attended the BWR meeting chaired by Suzanne Barnard. Suzanne Barnard then carried out further investigations.

67. Suzanne Barnard wrote to the Claimant on the 18 January 2021. She stated that she had decided that the concerns raised against the Claimant were not substantiated but that there was wider learning for him and the whole team. There had been a discussion about the Claimant's relationship with other members of the night team during the meeting and so mediation was offered to try and resolve the issues and create positive working relationships. The Claimant was asked to contact her if he wanted this to be organised. The Claimant was told that he was only to work day shifts which they would review regularly.

68. Neither Fabian Traub nor the Claimant received any reprimand or warning following the incident.

69. Fabian Traub provided his version of events in a statement dated 10 January 2021. The statement is detailed and specific. Having considered that statement, and all of the other evidence before us, we formed the view that there was a ring of truth in the account provided in so far as the reasons for failure to complete the DATIX system was concerned. Having considered that document in context and taking into account all of the evidence regarding the incident before us we therefore do not accept that Fabian Traub fabricated the incident report concerned.

70. Further, we find that the Claimant was not prevented from booking shifts for 5 or 6 weeks without pay as claimed. It is clear from Suzanne Barnard's letter of the 18 January 2021 that the Claimant was asked only to work day shifts. It may well be that the Claimant decided not to book shifts subsequent to the BWR meeting but there is no evidence before us to suggest that he was precluded from booking day shifts.

71. The Claimant asserts that during the associated BWR meeting on 15 January 2021, Ian Holland-Hay, Director of Clinical Services, deliberately discouraged the Claimant from taking legal advice. It is clear from the notes of the meeting that the meeting was chaired by Suzanne Barnard and that Chelsea Marks, Human Resources administration, was also present. The letters inviting the Claimant to the meeting and the outcome letter are both signed by Suzanne Barnard and indicate her attendance at the meeting rather than Ian Holland-Hay. We therefore find that Ian Holland-Hay was not present at the meeting. Consequently, he cannot have discouraged the Claimant from taking legal advice at that meeting.

Incident on 25 April 2021

72. In the early hours of the 25 April 2021, a resident was found on the floor covered in faeces. He was in the care of the Claimant during that particular shift on a one-to-one basis but was found by another member of staff. It was reported that the faeces were dry, indicating that he had been on the floor for a while. Statements were obtained from that member of staff and also from Wendy Felce, the shift co-ordinator on duty at the time. Both of these members of staff said in their statements that in the aftermath of this incident the Claimant became confrontational towards them.

73. The Claimant denied that he had failed to carry out observations of the resident as required or that the resident was covered in faeces at any point when he carried out the necessary observations. The Claimant sent an email to Suzanne Barnard on 26 April 2021. He explained what happened on the 24/25 April 2021. He also stated that the accusations against him were malicious.

74. On 30 April 2021, the Claimant was sent a letter requiring him to attend a BWR meeting on 11 May 2021. He was told in that letter the meeting was to discuss concerns in relation to not undertaking observations and engagement as per policy and surrounding clinical and professional practice. He was informed that if he did not provide a satisfactory response to the points raised then his bank worker agreement may be terminated.

75. The meeting did not go ahead on 11 May 2021. It was recorded in a letter to the Claimant dated 13 May 2021 that the Claimant had also raised his own concerns which were also going to be discussed. He was told that he could only work day shifts in the meantime. The Claimant was invited to a reconvened meeting on the 20 May 2021.

76. On 20 May 2021, the Claimant attended a BWR meeting chaired by Ian Holland-Hay. The Claimed denied that the allegations against him were true. He stated that no allegations were made against him on the shift itself. He was not told that he did anything wrong: it was all staged. He stated that he was being targeted and all that was being said was lies. He asserted that the management is one sided and do not look at things from his perspective. He said "*I fit the profile*", that he was being targeted, that there was a pattern as it has happened 6/7 times. He referred to three members of staff who all made allegations. The Claimant was asked if he understood why people see him as confrontational. He stated that Ian Holland-Hay viewed him in the same way that those members of staff view him. He made reference to his cultural background and how he presents himself.

77. It appears from the minutes that the meeting became somewhat heated. It is recorded that Ian Holland-Hay asked the Claimant to stop speaking over him and being rude. The Claimant stated that he was not being rude, and that he should be allowed to speak and not have words put in his mouth. He said that it was because he was "*different-his background*". Ian Holland-Hay asked the Claimant if he meant in a race way. The claimant replied that he did not mean that. He said that the way that he was being targeted was putting him, and others, off booking night shifts.

78. Ian Holland-Hay told the Claimant that he should book some day shifts, build his reputation back up and see what happens.

79. There is an undated letter [RB 113] confirming the outcome of the meeting of the 20 May 2021. This confirmed that until further notice the Claimant was to book day shifts only.

80. The Claimant sent several emails subsequent to this requesting night shifts. It was decided that he would remain on day shifts. The Claimant began to work night shifts again in around July 2021.

List of Issues – 17.1.4

81. On 21 July 2021, the Claimant was contacted by Chelsea Marks by email and offered a shift on Sunday night for double pay. On 23 July 2021 he confirmed that he would take the shift. The Claimant was also, around that time, telephoned by Suzanne Barnard to ask if he would take the shift.

82. The Claimant telephoned Clement Mensah around the time that he was offered the shift. Clement Mensah's evidence was that the Claimant said he was worried about why he was being offered double pay and was concerned that there was a plot, that he was being set up and that he did not trust or have confidence in the managers. Clement Mensah encouraged the Claimant to take the shift. The Claimant also told him that he was considering his position with The Priory because he felt that he was being picked on constantly and the Group had not done anything to stop this which had made him stop attending shifts.

83. On 28 July 2021, a report was made by Aderonke Adetoye, an agency healthcare assistant. She alleged that on the shift that began on 25 July 2021, the Claimant made sexually inappropriate advances and comments to her. She alleged that she told him that she was not interested but that he continued to tell her that he liked her and then made an explicit sexual reference as to what he would do to her. Aderonke Adetoye reported that she found the behaviour sexually threatening and distressing. She also reported that the Claimant had been texting her. She also alleged that another agency worker, Blessing Akinjisola, had told her that the Claimant had acted in a similar manner towards her. She stated that she did not want to work on any further shifts with the Claimant. The specific details of what was alleged by Aderonke Adetoye can be found in the report dated 20 August 2021 [RB145-150] which is referred to further below.

84. Clement Mensah confirmed in evidence that whilst he was working and on site during this shift, he was not present when the alleged incident was said to have occurred. He was in a different area.

85. Suzanne Barnard's evidence was that she did offer monetary enhancements to the Claimant and other staff for shifts that Grafton Manor could not cover. Such increases in rate could not be approved at site level: it could not be agreed within Grafton Manor, it was her manager's decision.

86. It is the Claimant's case that he was intentionally lured to work on the shift concerned by management so that they could set him up and fabricate the incident involving Aderonke Adetoye. We accept Suzanne Barnard's evidence that higher rates of pay were from time to time offered to staff as an incentive to work on hard to cover shifts and that she needed authority from her manager, who was not located at Grafton Manor, in order to offer such an enhanced rate.

87. Having considered all of the evidence before us, we do not accept that the evidence demonstrates that there was a plot to lure the Claimant to the shift

concerned in order to fabricate the allegations subsequently made. We find that the sole reason that the Claimant was offered the shift at an enhanced rate of pay was to ensure that there was adequate cover on the shift concerned. As the Claimant was a bank worker, had the Respondent not wanted the Claimant to work any further shifts, it could simply have not offered him any further shifts. There was therefore no need for the Respondent to set him up or fabricate a reason for terminating his bank agreement.

88. Having heard evidence also from Clement Mensah about what the Claimant said to him on the phone, we accept that the Claimant believes that he was set up. However, we considered that it simply makes no sense for Respondent to orchestrate such an elaborate fabrication when there was a straightforward option of not providing him with any further work. Further, we found it perfectly plausible that if the Respondent was struggling to cover shifts that it would offer incentives to cover those shifts because if shifts were not fully staffed then safeguarding issues may well arise.

89. We have also taken into account that the Respondent carried out a thorough investigation before reaching its conclusions, which we say more about below. There is no evidence that it jumped to any conclusions without first considering all of the circumstances and the evidence before it.

90. We find that the Claimant was not lured back to work by Suzanne Barnard with an offer of double payment in order that Suzanne Barnard could orchestrate an incident where the Claimant was accused of inappropriate sexual behaviour.

List of Issues – 17.1.5

91. Suzanne Barnard wrote to the Claimant on the 2 August 2021 requesting his attendance at a BWR meeting. The letter stated that the meeting related to an allegation that he had made sexually inappropriate comments towards a female member of staff.

92. On 2 August 2021, the Claimant emailed Chelsea Marks confirming attendance at the meeting. He also stated that he was surprised to hear such a ridiculous allegation. He asked whether this was the latest part of the jigsaw to get him in trouble.

93. On 2 August 2021, Suzanne Barnard emailed Julie Czornenkyj. In that email she referred to an earlier conversation with the Claimant in which the Claimant stated that his solicitor would be attending the meeting. She told him that this was not possible but that he could bring a union representative or colleague. He then stated that he would record the meeting instead. She informed him that this was prohibited but that he would receive the minutes and outcome letter. He stated that he would be sharing the minutes and outcome letter with a solicitor as they are trying to get him out and he would take action against them.

94. On 4 August 2021, the Claimant attended the BWR meeting chaired by Suzanne Barnard. What was discussed is outlined in the relevant notes of the meeting. The meeting was not audio recorded. We accept Suzanne

Barnard's oral evidence that it was The Priory Group's policy not to allow audio recordings unless it is required as a reasonable adjustment.

95. The Claimant does not accept that the notes accurately reflect what was said. The notes record that the allegations were put to the Claimant. He denied the allegations made. He stated that, when he has worn tops with short sleeves, Aderonke Adetoye has joked about his appearance and touched his arms in a joking way, but he had always kept it professional. He denied sending texts to Aderonke Adetoye but stated that he did remember speaking to her on the telephone to discuss business but that she was using the excuse of being a woman to ruin his life. He stated that she is jealous of him. He stated that she is not his type as he does not like black women and she is older than him. He stated that black people love to destroy each others lives and that they try to bring others down out of jealousy and competitiveness. The Claimant denied the allegations made against him. He denies that he made any such comments.

96. On balance we formed the view that it was more likely than not that the Claimant made the comments concerned in the meeting. It seemed to us unlikely that the Respondent would have fabricated comments of such a specific nature. The Claimant stated that Aderonke Adetoye was targeting him so that what she said was recorded on the Disclosure and Barring Service (DBS). He stated that people do not like him because he says what he thinks. It was noted that he did not have any problems on day shifts. The Claimant stated that he considered that the treatment that he has received amounted to bullying. Suzanne Barnard informed the Claimant that further investigations and discussion with human resources would be undertaken and then she would be in touch.

97. On 3 August 2021, Suzanne Barnard spoke to Aderonke Adetoye by telephone. On 4 August 2021 Suzanne Barnard spoke to Wendy Felce and Michael Kallon by telephone. On 12 August 2021, Suzanne Barnard spoke to Blessing Akinjisola.

98. On the same date, Aderonke Adetoye came to Grafton Manor and produced several text messages between her and the Claimant.

99. There is a report written by Suzanne Barnard dated 20 August 2021 regarding the investigation that she conducted. She decided that the grievance against the Claimant was to be upheld due to the severity of the claims, which occurred whilst working with vulnerable residents. It was decided to end the Claimant's Bank Worker Agreement with immediate effect. It is recorded that Aderonke Adetoye stated that she wished to inform the police and had sought support from EAP and The Priory. It was also decided that it was appropriate, as the Claimant was a student nurse, to inform his university of the incident.

100. Suzanne Barnard's evidence is that that she found some of his comments in the meeting to be inappropriate. She stated that she found his comment that Aderonke Adetoye was using the excuse of being a woman to ruin his life was inappropriate. She stated that his comment that black people love to destroy each other's lives was very inappropriate. She stated that, at the point where she concluded her investigation, she had a reasonable belief that the

Claimant had been inappropriate with Aderonke Adetoye. She decided that this was supported by evidence, namely the text messages provided by Aderonke Adetoye and how several members of staff had witnessed Aderonke Adetoye being very distressed following the incident between her and the Claimant. Further, she found that the claimant has been dishonest during the investigations as he had maintained that he had not been in contact with Aderonke Adetoye via text message when he clearly had, and that the nature of the text messages she had seen were very forward.

101. On 12 August 2021, the Claimant emailed Suzanne Barnard. He stated that there is no evidence whatsoever to prove that he did what was said by Aderonke Adetoye. He queried why a sweeping investigation was being carried out by contacting employees who were not even on the shift. He states that, as he is not popular to many at Grafton Manor, carrying out a sweeping investigation will allow them to manufacture things or provide them with the opportunity to corroborate Aderonke Adetoye's story. He stated that there is no physical evidence to corroborate claimed events. He stated that, as mentioned in the meeting, he does not fancy or date black women. He stated that carrying out a sweeping investigation was wrong and unnecessary.

102. On 12 August 2021, Suzanne Barnard emailed the Claimant to tell that she was finalising her investigation and would be in touch early in the following week.

103. There is a letter from Suzanne Barnard to the Claimant dated 20 August 2021, informing the Claimant that his bank worker agreement was terminated. The letter included the following:

" […]

From this subsequent investigation, I discussed your claim that the allegation was malicious and the individual concerned detailed that there are several successful men based at Grafton Manor in a similar situation to yourself and this is the first time she has felt the need to raise a concern. Additionally another female member of staff has detailed that you also presented in an inappropriate manner with her by telling her you liked her and wanted to get to know her more, which she declined. Both of the women concerned are black which does not support your claim of not being attracted to black women. Finally text message evidence from the same number we have on file for you has been shared with us, which clearly shows you informing the staff member that you want to get to know her and informing her that your discussions are confidential as well as other comments. Therefore, as a result I have reasonable belief that the allegations made are founded.

As a result, I regret to inform you that due to the concerns your Bank Worker agreement will be terminated with immediate effect.

Due to the nature of the allegations and the legal requirements on the Company, we are duty bound to notify the University of Buckinghamshire. They may contact you directly concerning this and what action they may decide to take as a result. You should notify any potential future employer of this."

104. Suzanne Barnard decided that, as well as the serious allegation of sexual misconduct, the Claimant's attitude towards the allegations, and the offensive and discriminatory comments he made during the investigation, from a safeguarding approach the Respondent could no longer engage the Claimant given the risks to its staff and patients.

105. Suzanne Barnard made contact with the Claimant's university on the same day that she wrote to him with the outcome of the BWR meeting. She states that the Respondent would have reported any such concerns to an education provider and she denies that it was done because of the Claimant's race or religious beliefs.

106. On 20 August 2021 to 25 August 2021, there was communication between the Respondent and the Claimant's education provider regarding the outcome of the investigation.

107. In cross examination, the Claimant asked Suzanne Barnard why she chose to contact his university without substantial evidence of the alleged incident; the only evidence relied upon being texts from years ago. Suzanne Barnard replied that following the investigation and outcome the matter was discussed externally. Sarah Alexander advised her to report it to his university and so she followed her instructions.

108. On 31 August 2021, the Claimant emailed Suzanne Barnard. He stated that he was unsatisfied and not pleased with the outcome of the investigation. He stated that he had sought legal advice. He asked whether there was a right of appeal or right to a further investigation.

109. On 31 August 2021, Suzanne Barnard emailed the Claimant and asked that he email her with the points that he wished to raise and she would review them.

110. On 2 September 2021, the Claimant emailed Suzanne Barnard. He stated that he felt that the investigation was rushed and no due process was followed such as to invite him to a second interview to discuss in detail the texts he had received months prior from Aderonke Adetoye. He stated that he expected the investigation to go into more detail as to how they got to the point of mutually sharing and exchanging telephone numbers. He challenged the way in which evidence was collected and the weight given to certain aspects of the evidence. He stated that Aderonke Adetoye was using her platform as a female to deliberately hurt him because of rejection. He stated that he was expecting a diverse investigation panel that included at least one man who could have viewed the incident from a different perspective.

111. On 2 September 2021, Suzanne Barnard emailed Julie Czonenkyj and asked her how she should reply to the Claimant's email, if at all. Suzanne Barnard decided not to take the matter further.

112. We noted that in evidence before the Tribunal, the Claimant's position remained that the Respondent had not shown that the texts were from him or that they were sent from his phone until the Tribunal asked for clarification from the Claimant about the telephone number concerned, as it was the same one that was provided on his claim form. At this point he confirmed that the number on the texts was his. The Claimant had denied to the Respondent

that he had any such non business interactions with Aderonke Adetoye whereas it was reasonable for the Respondent to form that view from the text messages that had been produced.

113. The allegation that Blessing Akinjisola had raised concerns about inappropriate behaviour by the Claimant was investigated by the Respondent following reference by Aderonke Adetoye and Wendy Felce to Blessing Akinjisola having had a similar experience to Aderonke Adetoye. Suzanne Barnard spoke to Blessing Akinjisola by telephone on 12 August 2021. Blessing Akinjisola stated that the Claimant had told her that he liked her but that she said that she was married. She said that he accepted this and he apologised. Therefore, there was evidence before the Respondent that the Claimant had made advances towards Blessing Akinjisola although nothing further.

114. On the basis of the evidence before us, we were entirely satisfied that the investigation carried out by Suzanne Barnard on behalf of the Respondent was thorough, balanced and fair. The allegations were discussed with the Claimant at length, several individuals were interviewed and texts that were produced were viewed. At all stages the Claimant had the opportunity to challenge the evidence relied upon. We found that the Respondent reached the conclusions that it did on the basis of the evidence before it and that Suzanne Barnard genuinely believed that the allegations events had occurred. On that basis the bank worker agreement was terminated. We therefore did not find that the investigation was 'one-sided' or that there was a determination on the part of the Respondent to find the Claimant 'guilty'.

Management diversity

115. The Claimant asserts that despite a large proportion of the care staff being from ethnic minority groups there was a lack of racial diversity within the management team at Grafton Manor.

116. Suzanne Barnard's gave live evidence regarding the ethnicity of the management team. She stated that she, Iain Holland-Hay (Director of Clinical Services) and Mark Mayhew are white, Mark Mason (Site Services Manager) is black, and Frank Adjei is black. Their consultant psychiatrist, Dr D Purkayastha, is of Indian heritage and their consultant psychologist, Antonia Von de Slurjis, is white Dutch.

117. The Claimant asserted that other white individuals such as Chelsea Marks are part of the management team. However, we accept Suzanne Barnard's evidence that she was part of the administrative team rather than the management team.

118. On the basis of Suzanne Barnard's evidence, the Tribunal accepts that the management team was ethnically diverse at the time that the Claimant was working there. Whilst the Claimant asserts a lack of diversity, he has failed to explain why this is the case.

Racial stereotyping

119. During the course of cross examination, the Claimant put it to Suzanne Barnard that her behaviour towards him amounted to her racial stereotyping him as her evidence was that she sometimes found him hostile and confrontational. The Claimant asserts that he has never used confrontational language.

120. We considered whether there was any basis for the Claimant's allegation that Suzanne Barnard's behaviour or actions amounted to racial stereotyping. We found that it did not. In reaching these conclusions we noted that her observations about the Claimant's conduct related to the specific circumstances of each incident. Her evidence was also balanced, for instance at paragraph 20 of her witness statement she states that at the BWR meeting on the 15 January 2021, he was appropriate during the meeting and that he was not hostile or confrontational as he had been on other occasions.

121. We noted that there were other occasions on which it is recorded in the documents that the Claimant's behaviour was considered by others to be rude, hostile or intimidating. During the BWR meeting on 20 May 2021, Iain Holland-Hay said to the Claimant that the Claimant was talking over him and being rude. In August 2021, Suzanne Barnard informed Human Resources that the Claimant had been hostile during the course of a telephone conversation. Wendy Felce stated that staff had said that the Claimant was quite intimidating sometimes. Suzanne Barnard's evidence is that Anna Boyce did not want to be a witness in these proceeding because "*she was and remains very intimidated by the Claimant*".

122. Taking into account all of the above, we find that the evidence does not demonstrate that Suzanne Barnard's behaviour towards the Claimant, in any way, amounted to racial stereotyping or was in any way connected to his race.

Bank Working Agreement

123. The Claimant does not dispute that he was a bank worker for the Respondent. However, the Claimant's position is that he has doubts as to whether he had signed the contract that has been provided by the Respondent to the Tribunal.

124. Other than the Claimant's bald assertion that the document is not reliable there is no evidence to demonstrate that this is not the contract entered in to between the Claimant and Respondent. The Claimant has not provided any alternative contract or any evidence to demonstrate that the document is not reliable. He has not explained specifically why he considers that the document concerned is not reliable. Further, the parties affirmed the contract by working in accordance with it.

125. On the evidence before it, the Tribunal is satisfied that the contract was in existence during the time that the Claimant was working for the Respondent and that the parties affirmed the contract by working in accordance with it.

126. The bank working agreement [at RB 73-76] contains the following terms:

1. STATUS OF THIS AGREEMENT

1. This agreement governs your engagement by Partnerships in Care Limited, part of the Priory Group of Companies (Company) as a Bank Worker. This is not an employment contract and does not confer any employment rights on you (other than those to which workers are entitled). In particular, it does not create any obligation on the Company to provide work to you and you will work on a flexible, "as required" basis.

2. it is entirely at the Company's discretion whether to offer you work and it is under no obligation to give any reasons for its decision to offer or not offer work.

2. NO PRESUMPTION OF CONTINUITY

1. Each offer of work by the Company which you accept shall be treated as an entirely separate and severable engagement. The terms of this Agreement shall apply to each shift but there shall be no relationship between the parties after the end of one shift and before the start of any subsequent one.

2. The fact that the Company has offered you work, or offers you work more than once, shall not confer any legal rights on you and, in particular, should not be regarded as establishing an entitlement to regular work or count towards any continuity of employment. […]

4. ARRANGEMENTS FOR WORK

1. If the Company wants to offer you any work it will contact you either by phone, email or text as agreed locally with the site. You are under no obligation to accept any work offered by the Company at any time.

2. If you accept a shift, the Company will expect you to complete the shift.

3. If you will not be able to complete the shift for any reason you must inform the Company immediately as agreed locally.

4. If the Company needs to cancel the shift, it will notify you as soon as reasonably practicable. […]

8. PAY

1. You will be paid £8.83 an hour, which will be subject to deductions of tax and national insurance contributions, if applicable. […]

3. You will be paid weekly in arrears directly into your bank account and payslips will be available via the Company's online portal. […]

13. COMPANY RULES AND PROCEDURES

1. During each shift you are required at all times to comply with the relevant Company rules, policies and procedures in force, contained in the Bank Worker handbook and available on the intranet. […]

16. CHANGES TO TERMS AND CONDITIONS AND TERMINATION

[…] 4. The Company may terminate this Agreement immediately by giving notice in writing to you if it reasonably considers that you have committed any serious breach of its terms or policies.

5. For the avoidance of doubt, on the termination of this Agreement (howsoever caused) you will not be entitled to any further payments from the Company other than any outstanding salary and holiday pay.

127. In live evidence, the Claimant confirmed that there was nothing in the agreement, or in the practice of the Respondent, that prevented him from working elsewhere. He confirmed that there was no requirement for him to take particular shifts. However, he stated that once a shift had been booked by a bank worker they were expected to honour that booking.

The Relevant Law

Complaint of unauthorised deduction from wages

Jurisdiction-time limits

128. Section 23(2)(a) of the ERA provides a time limit for making a complaint about unauthorised deductions from wages to the Employment Tribunals as follows:

"(*2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—*

(a)in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b)in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this section in respect of—

(a)a series of deductions or payments, or

(b)a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received."

(4)Where the Employment Tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable."

129. Further guidance is given in caselaw as to how the "not reasonably practicable" test should be applied in individual cases. The term, "*not reasonably practicable*" should be given a "*liberal construction in favour of the employee*" [*Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53, CA*]. What is reasonably practicable is a question of fact and thus a matter for the Tribunal to decide. The onus of proving it was not reasonably practicable to lodge a claim in time rests on the claimant. There is "*a duty upon him to show precisely why it was that he did not present his complain*t" [*Porter v Bandridge Ltd 1978 ICR 943, CA*].

130. If a claimant fails to show that it was not reasonably practicable to present the claim in time, the Tribunal should find that it was reasonably practicable to do so [*Sterling v United Learning Trust EAT 0439/14*]. '*Reasonably practicable*' does not mean reasonable, and does not mean physically possible, but means something like 'reasonably feasible' [*Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372, CA*], In *Asda Stores Ltd v Kauser EAT 0165/07* Lady Smith stated that "*the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done*".

131. Where the claimant is generally aware of the right to make a claim, ignorance of the time limit on its own will not usually be sufficient reason for the delay. If a claimant is aware of their right to complain, they are under an obligation to seek information and advice about how to enforce that right. Failure to do so will usually lead the Tribunal to reject the claim. As per *Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53, CA,* in reaching its decision, the Tribunal is required to establish what opportunities the Claimant had to find out about his rights and whether he took those opportunities? If not, why not? Was he misled or deceived?

132. The correct test is not whether the claimant knew of their rights but whether they *ought to have known of them [Porter v Bandridge Ltd 1978 ICR 943,* CA]. In the case of *Avon County Council v Haywood-Hicks 1978 ICR 646, EAT*, the Employment Appeal Tribunal found that the Claimant, who did not find out about the possibility of bringing a claim until he read an article in a newspaper, ought to have investigated his rights within the time limit and claimed in time.

133. The Supreme Court has recently handed down its decision in *Chief Constable of the Police Service of Northern Ireland and another v Agnew and others* [2023] UKSC 33. The Supreme Court held that whether a claim in respect of two or more deductions constitutes a 'series' of deductions is essentially a question of fact and to determine this all relevant circumstances are to be taken in to account, including the similarities and differences between the deductions, their frequency, size and impact, how they came to be applied and how they are linked. The 'series' is not necessarily broken by a gap of more than three months.

Substantive law relating to unauthorised deductions from wages

134. Section 13(1)-(3) of the Employment Rights Act 1996 ("the ERA") provides for circumstances in which deductions may be made from a worker's wages. The relevant parts are as follows:

> *13.— Right not to suffer unauthorised deductions.*
>
> *(1) An employer shall not make a deduction from wages of a worker employed by him unless—*
>
> *(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
> *(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*
>
> *(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—*
>
> *(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*
> *(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*
>
> *(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion. […]*

135. Section 14 of the ERA lists the exceptions to section 13. None of the exceptions listed apply in this case.

136. As asserted in this case, an unlawful deduction can include a failure to pay any wages at all.

137. In determining what is properly payable, the Tribunal is required to determine, on the ordinary principles of common law and contract the total amount of wages that was properly payable to the worker. Determining what wages are 'properly payable' requires consideration of all the relevant terms of the contract, including any implied terms [*Camden Primary Care Trust v Atchoe* 2007 EWCA Civ 714, CA].

138. If there is ambiguity in the contractual term(s) which purports to authorise a deduction from wages, in other words if the scope of the authorisation is unclear, then that ambiguity will ordinarily be resolved in favour of the worker [*Potter v Hunt Contracts Ltd 1992 ICR 337, EAT*]

139. If the Tribunal establishes that there is a contractual or statutory provision or written agreement from the worker authorising the deduction, it must then decide whether the actual deduction is justified [*Fairfield Ltd v Skinner 1992 ICR 836, EAT*].

140. In interpreting the provision in a contract of employment, in the first instance the Tribunal is required to apply the normal every day meaning of the wording.

If there is any ambiguity then context and background is an important consideration.

141. In *Adams and ors v British Airways plc* 1996 IRLR 574, CA, the Court of Appeal confirmed that an employment contract should not be interpreted in a vacuum and that, when resolving any ambiguity in its express terms, it is proper to have regard to the factual setting in which the contract was made.

142. In *Hussman Manufacturing Ltd v Weir* 1998 IRLR 288, EAT*,* the Claimant was moved from a night shift to a day shift which resulted in a £17 reduction in his weekly wages. He asserted there was an implied term of mutual trust and confidence so, even if his employer had the contractual right to move him to a different shift, this was an unlawful deduction The EAT said that the consequences to an employee had to be '*much more fundamental than a mere drop in earnings, save in the most exceptional cases'* before the duty of trust and confidence could be said to have been breached. It decided that the wages properly payable to the claimant, once he was moved to a different shift were those payable to all persons working on the new shift. It commented that to continue to make payments to him to reflect what he received on the night shift would be perverse and contrary to sound industrial practice.

143. In *Agbeze v Barnet, Enfield and Haringey Mental Health NHS Trust* 2022 IRLR 115, EAT, the EAT decided that a bank worker on a zero-hours contract did not have a right to be paid during a disciplinary suspension. Under the express terms of his contract, the Trust was not obliged to offer him any work and he was not obliged to accept any assignment offered to him. The claimant's contract, only expressly obliged the employer to pay him in respect of a period during which work had been specifically offered and accepted. On consideration of the authorities, the proposed implied term was not one that arose from an application of the common law principles of implication of contractual terms.

144. The law preventing unlawful deductions is intended for "*straightforward claims where the employee can point to a quantified loss*" (*Coors Brewers Ltd v Adcock* [2007] EWCA Civ 19 at section 56).

Notice Pay / Breach of Contract

145. Section 86 of the ERA sets out the statutory minimum periods of notice required to terminate a contract of employment. However, these provisions apply only to employees. They do not apply to workers who are not employees.

146. In cases where section 86 of the ERA does not apply, entitlement to notice is governed by the agreement or contract between the parties.

Claims made under Equality Act 2010

Jurisdiction -Time limits – Direct Discrimination and Harassment complaints

147. The time limit for making a claim under the Equality Act 2010 is specified at section 123 of the Equality Act as follows:

"(1) Proceedings on a complaint within section 120 may not be brought after the end of –

(a) the period of three months starting with the date of the act to which the complaint relates, or

(b) such other period as the Employment Tribunal thinks just and equitable […]

(3) For the purposes of this section –

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it".

Direct Discrimination - section 13(1) Equality Act 2010

148. The definition of direct discrimination appears in section 13(1) Equality Act 2010 as follows:

"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".

149. As per section 4 EQA race and religion/belief are protected characteristics. 'Race' includes nationality or national origins.

150. The concept of treatment being less favourable inherently suggests some form of comparison and in such cases section 23(1) applies:

"On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case."

151. The effect of section 23 is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person of a different race.

152. In *Bahl v Law Society* 2004 IRLR 799, it was held that unfair treatment by itself is not discriminatory; what needs to be shown in a direct discrimination claim is that there is worse treatment than that given to an appropriate comparator. In that case it was said that "*where the alleged discriminator acts unreasonably then a tribunal will want to know why he has acted in that way. If he gives a non-discriminatory explanation which the tribunal considers to be honestly given, then that is likely to be a full answer to any discrimination claim. It need not be, because it is possible that he is subconsciously influenced by unlawful discriminatory considerations. But again, there should be proper evidence from which such an inference can be drawn. It cannot be enough merely that the victim is a member of a minority group. This would be to commit the error identified above in connection with the Zafar case: the inference of discrimination would be based on no more than the fact that others sometimes discriminate unlawfully against minority groups*."

153. In *Madarrassy v Nomura International Ltd*, it was held that the bare facts of the difference in protected characteristic and less favourable treatment is not "*without more, sufficient material from which a tribunal could conclude, on balance of probabilities that the Respondent" committed an act of unlawful*

discrimination". There must be "*something more*".

154. In *Nagarajan v London Regional Transport* [1999] IRLR 572, the House of Lords held that 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?*'

155. In *Burrett v West Birmingham Health Authority* 1994 IRLR 7, the EAT confirmed that it is for the Tribunal to decide as a matter of fact what is less favourable treatment and the test posed by the legislation is an objective one.

156. The fact that an individual believes that he or she has been treated less favourably does not of itself establish that there has been less favourable treatment, although their perception of the effect of treatment is likely to be relevant as to whether, objectively, that treatment was less favourable.

157. In *Anya v University of Oxford & Another* [2001] IRLR 377, it was said that it is necessary for the Employment Tribunal to look beyond any act in question to the general background evidence in order to consider whether prohibited factors have played a part in the employer's judgment. This is particularly so when establishing unconscious factors.

158. As the Employment Appeal Tribunal and appellate courts have emphasised in a number of cases, including *Amnesty International v Ahmed* [2009] IRLR 884, in most cases where the conduct in question is not overtly related to race, the real question is the "reason why" the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator to identify whether race had any material influence, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator.

159. Decisions are frequently reached for more than one reason. Provided the protected characteristic or, in a victimisation claim, the protected act, had a significant influence on the outcome, discrimination is made out. (Nagarajan v London Regional Transport [1999] IRLR 572, HL)

160. Case law emphasises that very little discrimination today is overt or even deliberate. Individuals can even be unconsciously prejudiced.

161. The Equality Act 2010 provides for a shifting burden of proof. Section 136, so far as material, provides as follows:

"(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."

162. In *Igen v Wong and Others* [2005] IRLR 258, it was confirmed that the Employment Tribunal should go through a two-stage process. The first stage requires the claimant to prove facts which could establish that the Respondent has committed an act of discrimination, after which, and only if

the Claimant has proved such facts, the Respondent is required to establish on the balance of probabilities that the treatment was not for the proscribed reason. In concluding whether the Claimant had established a prima facie case, the Tribunal is to examine all the evidence provided by the respondent and the claimant.

163. It is therefore for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

164. In *Hewage v Grampian Health Board* [2012] IRLR 870, the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should be applied. That guidance appears in *Igen Limited v Wong* [2005] ICR 931 and was supplemented in *Madarassy v Nomura International PLC* [2007] ICR 867. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all of the evidence, including any explanation offered by the employer for the treatment in question. However, if, in practice, the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

165. In many direct discrimination cases, it is appropriate for a Tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as she was. (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] IRLR 285.)

Harassment -section 26 Equality Act 2010

166. The relevant sections of the Equality Act 2010 are as follows:

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—

(i)violating B's dignity, or

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

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

(a)the perception of B;

(b)the other circumstances of the case;

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

167. The Respondent may be held liable on the basis that the effect of its conduct has been to produce the prescribed consequences even if that was not a purpose.

168. A respondent should not be held liable merely because its conduct has had the effect of producing the prescribed consequence. It should be reasonable that the consequence has occurred and that the alleged victim of the conduct must feel that their dignity has been violated or that an adverse environment has been created.

169. The words of the statute were considered by the Employment Appeal Tribunal in *Betsi Cadwaladr University Health Board v Hughes and others* UKEAT/0179/13. Justice Langstaff referred to the judgment of Lord Justice Elias in Grant v HM Land Registry [2011] EWCA Civ 769 that; "*the words "violating dignity", "intimidating, hostile, degrading, humiliating, offensive" are significant words* […] *tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment*."

170. In *Grant v HM Land Registry & EHRC* [2011] IRLR 748, the Court of Appeal emphasised the importance of giving full weight to the words of the section when deciding whether the Claimant's dignity was violated or whether a hostile, degrading, humiliating or offensive environment was created: "*Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment*."

171. In *Pemberton v Inwood* [2018] EWCA Civ 564, Underhill J said *"In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))*".

172. Context is very important in determining the question of whether there was an intimidating, hostile, degrading, humiliating or offensive environment for a claimant.

OUR CONCLUSIONS

173. The issues between the parties which fell to be determined by the Tribunal were set out above.

EQA, section 13: direct discrimination because of race/religion

174. The Claimant identifies as Black and of African origin. The Claimant is Muslim. The claimant expressed strongly his view that he had been subject to discrimination on the grounds of his race and religion.

175. For us to reach the conclusion that the Claimant has been subjected to such discrimination, there must be evidence, although it is possible that evidence

could be inferences drawn from relevant circumstances. A belief, that there has been unlawful discrimination, however strongly held is not enough on its own.

176. In order to decide the complaints of direct race and religious discrimination, we had to determine whether the Respondent subjected the Claimant to the treatment complained of (which is set out in the List of Issues above) and then go on to decide whether any of this was "less favourable treatment" (that is did the Respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances. If there was less favourable treatment we had to decide whether any such less favourable treatment was because of the Claimant's race or his religion.

177. We applied the two-stage burden of proof referred to above. We first considered whether the Claimant had proved facts from which, if unexplained, we could conclude that the treatment was because of race or religion/belief. The next stage was to consider whether the Respondent had proved that the treatment was in no sense whatsoever because of race or religion/belief. We also had to determine whether the allegations were presented within the time limits set out in 123(1)(a) & (b) of the EQA and if not whether time should be extended on a "just and equitable" basis. We set out below our conclusions on these matters for each allegation listed in the List of Issues.

178. In assessing the evidence before us and in reaching our conclusions, as well as considering each complaint individually we have also taken a step back and considered all of the complaints/allegations made in the round.

The racial slur allegation (List of Issues - 17.1.1)

179. We have found that this complaint was made out of time and it was not just and equitable to extend time for reasons that we provide below. The Tribunal has no jurisdiction to determine this complaint.

180. However, even if the Tribunal had jurisdiction to determine this complaint we would have found that the Claimant has not shown that Fabian Traub used the racist slur as claimed. As the Claimant has not shown that the alleged incident occurred, we have not gone on to consider whether there was less favourable treatment because of race in respect of this complaint.

The allegation that a colleague complained about the Claimant praying on 17 May 2020 and that the Claimant was not immediately interviewed about this causing his shifts to be cancelled for 6/7 weeks (List of issues - 17.2)

181. We have found that this complaint was made out of time and it was not just and equitable to extend time for reasons that we provide below. The Tribunal has no jurisdiction to determine this complaint.

182. However, for the reasons that we provide above, even if the Tribunal had jurisdiction to determine this complaint, we would have found that the Claimant has not shown that a colleague complained about the Claimant performing his prayers whilst the Claimant was engaged in a one- to-one observation of a service user, causing the Claimant's shifts to be cancelled for 6-7 weeks. We find that the Claimant has not shown that he was subject to a BWR due to any such incident. As the Claimant has not shown that the alleged

incident occurred we have not gone on to consider whether there was less favourable treatment because of religion.

The allegation that the Claimant was told to shut up by Anna Boyce and subsequent events -November 2020 (List of Issues - 17.1.2)

183. We have found that this complaint was made out of time and it was not just and equitable to extend time for reasons that we provide below. The Tribunal has no jurisdiction to determine this complaint.

184. However, for the reasons that we provide above, even if the Tribunal had jurisdiction to determine this complaint, we would have found that those issues complained of did not amount to less favourable treatment because of race. We found that the Anna Boyce told the Claimant to shut up, that the Respondent did not discipline Anna Boyce for this and that the Claimant's shifts were cancelled on the 7 and 8 November 2020 pending the outcome of the BWR meeting. However, the Claimant was not suspended nor were all of his shifts subsequently cancelled. He was moved to day shifts after the BWR meeting.

185. Whilst the Respondent cancelled the Claimant's shifts on the 7 and 8 November 2020, we were satisfied that the shifts would have been cancelled pending a BWR meeting for any bank worker in comparable circumstances. There is no evidence before the Tribunal to demonstrate that any other bank worker in comparable circumstances was, or would have been, treated differently to this. We have found that there was friction between the Claimant and Anna Boyce on this occasion. This was because Anna Boyce refused to sign the Claimant's time sheet because she believed him to have arrived late. The comment made by Anna Boyce discloses no connection to the Claimant's race. There is no evidence before the Tribunal to demonstrate that Anna Boyce or the Respondent was treating the Claimant less favourably or singling him out because of his race rather than for some entirely different reason. Whilst Anna Boyce was not disciplined nor was the Claimant. Whilst what she said to the Claimant may not have been professional, there is nothing whatsoever to suggest that it was in any way linked to the Claimant's race.

186. Taking into account all of the above factors, we did not consider that either the Respondent's actions, or the actions of Anna Boyce, resulted in less favourable treatment, or that any of those actions were in any way related to race. We formed the view that they were for entirely different reasons why the Respondent acted in the manner that it did. We found that the Respondent's approach to the issue that arose was to remove the Claimant from night shifts for a period of time and for him to instead work on day shifts given the heightened tensions that had occurred between the Claimant and Anna Boyce. Iain Holland-Hays decided to take this action having found also that the Claimant was in fact late on that particular occasion as witnessed by other colleagues. He felt that both the Claimant and the site would benefit from the additional support available on day shifts. The outcome was that the Claimant was told to work days shifts rather than night shifts which it was said would offer continued support both to him and others. The Claimant has not shown that this was less favourable treatment than a hypothetical comparator would

have received in the same or similar situation and, further, the action taken was in no way connected to the Claimant's race.

Incident when a service user fell from his bed: 14 January 2021 (List of Issues - 17.1.3)

187. We have found that this complaint was made out of time and it was not just and equitable to extend time for the reasons that we provide below. The Tribunal has no jurisdiction to determine this complaint.

188. However, for the reasons that we provide above, even if the Tribunal had jurisdiction to determine this complaint, we would have found that the Claimant has not shown that Fabian Traub fabricated the incident report, or that he was precluded from booking shifts (or suspended) without pay for 5 to 6 weeks, or discouraged from taking legal advice by Iain Holland-Hay as claimed.

189. We have found that the Claimant was correct to state that Fabian Traub was not disciplined. Even if the Tribunal had jurisdiction to determine this complaint, we would have found that Fabian Traub not being disciplined did not amount to less favourable treatment of the Claimant because of race.

190. The Respondent clearly had a duty to investigate an incident where a service user had fallen out of bed, which was a serious matter involving the care of a vulnerable individual. The Claimant was involved in his care on that evening. Part of the investigation therefore needed to include consideration of the Claimant's involvement and actions and/or inactions on that evening. The Tribunal was satisfied on the evidence before it that the investigation was carried out in an even-handed manner. There was no reason for Fabian Traub to be disciplined given that we have found that he did not fabricate the report. Indeed, the Claimant was not disciplined either, despite there being a delay in reporting the incident. The Respondent's approach was simply to treat the incident as a wider learning exercise for both the Claimant and the whole team, as well as offering the possibility of mediation.

Events of July and August 2021 (List of Issues 17.1.4 and 17.1.5)

191. For the reasons that we have provided above, we do not accept that the Claimant was lured back to work by Suzanne Barnard with an offer of double-time payment, so that Ms Barnard could orchestrate an incident where the Claimant was accused of sexual harassment, which led to a gross misconduct allegation being made against the Claimant

192. As the Claimant has not shown that the alleged act (of being lured back to work in order to orchestrate an incident) occurred, we have not gone on to consider whether there was less favourable treatment because of race.

193. For the reasons that we have provided above, we found that the investigation carried out by Suzanne Barnard on behalf of the Respondent was thorough, balanced and fair. We did not find that the investigation was one-sided or that there was a determination on the part of the Respondent to find the Claimant 'guilty'. We find that the reason that the Respondent undertook the investigation was because of the allegations made by Aderonke Adetoye. We would have expected any responsible employer to carry out an investigation in such circumstances.

194. On the evidence before us, we are entirely satisfied that the Respondent would have carried out such an investigation in respect of any worker against whom such allegations had been made. We therefore do not consider that the Claimant was subject to less favourable treatment on the basis of race on the basis that an investigation was undertaken. On the evidence before us we do not consider that the Claimant's race was in any way relevant to the Respondent's decision to carry out an investigation or for the manner in which the investigation was carried out.

195. During the course of the investigation, Suzanne Barnard was informed by Wendy Felce that she was aware that that Blessing Akinsola had a similar interaction with the Claimant in the previous year. This resulted in Suzanne Barnard contacting Blessing Akinsola. What was said by Blessing Akinsola did not demonstrate sexually inappropriate behaviour on the part of the Claimant. Suzanne Barnard decided however that it did demonstrate that the Claimant had approached her and told her that he liked her whilst on a shift at Grafton Manor.

196. We find that the evidence of this telephone call was a very small part of a wider evidence taken in to account by the Suzanne Barnard when carrying out her investigation and making her decision to terminate the bank working agreement. There is nothing to suggest that Suzanne Barnard sought to misrepresent what Blessing Akinsola said in the telephone call or that she relied upon that evidence in isolation when decided to terminate the Claimant's bank working agreement. In the circumstances, we do not consider that Suzanne Barnard's approach to what was said by Blessing Akinsola in any way demonstrates less favourable treatment on the basis of race.

197. The Respondent accepts that it did not allow the Claimant to record the investigation meeting. Suzanne Barnard's evidence, which we accept, is that it only allows an employee or worker to record a meeting if it is required as a reasonable adjustment. The Claimant has provided no evidence to show that this is not the case. He has not demonstrated that he has been treated less favourably than any one else in this respect. In the circumstances we find that he has not shown less favourable treatment because he was not allowed to record the investigation meeting.

Requiring the Claimant to report termination of his agreement to any new employers (List of Issues - 17.1.6)

198. In her letter of the 20 August 2021, Suzanne Barnard did inform the Claimant that he "*should notify any potential future employer of this*", 'this' appearing to be a reference to the termination of his employment with the Respondent, although it is not entirely clear from the way in which the letter is worded.

199. We find that the Claimant has provided no evidence to demonstrate that this was less favourable treatment than any other employee or worker would have been subject to in similar circumstances. We are satisfied that in informing the Claimant that he should do this, Suzanne Barnard was in no way

motivated by the Claimant's race but rather that this was standard procedure. Whilst no independent documentary evidence has been provided to corroborate that this was standard procedure we were satisfied, given the nature of the work undertaken by the Claimant and the regulatory oversight required by the Respondent's business that there was nothing unusual about Suzanne Barnard's actions in this respect.

Contacting the Claimant's university (List of Issues-17.1.7)

200. The Respondent accepts that Suzanne Barnard did contact the Claimant's education provider to inform them of events. The Claimant asserts that the Respondent did this without any evidence. We have found that the investigation carried out by Suzanne Barnard on behalf of the Respondent was thorough, balanced and fair.

201. We find that the Claimant has provided no evidence to demonstrate that this was less favourable treatment than any other employee or worker would have been subject to in similar circumstances. We are satisfied that in doing this, Suzanne Barnard was in no way motivated by the Claimant's race but rather that this was standard procedure. Whilst no independent documentary evidence has been provided to corroborate that this was standard procedure, we were satisfied, given the nature of the work undertaken and the regulatory oversight required to be carried out by the Respondent's business, that it would be expected to make such a report.

Claimant being suspended from shifts every time a white colleague reported an issue relating to him and his concerns about this were not investigated, despite having been raised in meetings with Ms Barnard and Mr Holland-Hay (List of Issues-17.1.18)

202. We have found that the Claimant's shifts were not cancelled on each occasion that a BWR occurred as alleged by the Claimant. Night shifts on the 7 November and 8 November 2020 were cancelled pending the outcome of the BWR meeting of the 11 November 2020. Subsequent to that BWR, and the BWRs that occurred on the 20 October 2020, 13 January 2021 and 20 May 2021, the Claimant was asked to work day shifts for the time being. However, no other shifts were cancelled. The Claimant's assertion that he was suspended from shifts every time that a white colleague reported an issue relating to him is therefore not correct.

203. The other individual involved with the events leading up to the BWR meeting on 11 November 2020 was Anna Boyce who we understand is white British. She was not disciplined. Given the surrounding circumstances, and as it appears to have been when the Claimant was challenging her authority and was pressing her to sign his timesheet when he arrived late, we considered that suspending her for telling the Claimant to shut up would have been wholly disproportionate and does not demonstrate that she was treated more favourably than the Claimant. Whilst the BWR had been arranged, in part, to investigate whether the Claimant had acted in a rude and unprofessional manner and tone towards Anna Boyce, the Claimant who, despite denying that it was the case, was found to have arrived at work late. He was required instead to work days shifts for the time being to enable more support to be

provided to all concerned. In the circumstances, we find that the Respondent's actions following this BWR was motivated solely by the need to improve the work environment for all concerned and to seek to dissipate tensions that had arisen between the Claimant and other workers, including Anna Boyce, on the night shift. The Respondent's actions in this respect did not in any way amount to less favourable treatment because of race.

204. We have also considered whether cancelling the Claimant's pre-booked shifts on the 7 November and 8 November 2020, pending the outcome of the BWR meeting, was less favourable treatment because of race. We do not consider that it was. Concerns that had been raised including matters regarding the Claimant's clinical and professional practice. In those circumstances, we were satisfied that the reason for cancelling the two shifts related solely to those concerns, which we accept were genuinely held, and was not less favourable treatment, nor was the treatment as a consequence of the Claimant's race.

205. The other individual involved with the events leading up to the BWR meeting on 15 January 2021 was Fabian Traub who we are told is white but not of British origin. The concerns raised against the Claimant were found not to be substantiated. However, following the incident, the Claimant was informed that he should only work day shifts as a supportive measure because of tensions with other night team staff. Fabian Traub was not suspended or disciplined, and, on our findings, there was no basis upon which to do so. Mediation was offered to try and resolve any issues and create positive working relationships. In the circumstances, we find that the Respondent's actions following this BWR was motivated by ensuring that reporting requirements were being met and improving working relationships between the Claimant and his colleagues. The Respondent's actions did not in any way amount to less favourable treatment because of race.

206. Several staff members were involved in reporting the events leading up to the BWR meeting on 20 May 2021. These were Wendy Felce, Ruth D.S. and a person known by the initial OA (who took the photographs of the resident's soiled sheets). It is not suggested by the Claimant that any of these individuals should have been disciplined or their shifts suspended.

207. In relation to the events of the 4 August 2021, the complaint was made by Aderonke Adetoye, who was a black female colleague. The subsequent investigation carried out by Suzanne Barnard was therefore not triggered by the complaint of a white colleague.

208. The Claimant also asserts that his concerns were not investigated. It is clear from the evidence before us that, on numerous occasions, whilst still working for the Respondent, the Claimant has said that other staff members were targeting him or against him. For example, he said to Iain Holland-Hay at BWR meeting on the 20 May 2021 that he was being "*targeted*". He said "*I fit the profile*", "*They aren't the same as me, they don't like me for one reason or another…I feel I've been targeted, no concept of team work, they are always looking for something wrong. They have no brains*." Iain Holland-Hay then specifically asked the Claimant whether he was referring to race. The Claimant responded "*No, no*".

209. Suzanne Barnard's evidence was that she did investigate all concerns raised by the Claimant. In her letter of the 18 January 2021, she stated that at the meeting there was a lengthy discussion about the Claimant's relationship with other members of the night team. She then offered the Claimant the opportunity of mediation with the staff concerned to resolve this and support positive working relationships. The Claimant did not take up the offer of mediation.

210. Having considered all of the evidence before us in the round, including the instances referred to in the previous two paragraphs, we are satisfied that the Respondent did take the concerns raised by the Claimant seriously, gave consideration to the issues that he raised and sought to take positive steps to address those concerns. The Claimant has not shown that the way in which the concerns that he raised were addressed in any way constituted less favourable treatment or that it was in any way connected with his race.

Consideration of all aspects of the complaints in the round

211. As well as considering each complaint contained in the List of Issues individually, we also took a step back and looked at all of the circumstances and all of the treatment complained of as a whole, including the circumstances surrounding the breach of contract and unauthorised deductions from wages complaints. We did this so as to consider whether it disclosed a pattern of behaviour by the Respondent, and/or by individuals working for the Respondent, that was discriminatory on the grounds of race or that would amount to harassment on the grounds of race.

212. We have no doubt that the Claimant is strongly of the belief that he has been treated very unfairly and that he has been discriminated against. However, we were not satisfied that he has shown that any of the actions taken by the Respondent, individually or looked at as a whole, were motivated or connected in any way to his race. Rather they were motivated by the need to investigate matters relating to patient wellbeing and care, to seek to address tensions that had arisen between the Claimant and his colleagues or concerns/complaints raised by colleagues, as a consequence of contractual terms and as a consequence of the Respondent's safeguarding duties.

EQA-section 26: harassment

The racial slur allegation (List of Issues -18.1, 18.2 and 18.3 with reference to 17.1.1)

213. We have found that this complaint was made out of time and it was not just and equitable to extend time. The Tribunal has no jurisdiction to determine this complaint.

214. However, even if the Tribunal had jurisdiction to determine this complaint, we would have found that the Claimant has not shown that Fabian Traub used the racist slur as alleged. Our reasons for this are above. As the Claimant has not shown that the alleged incident occurred, we have not gone on to consider whether the alleged incident related to the Claimant's protected characteristics of race or amounted to harassment as defined by section 26(1)(b) EQA.

The allegation that a colleague complained about the Claimant praying on 17 May 2020 and that the Claimant was not immediately interviewed about this causing his shifts to be cancelled for 6/7 weeks (List of Issues -18.1, 18.2 and 18.3 with reference to - 17.2)

215. We have found that this complaint was made out of time and it was not just and equitable to extend time for reasons that we provide below. The Tribunal has no jurisdiction to determine this complaint.

216. However, for reasons that we have provided above, even if the Tribunal had jurisdiction to determine this complaint, we would have found that the Claimant has not shown that a colleague complained about him performing his prayers whilst the Claimant was engaged in a one-to-one observation of a service user, causing the Claimant's shifts to be cancelled for 6-7 weeks. We have also found that the Claimant has not shown that he was subject to a BWR due to any such incident. As the Claimant has not shown that the alleged incident occurred, we have not gone on to consider whether the alleged incident related to the Claimant's protected characteristics of race or amounted to harassment as defined by section 26(1)(b) EQA.

The allegation that the Claimant was told to shut up by Anna Boyce and subsequent events -November 2020 (List of Issues List of Issues -18.1, 18.2 and 18.3 with reference to 17.1.2)

217. We have found that this complaint was made out of time and it was not just and equitable to extend time for reasons that we provide below. The Tribunal has no jurisdiction to determine this complaint.

218. Even if the Tribunal had jurisdiction to determine this complaint, we would have found that those issues complained of did not relate to the Claimant's protected characteristics of race or amount to harassment as defined by section 26(1)(b) EQA. We have found that the Anna Boyce told the Claimant to shut up or words to that effect. We have also found that there was friction between the Claimant and Anna Boyce on this occasion. However, this was because Anna Boyce refused to sign the Claimant's time sheet because she believed him to have arrived late and not for any other reason. The comment made by Anna Boyce discloses no connection to the Claimant's race. There is no evidence before the Tribunal to demonstrate that Anna Boyce's actions were because of his race rather than for some entirely different reason. Whilst what she said to the Claimant may not have been professional there is nothing whatsoever to suggest that it was in any way linked to the Claimant's race.

219. Therefore, even if the Tribunal had jurisdiction to determine this complaint, we would have found that those issues complained of did not relate to the Claimant's protected characteristics of race or amount to harassment as defined by section 26(1)(b) EQA.

Incident when a service user fell from his bed: 14 January 2021 (List of Issues - List of Issues -18.1, 18.2 and 18.3 with reference to 17.1.3)

220. We have found that this complaint was made out of time and it was not just and equitable to extend time. The Tribunal has no jurisdiction to determine this complaint.

221. However, for reasons that we have provided above, even if the Tribunal had jurisdiction to determine this complaint, we would have found that the Claimant has not shown that Fabian Traub fabricated the incident report, that he not was precluded from booking shifts (or suspended) without pay for 5 to 6 weeks or discouraged from taking legal advice by Iain Holland-Hay as claimed.

222. Even if the Tribunal had jurisdiction to determine this complaint, we would have found that those issues complained of did not relate to the Claimant's protected characteristics of race or amount to harassment as defined by section 26(1)(b) EQA.

Events of July and August 2021 (List of Issues -18.1, 18.2 and 18.3 with reference to 17.1.4 and 17.1.5)

223. For the reasons that we have provided above, we do not accept that the Claimant was lured back to work by Suzanne Barnard with an offer of double-time payment, so that Ms Barnard could orchestrate an incident where the Claimant was accused of sexual harassment.

224. As the Claimant has not shown that the alleged act occurred, we have not gone on to consider whether there was less favourable treatment because of race in this respect.

225. For reasons that we have provided above, we found that the investigation carried out by Suzanne Barnard on behalf of the Respondent was thorough, balanced and fair.

226. On the evidence before us we do not consider that the Claimant's race was in any way relevant to the Respondent's decision to carry out an investigation or for the manner in which the investigation was carried out.

227. We find that the Respondent's treatment of the Claimant during the course of the investigation did not in any way relate to the Claimant's protected characteristics of race or amount to harassment as defined by section 26(1)(b) EQA.

Requiring the Claimant to report termination of his agreement to any new employers (List of Issues -18.1, 18.2 and 18.3 with reference to 17.1.6)

228. In her letter of the 20 August 2021, Suzanne Barnard did inform the Claimant that he "*should notify any potential future employer of this*", "this" appearing to be a reference to the termination of his employment with the Respondent, although it is not entirely clear from the way in which the letter is worded.

229. We are satisfied that in informing the Claimant that he should do this, Suzanne Barnard was in no way motivated by the Claimant's race but rather that this was standard procedure. Whilst no independent documentary evidence has been provided to corroborate that this was standard procedure we were satisfied, given the nature of the work undertaken by the Claimant and the regulatory oversight required by the Respondent's business that there was nothing unusual about Suzanne Barnard's actions in this respect.

230. We find that the Respondent's treatment of the Claimant in requesting that

the Claimant notify any potential future employer did not in any way relate to the Claimant's protected characteristics of race or amount to harassment as defined by section 26(1)(b) EQA.

Contacting the Claimant's university (List of Issues -18.1, 18.2 and 18.3 with reference to 17.1.7)

231. The Respondent accepts that Suzanne Barnard did contact the Claimant's education provider to inform them what had happened. The Claimant asserts that the Respondent did this without any evidence. We have found that the investigation carried out by Suzanne Barnard on behalf of the Respondent was thorough, balanced and fair.

232. We are satisfied that in doing this, Suzanne Barnard was in no way motivated by the Claimant's race but rather that this was standard procedure. Whilst no independent documentary evidence has been provided to corroborate that this was standard procedure we were satisfied, given the nature of the work undertaken by the Claimant and the regulatory oversight required to be carried out by the Respondent's business, that it would be expected to make such a report.

233. We find that the Respondent's treatment of the Claimant in notifying his education provider of events did not in any way relate to the Claimant's protected characteristics of race or amount to harassment as defined by section 26(1)(b) EQA.

Time Limits - Complaints of Direct Discrimination and Harassment under EQA

234. We had to determine whether the discrimination and harassment allegations were presented within the time limits set out in 123(1)(a) & (b) of the Equality Act and, if not, whether time should be extended on a "just and equitable" basis.

235. Any alleged incident that that occurred prior to 10 June 2021 is outside the primary statutory three month time limit unless it forms part of a continuing act. Where an alleged incident occurred outside the primary time limit, and is not part of a continuing act, the Tribunal can only deal with the complaint if it considers that it is just and equitable to do so.

236. The Tribunal has decided that the Claimant has not shown that the alleged incidents of 22 April 2020 (racial slur by Fabian Traub) and 17 May 2020 (incident relating to prayers) occurred. The Tribunal has also decided that Fabian Traub did not fabricate an incident which resulted in the Claimant being suspended for 5 or 6 weeks without pay. As it has not been shown that these acts occurred as claimed, we have not gone on to consider if it would be just and equitable to extend time in respect of these particular issues and they cannot form part of a continuing act.

237. We have found that, in November 2020, Anna Boyce told the Claimant to shut up, or words to that effect, although we have found that this was not less favourable treatment because of race. In respect of the remaining complaints

relating to events in January 2021 we have found these did not amount to less favourable treatment because of race.

238. If we had found that there was less favourable treatment because of race in respect of the incidents in November 2020 and January 2021, we would, in any event, have found that these complaints were not part of a continuing act. This is because the events are entirely unconnected, involved different colleagues and different issues arose. Further, based upon on our findings above, there was no evidence of any campaign of hostility, harassment or other adverse or less favourable treatment on the grounds of.

239. Further, we would not have been satisfied that it was just and equitable to extend time on the facts of this case. Firstly, we find that the Claimant had, in general terms, an awareness of the possibility of making a claim in the Employment Tribunal. We formed this view because it can be seen from the documents before the Tribunal that the Claimant made mention, on several occasions, from January 2021 onwards, of solicitors and legal action. The Claimant stated in live evidence that he had sought online legal advice. He could have sought further information about time limits during the course of those enquiries or by speaking to another organisation such as ACAS. It was open to him to make further enquiries and seek further advice. He did not do so.

240. Further, we considered the manner in which the claim has been presented to the Tribunal was likely to present challenges to the Respondent in terms of defending those complaints. We considered that the cogency of the evidence was likely to be affected by the delay.

241. Considering all of the evidence before us in the round we decided that the balance of prejudice fell in the Respondent's favour and that it was not just and equitable to extend time in respect of the allegations relating to November 2020 and January 2021.

242. The complaints which relate to events that occurred on or after 10 June 2021 are in time.

Complaint of unauthorised deduction from wages

Jurisdiction (time limits)

243. As the Tribunal understands it, the Claimant's case is that he is owed wages for periods when he states that he was suspended (for periods that he was not allowed to book shifts) or if shifts were cancelled because he was subject to a BWR. The Respondent submits that the Claimant was never subject to a suspension as he was on a zero hours contract and the Respondent therefore had no obligation to provide him with work on any particular date.

244. In an email to the Tribunal dated 29 April 2023 [RB 241], the Claimant identified the wages that he asserts that the Respondent has failed to pay as follows:

"*Missing payment calculation of the amount by way of wages*

13/03/2020
20/03/2020
19/02/2021
26/02/2021
05/03/2021
12/03/2021
19/03/2021
26/03/2021
02/04/2021
09/04/2021
16/04/2021
28/05/2021
04/06/2021
11/06/2021
18/06/2021
25/06/2021
02/07/2021
09/07/2021
16/07/2021
06/08/2021
13/08/2021
Altogether this amount to 21 weeks of suspension without pay. 21 weeks x £500 (Weekly wages) = £10,500"

245. The claim was lodged with the Tribunal on the 30 September 2021. Taking in to account the ACAS conciliation period from 9 September 2021 to 28 September 2021, any deduction that occurred prior to 10 June 2021 is outside the primary statutory three month time limit.

246. As identified by Ms Harty, the alleged unlawful deductions fall into three distinct periods:

Period 1: 13 March 2020 to 20 March 2020;

Period 2: 19 February 2021 to 16 April 2021; and

Period 3: 28 May 2021 to 13 August 2021.

247. The Respondent submits that those alleged deductions that occurred within periods 1 and 2 are out of time and that there is no continuing act because there is no temporal link between period 1 and period 2, which starts almost a year afterwards, and the Claimant has not established in his pleadings or his cross examination that periods 1 and 2 (or period 3) are linked in any other way.

248. We find that there is no link between the distinct periods as identified above. Further, there is no link between the acts complained of on the 28 May 2021/ 4 June 2021 and the act complained of on the 11 June 2021. This is because for the reasons we provide below, the Claimant has not demonstrated that there was an unauthorised deduction for any of the dates claimed. As there is no unauthorised deduction, there can be no continuing act.

249. It follows that the complaints made in respect of unauthorised deductions prior to 10 June 2021 are outside the statutory three month time limit. In those circumstances, the Tribunal must consider whether it was not reasonably practicable for the complaints to be presented before the end of the relevant period of three months, and, if so, whether the complaints were presented within such further period as the Tribunal considers reasonable.

250. In reaching that conclusion, we have taken in to account our finding that we consider it likely that the Claimant was able to check his payslips subsequent to the 28 April 2020 and able to access his bank statements for the periods in question. He therefore had the ability to check his bank statements and cross refer them with his payslips to establish if he had been incorrectly paid.

251. Considering all of the evidence before us in the round, we find that it was likely that the Claimant had, in general terms, an awareness of the possibility making a claim in the Employment Tribunal. We formed this view because the Claimant made mention, on several occasions, from January 2021 onwards, in the documents before the Tribunal of solicitors and legal action. We find that he had access to legal advice These include the following examples:

- The Claimant said that he would involve solicitors if Mr Traub wanted to go "*down this route*" [RB 96] (7 January 2021);
- The Claimant told Mr Holland-Hay that his solicitor had advised him not to book shifts [RB 156] (4 August 2021);
- The Claimant told Ms Barnard that he had been in touch with his solicitor [RB147] (August 2021);
- The Claimant told Ms Barnard that he had called his solicitor [RB133] (August 2021);
- The Claimant told Ms Barnard that he had sought legal advice [RB138] (August 2021);
- The Claimant stated in an email to Chelsea Marks of R: "*I'll see you at the work tribunal*" [RB158] (August 2021); and
- The Claimant stated in his investigation meeting that "*he was advised by his solicitor*" [RB155] (August 2021).

252. In the circumstances, even if the Claimant was not aware of the time limits, he had the opportunity to establish what they were. Despite having access to legal advice, he did not make a claim in respect of any alleged deduction prior to 10 June 2021. We consider that it was reasonably practicable for complaints relating to alleged deductions prior to 10 June 2021 to have been made within the three month time limit.

Substantive complaint of unauthorised deduction from wages.

253. The complaints of unauthorised deductions covering from 11 June 2021 to 13 August 2021 were made in time. We have found that the complaints for periods prior to 10 June 2021 were out of time and so the Tribunal has no jurisdiction to decide them. However, even if we had found that the Tribunal had jurisdiction, we would have found that there was no unauthorised deductions for those periods also for the reasons that we provide below.

254. The burden of proof falls upon the Claimant to show that unauthorised deductions were in fact made from his pay. In the first instance in order to substantiate such a claim the individual must demonstrate that a deduction has been made.

255. We found the Claimant's claims, and evidence, regarding the nature of the claimed unlawful deductions from wages to be unclear and confusing. The Claimant has provided a list of weeks that he says he worked but was not paid. He has not identified specific dates/hours for which he has not been paid. He has not specified the amounts he says that he was underpaid on each occasion. Rather he states that he was underpaid by £500 per week. He has not provided the dates of the specific shifts when he says he was booked to work but then not paid. He asserts that this is not his fault as he cannot provide the specific amounts owed because he was unable to access his pay slips and that the payslips now provided are unreliable. For reasons that we have provided above, we reject the argument that the Claimant was not able to access his payslips or that the payslips now provided by the Respondent are unreliable. For the reasons that we have provided above, we do not accept that the Claimant was unable to cross check with his bank statements the amounts on the payslips.

256. The Claimant was cross examined at length regarding the dates that he has identified as being owed wages from. From his answers in live evidence, it appeared that the Claimant had gone through the payslips provided by the Respondent during disclosure and, if a payslip was missing, he had identified that as a week in which he was suspended and an unlawful deduction had been made. The Claimant was not able to identify, when cross examined on the point, whether any of the above dates included pre-booked shifts that the Respondent had cancelled. He claimed that there were documents to demonstrate such cancellations. However, there is no documentary evidence before us that demonstrates that shifts were cancelled in the weeks that the Claimant asserts unauthorised deductions were made. The documentary evidence does show that shifts booked for 7 and 8 November 2020 were cancelled but he does not make a complaint of unauthorised deductions in respect of those dates.

257. We have found that the Claimant was told to book only day shifts from the 18 January 2021 and (having resumed night shifts at some point later) again was told only to book day shifts from 30 April 2021, returning to night shifts in July 2021.

258. The Claimant confirmed in live evidence that, at various points, he had not taken shifts because of his studies/placements or for other reasons relating to the way that he considered that he was being treated by the Respondent.

259. Further, taking into account sections 1 and 2 of the Bank Working Agreement, as well as considering the terms of the agreement as a whole, we find that the agreement did not impose any obligation on the Respondent to offer the Claimant shifts (whether they be day or night shifts) or honour shifts already booked if there was reason not to do so. The terms of the agreement did not require the Claimant to accept shifts, although it states at section 4(2) that a bank worker is expected to honour a booked shift. However, there is then reference at 4(3) as to what the bank worker should

do if they cannot honour the shift, and, at 4(4) reference to what the Respondent will do if it has to cancel the shift.

260. Throughout his claim, the Claimant refers to being suspended. However, applying *Agbeze v Barnet, Enfield and Haringey Mental Health NHS Trust,* even if the Claimant were able to show that shifts were cancelled pending the outcome of a BWR on the dates that he alleges deductions were made (which he has not), we find that the Bank Working Agreement permitted the Respondent to cancel any such shift and that there was no consequent obligation for the Respondent to pay the Claimant for that cancelled shift.

261. Consequently, we find that the Claimant has not shown that any of the sums claimed were 'properly payable' as required by section 13(3) of the ERA on the dates alleged and so no unauthorised deduction occurred on any of the dates complained of.

Notice Pay/Breach of Contract

262. The Claimant's relationship with the Respondent was governed by his Bank Working Agreement. The Claimant does not assert that he was an employee rather than a worker. Taking into account the terms of the agreement, and on the Claimant's own evidence, this seems to be the case. Under that agreement there was no obligation for the Respondent to provide the Claimant with work and the Claimant was under no obligation to accept work. There were periods where he chose not to ask for shifts. There was no clause in the agreement preventing the Claimant from working for other organisations without permission or at all.

263. As the Claimant was not an employee, he is not entitled to notice under section 86 of the ERA.

264. Further, clause 16(4) of the agreement provides for immediate termination if the Respondent reasonably considers that a serious breach of its terms or policies has been committed. Taking into account our findings of fact detailed elsewhere in these reasons, we find that the Respondent was entitled to rely upon this clause to terminate the agreement.

265. In any event, clause 16(5) of the agreement makes it clear that, other than outstanding pay and holiday pay, no other payments will be made on termination of the agreement.

266. The Claimant was therefore not entitled to notice of termination of the agreement. As such his claim for notice pay cannot succeed.

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Employment Judge Boyes
Date: 22 November 2024

Sent to the parties on:
25 November 2024

For the Tribunal Office