THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE K ANDREWS**
MEMBERS: **Ms N Christofi**
Mr N Shanks

BETWEEN:

Mr A Singh
Claimant

and

Lewisham and Greenwich NHS Trust
Respondent

ON: **12-16 June 2017**
& 18-19 September 2017 in chambers

Appearances:
For the Claimant: **In person**
For the Respondent: **Ms H Patterson, Counsel**

JUDGMENT & ORDERS

1. In respect of the 15 allegations initially relied upon by the claimant, he was not discriminated against because of his race, harassed or victimised. Accordingly all discrimination claims in respect of those 15 allegations fail and are dismissed.

2. The claimant did not make any protected disclosures and his claim of unfair dismissal fails and is dismissed.

3. The claimant shall indicate in writing to the respondent and Tribunal within 21 days of receiving this Judgment whether he wishes to pursue or withdraw them. If he wishes to pursue them, the respondent shall indicate in writing to the claimant and the Tribunal within 21 days of receipt of the claimant's indication, if it wishes to apply for either a strike out or a deposit in respect of those claims. If so, a preliminary hearing to consider that application shall be listed before a different Judge sitting alone. Otherwise a preliminary hearing to consider case management only shall be listed before Judge Andrews.

REASONS

Claims and Issues

1. In this matter the claimant complains that he has been discriminated against because of his race. He is Indian. A case management order in April 2017 directed the claimant to select a maximum of 15 of his 32 original allegations to pursue with the remainder to be stayed. The claimant selected 15 allegations details of which appear at appendix A to this Judgment. The claimant relies on all 15 as examples of direct race discrimination and harassment. For the purposes of his claims of direct race discrimination the claimant has identified actual comparators for each allegation as set out below.

2. The claimant also says that he has been victimised. The alleged detriments are the same 15 allegations. The alleged protected acts (and whether the respondent accepts that they are such) are as follows:

    a. Email to Mr D Knevett dated 3 September 2014 (accepted).
    b. Complaints dated 30 October 2014 (not accepted) and 24 January 2015 (accepted).
    c. Complaint dated 9 April 2015 (accepted).
    d. Email to Mr J Port dated 21 April 2015 (not accepted).
    e. Complaint dated 23 April 2015 (accepted).
    f. Email to Ms J Lynch dated 21 August 2015 (not accepted).
    g. Complaint dated 10 September 2015 (accepted).

3. The claimant also says that he made protected disclosures as set out in the extract from the agreed list of issues which appears at appendix B to this Judgment and that because of this he was dismissed (constructively) making that dismissal automatically unfair.

4. The respondent says in respect of the discrimination claims that any act or omissions alleged that occurred between May 2014 and October 2015 are out of time.

Documents

5. The matter had been extensively case managed prior to this hearing on a number of occasions. Notwithstanding this, the claimant applied on the first day for additional documents to be added to the bundle. Some were agreed by the respondent but there were two documents in particular they objected to, as they said adding them would significantly widen the issues already agreed. Having considered the Orders made previously by EJ Baron and also correspondence between him and the parties (in particular his letter dated 26 May 2015) I concluded that the issues as described in the agreed list of issues in the bundle reflected EJ Baron's Orders and the claimant's additional documents would not be allowed. During the course of the hearing the respondent added a small number of documents to the bundle in order to deal with unanticipated matters that arose in evidence.

Evidence

6. We heard evidence from the claimant and for the respondent from Mr S Asher (Head of Information Systems and Data Warehouse), Mr J Port (former HR Advisor) and Ms B Tringham (Head of Information, Clinical Coding & Medical Records).

Relevant Law

7. Discrimination

8. Section 13 of the Equality Act 2010 (the 2010 Act) provides that a person discriminates against another if, because of a protected characteristic, he treats that person less favourably than he treats or would treat others. Race - which includes colour, nationality and ethnic or national origins - is a protected characteristic.

9. To answer whether treatment was "because of" the protected characteristic requires the Tribunal to consider the reason why the claimant was treated as he/she was. The Equality and Human Rights Commission Code of Practice states that whilst the protected characteristic needs to be a cause of the less favourable treatment it does not need to be the only or even the main cause.

10. It is a matter for the Tribunal to determine what amounts to less favourable treatment to be interpreted in a common sense way and based on what a reasonable person might find to be detrimental.

11. Section 23 of the 2010 Act refers to comparators and says that there must be no material difference between the circumstances relating to each case. The relevant "circumstances" are those factors which the employer has taken into account when treating the claimant as it did with the exception of the protected characteristic (Shamoon v Chief Constable RUC 2003 IRLR 285).

12. Section 26 of the 2010 Act provides that A harasses B if A engages in unwanted conduct related to a relevant protected characteristic and that conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. When deciding whether conduct has had that effect subsection 4 requires us to take into account the perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

13. Two authorities give helpful guidance in applying these provisions: Richmond Pharmacology Ltd v Dhaliwal (2009 IRLR 336) and Land Registry v Grant (2011 IRLR 748) where Elias LJ said:

> "Where harassment results from the effect of the conduct, that effect must actually be achieved. However, the question whether conduct has had that adverse effect is an objective one – it must reasonably be considered to have that effect – although the victim's perception of the effect is a relevant factor for the tribunal to consider. In that regard, when assessing the effect of a remark, the context in which it is given is always highly material.

Moreover, tribunals must not cheapen the significance of the words "intimidating, hostile, degrading, humiliating or offensive environment". They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

14. Section 27(1) of the 2010 Act says that a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act. A protected act includes making an allegation (whether or not express) that A or another person has contravened the 2010 Act. The protected act need not be the sole reason for the detriment in question; it is sufficient if it was a significant influence on A's decision. There is no need for the Claimant to rely upon a comparator to make out a claim of victimisation. Something will amount to a detriment where a reasonable person would or might take the view that the act or omission in question gives rise to some disadvantage.

15. The position on burden of proof in claims of discrimination is set out at section 136 of the 2010 Act. In summary, if there are facts from which the Court could decide, in the absence of any other explanation, that the claimant has been discriminated against then the Court must find that that discrimination has happened unless the respondent shows the contrary. It is generally recognised however that it is unusual for there to be clear evidence of discrimination and that the Tribunal should expect to consider matters in accordance with these provisions and the guidance set out in Igen v Wong and others ([2005] IRLR 258) confirmed by the Court of Appeal in Madarassy v Nomura International plc ([2007] IRLR 246). In the latter case it was also confirmed, albeit when applying the pre-2010 Act wording, that a simple difference in status (whether race or sex) and a difference in treatment is not enough in itself to shift the burden of proof; something more is needed. It is important in assessing these matters that the totality of the evidence is considered.

16. Any complaint of discrimination may not be brought after the end of the period of three months starting with the date of the act complained of or such other period as the Tribunal thinks just and equitable (section 123 of the Equality Act 2010). Where the alleged discriminatory act is one of the failure to act, section 123(4) provides that in the absence of evidence that failure is taken to occur when the alleged discriminator does something inconsistent with doing the act, or otherwise on expiry of the period in which they might reasonably have been expected to do it.

17. Conduct extending over a period is to be treated as done at the end of that period (section 123(3)(a)). This is distinct from an act with continuing consequences where time runs from the date of the act as above. Where an employer operates a discriminatory regime, rule, practice or principle then that will amount to an act extending over a period (Barclays Bank plc v Kapur (1991 ICR 208 HL). When deciding if there is such conduct, however, Hendricks v Commissioner of Police for the Metropolis [2002] EWCA Civ 1686 confirms that the correct focus is on the substance of the complaint that the respondent is responsible for the state of affairs leading to the alleged discrimination rather than too literal approach in analysing whether a regime, rule, practice or principle exists on specific facts. This approach has

been confirmed in the context of the 2010 Act in Rodrigues v Co-operative Group EAT July 12.

18. Unfair dismissal

19. In order to bring a complaint of unfair dismissal it is first necessary to establish that the claimant has in fact been dismissed.

20. If there is no express dismissal then the claimant needs to establish a constructive dismissal. Section 95(1) of the Employment Rights Act 1996 ("the 1996 Act") states than an employee is dismissed by his or her employer for these purposes if:

> "(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

21. Case law has established that to succeed in such a claim the employee must establish that
    a. there was a fundamental breach of contract on the part of the employer;
    b. the employee resigned in response; and
    c. the employee did not affirm the contract before resigning.

22. In Western Excavating (ECC) Limited –v-Sharpe [1978] ICR 221, the Court of Appeal confirmed that the correct approach to considering whether there has been a constructive dismissal is as follows:

> "if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer's conduct, he is constructively dismissed."

23. Those terms of the contract include not only the express terms set out in writing or orally but also the term of mutual trust and confidence that is implied into every contract of employment and which, if breached, is capable of constituting a fundamental breach.

24. Whether there has been a fundamental breach of that term is a question of fact for the Tribunal. The House of Lords in Malik v BCCI SA (in liquidation) [1997] IRLR 462 (as corrected by Baldwin v Brighton & Hove CC [2007] ICR 680) confirmed that the employee needs to show that the employer has, without reasonable and proper cause, conducted himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between them. This conduct is to be objectively assessed by the Tribunal rather than by reference to whether the employer's conduct fell within the band of reasonable responses and must be assessed as a whole. The employer's subjective intention is irrelevant; it is for the Tribunal to consider objectively whether the conduct complained of was likely to have that effect.

25. Furthermore, individual actions taken by an employer which may not in themselves constitute fundamental breaches of any contractual term may have a cumulative effect of undermining trust and confidence thereby entitling the employee to resign and claim constructive dismissal.

26. In order to bring a claim of unfair dismissal the employee must usually have been employed for 2 years. An exception to this is if that employee made a protected disclosure and if that is the reason, or principal reason, why he was dismissed that dismissal will be automatically unfair (section 103A of the 1996 Act).

27. Any disclosure of information which in the reasonable belief of the worker making the disclosure and, if made on or after 25 June 2013, is made in the public interest and tends to show one or more of the matters listed at section 43B(1) of the 1996 Act will be a qualifying disclosure. That list includes that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject and that the health and safety of any individual has been, is being or is likely to be endangered. The disclosure must identify, albeit not in strict legal language, the breach relied upon (Fincham v H M Prison Service EAT 0925 & 0991/01).

28. To be protected a qualifying disclosure has to be made in accordance with one of six methods of disclosure which include to the person's employer (section 43C(1)).

29. A mere allegation is not sufficient to be regarded as information – there must be a conveyance of facts (Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38). Whether a worker had a reasonable belief as required by section 43B will be judged by taking into account that worker's individual circumstances into account.

30. The information does not have to be true but to be reasonably believed to be true there must be some evidential basis for it. The worker must exercise some judgment on his or her own part consistent with the evidence and resources available (Darnton v University of Surrey 2003 ICR 615).

31. "Public interest" is not defined in the 1996 Act nor is there any statutory guidance as to its meaning but the worker must reasonably believe the disclosures to be in the public interest.

Findings of Fact

32. Having assessed all the evidence, both oral and written, we find on the balance of probabilities the following to be the relevant facts first by way of general overview and then specifically in relation to the 15 factual allegations initially relied on by the claimant. These are dealt with chronologically rather than in the order in which they appear in the list of issues.

33. As is often the case in claims of this nature, we heard significant amounts of evidence that proved not to be relevant to the allegations that we were considering. Our findings relate only to relevant evidence. There were on

occasions very stark contrasts in the evidence that we heard from both parties. In making the findings that we do, we do not suggest that any individual witness has sought to mislead the Tribunal or to be untruthful but simply to record on the balance of probabilities what we find most likely to have happened.

34. General Overview

35. On an unknown date the respondent advertised for a Data Warehouse Administrator. In summary the role involved maintaining and developing the respondent's data warehouses under the supervision of the Data Warehouse Manager. The person specification stated that a

> "minimum of 2 years' experience of relational database management systems such as MS SQL 2000/2005/2008"

was essential and

> "Experience of working within structured project management controls e.g. Prince 2 environment"

was desirable.

36. This post had previously been undertaken by Mr A Mahmood, a gentleman of black Eritrean origin. Mr Mahmoud had left the respondent approximately 8 months previously to join another NHS Trust but, because the two Trusts shared IT systems, he was still able to log on and access the respondent's system after he left.

37. The claimant applied for the post stating in his application that he had attended a Database Developer Course: SQL & PL/SQL Introduction, SQL Star International and that he had used SQL in previous roles. Under supporting information he said:

> "I have experience of working with a variety of database packages including MS Access, SQL Server & Oracle in different environments… I have knowledge of managing, querying, transforming and updating databases using SQL… In my current role… I am extensively using… SQL queries… I have experience of collecting data from various data sources such as… SQL server…"

38. He was shortlisted by Mr Asher and was interviewed by a panel including Mr Asher in April 2014. The claimant was successful and was offered the job on 28 April 2014. Included with the offer letter was a document headed summary statement of terms and conditions.

39. The claimant commenced employment on 12 May 2014. He was line managed by Mr Asher, although it was intended that another person would be recruited as his immediate line manager and that person would in turn report to Mr Asher. In the event that appointment was not made as no suitable candidate could be found (although it remained budgeted for until the end of the financial year 2016/17) and Mr Asher line managed the claimant throughout his employment. At this time Mr Asher had a team of

approximately 9 permanent staff and 20 temporary staff based over three sites in two buildings.

40. The claimant shared an office with Mr Asher and Ms A Joyce, Trust Data Quality Manager (although she was only present for a limited period of time once a week). He also had access to an office next door that had two hot desks for other members of Mr Asher's wider team to use as required.

41. In overview, it is clear that the relationship between the claimant and Mr Asher soured very quickly. Mr Asher formed the view almost immediately that the claimant did not have the skill set in relation to SQL that he had believed him to have and that because of this he could not perform his work satisfactorily or, on occasion, at all. Mr Asher raised this first with Ms Tringham, his line manager, who sought advice from HR as early as 10 June 2014. Ultimately a decision was made that that an investigation should be carried out into whether the claimant had misled the respondent as to his skills when he applied for the job.

42. The claimant also incurred a number of sickness absences which led to sickness absence proceedings against him. Further disciplinary proceedings were commenced against the claimant in 2015 due to his alleged failure to participate in those sick absence process.

43. During his employment the claimant raised a number of grievances and bullying and harassment complaints in relation to Mr Asher, Ms Tringham and Mr Port of HR.

44. Performance management proceedings regarding the claimant were just being started by the respondent when he resigned in October 2015.

45. As far as comparators are concerned, their roles are as described above. We heard no evidence as to the role of Ms S Blower. The claimant gave no clear evidence or made any submissions about how he was treated differently to any of his comparators.

46. Allegation 16 (comparators: Ms Joyce, Ms Blower, Mr Asher) As stated above, when the claimant was sent the offer of employment a summary terms and conditions document was enclosed. Mr Port confirmed to us that the claimant should have been sent a further document setting out in detail his terms and conditions (i.e. a contract) and accepted that it is entirely possible that this had not been done but as it would have been done by the respondent's recruitment team he could not comment. Mr Asher would have had no active role in generating that further document.

47. We find that there was a failure by the respondent's recruitment team to send a full contract of employment which an employee would ordinarily reasonably expect to be received within two months of commencement of employment (although an amendment to contract was sent to the claimant in August 2014).

48. Allegation 7 (comparators: Ms Joyce, Ms Blower, Mr Asher, Mr Mahmood) This is an overarching allegation with a number of strands.

49. First the claimant says that he had no work to do. This arises from Mr Asher's concerns, briefly described above, with regards to the claimant's ability to perform the relevant work. Whether Mr Asher was correct in having those concerns, which we do not have to decide, it is clear that those concerns were genuinely held and had crystallised by 21 July 2014 when he told the claimant that the investigation into whether he had misled the respondent would commence. Mr Asher initially gave the claimant a variety of what he believed were straightforward tasks involving SQL and advised him to research what e-learning he could do for himself online. Mr Asher found that he had to give the claimant significant help and often do or re-do tasks for him. Eventually on a date that could not be identified but we find was most likely some time during the summer/autumn of 2014, Mr Asher gave the claimant a specific pivot table task and decided that he would not give him any further work until it was completed and would not do it for him. Consequently, from then until the end of the claimant's employment, the claimant was given no additional work. It is clear therefore that the claimant was not given anything like a full workload.

50. The claimant also says that he was given no support. He referred in particular to the fact that during the period of his employment he received no appraisals, and that he was seeking to raise his various concerns about his treatment with members of management, both operational and HR, but not receiving satisfactory responses, or indeed on occasion any response at all.

51. It is clear that as the claimant's employment progressed and relationships deteriorated and he raised several complaints, both formal and informal, various managers did not always promptly or comprehensively respond to his concerns. There were other occasions, however, when the claimant clearly was offered support. In particular, when he raised a specific concern about his chair (dealt with in more detail below) action was taken promptly for his needs to be properly assessed and an appropriate replacement was ordered. The claimant was also referred to the respondent's occupational health (OH) team at a time when he was not required to be according to the policy and Mr Asher, when he could have issued the claimant with a formal stage one sick absence warning, chose to undertake the more lenient option of informal counselling. The claimant was also offered the opportunity to be referred to a physiotherapist, which he declined, and mediation which he again declined (and took objection to). As far as a lack of appraisal is concerned, it is correct that he did not receive one. None of Mr Asher's direct reports in this period did, however, most likely because of the large number of direct reports he had at the time and the pressure of work he was facing.

52. Our conclusion is that the claimant was offered support, albeit it could perhaps be described as patchy, but at times he resisted what was offered. It seems that he wanted support on his own terms. Undoubtedly, the respondent could have done better in its management of both the claimant

and the situation generally but the claimant could have been more receptive to the efforts made.

53. The claimant also says that he received no training. On commencement of employment the claimant attended the general two-day induction programme that all new recruits undertook but the fundamental matter at issue in this case was the claimant's ability or otherwise to perform the job he was recruited to do. The claimant is very strongly of the opinion that he is an expert in SQL, indeed during submissions he described himself as better than anyone else at the respondent in SQL, and that he had no need for any training in that respect. Clearly Mr Asher did not share that view but, not unreasonably because that was the claimant's view, did not offer him SQL training. The lack of training that the claimant is concerned about relates to other matters. In particular Prince 2, QlikView and Cerner.

54. As far as Prince 2 is concerned, although it stated in the person specification that a knowledge of Prince would be desirable, we accept the respondent's case that the claimant did not need Prince training in order to perform his role. As far as QlikView is concerned, this was first offered to the claimant at a time when it was being offered for free in London to all employees of the respondent by the supplier. QlikView was not required for the claimant to perform his role. The claimant could not attend due to his absence on leave and therefore he asked to attend a separate training session. That session was to be held in Leeds and would have to be paid for and accordingly his request was reasonably declined. The claimant was however invited to and did attend the second session of QlikView when it was again held for free in London. Cerner was discussed as a possible training opportunity for the claimant and a number of other employees, but in the end, only Mr Asher attended and with a view to performing a particular function. We accept the respondent's case that the claimant did not need to be trained on Cerner to perform his role.

55. The claimant says that he had no software access for the last 6 months or so of his employment. Mr Asher's account, which we accept, was that during this period - because of the merger between the respondent and another Trust - the claimant was asked not to log into two of three environments that he would usually use. The third environment that he still had access to was sufficient to allow him to perform his role.

56. The claimant says that he attended no work-related meetings. Mr Asher's account, which again we accept, is simply that there were no work-related meetings that the claimant could or should have attended but was prevented from attending.

57. The claimant says that he had no interaction with colleagues. The physical layout of the claimant's work location was as described above and it is clear that he interacted with Mr Asher, although it was not always very happy interaction, and occasionally with Ms Joyce. The nature of the claimant's role, however, and the fact that he was performing limited work for the reasons set out above, no doubt led to reduced opportunities for his interaction generally within the Trust. There was no evidence, however, that

there was any step taken by any representative of the respondent to engineer this situation.

58. The claimant complains that Mr Port was 'hand in glove' with Mr Asher. It is clear that Mr Port was supporting Mr Asher in numerous ways in trying to navigate what had become a very difficult relationship. He could perhaps have been better in communicating more clearly to the claimant his own role and it is unfortunate that he failed to reply to a complaint emailed to him by the claimant on 30 October 2014 (one of the disputed protected acts). However, we find that Mr Port's behaviour towards the claimant was at all times professional.

59. The final strand of allegation 7 is a general one regarding Mr Asher's behaviour and tone towards the claimant. He has been described as being loud, rude and bullying. The claimant relied upon a particular email sent on 1 May 2015 as an example of Mr Asher's rudeness which, in its entirety, said:

"Ajayendra

The chair was order (sic) last week Friday and will arrive when the supplier delivers it to us.

Regards"

Having considered that email in the context of allegation 15 regarding the chair, we conclude that although it is perhaps a little abrupt, it can certainly not be described as rude. The claimant also relies upon his account of the meeting, again described in more detail below, on 14 July 2015 with regard to alleged intimidating behaviour. We have found below that the claimant may well have found facing both Mr Asher and Mr Port when he was alone to be intimidating but we do not find that Mr Asher himself was intimidating.

60. Mr Asher accepted in his evidence that he could at times have been a little stern with the claimant when the claimant refused to accept what Mr Asher was saying. That seems entirely in keeping with the situation that the two gentlemen were facing and seems an appropriate categorisation. Accordingly, our finding is that overall Mr Asher's behaviour towards the claimant was not loud, rude and/or bullying.

61. <u>Allegations 1 (part) & 17 (comparators: Ms Joyce, Ms Blower, Mr Asher, Mr Mahmood (not 17))</u> As described above, a decision was made that an investigation should be carried out into whether the claimant had misled the respondent as to his skills when he applied for the job. Mr Asher informed the claimant of that decision on 21 July 2014 and asked him to bring in copies of all his relevant qualifications. He told him that if they proved he did have the relevant training then it may be possible to deal with the issue as performance management. The claimant says that this was done in an intimidating way. He also says that Mr Asher made a specific comment about Indians. For the avoidance of doubt, that allegation is not one of the 15 pursued at this stage by the claimant. Accordingly we make no finding of fact in that regard.

62. In the event an investigation was commenced by Mr Knevett. In the course of that investigation the claimant emailed Mr Knevett on 3 September which is accepted by the respondent as a protected act. Mr Knevett produced a report on 23 October 2014 concluding that there was no case to answer by the claimant in respect of a disciplinary charge but that consideration should be given to performance management with appropriate support to enable the claimant to carry out the required duties effectively.

63. Mr Knevett emailed that report to Ms Tringham, copied to Mr Port, on 24 October 2014. On 31 October 2014 she emailed Mr Port. She observed that both the claimant and Mr Asher were under pressure and that perhaps the claimant should be moved out of Mr Asher's team but that this needed to be discussed and that the next step would be for a performance process to be started. She said that it would be better to communicate the outcome of the investigation sooner than 10 November 2014 when she would next be in the office. She asked Mr Port to help draft a response.

64. Unfortunately Mr Port overlooked this request and neither he nor Ms Tringham did anything further about communicating the outcome to the claimant. It was only when the claimant emailed Mr Port on 14 January 2015 asking for a copy of the report that it became clear that this had been overlooked. Mr Port told the claimant that it would be provided at a feedback meeting with Ms Tringham. The claimant then asked Mr Knevett direct for a copy indicating that he was concerned he would get a doctored version from the respondent. Ms Tringham replied again saying that he would be given the report at the meeting that had by then been arranged for the following week.

65. On 24 January 2015 the claimant submitted a bullying and harassment complaint generally in respect of Mr Asher – one of the protected acts.

66. The meeting between the claimant, Mr Port and Ms Tringham took place on 27 January 2015 and the Knevett report was shared with him.

67. There is a dispute between the parties as to what was said at that meeting about the reason for the delay in disclosing the report to the claimant. Ms Tringham's evidence was that she apologised profusely for not sending it earlier and explained that she had received it in October but had forgotten to forward it to him and once she became aware of the error she had immediately taken steps to set up the meeting. The claimant says that Ms Tringham told him very casually that the report had been misplaced and found after 2½ months. The claimant set out his version in an email to Ms Tringham on 10 February 2015. She replied on 16 February and did not disagree with his account or correct it. In cross-examination Ms Tringham accepted that she may have said the report was misplaced although she believed she had said it had been overlooked or that she lost track of it.

68. The claimant says that this supports his view that the delay in providing the report to him was deliberate with a view to both pressurising him into participating in mediation (which by then had been suggested but he did not want) and also to make him leave his employment.

69. Given the content of Ms Tringham's email of 31 October 2014 where she was clearly expressing a view that it would be better to communicate the outcome sooner rather than later, we find that there was no deliberate delay in disclosing the report prior to 14 January 2015. There was a deliberate delay in disclosure, however, between 14 & 27 January 2015 as Mr Port refused to disclose it in advance of the meeting. This was probably unhelpful in all the circumstances but we find that his reason was a desire to talk the claimant through the report and manage, if possible, his reaction to it.

70. Allegation 10 (comparators: Ms Joyce, Ms Blower) In March 2015 the claimant raised with Mr Asher that he believed his annual leave entitlement had been incorrectly calculated particularly by reference to bank holidays. He then raised the issue with Mr Port who replied on 25 March 2015 setting out what he believed to be the correct position. Email exchanges continued between them with Mr Port eventually advising the claimant to take it up further with his line manager or recruitment if he still disagreed. The claimant emailed Mr Asher on 30 March 2015 who replied on 10 April 2015 embedding within his email the relevant policy and advising that because the claimant was on a standard shift pattern, bank holidays were automatically given throughout the year.

71. Mr Asher advised the claimant to also speak to the payroll team which he did and they confirmed that Mr Asher's approach was correct.

72. The claimant says that the fact that Mr Asher, Mr Port and payroll all gave him the same answer is evidence of a conspiracy against him. We do not agree. We find that they gave the same answer as that is what they believed to be correct. Mr Asher did acknowledge in his evidence that the relevant policy document was badly written.

73. Allegations 3, 13, 14 & 31 (comparators: Ms Joyce, Ms Blower, Mr Asher (not 14), Mr Mahmood (not 13 & 14)) These allegations all arise from the respondent's management of the claimant's sick absence.

74. The respondent has a sickness absence policy which sets out a fairly typical process of managing sickness absence by reference to a number of days or episodes of absence within a period triggering absence reviews. It also records that OH will provide advice and guidance on the management of staff on short and long-term absence.

75. The claimant was absent for one day on 19 January 2015. He submitted a self-certificate to Mr Asher in which in the box "Brief Description of Illness/Injury" he wrote:

> "continuous harassment at workplace is causing a lot of stress, led to several episodes of ill health recently. Y'day had severe headache and high fever."

76. On receipt of that certificate Mr Asher completed a form reporting staff absences to payroll. The form requires managers to choose a category describing the absence from a set list of sickness reason codes with related

descriptions. Mr Asher chose code S10 which is described as "anxiety/stress/depression/other psychiatric illness".

77. The claimant complained on 30 June 2015 to Ms Lynch, Director of Workforce and Education, that he strongly objected to the "false illness type" being associated with him. Ms Wood, HR Business Partner, replied to that email on 6 July 2015 advising the claimant that the illness types were standard absence categories and was identified from the self-certificate.

78. On 10 February 2015 Mr Asher wrote to the claimant requesting him to attend an initial discussion meeting following his recent episode of sickness absence, his seventh in a six-month period. The invitation expressly stated that this would be an informal meeting. We note that at this stage, which is after the claimant had made complaints about Mr Asher, Mr Asher could have dealt with the claimant more formally at stage 1 of the process but chose not to.

79. The meeting took place on 13 February 2015 and the outcome was recorded in an email to the claimant on 20 February 2015. That email noted that the amount of absence incurred far exceeded the respondent's first trigger point however as this was his first interview, it was agreed that formal stages would not be initiated. It had also been agreed that the claimant would be referred to OH for an assessment and a new standard would be set of no more than one further episode of sickness for a period of 3 months starting from 13 February 2015. Further that an informal meeting would take place once the OH report was available.

80. The claimant was then absent for two 3 day periods in April and May due to back problems. Accordingly a further review was triggered. Mr Asher emailed the claimant on 22 June 2015. The subject line of this email read

"First Formal Sickness Review"

and in the body of it it said

'… please find attached a letter inviting you to the first formal sickness review.'

The letter attached, however, was headed

"Stage 2 - Sickness Absence Review Meeting'

and incorrectly referred to the meeting on 13 February 2015 as having been a stage 1 review meeting. Mr Asher's evidence was that this was simply a mistake, that he used the wrong template letter and it should have been an invite to a stage 1 meeting as indicated by the covering email. The claimant says that this was a deliberate act by Mr Asher as it would have been obvious to him that he was sending the wrong letter.

81. The claimant replied on 24 June to Mr Asher, copying Mr Port, stating that his email was inconsistent, unfair and unreasonable and was harassment. Mr Port replied confirming that the meeting was correct and consistent with Trust policy but at that point he had only seen the covering email rather than

the attachment. In due course Mr Asher became aware of the error and reissued an email to the same effect on 6 July 2015 enclosing a correctly populated letter requiring the claimant to attend a formal sickness absence review meeting on 14 July 2015. He advised the claimant that he would be accompanied by Mr Port and that the claimant was also entitled to be accompanied.

82. We find that it was a genuine error on the part of Mr Asher when he attached the wrong letter to the email on 22 June 2015. The covering email indicates that he intended to invite the claimant to a stage 1 meeting, his previous lenient approach to the claimant is in keeping with that and when the error was pointed out to him he corrected it.

83. The review meeting then took place on 14 July 2015. We heard very different accounts of this meeting from the claimant on one hand and Mr Asher and Mr Port on the other. There is similarly contrasting contemporaneous evidence. Mr Port emailed the claimant at 14.06 recording his summary of events and the claimant emailed Ms Lynch at 16.03 with his version.

84. We find that this meeting was clearly difficult and tense. This was no doubt not helped by the fact that the claimant had previously told Mr Asher that he would not be attending the meeting (Mr Asher denied this but we find in the claimant's favour on this) but Mr Asher and Mr Port attended anyway. Against this background and the relationship generally between the claimant and Mr Asher which had by then significantly deteriorated, the meeting was inevitably going to be problematic. We have no doubt that Mr Asher and Mr Port were very frustrated with the claimant and this must have been evident to the claimant who may well have found it an intimidating situation especially as there were two of them and one of him. We do not, however, accept the claimant's description that Mr Port and Mr Asher barged in, shut the door aggressively (we expect that they did shut the door as it was a confidential meeting) or were threatening and "scary". We accept that Mr Port may well have said the words specifically alleged by the claimant ("we are here for a meeting and you have to attend it") or words to that effect.

85. Further to the informal meeting in February 2015, the claimant had attended an appointment with OH on 12 March 2015 and a report was prepared. The claimant gave consent on 19 April 2015 for that report to be disclosed to the respondent and says that despite his requests to meet to discuss it this did not happen. This is supported by an email sent by the claimant to Mr Asher on 21 August 2015 to which Mr Asher replied on the same day that they would have a full opportunity to discuss the report at a meeting the next Wednesday. In the event that meeting appears not to have taken place with each party blaming the other for that. This remained the situation until the claimant's resignation on 26 October 2015.

86. Whoever was to blame it is clear that the OH recommendations were not discussed and were not effectively implemented by the respondent. Mr Asher accepted that regardless of whether the claimant was not cooperating

in setting up a meeting, he could have arranged for the stress risk assessment to be carried out in any event.

87. Allegations 9 & 15 (comparators: Ms Joyce, Ms Blower, Mr Asher) The claimant was on sick leave between 7 and 9 April 2015 due to back problems. On his return on 10 April 2015 he raised with Mr Asher that the chair he was using was unsuitable and was contributing to those problems. There is a stark dispute between the claimant and Mr Asher as to how Mr Asher reacted. The claimant says that he showed a lack of empathy and ridiculed him by bluntly saying "you don't know how to adjust the chair". Mr Asher says that this simply did not happen and when he knew that the claimant needed a new chair he requested an urgent workplace assessment which took place a couple of days later and an appropriate chair was ordered and delivered around 18 May 2015. An email exchange between the claimant and Mr Asher on 1 May 2015 (referred to above) shows the claimant chasing for his new chair and Mr Asher's reply which the claimant says was rude and indicative of Mr Asher's attitude towards him. He also disputes that an ergonomic chair was in fact delivered.

88. We find that Mr Asher responded appropriately and promptly when the claimant raised this issue with him and obtained an ergonomic chair for him. Mr Asher told him to use any chair he wished in the meantime. At no point did Mr Asher ridicule the claimant as alleged.

89. The claimant also says that in September/October 2015 a dusty cabinet close to his desk caused him allergies and infections which in turn led him to lean away from the cabinet which exacerbated his back problems. He says that he asked to move but was refused and on one occasion the cabinet, previously 4-5 feet away from his desk, was deliberately moved closer to him.

90. The respondent says that the cabinet was never moved, was not dusty and the claimant never complained about this or asked to move and if he had, Mr Asher would have agreed to him moving desk as there were plenty available.

91. We find that the cabinet was not moved, was not causing the claimant any specific health difficulties and he did not ask to move. We also find that if he had raised this as an issue Mr Asher would have responded appropriately as he did with the chair. Further, there were spare desks that the claimant could have used if he really felt the need to do so.

92. Allegation 32 (comparator: Mr Port) As stated above, the claimant emailed Ms Lynch on 14 July 2015 complaining about the meeting on 14 July 2015 and in particular Mr Port's behaviour. Ms Lynch did not reply.

93. In the meantime the claimant had raised three other complaints: against Mr Asher, Ms Tringham (the protected act dated 9 April 2015) and Mr Knevett (the protected act dated 23 April 2015). Mr P Ely, Head of Performance, had been appointed to investigate the complaint against Mr Asher and a first meeting had taken place between him and the claimant to

discuss that on 17 March 2015. On 7 August 2015 Mr Ely wrote to the claimant inviting him to attend a second investigation meeting on 14 August 2015 to discuss all the issues he had raised. He said that Mr Port would accompany him and reminded the claimant of the employee assistance programme.

94. The claimant replied on 10 August 2015 stating that he would only be able to participate in a meeting after various issues, which he detailed, had been dealt with. Those issues included his complaint about Mr Port.

95. This prompted a reply from Ms Lynch on 13 August 2015 confirming that she had asked Ms Wood to investigate the complaint regarding Mr Port and apologised for the delay in organising that. Ms Wood wrote to the claimant on the same day confirming that Ms Ohene, Learning & Development Facilitator, been appointed to investigate the complaint. The claimant emailed Ms Wood on 17 August 2015 asking her to ask Ms Ohene not to give him any meeting dates before he had completed and submitted a bullying and harassment form which he expected to be able to do the week commencing 31 August 2015.

96. On 18 August 2015 August Mr Asher emailed the claimant, copied to Mr Port, requiring him to attend a first formal sickness review on 26 August 2015. This led to a bad-tempered exchange between the claimant and Mr Port on that date when the claimant refused to attend. Given that the respondent knew that the claimant had raised a complaint which was about to be investigated regarding the behaviour of Mr Port at the first attempt to hold this meeting, it was clearly ill-advised to invite the claimant to another such meeting with Mr Port.

97. In any event on 10 September 2015 the claimant submitted his complaint form regarding Mr Port. Ms Ohene met the claimant on 15 September 2015. He told her that the 14 July 2015 incident was one of several and it was agreed that Ms Ohene would look at all his allegations rather than just that one. It was agreed that the claimant would send the evidence that he had to her, which he did promptly, and the meeting would then be rescheduled. Ms Ohene had already interviewed Mr Port on 14 August 2015 who left the respondent's employment in September 2015.

98. The claimant resigned on 26 October 2015 by email to Ms Lynch. His resignation letter stated that he felt he was left with no choice but to resign with immediate effect because of breaches of contract by the respondent. He set out in 20 bullet points the alleged breaches. They largely mirror the allegations made in this claim with the addition of discrimination due to age and family responsibilities/flexible working and trade union membership.

99. Ms Ohene interviewed Mr Asher on 9 November 2015 (but he signed the notes of that interview on 14 April 2016) and completed her report in April 2016. On 18 April 2016 Ms Wood sent a copy of that report to the claimant. Its conclusion was that there was no evidence to suggest Mr Port had harassed and bullied the claimant nor that he had discriminated against him.

100. Ms Wood's letter said that the reason for the delay in completing the investigation was "the complexities of the case". We find however that the real reason for the delay was that as both Mr Port and the claimant had left employment, it was (wrongly) not regarded as a priority.

101. As to the fairness of the outcome, Ms Ohene's report shows a thorough and structured approach to the matters raised by the claimant. Although the claimant did not agree with the outcome it was not unfair. Ms Ohene's conclusions were entirely reasonable.

102. Allegation 29 (comparators: Ms Joyce, Ms Blower, Mr Asher, Mr Mahmood) The claimant says that he became aware of disclosure of confidential information to Mr Asher on 20 August 2015 when Mr Asher discussed with him the various complaints he had made. The claimant emailed Ms Lynch the following day to complain about this.

103. Mr Asher could not recall the conversation but agreed that he had been told by HR about the investigation by Ms Ohene in August 2015 and he was interviewed by her in November 2015 (as described above). The respondent says that it was entirely proper for Mr Asher to be told about the complaints about him so that they could be properly investigated. The claimant accepted this in cross examination.

104. The allegation regarding Ms Joyce is that she was aware of the disciplinary case brought against the claimant in relation to whether he had misled the respondent in his job application. Ms Joyce was the notetaker for Mr Knevett at the interviews he conducted when he was investigating that issue. It was inevitable therefore that she would be aware of related information. This amounts to no breach of confidence.

105. The complaint regarding Mr Thorne arises out of a conversation the claimant says he witnessed between Mr Asher and Mr Thorne on 14 July 2015 when the claimant believed, because of a gesture made by Mr Thorne, that Mr Asher had discussed the claimant with him and breached confidence. Mr Asher remembers the conversation he was having with Mr Thorne and says it was about cricket and denies that there was any reference – however oblique – to the claimant. We accept Mr Asher's evidence on this.

106. Allegations 1 (part), 11 & 26 (comparators: Ms Joyce, Ms Blower, Mr Asher, Mr Mahmood (not 11)) On 11 November 2015 Ms Wood sent the claimant a detailed response to his letter of resignation. Large parts of that response were drafted for her by Mr Asher.

107. The claimant says that within this letter a false allegation was again made that he had misled the respondent as to his SQL skills. In fact the letter does not say that. It says that the claimant did not have the appropriate level of experience, that he had difficulties completing his work, there was no sustained improvement and that performance management was due to start but was delayed due to other issues.

108. The claimant also says that the letter contained a false allegation that the claimant had violated procedure by going on annual leave without his manager's permission. It is important to note that the statements made in Ms Wood's letter were only there in response to the claimant's letter of resignation in which he had said he had been wrongly accused of fraud without evidence. Ms Wood (again drafted by Mr Asher) set out the respondent's view of an incident where the claimant had changed an annual leave period after it had been signed off. The letter stated that the claimant had been told not to do this again "since this could be viewed as fraud" and noted that no further action was taken and the incident was not referred to HR. This letter reflected Mr Asher's genuine belief as to what had happened.

109. Finally the claimant says that Ms Wood's letter contained a false allegation that he deliberately did not attend the QlikView training. Again this was drafted for her by Mr Asher and reflected his genuine belief of what happened. The claimant disputes that view (it is linked to the issue above as to whether the annual leave record was correct or not).

Conclusions

110. Discrimination claims - time We find that the claims of discrimination were brought in time. The allegations amount to conduct extending over a period which ended at the earliest on the claimant's resignation on 26 October 2015.

111. Victimisation – protected acts The respondent has argued that the complaint dated 30 October 2014, the email to Mr Port dated 21 April 2015 and the email to Ms Lynch dated 21 August 2015 were not protected acts. We conclude however that, in all the circumstances, they were. The email dated 30 October 2014 expressly refers to an allegation of discrimination and although it does not relate it to a protected characteristic, the claimant had already, in his email to Mr Knevett dated 1 August 2014, alleged that he had been harassed and discriminated against on the ground of his race (and other matters). The email to Mr Port dated 21 April 2015 expressly alleged discrimination (and by then it was very clear to the respondent that the claimant considered he had been discriminated against on the ground of his race). The email to Ms Lynch on 21 August 2015 again is not express but the last line,

> "…Steve…said that I am asking for trouble for what I am doing"

in context, is a protected act.

112. Discrimination claims

113. We set out below our conclusions on each of the 15 allegations in the same order in which they appear above and then a wider view.

114. Allegation 16

115. The failure to send a contract of employment to the claimant was due to administrative error or oversight by the recruitment team. It was not because of his race nor was it for the purpose of violating the claimant's dignity or creating an intimidating etc atmosphere. Further, it could not reasonably have that effect on the claimant. In any event it was not conduct related to the claimant's race. At the time of this failure there had been no protected act.

116. Accordingly we do not find this allegation to be direct race discrimination, harassment or victimisation.

117. Allegation 7

118. In some respects the respondent's management of the claimant was flawed, both by his immediate line manager and at a corporate level. When considering the whole history of his employment it is clear that there were some opportunities to improve the situation that were missed by the respondent and some questionable decisions made (for example the commencement of conduct proceedings in relation to a misstatement of experience and the absence of a probationary period). There is nothing however of substance to support the allegation that any deficiencies in the general management of the claimant was because of his race or any protected act. Nor was it for the purpose of violating the claimant's dignity or creating an intimidating etc atmosphere. Further, it could not reasonably have that effect on the claimant. In any event it was not conduct related to the claimant's race.

119. As for the specific complaints made by the claimant regarding the respondent isolating him in various ways, we have found above that there was a failure to give him a full workload. We are satisfied however that the reason for that was Mr Asher's concerns about the claimant's ability rather than his race or any protected act. Likewise in respect of our findings that in some respects there was a failure to support, for example a failure to give appraisals, this was not due to his race or any protected act but was part of Mr Asher's general approach to his management responsibilities to the claimant and others, whether due to his heavy workload or oversight. As for the failure by the respondent to train the claimant on Prince 2, all aspects of QlikView and Cerner, this was due to lack of business need not his race or any protected act. As for the allegation of bullying etc, we have not found that made out on the facts.

120. Accordingly we do not find this allegation to be direct race discrimination, harassment or victimisation.

121. Allegations 1 (part) & 17 We conclude that Mr Asher had a genuine belief that the claimant had misled the respondent during the recruitment process and that is why he raised the issue with Ms Tringham and HR and why he raised it with the claimant on 21 July 2014. The reason he made the allegation was not because of the claimant's race and therefore was not direct race discrimination.

122. It follows that he did not make the allegation with the purpose of violating the claimant's dignity or creating an intimidating etc environment. It did however have that effect, and reasonably so, on the claimant. That conduct though was not related to the claimant's race and therefore was not harassment.

123. Even if making the allegation amounted to a detriment, at the time it was made (21 July 2014) no protected act had been done and therefore it could not amount to victimisation.

124. Accordingly we do not find the first part of allegation 1 to be direct race discrimination, harassment or victimisation.

125. As far as the delay in disclosing the resulting investigation report is concerned, there was unnecessary and unreasonable delay by the respondent in disclosing it to the claimant. Until 14 January 2015 the reason for this delay however was not deliberate but rather human error/oversight. The delay from 14-27 January 2015 was deliberate but was due to a desire to manage the claimant's reaction to the report by giving it to him face to face. Neither of these amounted to being because of the claimant's race and therefore was not direct race discrimination.

126. It follows that the delays did not have the purpose of violating the claimant's dignity or creating an intimidating etc environment. They did however that effect, and reasonably so, on the claimant. That conduct though was not related to the claimant's race and therefore was not harassment.

127. The delay between October 2014 and 14 January 2015, although a detriment, was due to human error/oversight and therefore not because the claimant had done any protected act and was not victimisation. As far as the delay from 14-27 January 2015 is concerned, we have considered very carefully the interrelation between that and the claimant's complaints/grievances etc. Although the protected acts were clearly a very important part of the context for the decision to only give the report to the claimant face to face, the decision was not made <u>because</u> the claimant did those acts and did not amount therefore to victimisation.

128. Accordingly we do not find allegation 17 to be direct race discrimination, harassment or victimisation.

129. <u>Allegation 10</u> There was a genuine difference of opinion between the claimant and the respondent as to the claimant's leave entitlement. The reason for the respondent applying its leave policy to the claimant in the way it did was because of the genuine belief by all of Mr Asher, Mr Port and the payroll team that that was correct. It was not because of the claimant's race.

130. It follows that the conduct did not have the purpose of violating the claimant's dignity or creating an intimidating etc environment. Further it did not reasonably have that effect on the claimant. Even if we are wrong about

that, however, the conduct was not related to the claimant's race and therefore was not harassment.

131. Further, there was no detriment to the claimant. He raised a query, it was considered and answered more than once. Even if the claimant was in fact right in his interpretation of the policy and he should have been given extra leave, the reason he was not was not because he had done a protected act. He was not therefore victimised.

132. Accordingly we do not find this allegation to be direct race discrimination, harassment or victimisation.

133. Allegations 3, 13, 14 & 31 We find that when Mr Asher completed the sickness absence record and described the claimant's absence on 19 January 2015 as code S10, this was an entirely reasonable thing for him to do (allegation 14). The claimant had identified himself as suffering from stress and this had appeared first in his own description of his illness. This was why Mr Asher described it as he did and not because of the claimant's race. In any event it is not less favourable treatment to be described as suffering from stress.

134. It follows that the conduct did not have the purpose of violating the claimant's dignity or creating an intimidating etc environment. Further it did not reasonably have that effect on the claimant. Even if we are wrong about that, however, the conduct was not related to the claimant's race and therefore was not harassment.

135. Further, there was no detriment to the claimant and the form was not completed as it was because he had done a protected act. He was not therefore victimised.

136. As far as allegation 3 is concerned Mr Asher made a genuine error when he issued the letter dated 22 June 2015. It was not because of the claimant's race. It follows that the conduct did not have the purpose of violating the claimant's dignity or creating an intimidating etc environment. It did however have that effect, and reasonably so, on the claimant. That conduct though was not related to the claimant's race and therefore was not harassment.

137. The error did amount to a detriment but it was not because the claimant had done a protected act. Therefore it was not victimisation.

138. Turning to the meeting on 14 July 2015 (allegation 31), we conclude that the behaviour of Mr Asher and Mr Port did not amount to direct race discrimination. We find that in some respects they could have handled the situation better and tried to exert their authority on the claimant in what was probably a heavy-handed way. Any negative aspects of their behaviour, however, towards the claimant were born out of their frustration with him but were not because of his race.

139. It follows that their conduct did not have the purpose of violating the claimant's dignity or creating an intimidating etc environment. It did however have that effect, and reasonably so, on the claimant. That conduct though was not related to the claimant's race and therefore was not harassment.

140. The claimant did suffer a detriment to at least some extent during that meeting but it was not because he had done any protected act. Although we have found Mr Asher and Mr Port were frustrated with him we conclude that this was due to his unreasonable responses to their attempted day to day management of him, done in good faith, rather than because he had made complaints. Accordingly he was not victimised.

141. As far as the OH recommendations are concerned (allegation 13) we find that there was a failure on the part of the respondent to act effectively on these. The reason for this failure, however, was not because of the claimant's race but rather the general deterioration in the relationship between the claimant and Mr Asher/Mr Port. This was not therefore direct race discrimination.

142. It follows that the conduct did not have the purpose of violating the claimant's dignity or creating an intimidating etc environment. It did however have that effect, and reasonably so, on the claimant. He should have been afforded the opportunity to discuss the recommendations and have a risk assessment. That conduct though was not related to the claimant's race and therefore was not harassment.

143. For the same reason this failure did amount to a detriment but it was not because the claimant had done a protected act. Therefore it was not victimisation.

144. Accordingly we do not find these allegations to be direct race discrimination, harassment or victimisation.

145. Allegations 9 & 15 These allegations were not made out on the facts.

146. Allegation 32 The delay in delivering the outcome of the investigation to the claimant was not because of the claimant's race and was not therefore direct race discrimination.

147. It follows that the conduct did not have the purpose of violating the claimant's dignity or creating an intimidating etc environment. In all the circumstances this unnecessary delay did however have that effect, and reasonably so, on the claimant. The investigation should have been completed much more promptly. That conduct though was not related to the claimant's race and therefore was not harassment.

148. For the same reason the delay did amount to a detriment but it was not because the claimant had done a protected act. Therefore it was not victimisation.

149. As to unfairness of the outcome, this allegation is not made out on the facts.

150. Accordingly we do not find this allegation to be direct race discrimination, harassment or victimisation.

151. Allegation 29 This allegation is not made out on the facts.

152. Allegations 1 (part), 11 & 26 These allegations were not made out on the facts.

153. Accordingly when looked at individually none of the claimant's claims of direct race discrimination, harassment or victimisation succeed. We have also considered the allegations collectively but come to the same conclusion. Further we have asked ourselves whether there is any evidence to suggest any unconscious discrimination or bias on the part of, in particular, Mr Asher (who is black British of Afro-Caribbean descent) and Mr Port (who is white British) as they had the vast majority of day to day dealings with the claimant. We find no such evidence and bear in mind that it was Mr Asher who shortlisted the claimant for the job and was part of the interview panel who appointed him and had also clearly successfully previously worked with Mr Mahmood who is black Eritrean.

154. Constructive automatically unfair dismissal

155. The claimant relies upon the 17 alleged separate protected disclosures or groups of protected disclosures, at Appendix B, some oral and some written.

156. We did not hear evidence supporting the existence of all 17 but for these purposes accept that they were made as the claimant alleges. Having considered them and the context in which they were written/made however we do not find that any of them were made in the public interest but rather related to the claimant's own personal situation only. We considered carefully whether those that referred to public money being wasted met this test but concluded they did not. They remained in truth about the claimant rather than the public purse. Accordingly the claim of automatically unfair dismissal also fails and as the claimant did not have 2 years' service at his effective date of termination, he cannot bring an ordinary claim of unfair dismissal.

157. In any event, for the claimant to succeed in a case of constructive dismissal, he must have resigned in response to a fundamental breach by the respondent. It is clear from our findings above that although we are critical of the respondent in some respects, and we certainly believe that the claimant could have been managed better, we do not conclude that any mismanagement or specific events, individually or collectively, amounted to a fundamental breach entitling the claimant to resign in response.

Future Case Management

158. This therefore deals with the allegations of race discrimination and victimisation arising from the 15 allegations initially relied upon by the claimant and also the claim of unfair dismissal. A decision has to be made however regarding the disposal of the remaining allegations that are currently stayed. Orders are made above to establish the appropriate way forward.

159. For the avoidance of doubt, the claims that remain are ones of direct race discrimination, harassment and victimisation arising out of the 17 allegations not yet considered. The factual findings already made will be taken into account if and when those further allegations are considered.

Employment Judge K Andrews

Date: 5 October 2017

Appendix A

Appendix B