**Case No: 2205825/2018**

# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr John Edward**
**Respondent:** **Tavistock and Portman NHS Foundation Trust**

**Heard at:** **London Central** **On:** **4-6, 9-12 March 2020**

**Before:** **Employment Judge Goodman**
**Mr M.L. Simon**
**Mr. D. Clay**

**Representation**
**Claimant:** **in person**
**Respondent:** **Mr W. Young, counsel**

# JUDGMENT

1. The claims for discrimination because of race or age do not succeed.

2. The claims for harassment related to race or age do not succeed.

3. The respondent victimised the claimant by failing to redeploy him to a band 4 service administrator role. There was a 60% chance that if redeployed he would not have been dismissed.

4. The other victimisation claims do not succeed.

5. Remedy for victimisation will be decided at a further hearing to be listed. The hearing listed for 12 June 2020 has been postponed because of Covid 19 operational difficulty.

# REASONS

1. These are claims for race and age discrimination, harassment and victimisation. An unfair dismissal claim was struck out at an earlier stage because the claimant was just short of the two years qualifying service required.

2. The claimant worked for the respondent Trust as a band 5 data quality officer, starting at the end of May 2016. A few months in, his managers became concerned about his ability to do the job and began a performance improvement plan, first informal, then formal. When it progressed to a

capability hearing, the claimant protested about his treatment. The grievance process took some time. When the grievance was answered, the capability hearing was restored. The claimant was downgraded to band 4, but the Trust was unable to find a suitable alternative post. Consequently, on 8 May 2018 he was dismissed. There was an unsuccessful appeal.

**Claims and Issues**

3. The claimant alleges that the capability process was discriminatory, as were the actions of some managers: Frances Endres, Marion Shipman, Kerri Johnson-Walker, alternatively, they harassed him. The grievance process and the dismissal are also pleaded as discrimination. The issues were identified at an early preliminary hearing as those set out in paragraphs 4-69 of the amended grounds of claim and we worked from that list during the hearing. A copy is appended.

4. Victimisation claims were added by amendment in September 2019. These were that because of the grievances dated 26 September 2017 and 23 October 2017 he was unfavourably treated. The treatment is listed below, using the text and numbering from the claimant's draft of the particulars, as allowed by EJ Pearl at the September 2019 hearing:

> *"2.1 On 19 September 2017 Kerry Johnson-Walker (KJW) instructed the claimant not to attend the CYAF and admin leads meetings. On 19 December 2017 she changed her mind and instructed him to attend. When the claimant said, let the ongoing capability procedure come to an end and then if he is still here he would attend, she complained to Sarah (Mountain) in HR and coerced him to agree to attend. She also said she would reinduct him to the CYAF meetings. Finally, she did not induct him and thus indicated that he does not have to attend the meetings.*
>
> *2.2 In addition to the ongoing capability proceedings the claimant had to endure constant threat of complaints to HR against him and humiliation with fear of disciplinary sanctions with possible dismissal. Further, he had to endure unreasonable coercion and overbearing from Kerry for no good reason.*
>
> *2.3 On 19 December 2017 at the same HR meeting KJW complained that the claimant does not therefore, the claimant copied into KJW almost all the emails he was sending out. At the capability hearing she maliciously claimed that she had to check all the emails prepared by the claimant before they are being sent out (see 28 & 29 amended particulars of claim)*
>
> *2.4 Without any evidence to substantiate Kerry's email claim, the capability hearing panel relied on Kerry's email claim as a ground for dismissal.*
>
> *2.5 On 19 October 2017 KJW instructed the claimant and another member of staff, Omer Kemal, to produce the October 2017 CGQC reports for two different directorates and completed by 20th. She wrote she will provide the required data for the reports after the CQPE meeting. She provided the data, not for the claimant. (See paragraph 30 amended particulars of claim)*

*2.6 the claimant suffered increased stress caused by the obvious hatred and discrimination shown by Kerry towards him and disruption to his work.*

*5. As a result of the claimant raising grievances the grievance panel did not investigate the issues as it should have done. It wanted the claimant to raise some of the grievances capability hearing but the capability hearing panel that was in collusion with Marion was mum on those grievances. The appeal panel just followed the footsteps of capability hearing. None of these panels had any open mind at least to make a recommendation to mitigate the damage done to the career payments career by the disclosure of confidential information by Kerry. It was a concerted effort by them to end the claimant's career and ensure no one raises the discrimination as the grievances under any circumstances.*

*5.1 as stated above the respondent had consistently engaged in unwanted conduct related to the protected act that… Created an intimidating, hostile, degrading, humiliating and offensive environment for the claimant.*

*6 As a result of the above, the claimant did not benefit from fair open-minded statutory procedure and as a result he lost his job and made unemployed. Is economic well-being and peaceful enjoyment of his life has been shattered. He was deprived of even the standard job reference to look for alternative employment."*

**Remedy**

5. The claimant filed an amended schedule of loss shortly before the hearing. It involved a substantial revision of the pension loss claim. Because of the complexity of the current NHS pension position, and the short notice of this change, remedy issues were postponed to another day. This hearing dealt with liability and causation only.

**Amendment of Claim**

6. On day 5 of the hearing, the claimant applied, part-way through his cross-examination of Marion Shipman, to amend his claim by adding an allegation that an email in the hearing bundle dated 21October 2016 from Lee Chesham (his then line manager) to Marion Shipman, that the claimant was performing poorly, and that the claimant and Kerry Johnson-Walker "are worlds apart", was an act of discrimination or harassment. The amendment was allowed with oral reasons; counsel asked for written reasons, which are now given.

7. It is important to understand that the claimant does not accept that the 21 October email is genuine. He believes the text of the original sent email has been deleted and the current text substituted by an unknown employee of the respondent at a later date in order to damage his case for discrimination and bolster the respondent's case that the claimant was a poor performer. The **Selkent** principles having been summarised for him, the claimant explained that he had not mentioned this at the two preliminary hearings when he had tried to amend his claim in other respects because he had not seen it until disclosure took place in April 2019, thereafter, he had been preoccupied with an appeal against refusal of an amendment by Judges Grewal and Sharma that he had not wanted to complicates the hearing in September 2019 before Judge Pearl, when some victimisation claims were allowed and some not, and

finally, and frankly, explaining why he had not dealt with this at the opening of the hearing, that until today he had forgotten the adverse comparison of ability.

8. The respondent objected on the basis that this was a new claim, involving new facts, made very late. He had mentioned this matter in his witness statement, but the respondent was prejudiced because they had decided that Lee Chesham's evidence was not necessary, and they might have made a different decision had they known of this amendment. The injury to the claimant's feelings was small, given that he was not even aware of it until April 2019. The only witness they have available as to the source of the email is Marion Shipman.

9. Allowing the amendment, the tribunal held that it was made very late, did not appear in the otherwise very detailed grounds of claim or amendments of claim, even though the claimant had had the document for ten months and two further hearings, and five days of the final hearing, giving him plenty of opportunity. It was also difficult for the respondent to have anticipated the allegation, only knowing from the witness statement that the claimant maintained that email was fake. The issue is whether the email is in fact genuine. We have to assess whether it is (a) accurate, knowing that a few weeks later Ms Kerry Johnson in fact applied for a management job and was promoted, suggesting she did have ability and (b) indicates a prejudiced mindset. Despite the timing of the amendment, the prejudice to the respondent is small. They have Ms Shipman to say that the email is genuine, and there is only the claimant's evidence that Lee Chesham would not have written in these terms. There is much other material from which we can assess the reliability of his evidence. Further, though the matter is a very small piece in the overall jigsaw of facts from which we are invited to infer a discriminatory imposition of the performance improvement plan in December 2016, even small facts can tip the balance where inferences have to be drawn, The balance of prejudice favours the claimant, to enable him to have all the facts considered by the tribunal to make the hearing fair to both sides.

**Evidence**

10. The tribunal heard evidence from the following witnesses. Because this is case involving alleged discriminatory treatment, we record their national origin and ethnicity:

**John Edward**, the claimant. He identified as Asian, from Sri Lanka

**Kerri Johnson-Walker**, the claimant's line manager from the end of 2016. White British.

**Louise Lyon**, Director, Quality and Patient Experience. White British.

**Frances Endres**, Head of Administration and Operations, CYAF. White American.

**Keyur Joshi**, former Service Manager, who heard the grievance. British Asian.

**Marion Shipman**, Associate Director, Quality and Governance, and line

manager of Kerri Johnson-Walker. White New Zealander.

**Craig de Sousa**. Director of HR. British. He managed the appeal hearing.

**Sarah Mountain**. HR business partner who advised on the capability procedure and also managed the redeployment process. White British.

**Karen Merchant**. White British. HR Business Partner who assisted Jeyur Joshi in the grievance process.

**Helen Farrar**, non-executive director. White British. She heard the appeal.

11. There was a hearing bundle of over 2000 pages, with further bundles of documents on mitigation. We read those to which we were directed.

12. After hearing the evidence we read the written submissions each side had prepared, and there was a brief hearing of oral submissions before judgement was reserved, though not before setting a date for deciding remedy, if that was required.

**Findings of Fact**

13. The respondent is a specialist mental health trust, within the NHS, for child and adult mental health services. It is small, by the standards of NHS trusts, with 750 staff, most of them in clinical posts. Its funding is allocated by health service commissioners, who have regard to the Trust's performance against KPI's and CQINS (measures of care quality). To this end the trust employs staff to collect and report on the data needed to demonstrate whether they meet targets.

14. The claimant was employed as a band five Data Quality Officer in the data quality team (DQT) within the children, young adults and family directorate (CYAF). This team selects data to prepare reports on targets. Another team, Informatics, collects the data. He started work 20 May 2016. One of those who interviewed him for the post was Frances Endres.

15. The claimant is originally from Sri Lanka. He speaks and writes good English, but with an accent that identifies him as someone who did not grow up here. He was born 8 June 1955, making him 60 when he started and 63 when he was dismissed.

16. We have not seen the claimant's CV on application to the respondent, we could not find a post dismissal CV in the two volumes of mitigation documents, and there is nothing in the claimant's 62 page witness statement about his employment history or qualifications. A letter applying for jobs after his dismissal indicates that he is part-qualified as a management accountant, is a graduate, computer literate, and has studied statistics. Before working for the respondent, he worked for another NHS Trust in London from 2010 as a data officer.

17. In 2015 the respondent trust's performance figures had been qualified by external auditors. They said there were "significant problems" in collating and validating data, especially waiting times, non-attendance at appointments, and outcome monitoring. An action plan was implemented at the beginning of

2016 for collecting outcomes data. New staff were recruited, including the claimant in May 2016 and Kerri Johnson-Walker in September 2016. Nevertheless, by the end of October 2016 when Lee Chesham, the Data Quality team manager, handed in his notice having got another job, he said: "I'll be glad to leave the chaos here".

18. The claimant had some initial training in output monitoring reports. At the beginning of July the trainer reported that his work "looks well under control".

19. The claimant was asked to revise and deliver training on data for other teams, and did so successfully.

20. For 6 or 7 weeks over the summer his line manager was off sick and Marion Shipman stepped in to manage him. At an initial meeting there was a conversation about Sri Lanka. She told the claimant her husband had been born there, and she understood it was very beautiful, and she hoped one day to visit. She mentioned his family had owned a company that had been nationalised but still retained the name.

21. While being managed by her the claimant could make appointments to see her. When Lee Chesham returned he told the claimant he should have 1:1 meetings with him from now on. The claimant now says that he was no longer able to access Ms Shipman's diary. Having heard evidence, we accept that the claimant was like all other staff able to view her diary to see when she was free, while only particular individuals, which had never included him, could view the content of those meetings. We do not accept the claimant's assertion that the normal operation of an Outlook diary had been altered by Ms Shipman or the IT department to prevent him even looking at it. There was no evidence to show this had occurred; the claimant did not say he had tried to book a meeting but been unable to access the diary. In our finding this is a false construction on Lee Chesham's remark that he was resuming regular line management.

22. Despite his encouraging start, on 21 October 2016, following pressure on the team to produce an overdue report, Lee Chesham emailed his superior, Marion Shipman saying:

> "John, bless him, has pretty much only been working on these reports for three whole weeks this month but as you will note they are of a poor standard and I have spent a good few hours formatting and adjusting some of the content. It's not what I expect someone as a band 5 to produce and we'll need to reiterate that at our meeting next week. Also, checking things like '0' scores with Frances or team leaders – this is what the data officer is expected to do. It's sad to say that I feel the QT is carrying John as I've mentioned to you previously. He's a nice guy and needs support but I just haven't had time to mollycoddle and check everything. In comparison to Kerri, for example, they are worlds apart. John's report – the graphs are of different sizes, fonts change, some numbers are bold, some not, the whole thing is relatively inconsistent and doesn't read like a report should. They were certainly in no fit state for a commissioner's eyes".

23. Ms Shipman replied that she agreed, and:

"suggest we have a conversation with HR in the first instance to agree the way forward. This is the second quarter we had carried the work and was okay the first time we cannot continue like this".

Mr Chesham contacted the HR Department, referring to an earlier discussion about the claimant, and asking for support. The meeting was proposed for the following week. It is not known whether it took place.

24. This is the email that the claimant first saw in April 2019, during disclosure in these proceedings, which he says has been faked after the event. He says he had good relations Lee Chesham, who would not have written these things. Lee Chesham did not propose a performance improvement was merited, it was imposed on a reluctant Mr Chesham by Ms Shipman.

25. On 2 December 2016, Frances Endres emailed Ms Shipman saying: "I asked John for a report letting us know which patient records did not have a completed assessment form two months ago now. As he finally got something this week, but he has requested the wrong report for Informatics". She said this was despite asking him for it "every Tuesday for the last eight weeks". She asked Lee Chesham to attend the Tuesday meeting in the claimant's place, and for requests to Informatics for data to be rerouted through Lee Chesham in future. In turn, Ms Shipman asked Lee Chesham to "find out what happened here, including what happened at the meeting John attended on Tuesday. There is clearly a complete lack of confidence in what John is doing. Can you please discuss with Sarah in HR the process around performance management".

26. Lee Chesham was leaving soon, and reluctant to start a formal process, preferring to leave it for his successor, but Ms Shipman wanted to start as soon as possible. Sarah Mountain, of HR, made arrangements. She emphasised the need for consistency in handover to his successor, to make it fair to the individual employee. Mr Chesham involved the UNIDSON trade union representative when staring the process.

27. On 9 December 2016 Lee Chesham met the claimant to give him the informal (stage I) performance improvement plan, by which his capability was to monitored against five objectives, selected from the job description, from 12 December 2016 to 1 March 2017.

28. Kerri Johnson-Walker, who had joined the team in September data quality officer for his, replaced Lee Chesham as team manager with effect from 28 December, though earlier in practice as Mr Chesham used up his annual leave before termination. It was her first management role. She had never undertaken performance improvement management before.

29. It is alleged that shortly after taking over she picked the claimant up for being 5 minutes late for work. The respondent did not require staff to clock in or otherwise record arrival times. Both started work at 8 or 8.30. It was a conversational remark, not reproof or accusation.

30. Kerri Johnson-Walker met the claimant on 12, and again on 20 January 2017, to review his progress against objectives. The first objective was "timely completion of Camden commissioning quarterly reports". The claimant had submitted the Q3 report two days before the deadline for submission. Thus,

technically it was on time, but Miss Johnson-Walker deemed he had not met the subjective, because:

> "the Camden reports that you submitted to me contained a lot of simple calculation mistakes and has some missing/inaccurate data in almost every report, which meant that I had to check everything before sending it to contracting, which was timely. Because of the extra checking that was required, reports were then sent today after they were due, meaning we didn't meet our SOP for reporting."

The mistakes were such that she queried whether the claimant had difficulty with his eyesight. She advised him on techniques for checking his work. She added: "I will not be able to pass on the objective to satisfy your improvement plan, however there is still time before the end of March make correction to allow you to pass this." (The tribunal notes however that the next quarterly report was not due until mid-April; when he did, it was of adequate standard). On second objective, accurate analysis, there was no evidence, because the Camden reports were not of a qualitative type. For the third objective, good stylistic quality, the grammar was sound, though she recommended checking what format was required for particular report. The fourth objective, ad hoc reports, could not be assessed because there had not been any in the period. The fifth objective was: "proactivity around data issues", meaning flagging up problems. He had done some work on a particular problem.

31. There was no further review meeting during the assessment period, which ended 1 March, and as far as we can tell, the outcome was not discussed with the claimant at all. Ms Johnson-Walker evidently asked HR what to do next, because on 3 May Sarah Mountain arranged a meeting about the claimant, apologising for not getting back to her earlier. At this point, Ms Johnson Walker, complaining about this delay, said:

> "given the response time, I feel as though we may have completely missed the boat with this. Although he did fail his improvement for the time period he has now submitted the report for the Q4 and they will back up to standard. And I have no evidence to using these meetings as this would show an and "improvement". However, although he has improved in this area is work is very slow, and I have stripped him back to a lot of duties, which is the reason he was able to do these reports. I would like to speak to with Marion before meeting with you and John because I feel if we say to him that he did not pass, you will now say that he has improved as this quarter's report back up to scratch (which they were)".

Sarah Mountain of HR replied: "if he is performing at the required level in terms of all his duties then we can still proceed with stage 2. His reports have improved, which can be noted and it can still be an achievement, however he would need to be delivering in all areas to be considered to be performing at the level required for the post. His other tasks needed to be reintroduced to his workload.

32. In other words, the claimant had now produced the Q4 Camden report which was of adequate quality, but his manager was still concerned that his performance was not as it should be. The claimant's concern is that the reference to "missing the boat" means they (Ms Endres, Ms Shipman, Ms Johnson-Walker) had decided to be rid of him, and through Ms Mountain were

fixing the process to achieve that result.

33. Sarah Mountain met the claimant in Kerry Johnson Walker on 26 May 2017 to discuss with him the old and the new capability policy from then on. The claimant agreed to use the new one. They then selected objectives for a stage 2, formal, performance improvement plan, for the period 16 June to 28 July 2017. Objective 1 was to create a good working relationship with the CYAF admin leads, the criterion for success being "good communication of CYAF specific KPIs and CQUINS". He would attend the weekly leads meeting, and his manager would get feedback on his attendance and the quality of information given at weekly meetings. The tribunal understands the aim of liaison with data quality was that the teams would understand what the DQT wanted from them so there would be fewer misunderstandings in collecting data and reporting back to teams on performance against targets and how to improve.. Objective 2 was to run reports on a monthly basis on a service level to admin leads, with the datasets being copied to the team manager for monitoring. Objective three was to complete the Q1 Camden report, due July 2017, on time and with few mathematical and layout errors. Objective 4 was to complete the audit reports in the workplan and follow-up actions. There should be no rolling action plans on quarterly reports. Objective 5 was to provide information and reports to the Trust's clinical governance committee and attend their meetings to communicate performance around CYAF targets. Objective 6 was for ad hoc requests to be clarified, carried out and completed "in a timely manner". To demonstrate good performance, he had to meet all of these objectives

34. During the review period, there were no formal meetings with the line manager to discuss his progress. Ms Johnson-Walker says that said they would meet from day-to-day on particular tasks, as they sat back to back.

35. When it came to the review on 16 August he was deemed not to have achieved these objectives.

36. On 1 September Ms Johnson Walker completed a management statement of case for a capability review meeting on 7 September. That meeting would be stage 3 of the capability process at which t would be judged whether his capability was adequate. The informal stage simply said to have been unsatisfactory because he did not meet all the objectives. On performance against objectives at stage 2 she went into much more detail.

37. To assess objective 1, the relationship with CYAF admin leads, Ms Johnson-Walker sought feedback from Frances Endres, who chaired the admin leads meeting. Her request for feedback just said: "as part of John's improvement plan, I am meant to ask you for some feedback on his attendance and also the helpfulness of what he has delivered to you."

38. Miss Endres replied:"

> I find John very kind, but he is easily confused and doesn't seem to understand or be able to follow basic requests. The example that you have just sent also regarding the Physical Health forms is a prime example. We spoke about this at length today in the admin meeting and I asked John to check the report as it was saying that some forms were incomplete and

due when, in fact, they had been completed. Another example from today was he told the group that there were many outstanding forms needed completing. I asked him to send us a report and he told (sic) he had done. When I dived a bit deeper, he was referring to the report he had done months ago and sent the team managers. I asked him to run the report and send it to me and I would distribute it. He said he would run it and then, oddly, said he would include all the N/A forms. We asked him to not include the N/A forms and only send us forms due this year. He said he would include just forms due in August. I reiterated that I wanted all forms due for open patients who have had at least one appointment who have a form due from 1 April to today. Please do not include any N/A forms as they have been marked that way on purpose".

She added:

> "Individually, these incidents seem small however, as it is with every request that we make, I feel slightly better making the request myself and I know it is being done correctly.
>
> "His attendance is patchy. We see him about 50% of the time and are never sure if he is coming or not. His input is not always clear or helpful. So today he told us that: 'the problem is end of month appointments and Informatics says 20'. Clearly this was quite unclear so we asked many questions and were told that we need to do better about upcoming appointments. There was quite a lot of upset about this as I do feel like we are pretty good at this when I we asked which teams there was no answer which is not very helpful.
>
> "Sorry to be so grumpy but I feel like a band 5 quality team administrator should be able to handle all of what I have raised in this email without help from myself".

39. On the accuracy of this, it is unfair to say that the claimant only attended 50% of the time. The meetings did not keep a register, so it was a matter of impression only. We know that in September 2016 the claimant notified in advance that he would not attend because it would be on holiday. We also know that the claimant did not attend meetings at all, at her own request, from January to June 2017. As far as we know, he attended three of the meetings in the review period, and not all took place. This may have happened because Miss Endres was not aware that the period for which feedback was required was only the last ten weeks, not the whole period of employment. On the other hand, when it comes to the quality of his input to meetings, the claimant agrees that his contribution to the meeting: "Informatics is 20", was not helpful. The specific examples of lack of understanding she gave were contemporary and specific. The respondent's evidence about his attendance in 2016 was that he did not contribute to the meetings, although he was present in order to assist the teams in understanding what was needed from them in the way of data. This feedback suggests it had not improved – he did not understand what was wanted.

40. On objective two, she had feedback from Dawn De Freitas, though she was not named in the statement of case. Ms de Freitas said:

> "I have experienced quite a negative experience when I have requested

reports from John, he doesn't seem to listen to instructions given and the requests made, he recently sent out a report to the whole of the admin plus clinicians, which should never have happened, as you can imagine this alarmed most of the clinicians here as the current practice is that reports come from admin, we follow these up with the clinicians ourselves, and again we were being asked to report on things we have never had to do before. I guess in a nutshell he just doesn't seem to understand what is being asked and gives you the wrong information, we get there eventually but it can be hard work trying to get him to get it right and just sometimes understanding what is asked of him".

Kerry Johnson- Walker gave evidence of this particular episode. The claimant had sent out a dataset for a much longer time period than was relevant and asked the clinical teams to complete the blanks. It was sent to clinicians as well as to the administrative leads in each team. It should only have gone to the admin leads. When Ms Johnson-Walker tried to explain it to the claimant, so as to send out a request with more limited time parameters, he still sent it to clinicians as well, and she had to intervene herself to stop this. We noted from the evidence and the documents that the episode caused particular trouble because the claimant was asking for school attendance, (and this could either have been a note of what school the child attended, or a record of whether the child was attending school regularly) and when an administrator telephoned to complete the data, a patient complained, believing school would be informed that the child was receiving treatment. This was not the fault of the claimant; he seems to have been blamed for the administrator making the call, when it should have been picked up from a form on a clinic appointment. That said, although the claimant could not have anticipated the complaint, the feedback illustrated the perception that the claimant's involvement caused more work than it contributed.

41. Objective 3 was completing the Camden commissioning report on time with few errors. Ms Johnson Walker said this objective was not met because the report was completed in a timely manner, and (but?) accurate only because she had had to "resolve data issues myself corresponding with Alex Mills in Informatics, because the claimant's own emails to him about this have been so vague." It took her 2 ½ hours.

42. Objective 5, information reports of clinical governance meetings, the report was good accurate and on time, though Miss Johnson Walker believed that he was unfamiliar with the various targets for the CYAF. A clinician however had objected to the "directive language" in the report, as the group had found it "very demotivating". It was also said that it had taken the claimant two weeks to complete it, whereas it used to take Kerry Johnson-Walker one day. She added "many of (the claimant's) jobs seem to take a vast amount of time, leaving him very little time to deal with any ad hoc requests".

43. He had not attended clinical governance meetings because "after I had received feedback around JE's confusion in the admin lead meeting, I was not confident enough to allow him to present the report in clinical governance".

44. The claimant has objected that if the report was so unsatisfactory that it did not meet targets (the "directive language")., she should not have sent it to the clinical governance meeting. After hearing evidence on the point, we accept the respondent's evidence on the length of time the claimant took to do

reports, but take the view that it was not fair to pick him up on an error (if it was) that she had not herself thought important. There was also the obvious unfairness that he could not fulfil the objective of attending these meetings if he was told not to. The reasoning given by the respondent's witnesses was that if the claimant floundered in the relative informality of the weekly admin lead team meeting, he would be at significant disadvantage in the formality of the clinical governance meeting attended by clinicians. As we accept the evidence of his performance in the admin lead meeting, it is understandable that he was not sent to the clinical governance meeting. He was not failed for that.

45. Objectives 2 and 4 are not mentioned, so it should be assumed he had demonstrated competence in these.

46. In summary it was said he was not performing to the current level required, he had not shown improvement since 12 December 2016, his underperformance meant increased workload for the rest of the team, and his work had to be checked before being sent out, despite the additional support and assistance from his manager.

47. The claimant was sent this report and called to the stage 3 capability meeting on 7 September. Louise Lyon chaired it. She decided to postpone the when the claimant attended unprepared and unrepresented. A further meeting at the end of September had to be postponed because he was on holiday.

**Grievance**

48. On 26 September the claimant submitted his own detailed statement in response to the management case. It is an 18 page document dealing with the detail of the criticism, disputing what was said, asserting that he had performed adequately, and criticising his managers for their own mistakes. Within it, he stated: "within the past six months, Kerri Johnson-Walker made a serious and shocking racial remarks in the presence of many other members of staff. She said too many foreigners are coming to this country". And "on several occasions KJ W said she used to bully others at school. In one occasion another member of staff asked why would you want to bully others? KJ W said, "it is better to be a bully and to be bullied. Further on, he said of Frances Endres's feedback, and specifically the comment about "informatics says 20", that "it was an occasion of slip of the tongue but what has been stated here by way of feedback is untrue and smacks of language intolerance and racial acrimony".

49. On reading this, Karen Merchant, who was the HR member supporting the stage 3 meeting for Louise Lyon, identified that these were serious accusations and should be treated as a grievance, to be answered before the stage 3 meeting went ahead.

50. On being notified of this, the claimant provided a further 6 page document called "grievance", alleging harassment and bullying, discrimination on the grounds of race, language, nationality, colour and age, and "victimisation to a certain extent". He laid out the details of unfairness in his work, and asserted that he had been put onto the informal PIP in December 2016 because he was from a minority ethnic community.

51. He also complained that at the time of the complaint from clinicians about data being widely circulated and too much being requested, Miss Johnson-Walker had disclosed to two clinicians, Dr Searle and Dr Williams, that, "our data officer John Edward was not fulfilling his job description as part of the improvement plan", and that she was taking the correct steps with HR under the competency policy and procedure. He said this undermined him going to the clinical governance meetings. As a result of this he was highly likely to lose his job and any career prospects completely.

52. He blamed Marion Shipman for not intervening when it was said that he had been late completing the quarter 3 Camden report.

53. These two documents are the protected acts for the victimisation claim.

54. Marion Shipman and Kerri Johnson-Walker were sent the grievance documents and invited to respond. They did by 12 December. In hers, Ms Johnson-Walker included statements about her obtained from colleagues in the team, and also from Sarah Mountain in HR, who said that during the stage 2 meeting (May 2017), the claimant kept referring to Ms Johnson-Walker, who was in the meeting, as "she", which she considered disrespectful, and although Miss Johnson-Walker had said that she didn't take offence, because it was "culturally how he would speak", and he did not mean it in a derogatory way, Sarah Mountain thought it was a good example of how tolerant she was.

**Grievance Outcome**

55. There was then a grievance hearing, conducted by Keyur Joshi on 9 January 2018. It was a long meeting. He wrote up his report that same night, and his outcome letter was sent to the claimant on 12 January 2018.

56. He upheld the grievance about Kerry Johnson-Walker disclosing to the clinicians that the claimant was subject to performance improvement. He required her to apologise to the claimant for this. He also found that she had made remarks about being a bully (her explanation is that she went to a tough school and this was how to get by). He identified that many of claimant's other complaints were in fact about the capability process; that was not grounds of itself to raise a grievance, and the items in his grievance that were a response to the capability issues (for example, Francis Endres' feedback) should be considered at the capability clearing, with the support of his union representative.

57. On the "too many foreigners" remark he ruled there was insufficient evidence.

58. At this point we resolve this ourselves as a point of fact. The claimant asserts the remark, but we do not accept that it was uttered at all, or if it was, that it indicates dislike of or bias toward settled immigrants like the claimant. Neither then nor now is he able to say when it was made, or provide any context, save that it was something he overheard when at his desk. It is understandable that he may not have noticed the conversation leading up to it, but if it shocked him, he might be expected to remember what happened next in the conversation. In all the months they worked together, he recalls nothing else of the kind. If it was uttered at all, it is capable of an innocent explanation as a respectable point of view, though it may also have shown

prejudice. Ms Johnson-Walker does not recall the words, nor does anyone else. The claimant adds that two others in the team have been promoted (Faye Eneri, who was promoted to his job) or awarded extra pay (Omer Kemal). He does not in terms say they heard the remark but refused to confirm that because of the inducement. The respondent says both got their additional pay and promotion by way of open competition, which the claimant does not dispute, Without other evidence we do not accept the suggestion, not even an assertion, that they were paid not to say what they had heard. Finally, the claimant has sometimes been an unreliable witness. We have in mind in particular his insistence that on 7 November 2017 Frances Endres repeatedly asked him for a password "to make the claimant commit serious mistakes by exposing patient information to an unintended recipient" (grounds of claim:8). Here the evidence is all in emails we can read, not words he recollects, and in our view the emails clearly demonstrate that he can make assertions for which there is no foundation. He sent Ms Endres a file. It was password protected. She asked him for the password so she could read it. He sent her a password. She replied: "hmm, it doesn't work". He then realised he had sent her the right password, but the wrong file. He sent her the right file. There the brief string ends. It is ludicrous to represent that in this exchange she "repeatedly" asked for a password, let alone that she did it to make him commit serious mistakes. He sent her a file and the password. She did not try to trick hm, she only wanted to open the file he had sent her, and nothing suggests that at that point either of them realised he had sent her the wrong file.

59. We concluded it is not established that this "foreigners" remark was said.

60. Another part of the grievance was that setting improved grammar as an objective was unjustified, as he did not make such errors. Mr Joshi pointed out that his previous line manager (of whom he did not complain) had set the objectives, and it had not formed part of his improvement plan thereafter. That was not upheld.

61. Nor did he hold unfairness in Marion Shipman not disciplining Kerry Johnson-Walker for mistakes in one report, or subjecting her to a performance improvement plan. No one had raised an issue about her performance that would require this.

62. He noted finally that the claimant had asked to be transferred to the finance department, but that was not in his power.

63. In September 2017 the claimant had again been told not to attend the admin leads meetings, because of Ms. Endres's feedback on his contribution. In December 2017 she left for another post within the trust and Kerri Johnson-Walker told him to resume his attendance. The claimant said he was not going to until the capability procedure had come to an end. His reason for saying this are not known to us. Ms Johnson- Walker involved HR and the claimant then reluctantly agreed. Having heard the evidence, we do not understand why this instruction is presented as detriment or unfavourable treatment. Attending these meetings was part of his job.

**Stage 3 Capability Meeting**

64. The claimant notified the respondent on 29 January 2018 that he did not

propose to appeal the grievance outcome, so the respondent fixed the stage 3 capability hearing before Louise Lyon for 6 March 2018.

65. Before the meeting she read the management statement of case, and the claimant's two documents opposing it. She was aware there had been a grievance hearing, but did not have the outcome letter.

66. The claimant has alleged she investigated his case, and so was not a suitably independent to decide whether he was capable of doing the job. In our finding, what she did was not investigation. She simply made herself familiar with the written material and clarified it at the hearing.

67. Kerry Johnson-Walker attended to present the management case, and the claimant spoke at length.

68. Ms Lyon concluded there were clear concerns about his performance, based on evidence of contemporary emails and reports. The claimant's case was:

> "contradictory – he did not acknowledge that there were any problems with his his performance and he seems to focus only on what he was doing well. He suggested that if he was delivering against the performance improvement plan alone than there was not any serious concerns about his performance. It was far from clear to me that he was delivering the PIP however".

He had also suggested there was a conspiracy or other concerted effort by unconnected individuals to deliberately give him incorrect information and trick him into doing things which put him in the wrong, so that he could be managed out. She did not accept that. His inaccuracies were "regular and numerous". He was not able to identify errors and highlight where corrections were needed, and he was not taking the lead in ensuring adherence to standards for the clinical teams. He should have been proactive in going out to them. They seemed to lack confidence in him. He was not on a "stable upward trajectory". If he continued, there was "potential reputational damage to the DQT". He was not working to his band five job description. However, he was willing, and able to work on tasks under close direction, instruction and supervision. She decided to "down band" him to band 4, and explore the options redeploying him at that level.

69. On 12 March she wrote to the claimant explaining these conclusions in summary. His relationship with the direct line manager and CYAF team had broken down. There was no effective contribution to the CYAF admin leads team meeting. His errors had caused a significant burden for administrative and clinical staff, and undermined confidence in the work of the quality team. He had improved, but his line manager continued to check all his completed reports and emails. The time taken was excessive, and meant that other tasks could not be delegated to him. He did not work autonomously, as expected of a band 5. He was not working with CYAF admin leads to improve data quality. She concluded: "based on your skills set identified at the hearing you may be more suited to a role which requires greater supervision and support". In this respect:

> "if either a redeployment opportunity cannot be found within four weeks of the date of this letter or if you are redeployed and it is determined within a

for further four weeks that the post is not suitable and you cannot perform the duties then I will have no other option but to dismiss you on the grounds of capability".

**Redeployment**

70. Sarah Mountain looked for other jobs. She looked at the Trust's intranet and found two band 4 posts. One was a process support worker based at a special school, working with children. Another was a Service Administrator in the Gender Identity Clinic. She emailed the HR department to see if any other vacancies were known, and she also emailed finance about a vacancy, seven emails in all, without result.

71. Working from the job description for the service administrator role, the assessment of the capability panel as set out in Ms Lyons' letter, and the additional information from the grievance outcome letter that the claimant had told Mr Joshi that he would like to be transferred to the finance team, she conducted a paper exercise, and decided that this was not a suitable job for the claimant.

72. We understand from the evidence that she did not discuss either role with the claimant. He was not told to look on the intranet for posts himself (although Ms Mountain says he should have done), and she did not speak to the Assistant Service Manager at the clinic who he would be working for. She does not know if the role was in fact filled.

73. She then called the claimant to a redeployment meeting on 8 May 2018. She told the claimant that there were no suitable vacancies at band 4. The claimant did not question this. He says that was because he was "out of my mind" at losing his job. The claimant was told he was now dismissed and would be paid in lieu of notice. Next day he was sent a letter confirming the dismissal.

74. Ms Mountain wrote a file note saying: "due to the challenges of being a small trust with few band 4 posts (64), 2 vacancies at this level". Of the vacancies she said: "neither of these roles would be suitable based on the person specification and skills which JE had. Those were patient facing and did not involve data processes or analysis".

75. Sarah Mountain prepared two witness statements about why she made the decision. In the first one, prepared before the claim was amended to include a victimisation allegation, she said the Service Administrator role was patient facing, and his experience was limited to back-office work. She also recalled the conversation at the stage 3 capability hearing confirming that he did not work well on his own, with little supervision. She explained in the hearing that the clinic was at a satellite centre, so other administrative staff would not be available to provide supervision. She added in her statement: "I also considered that the relationship of trust and confidence within the CYAF department had broken down to the point that it would not be possible to put Mr Edward back in …even if he had been suitable for the role".

76. In the second statement, she expanded on the claimant not being redeployed to that job even if he had been suitable. He had been the Data Quality Officer responsible for the CYAF service. That team had raised concerns about his

performance which led to his capability process. Their lack of trust and confidence in him predated his grievances, and added:

> "Mr Edward's response to the management statement of case the capability hearing – his grievances – tend to illustrate a lack of trust and breakdown of relationships on both sides".

**Appeal**

77. The claimant appealed the decision, in 17 pages with 34 appendices. It was a review of the papers, with a hearing on 17 July 2019 where the claimant made verbal points. Helen Farrow, a non-executive director of the Trust, heard the appeal. Craig de Sousa, of HR, made handwritten notes, and then drafted the outcome letter for Ms Farrow to approve. It was found that the claimant had not established any unfairness of process, and that dismissal for lack of capability was justified. The claimant complains that the argument he raised at the hearing about Ms Lyon not being neutral was ignored, but the decision does not have to review every argument. He has not demonstrated that they did not read his material on the fairness of the capability hearing.

**Various 2016 Incidents involving Marion Shipman**

78. We have to make findings on allegations tending to show unfairness and bias on the part of Marion Shipman in shifting blame onto the claimant – 9.1, 10, 11, 11.1, 12 and 13 of the grounds of claim.

79. We do not find that she blamed the claimant for altering the Q2 Camden report in November 2016. It is clear there was overlap and confusion. The contracting team extended the deadline. Lee Chesham explained it was delayed in another team. On whether he was faulted for not understanding regrouping of the teams and how this affected presentation of data already collected, we could not understand any more than the respondent why the claimant had thought he must recheck all the underlying data. On the new SEFs, it was plain from the emails that the new form was drafted not by the claimant but by the contracting team. The claimant was not blamed for clinical teams' confusion about the form, but for delays getting them back. The claimant was not kept out of the loop in investigating which form had to be completed - he was copied into the email - and we not accept that he could not contribute after reading it by telling them which form he had sent. If he was not being involved it would not have been sent to him.

80. Finally, it is said Ms Shipman gave more support to Ms Johnson-Walker in autumn 2016 than she did the claimant. We accept that Ms Johnson-Walker was a new starter, in AFS, in September 2016. Lee Chesham was still working from home one day a week. It was understandable that Ms Shipman should spend time then making her familiar with the targets and using her to help out with CYAF, then far busier than AFS.

**The Claimant's Training Sessions**

81. Two allegations concern the claimant's delivery of training to others (20, 21 of grounds of claim). We do not find Neema Sidhartha made a complaint about a session being late. As for cancellation of training on 7 September 2017, we accept the explanation that this was done it would follow the capability

hearing (in fact postponed soon after it started) and Ms Johnson Walker anticipated the claimant would not want to go on with it. It seems she forgot to tell him.

**Other matters involving Ms Johnson Walker**

82. The claimant says in May 2017 he had to prepare an outcome monitoring report and Ms Shipman read him some data. He typed in '988' which is 10 times too high - the usual figure is around 80 - especially when the next percentage was 8%. He did not correct this. He asserts she set him up to make the mistake. Mr Johnson-Walker denies she read him the wrong figure, of if she did, or if he mistyped it, he should have from the order of magnitude and because the percentage made no sense that it was wrong. We accept that a Data Quality Officer is expected to have an opinion on the validity of data, and to 'sense check' that the figure is in the expected range. Nor do we find she was trying to trick him. She wanted the report to be accurate.

83. It is also said that Ms Johnson Walker asked the claimant to take data from a report that contained errors (SSRS). We have seen the erroneous and corrected reports. They are not so extensive that taken in isolation she should have been disciplined. The claimant picked them up. Any errors that fed into his report were not held against him. The previous month she had not told the claimant of a glitch affecting the accuracy of PHF reports. Any resulting error however was not held to be the claimant's fault. In a later glitch affecting MHSDS reports, Ms Johnson-Walker told the claimant it was not a glitch; despite that he was able to fix it. It seemed to us Ms Johnson-Walker was occasionally careless. Whether she deliberately misled him so as get him to fail objectives was hard to see.

84. On 19 October some reports the team had to distribute to meet an urgent deadline were held up awaiting data from another team. Ms Johnson-Walker announced the data was now ready. Omer Kemal then completed his section. The claimant did not, and when Ms Johnson-Walker found after he left that he had not done it, she did it herself. Our finding is that Ms Johnson-Walker did tell the team, and the claimant either did not hear or did not take in what she was saying. We noted that this had occurred before (he more than once complained in tribunal that instructions should have been put in writing), and as a panel we noted during the hearing that sometimes he did not follow instruction, and whether that was through poor hearing, poor recall, anxiety, preoccupation, or not understanding, was not always clear.

85. In a further episode the claimant said he was provided with quarterly data, not year to date. We concluded there had been a misunderstanding as to the purpose of a report he was sent to use as a model.

86. In December 2017 it was said the claimant did not copy Ms. Johnson-Walker into emails and she needed to check them. In our finding, all team members had to copy her in on emails they sent to others so she could handle any queries from other teams, and the claimant had stopped doing this. The claimant had also asked to send her data to be attached to emails to check before he sent it to anyone else. She checked the data before it went out. She did not check the text of all emails before he sent them out. Others seem to have understood she was checking all his emails, but the claimant and Ms Johnson-Walker agree that it was data she checked, not the text of the email

itself.

**Relevant Law**

87. The Equality Act 2010 in section 13 prohibits direct discrimination because of a protected characteristic. The discrimination is where an employer treats or would treat the claimant less favourably than someone with whom he does not share the protected characteristic. When comparing treatment "there must be no material difference between the circumstances relating to each case" – section 23.

88. When making the comparison, the tribunal must look for the reason why the claimant received less favourable treatment. The conjunction of protected characteristic and unfavourable treatment is not enough- there must be something else.

89. Employers seldom these days state that a discriminatory reason is the reason for their actions, they may not even be aware of it themselves. The Act provides a reverse burden of proof in section 136: "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" unless (A) shows that (A) did not contravene the provision". As described in **Igen v Wong 2005 ICR 931**, this is a two stage test, and as confirmed in **Madarassey v Nomura international, 2007 EWCA Civ 33**, the fact of unfavourable treatment and a difference in protected characteristic are not enough to shift the burden – there must be something else. Where there is no actual comparator, it may be in order simply to look for the reason why the claimant received the treatment he did – **Shamoon v Chief Constable of RUC 2003 ICR 337**.

90. Age is a protected characteristic. So is race, which is defined to include national origin.

91. The same provisions on burden of proof, and finding a reason why apply in harassment and victimisation.

92. Harassment is defined in section 26(1) as where:
"(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.

93. When deciding whether conduct has that effect "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 - section 26(4).

94. Victimisation is defined in section 27. It is where an employee is treated unfavourably because of a protected act, which in this case, is agreed to be the complaints in September and October 2017 that he was singled out for

unfair capability management because he was from a minority ethnic group, in other words he was complaining of a breach of the Equality Act.

**95.** Because the claimant had been employed less than 2 years, he cannot bring a claim for unfair dismissal. If there are features of the capability process that we may consider unfair to the claimant, we must remember that in Equality Act claims the tribunal can only consider whether his age or national origin, or that he had complained of discrimination, were the reason or reasons why he was treated this way.

**96.** The Tribunal is required to make a careful evaluation of the respondent's reason or reasons for dismissing the claimant - or subjecting him to other detriment. This is a finding of fact, and of what inferences can be drawn from facts, as a reason is a set of facts and beliefs known to the respondent - **Abernethy v Mott, Hay and Anderson 1974 ICR 323 CA**, and **Kuzel v Roche Products Ltd (2008) IRLR 530, CA.** The real reason may not be the label attached to it by the employer, nor the reason advanced by ether party. It is for the Tribunal to make a finding – **Blackbay Ventures Ltd v Gahir (2014) ICR 747.**

**97.** Tribunals must be careful to avoid "but for" causation: see for example the discussion in **Chief Constable of Manchester v Bailey (2017) EWCA Civ 425** (a victimisation claim) and always look for the reason why the employer acted as it did.

**98.** It is not necessary to show that the employer acted through conscious motivation – just that, in a victimisation claim, a protected act, or in a race or age discrimination claim, the difference in age or race, was the reason for the detriment or dismissal – **Nagarajan v London Regional Transport (1999) ITLR 574.**

**Discussion**

99. We begin with the claims of discrimination and the respondent's conclusion that the claimant was not capable of working at band 5 level which resulted in his dismissal. Performance management means finding objectives related to the job to be met by carrying out tasks that demonstrate competence in measurable ways. It can be simple to understand in principle, but very hard to apply in practice, and employers can sometimes set objectives an employee passes but still be left with a conviction that he is not up to it, and even with training, never will be. There were a number of faults in the application of this procedure. The claimant is rightly aggrieved that he set a target of getting a report in on time, only to be told he still failed because it was so full of errors. It was right to conclude this was unsatisfactory, but the objective had been wrongly drafted. Ms Endres's feedback was probably wrong about his attendance, though right that he was not good at explaining to the teams what the data quality officers wanted from them. Attending clinical governance meetings was set as an objective and then he was forbidden to go. As far as we could tell, the claimant unfairly got the flak for the patient complaint about information on school attendance. It was wrong that he was not told in March 2017 whether he had passed the informal stage or not, so he went from January to May not knowing whether he was performing adequately or not. Not being proactive was mentioned in the capability decision letter, when it was an objective at stage one that he had passed. At second stage Ms

Johnson- Walker stepped in so he was deemed not to pass when he prepared it on time. Some of the objectives were so broad as to be difficult to measure without subjective evaluation. This could have been inexperienced staff preparing it, or it could, as the claimant argues, been because the outcome was fixed in advance. We were also aware that at times there may have been prejudice against him so that when things went worn got was assumed he was at fault even when investigation showed it was not him, to he was not the only one – as in the new form queried by clinicians.

100. We find it significant that Lee Chesham, who the claimant did not hold to be prejudiced, thought the claimant was struggling to deliver the work required, and was discussing performance management in the second quarter of the claimant's employment. He may have been pushed to start the procedure, but we concluded this was not because he thought there should not be a PIP, he did, it was just that he did not want to start the task just when he was leaving, preferring to leave it to his successor. The importance of this is recognised by the claimant, and it is why he insists this email is fabricated. We do not so find. It is difficult to fake a sent email. Its tone is natural and sympathetic. Ms Shipman gave evidence it was genuine.

101. There were also examples before of us the claimant making mistakes. He had set parameters too wide in the clinic forms he was reporting on to the admin teams, and there was no reason to send it to clinicians when it was normally for administrators, let alone repeat it when directed not to. Ms Johnson-Walker was so puzzled by the numerical errors she wondered if his eyesight was poor, which supports a finding that there were errors, and she was not making it up for some other reason. The 988 and 8% was an example which demonstrates their concern that he was not *noticing* some very obvious errors, wherever they came from.

102. The fact that the respondent was concerned they had "missed the boat" in removing the claimant for poor performance when he had improved and produced an adequate Q4 report might indicate an improper purpose. Against that, Ms Johnson-Walker was an inexperienced manager, and data collection and reporting had been 'in chaos'. Both could account for imperfections in the capability procedure.

103. In the overall decision, he was given credit for good work at a band 4 level.

104. What of facts that might indicate that national origin was a factor? We cannot hold that Ms Shipman's remark about Sri Lanka on first meeting the claimant is significant. It is a natural gesture of friendliness to try to establish some connection with another. It might also have shown she was conscious he was foreign, to remark on it at all, but without some other episode or remark, we cannot hold that to say this was an indication of prejudice or bias. "Where are you from" (and the claimant does not say she asked this) can indicate bias if the person asked has a brown skin, and is British, but not if it is evident from speech that they grew up abroad in a non-English speaking family.

105. We have found the "foreigners" remark did not come from Ms Johnson-Walker, or was taken out of context. In other respects it is significant that this is the only indicator of possible bias when they worked in close proximity for 19 months.

106. We cannot say that Ms. Endres must have been racially biased if she held a strong opinion about the claimant's usefulness in meetings. She was on the panel that interviewed him for the job, making it less likely that she was prejudiced against Asians, or foreigners from non-English speaking countries, per se. Her error about his attendance record is explained by her having forgotten she had asked for someone else to attend, making him absent for many months.

107. The claimant relies on an email exchange in which he and Alex Mills in the Informatics team (who is white) debated which report was wanted. The managers took the view that both were at fault in misusing terminology, but ththe claimant was at fault for not being clear what he wanted. The explanation that Informatics collect data, but the Data Quality team (the claimant) should not know what to ask them for, is plausible.

108. We do not accept that including grammar in the objectives for the first PIP indicates bias against foreigners. The claimant's grammar is not always perfect (notable in use of plurals) but so is the grammar of many monoglot English-born employees, and including it as an objective does not show racist bias.

109. Looked at in the whole, we concluded that the reason why the claimant was subjected to performance management, and found to be wanting, was because his performance was less than was expected in a band 5 role. That he was Asian, or a foreigner, or a foreign born Asian, was not the reason.

110. As for age discrimination, the claimant based this claim on the fact that he was seen to be slow, arguing that this was a proxy for bias against older people. None of his colleagues knew his age. He looks younger than his years. Some had estimated his age as lower than it was, as did the lay members of the tribunal before checking the claim form for the date of birth. Some of his colleagues did recognise him as older than them. Both his line managers had complained at different times about different tasks that it took him much longer to do a piece of work than others. We concluded they said he worked slowly because he did, not because he was older than them.

**Harassment**

111. Paragraphs 5 to 69 of the grounds of claim are pleaded as discrimination and harassment. As a matter of law they cannot be both. We have picked out for discussion those that seem to us more likely to be harassment, that is, having the potential to cause a humiliating, intimidating, and so on, environment for him.

112. Of course an employee may find performance management a humiliating experience. In our finding this was not its purpose, as his 2016 managers (Marion Shipman and Lee Chesham) did believe his performance was inadequate. Nor do we hold that it was in the circumstances reasonable to have that effect. It was carried out under the Trust's own process.

113. Some of the specific criticism of him by others was not known to him until after he had left – for example the email of 21 October 2016 which he maintains was faked, and other emails about particular episodes which he did not see until disclosure. Some of it was seen by him - notably the feedback

from Frances Endres in the management statement of case, and Dawn de Freitas, though he did not know it was her, but even if we had held that this had the purpose or effect of humiliating (etc) him – and we do not so hold – it cannot be related to race. All that can be said is that he was of an Asian background and Ms Endres was white, or that she was foreign but spoke English as her native tongue and he was foreign and spoke it as a second language, but as the criticism did not relate to culture or speech or his understanding of language (save that he did not contribute much to meetings, but that was an observation relevant to the enquiry made) we could not relate it to race.

114. The unnecessary humiliating remark was Mr Johnson-Walker revealing to the two doctors in summer 2017 that he was subject to performance management. She seems to have done this because the team as well as the claimant was being criticised and she wanted to show they were managing what they saw as the problem; she was inexperienced and did not stop to think that this would make his relations with the doctors difficult, or she did think, but did not care as she thought he deserved it. She was rightly told to apologise as an outcome to the grievance. However, we cannot hold that this was related to race. There is nothing other than the difference in ethnicity. The comment itself had nothing to do with that.

**Victimisation**

115. Of the actions numbered 2.1-2.5, and 5.0 and 5.1, we do not hold that the claimant's complaints of discrimination made in September and October 2017 were the reason for the treatment complained of.

116. 2.1 concerns the claimant being told first to attend admin leads meetings and three months later to attend them. He had to stop because of Ms Endres's poor feedback on 18 August, which would have made it difficult for him. The fact that Ms Endres was leaving so he could start going to these meetings again in December makes sense, and is not to do with the grievance. If in fact he was asked to stop attending because he had complained she was racist (and this was not raised by him in evidence) it is not clear how this was a detriment. He had not been attending from January to June 2017, he only attended a few in the summer of 2017, and he was no longer being assessed for performance at these meetings.

117. 2.2 is very general, and of any comments about involving HR we could not see any that were not justified by events.

118. 2.3 and 2.4 are about checking emails. As discussed, he had not copied emails as instructed, and in December was being asked to do so. The capability hearing understood Ms Johnson-Walker to have said she had to check his emails when in fact she was checking the data which was then emailed – and on occasion who he sent emails too (as when he had included clinicians when he should not have). If the panel had found she was having to check all his data, rather than his emails, the result would have been the same. It was a misunderstanding of what she said, and we did not think it arose from the fact that he had lodge da grievance. Ms Johnson- Walker's assessment of the claimant's ability was clear well before the grievances. They were not the reason why she spoke as she did t the panel.

119. 2.5 is about the episode in October 2017on which we have already found that the team was told verbally the data was now avaialbale and the claimant missed it. We do not find as a fact that Ms Johnson-Walker did not tell him, let alone that that she did this because of the grievance. The omission made extra work for her at a time when the team was under pressure of a deadline.

120. 2.6 is a general assertion that he was subject to stress because he had made grievances. This broad allegation was not particularised and it is not clear what episodes were meant. The claimant was under a lot of stress because of the impending grievance and capability hearings, but we could not identify how otherwise he put under pressure because he of the grievances.

121. Next is 5, where it is said the claimant was told that those of his grievances that related to the capability procedure should be left to that procedure, but the capability panel and appeal panel ignored the allegations of discrimination made, and in particular, the allegation that Ms Shipman had procured the start of a capability procedure as an act of discrimination. We do not hold that the capability process went against the claimant because he had complained of discrimination. Ms Lyon was aware of the content of the grievance, even if she did not know the outcome. She knew of his allegations as part of his resistance to the management case. She focused on what was said to be lacking in his performance as a matter of fact. There was evidence that Lee Chesham, not Ms Shipman, complained of the claimant's performance. Ms Shipman in any event had worked with the claimant when Lee Chesham was away and so had first hand knowledge of his performance.

122. The last allegation, that he was dismissed because of the grievance, was accepted as such by the respondent, though opaquely pleaded by the claimant. What he complains about is clearer in paragraph 58 of the grounds of claim, which deals with redeployment. This is the step that converted downgrading for lack of capability to a dismissal. The claimant also made it clear from the start of the hearing that he considered the grievance had adversely affected the redeployment exercise, in particular pointing out that according to paragraph 14 of the grounds of response, the grievance about discrimination was a reason not to place him in the service administrator role

123. In the hearing it was submitted by the respondent that this pleading was a slip of the tongue. Nevertheless, the document was pleaded by solicitors specialising in employment work, and must have been based on instructions. There was no application to amend it. We cannot wholly discount it, and must examine carefully the evidence of why the redeployment decisions were made.

124. Relevant law is set out in paragraphs 95-97 above. To that we add **Nagarajan v Agnew (1994) IRLR 61, EAT**, holding that where there are mixed motives, "there will be unlawful discrimination if the unlawful motive was of sufficient weight in the decision making process". O**wen and Briggs v James (1982) IRLR 502 CA**, and **O'Donoghue v Redcar and Cleveland Borough Council (2001) EWCA Civ 701** show that where there was more than one reason for a decision, the tribunal must asses the importance of each from the point of view of causation, and whether an unlawful reason has sufficient weight to be treated as a cause of the detriment.

125. The facts are set out in paragraphs 70-75. There were two jobs available at band 4. One was unlikely to be suitable – the claimant has not disputed it. Our concern is with the service administrator post, where the job description was disclosed by the respondent part way through the tribunal hearing and where the claimant maintained he was suitable.

126. The first reason given is that the job was unsuitable because the claimant was said to lack capability in his band 5 role because he required close

supervision, and it would not be possible to provide this in a stand alone clinic where he was the only administrator on the premises. At first sight this is attractive, but overlooks that this is a band 4 post where less independence and judgment is required, and Ms Lyon had judged him capable of working at that level. The job description shows he would in effect act as a receptionist, dealing tactfully with patient queries, managing appointments, travel expenses claims, typing reports, and seeing clinicians had the right papers for each appointment. He reported to an assistant service manager. The claimant was known to be calm, literate and methodical. He was a graduate. There had been no complaint about his conduct. Any new starter would need some induction into clinic procedures.

127. The letter from Ms Lyon (paragraph 69) was explicit that if a post was available there would be a four week period, after which he might still be dismissed if he was not suitable. If his ability to work unsupervised was in doubt, a four week period to test this was already envisaged therefore.

128. This brings into focus Ms Mountain explaining that even if he had been able to do the work, it was still unsuitable because it sat within the CYAF directorate. It explains why she did not consider placing him in the post for four weeks.

129. The claimant himself had asked not to work in the Data Quality team. He did not ask not to work in the CYAF. In December 2017 he had been asked by Ms Johnson-Walker to return to the CYAF admin leads meeting, so it cannot have been that CYAF would not work with him at that point. If he had been in the band 4 post in the clinic, he would not have had daily contact with other administrative staff in CYAF, at band 4 he was too junior to attend the admin lead meetings, and as far as we know his immediate line manager was not involved in the grievance. If there was any doubt whether he would want to work in CYAF, Ms. Mountain could have asked him. The first the claimant knew about it was in the dismissal meeting. He does not seem (judging by her file note) to have been told there was any lack of trust and confidence, and the job description was not discussed with him. In any case, by the time of the meeting, 8 weeks had already elapsed and there was no time left for the trial contemplated by Ms Lyon.

130. Ms Mountain mentioned the grievance in the context of her view of trust and confidence between the claimant and CYAF, when she said his "response to the management statement of case the capability hearing – his grievances – tend to illustrate a lack of trust and breakdown of relationships on both sides". It is true the grievances show the claimant had no trust in Ms Shipman, Ms Johnson-Walker or Ms Endres. She has not said that their trust and confidence in his ability to operate in any role, more particularly a service administrator role, had broken down before the grievance was lodged. Their comment had been about his ability as a Data Quality Officer. Neither Ms Endres nor Ms. Shipman would be involved in direct management of the claimant in clinic. Ms Mountain does not mention any discussion with the CYAF managers on the claimant being placed in the service administrator role. It seems to have been her decision, not theirs.

131. She had herself given a statement about the claimant as part of the grievance procedure, stating he had been rude to Ms Johnson- Walker, to

highlight what she thought to be Ms Johnson-Walker's tolerance. The allegations of discrimination had not been upheld. We are familiar with the difficulty this can cause in workplaces; many staff find it hard to be neutral about serious and unsuccessful allegations having been made against colleagues. She has not stated that she resented the grievance allegations against the managers, but evidently she had a view about their merit, as she had volunteered a statement. We do not go as far as to say that she consciously decided to punish the claimant for the allegation in his grievance, but it did operate on her view of the claimant's relationships with others, and in way that did not involve constructive examination of why she formed the view that relationships would be unworkable if he took the service administrator role.

132. Summarising, she formed a view, without discussion with CYAF members, or with the claimant, that trust and confidence had broken down to the extent that the claimant could not work anywhere within it. She mentions the grievance in this context. The grievance itself is not evidence that the relationship had broken down from the point of view of the managers, or, for the claimant himself, with the wider CYAF beyond the named managers. If trust in his competence as a data quality officer had broken down, it was not clear that pre-grievance that would extend to the more limited band 4 clinic role. Resentments arising from the grievance being made might well change this; they are more likely to have been taken into account by her, because there was no evidence that prior to the grievance there was more than lack of confidence in his ability to work independently at band 5. She also had a view about the merits of the grievance, before it was decided. She judged the claimant unsuitable for the role without a four week trial, and justified the lack of any trial period by the trust and confidence assertion.

133. From these facts we infer that the grievance played a significant part in her decision that trust and confidence had broken down, such that even if capable of the job it would not be suitable. If the claimant had confined his representations to the accuracy of the capability procedure as it was applied to him, without also alleging special treatment because he was from a minority ethnic group, a major accusation which might have serious consequences for others if upheld, and even if not upheld, involving much work disruption within HR and the wider team, it seemed to us unlikely Ms. Mountain would have decided trust and confidence between the claimant and the wider CYAF team had broken down to the extent that he could not be placed in a band 4 job remote from other administrative staff. There is otherwise no explanation why she reached the decision without consultation with claimant or CYAF, when she had 8 weeks available to do it.

134. Thus we conclude that the failure to redeploy the claimant to the band 4 service administrator role was victimisation.

**Effect of Victimisation on the Dismissal**

135. We have to assess the chances that he would have been judged suitable after 4 weeks in the job. If not, he would still have been dismissed.

136. The claimant had no past experience of customer-facing roles that we know of. The claimant is generally polite, calm and measured, except where he believed some managers had decided to fix a process to get rid of him.

Some people find it hard to deal patiently with people whose behaviour is difficult because they are anxious or stressed, as patients and their families may be. There is a risk the claimant would have found this hard. It is also possible he would have found hard the interruptions to his workflow of having to take telephone calls. He preferred written processes he could refer to, rather than oral instructions, but it is likely travel expenses rules and the like would be written down, and oral instructions unlikely when he was mostly on his own. Given that he had been slow generally, including in producing accurate typed reports, he may not have mastered the essentials of the new role within 4 weeks. Gathering these factors, we concluded there was a 40% risk he would not been found suitable at the end of a four week trial.

Employment Judge

Date6th April 2020

JUDGMENT SENT TO THE PARTIES ON

07/04/2020

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FOR THE TRIBUNAL OFFICE