



EMPLOYMENT TRIBUNALS

Claimant: Mr M Ibeziako
Respondent: 1. York Teaching Hospitals NHS Foundation Trust
2. Locum Placement Group Ltd
Heard at: Hull On: 21, 22, 23 and 24 May 2018 and 25
May 2018 (deliberations)
Before: Employment Judge Davies
Dr D Bright
Mrs S Scott

Representation

Claimant: In person
Respondents: 1. Mr A Webster (counsel)
2. Mr N Price (counsel)

RESERVED JUDGMENT

1. The Claimant's claims of direct race discrimination, harassment related to race and victimisation are not well-founded and are dismissed.

REASONS

Introduction

- 1.1 These were claims of direct race discrimination, harassment related to race and victimisation brought by Mr M Ibeziako against Locum Placement Group Ltd, an employment agency with which he is registered, and York Teaching Hospital NHS Foundation Trust, at whose York Hospital he worked a number of shifts. The Claimant represented himself. The First Respondent was represented by Mr Webster of counsel and the Second Respondent by Mr Price of counsel.
- 1.2 The Tribunal was provided with a joint file of documents and we considered those to which the parties drew our attention. On the first day the Claimant indicated that he had not brought the most up-to-date version of the file with him. The Respondents confirmed that there had been some late disclosure on all sides but that the Claimant had been provided with copies of all additional documents by email and in hardcopy early the previous week at the latest. The page numbering had not changed, it was just that extra pages had been inserted in the file. Mr Webster helpfully gave the Claimant a complete, up-to-date copy of the file. We

decided that we would go ahead using that file. If there was any document the Claimant needed more time to look at we would ensure he was able to do so.

- 1.3 At the outset of the hearing, the Claimant renewed a request he had made the previous week for the hearing to be recorded. That application had been refused by the Regional Employment Judge. However, for the first time when renewing his application before the Tribunal, the Claimant indicated that he had a mental health difficulty which gave him problems with concentrating and remembering. He said that as a result he was not able to write down what was going on. The Claimant did not provide any medical evidence and this was the first time such an issue had been raised. However, the Tribunal took what the Claimant said at face value and assumed he had a disability requiring a reasonable adjustment. Neither party wanted the hearing to be delayed and the Tribunal explained that there was no recording equipment available. The Claimant indicated that he could record the proceedings on his mobile phone and in the circumstances we allowed him to do so. We offered the Respondents the opportunity to record the proceedings given that they were being recorded by the Claimant, but neither did so. In view of what the Claimant told us about his mental health difficulties, the Tribunal ensured that we took regular breaks and reminded the Claimant that he could ask for a break if he needed one. He did so, and he also requested that we finish early on the first day of the hearing, which we did.
- 1.4 The Tribunal heard evidence from the Claimant on his own behalf. For the First Respondent we heard evidence from Ms Allan (Sister), Ms Cambridge (Healthcare Assistant), Ms Hoskins (Assistant Director of Nursing – Workforce), Ms Joy (Senior Officer – Temporary Staffing), Ms Milne (Deputy Sister), Ms Mulenga (Registered Nurse), Ms Penny (Bed Duty Manager), Ms Molero Solanilla (Registered Nurse), Ms Tostevin (Senior HR Lead) and Ms Young (Healthcare Assistant). For the Second Respondent the Tribunal heard evidence from Mr Cheroomi (owner), Ms Price (Recruitment Consultant) and Ms Robinson (Recruitment Consultant).

The issues

- 2.1 The issues to be determined had been identified at a preliminary hearing before EJ Maidment. They were as follows:

Direct race discrimination

- 2.1.1 Did the Respondents subject the Claimant to treatment falling within s 39 or 41 Equality Act 2010 as follows? The Claimant says that:
- 2.1.1.1 At around 4 am on 1 September 2017 the Bed Manager told him by telephone that he could not go on his break when two white Healthcare Assistants (“HCAs”), Avril and Eileen, had been allowed to take a break. The telephone call was passed to the Claimant by Nurse Mulenga.
- 2.1.1.2 The Claimant was then sent to AMB Ward by the same Bed Manager during the same telephone call to do one-to-one observation of a patient, despite Avril and Eileen being available to do so.
- 2.1.1.3 The Claimant was sent to AMB although white staff already present at AMB were available to do the one-to-one observation. The Claimant says five or six staff were standing

- in reception when he arrived including two nurses and a number of HCAs.
- 2.1.1.4 The Claimant was directed by the senior nurse, called Sarah, to the patient who needed one-to-one observation without being given a handover and without being told the patient was aggressive.
 - 2.1.1.5 The Claimant was required to observe the patient on his own when the patient's care plan said there should be two people present.
 - 2.1.1.6 The staff in AMB laughed and commented that the patient had "started again" when the Claimant was called a "black bastard" by the patient. The Claimant was by the patient behind a curtain when he was assaulted a number of times by the patient and verbally abused. The staff were outside the curtain when they reacted as described.
 - 2.1.1.7 When the Claimant complained to the senior nurse about being asked to carry out the duty rather than staff who knew the patient, and complained about staff laughing, she did not record it on an incident form and did not institute an investigation.
 - 2.1.1.8 The Bed Manager who sent the Claimant to AMB Ward deliberately endangered him as a black employee by sending him to carry out the observation of the particular patient in question.
 - 2.1.1.9 On Ward 28 on 1, 2 and 3 September white employees called Eileen and Avril treated him like a slave, asked him to carry out duties they could and should have carried out and spoke to him in a raised voice when asking him to carry out the work.
 - 2.1.1.10 On the nights of 1, 2 and 3 September Eileen and Avril told the Claimant to attend a patient with a contagious infection, when he had heard them say that they would not do so.
 - 2.1.1.11 The Claimant reported to the ward sister on Ward 28 that he had been subjected to race discrimination by being sent to AMB Ward to carry out the one-to-one supervision and perform work that white staff would not have been requested to do and was then faced with complaints about his own conduct or behaviour.
 - 2.1.1.12 The First and Second Respondents colluded to fabricate the Claimant's response to the allegations made against him, in order to conceal the fact that he was making a complaint of race discrimination. When the First Respondent received complaints about the Claimant, it asked the Second Respondent to speak to him to obtain his statement. The Second Respondent sent the First Respondent a statement from the Claimant but it was not the statement he had made. It was a fabrication or an amendment to the statement he had made, which omitted reference to the Claimant's complaint of race discrimination.
 - 2.1.1.13 The allegations about the Claimant's conduct were invented as a response to his complaints of race discrimination.
 - 2.1.1.14 The First Respondent cancelled the Claimant's shifts and no longer called on the Second Respondent to provide the Claimant's services to it.

NB allegation 12 above is made against both Respondents. The remaining allegations are made against the First Respondent only.

- 2.1.2 If so, did the Respondents by doing so treat the Claimant less favourably than an actual or hypothetical comparator in whose circumstances there was no material difference?
- 2.1.3 If so, having regard to the burden of proof, was it because of race?

Harassment

- 2.1.4 Did the First Respondent, through its employees in AMB Ward, engage in unwanted conduct related to race by laughing and commenting that the patient had “started again” when he was verbally and physically assaulted by a patient on the night shift of 1/2 September 2017?
- 2.1.5 If so, did that conduct have the purpose or effect of violating the Claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

Victimisation

- 2.1.6 Did the Claimant do a protected act? The Claimant says:
 - 2.1.6.1 He complained orally to the ward sister in Ward 28 on 1 September 2017 that he had been subjected to race discrimination by being required to carry out the one-to-one observation of the patient and required to do work that white staff were not required to undertake; and
 - 2.1.6.2 In his written response to the allegations made against him he made a complaint of race discrimination.
 - 2.1.7 If the Claimant did a protected act did the Respondents subject him to a detriment because he did so by:
 - 2.1.7.1 the Respondents colluding to fabricate his response to the allegations against him to cover up that he was complaining of race discrimination;
 - 2.1.7.2 the First Respondent inventing allegations against the Claimant as a response to his complaints of race discrimination; and/or
 - 2.1.7.3 the First Respondent cancelling the Claimant’s shifts?
- 2.2 Although at the preliminary hearing the Respondents had raised issues about whether the Claimant could bring claims under s 39 and s 41 Equality Act 2010, those points were not pursued at the hearing.

The Facts

- 3.1 The Claimant describes himself as black Nigerian. He did a number of shifts at the First Respondent trust as an HCA placed through the Second Respondent employment agency. The Tribunal was concerned with events starting in early September 2017. The Claimant did three night shifts at the start of the month, on 1, 2 and 3 September.
- 3.2 On 1 September 2017 the Claimant was working on Ward 28. The nurse in charge was Ms Mulenga. She is black. Her evidence to the Tribunal was that she had not experienced race discrimination on Ward 28. It was not suggested by the Claimant that Ms Mulenga discriminated against him.

- 3.3 At some point during the shift, after midnight, Ms Mulenga was called by the Bed Manager, Ms Penny, and asked if she could release an HCA to help on Acute Medical Ward B ("AMB Ward"). The need for assistance arose as follows. AMB Ward is a busy acute admissions ward. During the night a patient had been admitted from a care home following a referral from his GP. The GP had spoken to Ms Penny and told her that the patient was increasingly agitated and aggressive. He had been on one-to-one observation in the care home. Ms Penny asked the care home to send a member of staff with the patient to carry on one-to-one observations at the hospital. Ms Penny told the nurse in charge of AMB Ward, Ms Milne, that the patient was coming. When the patient arrived, the care home had not sent a member of staff with him. To begin with the staff already on AMB Ward took turns carrying out one-to-one observations. It appears that the patient fell and Ms Milne called Ms Penny to ask for help from another ward.
- 3.4 It was the Claimant's case that Ms Penny knew this was a difficult patient and deliberately targeted him to provide the cover on AMB Ward because he is black. He accepted that he had never met Ms Penny but he said that she knew he was black because he had provided a photograph and ID to the nurse bank. Ms Penny's evidence was quite different. She said that she did not know who was on which ward. She simply looked at the cover in terms of numbers and saw that Ward 28 had 2+3 (i.e. 2 nurses and 3 HCAs) so she called and asked Ms Mulenga if she could provide an HCA to help on AMB Ward. She did not ask for the Claimant personally. Ms Mulenga agreed to provide cover and it was Ms Mulenga who decided to send the Claimant. That was consistent with Ms Mulenga's evidence. She said that she took a call from Ms Penny. The Claimant was sitting at the desk. There were two other HCAs, one was busy and one was on a break. In any event, she would normally ask an agency staff member to go and provide cover such as this because the substantive HCAs knew Ward 28 and could carry out the work on that ward more efficiently. Going to carry out one-to-one observations of a particular patient was a suitable task for an agency HCA. She therefore decided to send the Claimant. The Claimant accepted that he could not hear what Ms Penny was saying and could only hear Ms Mulenga's half of the call.
- 3.5 The Tribunal accepted the evidence of Ms Penny and Ms Mulenga. There was nothing to suggest that Ms Penny deliberately sought out the Claimant to cover this patient because of the Claimant's race. The Tribunal accepted her evidence that she simply identified a ward that had a third HCA and that it was Ms Mulenga who decided to send the Claimant. She chose him because he was an agency HCA and she wanted to keep the two substantive HCAs on Ward 28.
- 3.6 There was an issue because the Claimant had not yet had his break. Ms Mulenga could not remember very clearly but she thought she told the Claimant he could take his break when he got to AMB Ward. Ms Young was an HCA working on Ward 28 that night. She was the person called Avril to whom the Claimant had referred at the preliminary hearing before EJ Maidment. She clearly remembered overhearing the Claimant say to Ms Mulenga that he had not had his break and Ms Mulenga telling him to take it before he went to AMB Ward. The Claimant says there was a second call from Ms Penny chasing to find out where he was. He says he answered that call and told Ms Penny that he had not had his break. Ms Penny did not remember a second call. The Claimant's evidence was different from what he had said to EJ Maidment, which was reflected in the list of issues set out in his

case management order. Then he said that Ms Mulenga passed the Bed Manager over to him. It does not particularly matter whether there were one or two calls. The point of relevance is that the Claimant says he spoke directly to Ms Penny and told her he had not had his break. She told him he needed to go to AMB Ward. It may well be that Ms Penny spoke to the Claimant while he was still on Ward 28 and told him he needed to go to AMB Ward. The Tribunal could well understand that she might not remember doing so as this was a routine occurrence. Ms Penny's evidence was that in any event it would not be for her to deal with breaks. This would be done by the nurse in charge of the ward in question. She was quite clear that she had not refused to allow the Claimant to take a break because of his race. The Tribunal accepted that. Ms Penny was simply telling the Claimant he was needed on AMB Ward. Breaks were dealt with on the ward and no doubt that is what she expected. The Claimant therefore went to AMB Ward without having had his break or at least his full break.

- 3.7 Ms Milne (the person called Sarah to whom the Claimant had referred at the preliminary hearing) was the nurse in charge. The Tribunal found Ms Milne's evidence clear and credible. She explained the reasons for needing an extra pair of hands and how busy it was on AMB Ward. Ms Molero, another nurse working on AMB Ward that shift, agreed that it was busy. Ms Penny said that it was unusual for Ms Milne to ask for help so she took the view it must have been busy. The Tribunal accepted that the ward was busy and needed an extra pair of hands. There were not other (white) staff on AMB Ward who could have done the one-to-one observations without calling for help.
- 3.8 Ms Milne explained that she carried out the necessary risk assessment. She decided the patient needed one-to-one observation because of the risk of a fall. In doing so, she did not see his care plan from the care home. She did not consider that he needed two people to observe him and that was not usual in the hospital setting. The Tribunal accepted that Ms Milne's professional view was that the Claimant required one-to-one observation. There was nothing to suggest that the Claimant had been violent while on the ward, although there was an indication that he had fallen. Ms Milne did not remember whether she gave the Claimant a handover when he arrived at the ward to carry out the one-to-one observations but she expected she would have done so because that was her usual practice. The Claimant accepted that he had spoken to Ms Milne when he got to AMB Ward and that she showed him to the patient. The Tribunal found it extremely unlikely that she would not have told him what was required when taking him to the patient and we find that she did. The Claimant says that Ms Milne deliberately did not tell him that this was a difficult patient with a risk of violence because he was black. Ms Milne denied this and the Tribunal accepted her evidence.
- 3.9 The Claimant's evidence to the Tribunal was that he told Ms Milne he had not had his break. She did not remember him mentioning it to her. If he had, she said that she would have made sure he took it. The Claimant said that he tried to get Ms Milne's attention while he was carrying out the one-to-one observations to ask about his break but that she ignored him. However it was suggested to him that Ms Milne was dealing with an IV at the time and he seemed to accept that she was.

- 3.10 The patient requiring one-to-one observations was in a room with others. The Claimant drew the curtains around the patient's bed but left a gap so that he could see out. The Claimant now says that while he was doing the one-to-one observations he was physically assaulted five times by the patient and called a "black bastard." He says that the HCAs overheard and laughed and did not help him. In cross-examination the Claimant said a number of times that he only saw Ms Milne going into the room. He said that the HCAs had, "nothing to do at night except deliver drinks." He could not explain how, if he only saw Ms Milne going into the room, there were a number of unnamed HCAs the other side of the curtain laughing or failing to help. It was also suggested to him that if he was physically assaulted or needed help he could simply have used the buzzer. At that point he suggested the buzzer was broken or had been removed from the patient because the patient was violent. That had not been said before. Ms Milne and Ms Molero gave clear evidence. They had both helped out with the one-to-one observations of the patient before the Claimant came to AMB Ward. The buzzer was there and was working. Ms Molero was absolutely clear: if there was no buzzer she would not do one-to-one observations. Ms Milne and Ms Molero said that everyone was busy. Neither of them heard any issue and neither of them heard any laughing. The Tribunal accepted their evidence. The Tribunal did not find the Claimant's account credible. He was not able to explain how the only person he had seen was Ms Milne and yet there were HCAs standing and laughing the other side of the curtain. His explanation for not calling for help with the buzzer did not add up. In a subsequent written complaint in which he referred to discrimination the Claimant mentioned this shift (see further below). He did say that he had been assaulted five times but he made no reference to other staff laughing or failing to help him nor did he refer to the patient being racially abusive. As we shall come on to explain (see below) the Tribunal found that the Claimant did not make any complaint about any of these events at the time, but only after complaints had been made about him. In all the circumstances the Tribunal did not believe the Claimant's account. We accepted that the patient may have grabbed him, but not to the extent that the Claimant needed to buzz for help. He was not assaulted five times and he was not racially abused.
- 3.11 When Ms Mulenga had agreed to send the Claimant to AMB Ward she had asked for him to come back in time to help on Ward 28 by 5am. He did not return at that time so she called the ward. She did not know who she spoke to. Ms Milne thought that the Claimant was coming for the remainder of the shift. It is not entirely clear what happened after Ms Mulenga's call, but the Claimant ended up staying on AMB Ward for the rest of the shift. The Tribunal did not consider that there was anything untoward in this.
- 3.12 At the end of the shift, Ms Milne signed the Claimant's timesheet. That did not include any break. The Tribunal accepted that the Claimant may not have had his break or his full break that shift. However, we did not accept that he told Ms Milne when he arrived at the ward that he had not had his break and we do not accept that she ignored him when he was trying to get her attention. The Tribunal accepted Ms Milne's evidence that if she had been aware the Claimant had not had a break she would have made sure he took one. The Claimant says that he arrived on AMB Ward at around 4am. The practice is that staff begin taking their breaks at midnight, so there was no reason for Ms Milne to suspect that the Claimant had not had his break. In any event, the Tribunal had no hesitation in

accepting her evidence that she did not deliberately prevent the Claimant from having a break because of his race.

- 3.13 The Claimant's oral evidence was that he told Ms Milne when she signed his timesheet that the patient had physically assaulted him five times and had racially abused him. He said that she told him that because he was not an employee she could not log his complaint. That had not been said by the Claimant before. Ms Milne's evidence was that the Claimant had not made any such complaint to her.
- 3.14 The Claimant also says that he returned to Ward 28 after the night shift had ended. The Claimant produced a written witness statement in which he said that he told Ms Allen on Ward 28 that he had been physically assaulted and racially abused on AMB Ward. It appears that rotas were then produced indicating that Ms Allen was not on shift that day. In his oral evidence the Claimant said that he did not know Ms Allen. The person he made his complaint to on Ward 28 was in a dark uniform showing that she was the nurse in charge. When Ms Allen gave evidence, the Claimant confirmed that she was not the person he had told. He was unable to explain to the Tribunal how he came to use Ms Allen's name in his witness statement. The Tribunal noted that it was Ms Allen who forwarded a complaint made by patients about the Claimant on 4 September 2017 (see below). That seemed to the Tribunal to be the most likely explanation for the Claimant saying he had made a complaint to Ms Allen on the morning of 2 September 2017. This indicated a tendency of the Claimant to construct his evidence in the light of the events that followed, rather than giving an account of what he actually remembered. It meant that the Tribunal approached his witness statement with some caution.
- 3.15 In his oral evidence the Claimant said that having spoken to Ms Milne and Ms Allen he then told Ms Robinson at the Second Respondent about the assaults and racial abuse he had experienced on AMB Ward. He said that her response was the same as Ms Milne's: the Claimant was not an employee and she could not log his complaint. Ms Robinson was not asked about that in her oral evidence.
- 3.16 The Tribunal found the Claimant's evidence that he had made any of these complaints wholly unconvincing. Essentially this was said for the first time at the hearing. Ms Milne's evidence that no such complaint was made to her was entirely credible. The Claimant initially said that he complained to Ms Allen on Ward 28 but then accepted that it must have been someone else. The Claimant worked with Ms Mulenga on the night of 2 September 2017. She had sent him to AMB Ward the previous night, but he did not make any complaint to her or mention what had happened. There was no mention in any of the documents at the time, including the statement the Claimant wrote on 19 September 2017, of his making three separate complaints about physical abuse and racial abuse. The Claimant referred repeatedly at the hearing to what had been said by the Respondents at EJ Maidment's preliminary hearing about whether he was an employee for the purposes of liability under the Equality Act 2010. That linked with his suggestion that both Ms Milne and Ms Robinson had told him that because he was not an employee no complaint could be logged. It seemed to the Tribunal that the Claimant's account of complaints and responses was invented after the preliminary hearing. We did not accept that he made complaints about being assaulted or racially abused to Ms Milne, Ms Allen or Ms Robinson at this time. He did later

complain that he had been assaulted, but that was not until after complaints had been made about him.

- 3.17 The Claimant worked night shifts on Ward 28 on 2 and 3 September 2017. Two substantive HCAs worked those shifts: Ms Young (who had also worked the 1 September 2017 nightshift) and Ms Cambridge. Ms Cambridge was the person the Claimant had referred to as Eileen at the preliminary hearing with EJ Maidment. The Claimant's evidence to the Tribunal was that Ms Young and Ms Cambridge made him do most of the work. They shouted at him. There was a patient with a condition like Ebola who required barrier nursing. They would not attend to her and made the Claimant do so. That patient urinated very frequently and they made him deal with that. They treated him like a slave. They did so because he was black.
- 3.18 Ms Young had a good recollection of the Claimant. She agreed that she had delegated tasks to him; he was often sitting at the desk and they were very busy. She asked him to double up with Vicky (the other HCA on 1 September). She thought that was sensible because Vicky knew the tasks and it was more efficient. Ms Young was doing observations. She did ask the Claimant to deal with buzzers when they went off if she was busy and he was not. She did not agree that the patient he was being barrier nursed had a condition like Ebola. In any event, she did not single out the Claimant to care for that patient. The patient was on the ward for a long time and they had all cared for her. She had not said to a colleague that she would not care for the patient. She had not treated the Claimant differently because of his race. It seemed the Tribunal likely that Ms Young had asked the Claimant to undertake various tasks, but we found that she did not do so to avoid doing them herself. Rather she delegated them to ensure that all the work was done as efficiently as possible, particularly if the Claimant was sitting at the desk.
- 3.19 Ms Cambridge had a less clear recollection. However, she also said that she had not shouted at the Claimant or singled him out to do more work. She had not made him deal with the patient was being barrier nursed. She had not treated him differently because of his race. Although at the preliminary hearing the Claimant had said that Ms Cambridge was present on 1 September 2017, the roster showed that she was not and the Claimant accepted that. The Claimant said for the first time when cross-examining Ms Cambridge that he had challenged her during the course of the shift and told her that she was giving him all the work because of his race. When asked about that he could not give a clear account of what he had actually said to Ms Cambridge, but he said it led Ms Cambridge to tell him about her grandchild who had a parent who was black. When the Claimant said that, it prompted Ms Cambridge to remember that they had had a conversation about her grandchild. She said that she had used the expression "mixed race" and that the Claimant had told her that that was not acceptable language and was racist. She was absolutely clear that this was nothing to do with the Claimant suggesting that she was discriminating against him. That had not happened. The Claimant accepted Ms Cambridge's evidence. The Claimant had not previously suggested that he challenged Ms Cambridge during the course of the shift and he could not give a clear account of what he had said to her. By contrast, Ms Cambridge's recollection, prompted by the mention of her grandchild, was entirely credible.

- 3.20 The nurse in charge of the three shifts at issue was Ms Mulenga. It was not her experience that there was discrimination on this ward. The Claimant did not make any complaint of discrimination to her as the nurse in charge at the time.
- 3.21 Looking at the evidence about these three shifts on Ward 28, the Tribunal accepted the evidence of Ms Young and Ms Cambridge. Ms Young in particular had a good recollection, and the Claimant's account of challenging Ms Cambridge at the time appeared again to have been invented. Ms Young and Ms Cambridge did not shout at the Claimant, treat him like a slave or single him out to do more than his fair share of the work. They did not say that they would not care for the patient who needed barrier nursing and they did care for that patient. They did not send the Claimant to care for the patient when they could and should have done it themselves. They did not treat the Claimant differently because of his race.
- 3.22 So, by the end of the nightshift on 3 September 2017, the Tribunal finds that the Claimant had not been assaulted or racially abused by the patient, he had not made any complaint of assault or racial abuse to anybody and he had not been treated in the way described by Ms Young and Ms Cambridge.
- 3.23 On the morning of 4 September 2017 Ms Allen was the nurse in charge of Ward 28. Her evidence was that a member of staff told her that a number of patients had raised concerns about the Claimant. She went and spoke to those patients. There were four in one room and a fifth in another room. She found out their concerns and then wrote them down and emailed them to Ms Joy in the Nurse Bank team. That was the process when a complaint was made about an agency worker. She did not complete a Datix report because this was not an incident.
- 3.24 It was the Claimant's case that Ms Allen invented the patient complaints because he had made a complaint of discrimination. The Tribunal had no hesitation in rejecting that suggestion. First, Ms Allen's evidence was careful and entirely credible. She was alerted by staff, spoke to the patients and forwarded their concerns in accordance with the process for agency staff. Secondly, as we have found, the Claimant had not made any complaint of discrimination. Even on the Claimant's own account as it developed at the hearing, he accepted that he had not made a complaint to Ms Allen and was unable to identify any basis for saying that she was aware of any such complaint. However, the Tribunal has rejected the Claimant's account. There had been no complaint of assault or discrimination by the Claimant. There were concerns raised by patients and Ms Allen dealt with them in accordance with the First Respondent's process at the time. (We note that it has since then introduced a standard form for dealing with such complaints).
- 3.25 In support of his contention that the patient complaints were invented, the Claimant relies on evidence from Ms Oliver that was subsequently obtained (see below). Ms Oliver's evidence did not provide any support for the patient complaints, and in a number of respects was supportive of the Claimant. However, that by itself does not mean that the patient complaints were invented. Ms Oliver was not present in the rooms the whole time. It may simply mean that she did not observe the things the patients complained about. Or, it may mean that the patient complaints were not well-founded. But that is not the same as them not being made at all. The issue for the Tribunal is whether the complaints were made to Ms Allen and we had no hesitation whatsoever in accepting her evidence that they were. Indeed, it is

difficult to see how she could have invented the complaints, because they were entirely consistent with the tasks in fact carried out by the Claimant during the relevant shift.

- 3.26 Having been told about the complaints and spoken to the patients about them, Ms Allen emailed Ms Joy on 4 September 2017 with an outline of the complaints. In summary, patients had complained that the Claimant was rude, that he did not offer them drinks when doing a drinks round, that he had spent a lot of time pacing around or at one end of the room or looking at end of bed files and that he had spent 30 minutes in the patient toilet for no reason. The patient in a different room had complained that the Claimant watched her for three hours, staring at her and making her feel uncomfortable, although Ms Allen pointed out to Ms Joy that there was a chance the Claimant had been asked to observe the patient closely as she was a little confused in the night. Finally, Ms Allen said that the issue that worried her most was an allegation that the Claimant had pulled the curtains round most of the patients once they had settled down and that when a patient in the far corner bed pressed her buzzer he walked down behind the closed curtain of the patient in the next bed so the patient who had buzzed could not see him and slipped his hand behind the curtain to turn off the buzzer. He did not make himself known to the patient who had pressed her buzzer. This happened four or five times. One of the patients who did not have her curtains drawn saw this and asked him why he was turning the buzzer off. He replied rudely that she did not want him to help and that he was not discussing patients with her. Ms Allen's understanding was that the Claimant did not ask another member of staff to help the patient. Two of the patients felt that he had stayed in the room so that he could turn the buzzer off before anyone else could go in there and that it was a game to him. Ms Allen concluded her email by noting that the Claimant was booked in for shifts again that week. She wrote, "I wonder if he can be taken off the shifts until this has been looked into."
- 3.27 In accordance with the First Respondent's usual practice Ms Joy passed these concerns on to Ms Hoskins. Her evidence was that she dealt with such complaints to ensure consistency. Ms Hoskins decided to remove the Claimant from the shifts that were booked until the concerns had been investigated. She said that she did so because the concerns raised were quite serious. They were, and the Tribunal accepted that that was the reason for cancelling the Claimant's booked shifts and not his race.
- 3.28 Ms Hoskins asked Ms Joy to request a statement from the Claimant via the Second Respondent and she did so in an email on 5 September 2017. At the same time she explained that the Claimant had been removed from his booked shifts. Ms Robinson replied on 5 September 2017 to say that she had forwarded the complaints to the Claimant and she did so. She asked him to write a detailed statement as soon as possible so that she could send it to the First Respondent.
- 3.29 On 12 September 2017 Ms Robinson emailed the Claimant chasing him for a response. She tried to get hold of him by telephone and was unable to. On 13 September 2017 the Claimant emailed Ms Robinson to say that he had been waiting to speak to his trade union representative. He had spoken to them yesterday and agreed that he would send his statement once it was ready. He

emphasised that his statement would be copied to his trade union at the same time as it was sent to the Second Respondent.

- 3.30 On 19 September 2017 the Claimant emailed Ms Robinson a detailed response to the patient complaints together with some documents. This is the complaint document we have referred to above. It went through each of the allegations in turn, although it was not always easy to follow. At the end the Claimant made some complaints about Ward 28. The concerns identified were: not getting a break on 1 September 2017; being sent to AMB Ward and still not getting a break because staff on AMB Ward did not want to release him because they knew the patient had a history of violence; being left alone during night shifts; and providing inadequate staffing levels. The Claimant's written complaint then said that the two permanent HCAs on Ward 28 discriminated against him by making him attend to the patient requiring high-level dependency care. He said that this was because he was a black African and the two staff were white British. As already indicated, although the Claimant did make a complaint of discrimination in this document, he did not raise many of the matters he now says took place. Most notably, he did not say that he had been racially abused by the patient and he did not say that he had tried to make complaints at the time to Ms Milne, Ms Allen and Ms Robinson herself and had been told he could not do so.
- 3.31 On 20 September 2017 Ms Joy emailed Ms Robinson chasing the Claimant's statement. Ms Robinson replied to say that the Claimant would be sending it through today. She had already received the Claimant's statement but she did not send it through that day. In fact, nothing was sent until 3 October 2017. What was then sent was a different version of the statement. It was on the Second Respondent's headed paper, with a date of 20 September 2017. It contained an edited version of the response to the patient complaints. That included, in respect of the allegation about ignoring a buzzer, the Claimant's explanation that the patient wanted to be attended to by a female so he had asked Wendy (i.e. Ms Oliver) to assist the patient and she did so. After dealing with the patient complaints, the statement said that the Claimant had not been allowed to take his break on 1 September 2017 and included his complaint about being asked to care for the one-to-one patient and the allegation that he had been assaulted five times. There was no mention of discrimination.
- 3.32 There are two versions of events. The Claimant says that the First and Second Respondents colluded to fabricate this second version of his statement so as to cover up his complaints of discrimination.
- 3.33 The Respondents disagree. Ms Robinson said that when she first received the Claimant's statement of 19 September 2017 he did not indicate that he consented to its being sent to the First Respondent. She tried to get hold of him to find out if he did consent. When she spoke to him he was in a hurry and unable to talk. He told her he would call her back. It was not until 2 October 2017 that she got hold of him. At that stage he was not sure about his statement and wanted her advice. She told him she could not advise him. Although it was not the Second Respondent's policy, eventually she agreed to go through the statement with him over the phone and type his amendments. She did so. She went through the statement paragraph by paragraph, with the Claimant telling her what to write and her typing it then reading it back to him. He agreed every word. He agreed that the

date on the document should be 20 September 2017 and he agreed that it should be signed off by Ms Robinson typing his name. She said that she put the Claimant on speakerphone so that she could type and that her colleague, Ms Price, overheard the whole thing. Ms Price gave evidence confirming Ms Robinson's account.

- 3.34 The First Respondent's case is that it had no idea a second version of the statement existed until 27 October 2017. Ms Tostevin in HR had become involved because the Claimant had by then initiated the early conciliation process through ACAS. That started on 10 October 2017. Ms Tostevin sought information about the case internally and was provided with it by Ms Hoskins. As a result, by 20 October 2017 she had a copy of the second version of the statement, dated 20 September 2017, which had been provided by the Second Respondent. On 27 October 2017 the Claimant's trade union representative, Mr Sellars, came to see her. During their discussion it became apparent that they had copies of different versions of the Claimant's statement. Ms Tostevin took a copy of Mr Sellars's version. She saw references to discrimination. She emailed Mr Sellars to confirm that the two versions were different and she also emailed Ms Hoskins and then spoke to her on Monday, 30 October 2017. The same day she emailed the Claimant to say that she was aware that he was awaiting the outcome of a decision as to whether the Trust would be able to book him for future shifts. She said that last Friday she had received a copy of a statement he had sent to his trade union from Mr Sellars. She said that it was different from the one he had provided to the agency in early October and explained that to ensure the First Respondent considered all the points he raised the chief nurse team would need some further time to look into this. Mr Sellars emailed her the same day to say that because the Claimant was a member of the Hull branch of the union they would be dealing with it. Ms Tostevin did not hear anything further from the trade union. She met Ms Joy to try to establish why there were two versions of the statement.
- 3.35 Ms Joy emailed Ms Robinson on 1 November 2017 to say that the First Respondent had found out that the Claimant provided a statement on 19 September 2017 to his union representative which was different from the statement received from the Second Respondent on 3 October 2017. Ms Joy asked if Ms Robinson was aware of the statement that was produced on 19 September 2017 and asked for confirmation about how the statement was taken. Ms Robinson replied on 1 November 2017. She said she had just spoken to the Claimant and that he was not aware of any other statement apart from the one he had sent to them. She had transferred the initial statement the Claimant sent to her to another document with the shifts on and the Second Respondent's logo and had forwarded it to the First Respondent. She said that the one that was sent to her was the Claimant's compressed statement and that he was not aware of any other. Ms Joy replied the same day asking Ms Robinson to share the original statement provided by the Claimant or to confirm that she had not omitted any of his words when she transferred it over. She asked for clarification that the Claimant was happy with the statement she sent across. Ms Robinson then replied to say that the Claimant was aware they had moved the statement to another document as he was on the phone to her. She said that she read through it and he was happy for her to send it over. Ms Joy persisted, pointing out that the original statement provided to the trade union referred to discrimination whereas the version provided by the Second Respondent did not. Because of the seriousness of that allegation

they needed to understand whether this information was in the original statement provided by the Claimant.

- 3.36 The next email was from Mr Goodchild at the Second Respondent to Ms Joy. Mr Goodchild said that he had spoken to Ms Robinson. She had explained that when the Claimant provided his initial statement she contacted him to confirm that he was happy with it and that he gave authority for it to be forwarded to the First Respondent. During their conversation the Claimant was seeking Ms Robinson's advice. Ms Robinson said that she could not advise the Claimant but asked if this was definitely the action he wanted to take. At some stage he asked if she could help him amend the statement which she did. The change of statement was completely driven by the Claimant and that was the statement they sent to the First Respondent. Mr Goodchild concluded, "It now appears he has had a change of heart and has decided to take the matter further. I have requested our IT manager to search our server for such emails."
- 3.37 Ms Tostevin said that she asked Ms Joy to check whether there was any Datix entry detailing an assault on the Claimant. There was no such entry but there was an entry indicating that the patient in question had had a fall.
- 3.38 Ms Tostevin was absolutely clear in giving her evidence that she had not been sent the statement as originally produced by the Claimant. She and the First Respondent were wholly unaware of its existence until 27 October 2017 when she saw the version in Mr Sellars's possession. She then took steps to understand why there were two versions.
- 3.39 The Tribunal had no hesitation in finding that there was no collusion between the Respondents to fabricate the Claimant's statement, remove his complaints of discrimination or cover them up.
- 3.40 As far as the Second Respondent was concerned, Ms Robinson's evidence was not entirely consistent. For example, in her oral evidence she said that she did not forward the Claimant's 19 September 2017 statement to the First Respondent because the Claimant had not indicated that he consented to that. In her witness statement she had referred to needing the Claimant's consent at a later stage in the chronology. However, the Tribunal accepted that Ms Robinson went through the Claimant's statement with him and amended it paragraph by paragraph on the phone, reading it back to him and obtaining his approval to the contents. Her evidence about that was supported by Ms Price. In cross-examination Ms Robinson and Ms Price were asked how long the telephone conversation had lasted. Their estimates were not precisely the same, but were broadly similar. The Tribunal did not consider that the slight difference undermined their evidence about the nature or content of the conversation. Further, Ms Robinson was aware that the original statement had been copied to the Claimant's trade union, because he was at pains to emphasise that to her. She knew that there was a separate copy of it already in the possession of third party.
- 3.41 We have referred above to Ms Robinson's emails to Ms Joy when Ms Joy asked about the two statements. Ms Robinson's emails did not initially give a full or frank explanation. Evidently Mr Goodchild then became involved. It was clear from her oral evidence that Ms Robinson realised that she had not acted in accordance with

the Second Respondent's internal policy by making amendments for the Claimant and not sending them to him for approval. She discussed this with her line manager, Mr Goodchild, after the First Respondent started asking questions. When she did so Mr Goodchild told her that she must send the Claimant a copy of the version she had produced and she did so. That was sent on 7 November 2017 in an email in which Ms Robinson said that she was attaching a "copy of your amended statement as instructed by yourself verbally on the phone." It seemed to the Tribunal that to some extent Ms Robinson was uncomfortable because she knew she had acted in breach of policy and had been found out. She acknowledged as much and apologised in her oral evidence. That accounts for the content of her initial responses to Ms Joy. However, she repeatedly said in oral evidence that she had made the changes to the statement because of her relationship with the Claimant and out of goodwill. It was clear that she had struggled to get hold of the Claimant, and no doubt once she had got hold of him she was anxious to have the statement finalised. While Ms Robinson acted in breach of the Second Respondent's policy, the Tribunal was entirely satisfied that she had not simply invented a second version of the statement. She had been through it with the Claimant over the phone and amended it with his input. The Tribunal noted that the Claimant's response to the patient complaints seemed rather clearer in Ms Robinson's edited version.

- 3.42 The Tribunal wanted to understand how the references to discrimination came to be removed in the second version. Ms Robinson said that the Claimant was worried that a complaint of discrimination might affect his working at the First Respondent. She said that she did advise him, "if that's how he felt maybe add it in." The Tribunal had no doubt that there was some discussion about whether the Claimant's prospects with the First Respondent would be affected if he pursued a complaint of discrimination. That seems to be reflected in Mr Goodchild's email. It is not clear who first raised the concern. It may have been Ms Robinson and that may be why she wanted to speak to the Claimant before forwarding his initial statement to the Second Respondent. But the Tribunal was satisfied that there was a discussion about this between the Claimant and Ms Robinson, the outcome of which was an agreement to remove the reference to discrimination from the Claimant's response to the patient complaints.
- 3.43 The Claimant placed significance on the last sentence in Mr Goodchild's email, indicating that he had requested the IT manager to search for emails and the fact that no emails were forwarded. However, Ms Robinson's evidence was that the changes to the statement were done by telephone not by email. Mr Goodchild's email did not say that there were emails, only that he would ask for a search. The fact that none were subsequently sent did not affect the Tribunal's view.
- 3.44 As for the First Respondent, Ms Tostevin's account was wholly consistent with the contemporaneous documents, including emails to Mr Sellars, the Second Respondent, the Claimant and internal emails. The only possible finding is that the Second Respondent was unaware that there were two versions of the Claimant's statement until 27 October 2017 when persistent attempts were made to find out why there were two versions. There was no collusion and no fabrication.

- 3.45 Far from the First Respondent inventing complaints in response to complaints of discrimination from the Claimant, it was the other way round. The Claimant's complaints were made in response to the patient complaints about him.
- 3.46 Meanwhile, Ms Hoskins had continued to deal with those initial patient complaints. When she received the Claimant's statement (as provided by Ms Robinson) on 5 October 2017 she asked Ms Joy to obtain a statement from Ms Oliver, to whom the Claimant had referred. She also asked Ms Joy to look into the allegation of assault. Ms Oliver provided a statement on 14 October 2017. She was a bank nurse on Ward 28 on 3 September 2017. Her statement was broadly supportive of the Claimant. She gave explanations for some of the matters that had been raised. She did not see others.
- 3.47 Ms Hoskins also obtained a statement from Ms Molero on 26 October 2017. She (wrongly) said that she was the only nurse on AMB ward on 1 September 2017. (Ms Molero said the same in her witness statement but corrected it in her oral evidence. She explained that she had done a number of shifts and had been confused with a different occasion when Ms Milne had been covering the AMU. She had seen the rota for the night in question and accepted that she was not the only nurse on duty). In her email to Ms Hoskins, Ms Molero went on to say that she remembered a bank HCA doing one-to-one observations of a patient. No concern about a physical assault was raised by anyone.
- 3.48 As we have indicated, on 27 October 2017 Ms Hoskins learned from Ms Tostevin about the second version of the Claimant's statement. Ms Cambridge provided a statement on 15 November 2017 saying that she could not help. Ms Young provided one on 25 November 2017. She said that buzzers were not ignored and that the work had been divided up between the HCAs. She said that breaks were dealt with by the nurse in charge. Ms Hoskins checked the Datix entries and found an entry relating to a fall but nothing else.
- 3.49 The Claimant put in his ET1 on 15 November 2017. There was then something of a gap. Ms Hoskins explained that legal advice was taken and the investigation was put on hold at that stage. At the end of February 2018 following legal advice the investigation re-started. Ms Joy asked Ms Allen to comment on the Claimant's 20 September 2017 statement (as provided by Ms Robinson). Ms Allen did so. Some of her comments agreed with what Ms Oliver said or supported the Claimant's account. Ms Hoskins then requested more information about the allegation that the Claimant spent 30 minutes in the patients' toilet and the allegation that he was rude. On 2 March 2018 Ms Allen replied. She said that the patients had corroborated each other. One of them in particular had been there a long time and was not one to complain but had felt she had to speak up.
- 3.50 On 2 March 2018 Ms Hoskins concluded her consideration of the complaints. She decided that the Claimant had not demonstrated the First Respondent's values and determined that there should be an indefinite block preventing him from being given shifts at the First Respondent. She explained in evidence that on balance she took the view that the original patient complaints were credible whereas the Claimant's complaint was not. There was no report of an assault by the Claimant although there may have been an issue with his break on one night. Ms Oliver had

not been in the room the whole time and the patients had. Ms Hoskins therefore found on balance that the Claimant had not upheld Trust values.

- 3.51 Ms Hoskins did not investigate the Claimant's complaint of discrimination. That was put on hold when the ET1 came in and legal advice was taken. There was an understanding that the Tribunal would be considering that matter. Ms Hoskins was asked in cross-examination why she had relied on the Claimant's edited statement rather than the original he had provided. She said that the original did not necessarily change her view on the patients' experience. The Tribunal could understand that: the response to the patient complaints in the Claimant's statement was separate from the part in which he complained about Ward 28. Ms Hoskins explained that she did not follow the First Respondent's complaints procedure because the Claimant was an agency worker and that procedure was not applicable. She would do the same with any agency worker. At the time there was not a standard form and an email from Ms Allen was enough. Ms Hoskins said that she did not apply the ACAS Code of Practice on Disciplinary and Grievance Procedures because that applied to employers and employees. The Tribunal could understand that the Claimant wanted more direct involvement in the investigation. However we could equally understand that the First Respondent is a public body that might be reluctant to embark on a more lengthy and expensive process if that were not required.
- 3.52 Ms Hoskins gave clear evidence that nothing she did was because of the Claimant's race or because he had made a complaint of discrimination.
- 3.53 Strictly speaking the claims before the Tribunal did not include a complaint about Ms Hoskins's decision to impose an indefinite block on the Claimant. However, we heard evidence about this on all sides and the Claimant cross-examined Ms Hoskins about it. In those circumstances for completeness we record that we accepted Ms Hoskins evidence. Her investigation was put on hold as a result of legal advice and was restarted for the same reason. She reached a decision on the patient complaints on the basis of all the written material before her and on balance she decided that the patient complaints were credible. That was her genuine view and it had nothing to do with the Claimant's race or any complaint of discrimination he might have brought.

Legal Principles

- 4.1 Claims of discrimination are governed by the Equality Act 2010, s 4 of which provides that race is a protected characteristic. Discrimination and victimisation in employment are prohibited by s 39 of the Equality Act 2010 and harassment in employment is prohibited by s 40. Discrimination, harassment and victimisation by a principal against a contract worker are prohibited by s 41 Equality Act 2010. Turning to the specific prohibited conduct relevant to these claims, direct discrimination is governed by s 13 of the Equality Act 2010, which provides, so far as material:

13 Direct discrimination

- (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

...

4.2 Harassment is governed by s 26 of the Equality Act 2010, which provides, so far as material:

26 Harassment

- (1) A person (A) harasses another (B) if –
 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of –
 - (i) violating B’s dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

...
(5) The relevant protected characteristics are –

...
race;

... .

4.3 Victimization is dealt with by s 27 of the Equality Act 2010, which provides, so far as material:

27 Victimization

(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

- (a) B does a protected act, or
- (b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act -

- ...
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

...

4.4 The burden of proof is dealt with by s 136 of the Equality Act 2010. The Court of Appeal in *Igen Ltd v Wong* [2005] ICR 931 gave authoritative guidance as to the application of the equivalent burden of proof provisions under the Sex Discrimination Act 1975. That guidance remains applicable: see *Ayodele v Citylink Ltd* [2017] EWCA Civ 1913. The Tribunal had regard to it.

4.5 The guidance in *Igen* was expressly approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054. However, as the Supreme Court made clear in *Hewage*, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other: *Hewage* at para 32.

4.6 Under s 13, direct discrimination arises where (1) an employer treats a person less favourably than it treats or would treat others and (2) the difference in treatment is because of a protected characteristic. In answering the first question the Tribunal must consider whether the employee was treated less favourably than an actual or hypothetical comparator whose circumstances were not materially different. The second question entails asking why the employee received less favourable treatment. Was it because of a protected characteristic or was it for some other

reason. It is not always necessary to answer the first and second questions in that order. In many cases, particularly where there is not an actual comparator, it is preferable to answer the second question, the “reason why” question, first. If the answer to that question is that the less favourable treatment was on a proscribed ground, then there will usually be no difficulty in deciding whether the employee was treated less favourably than others would have been.

Application of the law to the facts

5.1 Against the detailed findings of fact set out above, the Tribunal turns to the issues in this case. We set out our reasons briefly because for the most part they follow inevitably from the findings of fact for which reasons have been given.

Direct race discrimination

5.2 We deal below with each allegation in turn, considering both whether the treatment of which the Claimant complains took place and, if it did, whether it was less favourable treatment of him because of race.

5.2.1 Ms Penny did not tell the Claimant on 1 September 2017 that he could not go on his break. She told him that he needed to go to AMB Ward. Breaks were not her responsibility. Even if the effect of telling the Claimant that he had to go to AMB Ward was that he could not take his break at that time the Tribunal accepted Ms Penny’s evidence as a matter of fact that this was nothing to do with the Claimant’s race.

5.2.2 The Claimant was not sent to AMB Ward by Ms Penny. It was Ms Mulenga’s decision that he should go, because he was an agency HCA. The Claimant did not suggest that Ms Mulenga treated him less favourably because of race. In any event, the Tribunal accepted her evidence about why she chose him to go. It was because he was an agency HCA and had nothing to do with his race.

5.2.3 There were not white staff already present on AMB Ward available to do the one-to-one observation. For the reasons set out in the findings of fact, the Tribunal accepted that AMB Ward was busy and needed extra help. That is why Ms Milne asked for an extra HCA. Doing one-to-one observation of a particular patient was an appropriate job for an agency HCA.

5.2.4 The Claimant was given a handover by Ms Milne, in the sense that she took him to the patient and explained what needed doing. It is not clear whether she said that the Claimant might be aggressive. In any event the Tribunal accepted as a matter of fact that Ms Milne did not deliberately fail to tell the Claimant that this was a difficult patient with a risk of violent because he was black. The Claimant’s race had nothing to do with Ms Milne’s treatment of him.

5.2.5 The Claimant was required to observe the patient on his own because that was Ms Milne’s professional assessment of what was required. Other staff had observed the patient one-to-one before the Claimant arrived. There was no less favourable treatment and this had nothing whatsoever to do with the Claimant’s race.

- 5.2.6 The Claimant was not physically assaulted or racially abused by the patient. In any event, there were not staff outside the curtain laughing, commenting or failing to assist the Claimant.
- 5.2.7 The Claimant did not complain to the senior nurse about being asked to carry out the duty or about staff laughing.
- 5.2.8 Ms Penny did not deliberately send the Claimant to AMB Ward in order to endanger him as a black employee because this was a potentially aggressive patient. It was Ms Mulenga who decided that the Claimant should go to AMB Ward and she did so because he was an agency HCA rather than one of the two substantive HCAs on Ward 28.
- 5.2.9 Ms Young and Ms Cambridge did not treat the Claimant like a slave, ask him to carry out duties they could and should have carried out or speak to him in a raised voice when asking him to carry out work.
- 5.2.10 Ms Cambridge and Ms Young may on occasions have asked the Claimant to deal with the patient who required barrier nursing. However, they did so because they were busy and not because they would not care for the patient themselves. The patient had been on the ward sometime and all the HCAs were involved in caring for her. To the extent that they asked the Claimant to attend the patient, this was nothing to do with the Claimant's race.
- 5.2.11 The Claimant did not report to the ward sister on Ward 28 that he had been subjected to race discrimination by being sent to AMB Ward. The Claimant did subsequently face complaints about his own conduct or behaviour but that was because such complaints had been raised by patients.
- 5.2.12 The Respondents did not collude to fabricate the Claimant's response to the allegations made against him. The First Respondent was wholly unaware until 27 October 2017 that the Claimant had provided a different version of his statement to the Second Respondent from the one forwarded to it by the Second Respondent. The version sent by Ms Robinson to the First Respondent was not fabricated by her but was agreed over the phone between her and the Claimant. The Claimant agreed that his complaint of race discrimination should be omitted from the version sent to the First Respondent. There was no less favourable treatment of the Claimant because of race.
- 5.2.13 The allegations about the Claimant's conduct were not invented. Patients made complaints that were reported to Ms Allen. She spoke directly to the patients and then passed the complaints on to Ms Joy.
- 5.2.14 The First Respondent did cancel the Claimant's shifts and stop calling on the Second Respondent to provide the Claimant's services to it. However, that is because serious concerns had been raised by the patients and Ms Hoskins considered it appropriate to cancel the Claimant's shifts until they had been investigated. There was no less favourable treatment and this had nothing to do with the Claimant's race.

Harassment

- 5.3 For the reasons set out in the findings of fact above, the Tribunal found that the staff on AMB Ward did not engage in unwanted conduct related to race by laughing and commenting that the patient had "started again". Indeed, the Claimant had not

been racially abused or physically assaulted by the patient on that night shift. Staff did not laugh, comment or fail to assist the Claimant.

Victimisation

- 5.4 The Claimant did not complain to the ward sister in Ward 28 on 1 September 2017 that he had been subjected to race discrimination. However, he did complain of race discrimination in his original response to the patient complaints as sent to Ms Robinson. That was a protected act.
- 5.5 However, neither Respondent subjected him to a detriment because he did so:
- 5.5.1 The Respondents did not as a matter of fact collude to fabricate his response to the allegations against him. The First Respondent was wholly unaware of the original version of the statement until 27 October 2017. Changes were made by Ms Robinson at the Second Respondent but those were done with the Claimant's knowledge and agreement.
- 5.5.2 The First Respondent did not invent allegations against the Claimant. The allegations arose from genuine patient complaints.
- 5.5.3 The First Respondent did cancel the Claimant's shifts, but that was not because he had made a complaint of discrimination. The protected act that took place occurred after the Claimant's shifts had been cancelled. The shifts were cancelled because serious concerns arose from the patient complaints and it was appropriate to cancel the Claimant's shifts until those concerns could be investigated.
- 5.6 For these reasons, therefore, none of the Claimant's complaints of discrimination, harassment or victimisation succeeds.

Employment Judge Davies

6 June 2018

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