



EMPLOYMENT TRIBUNALS

Claimant:
Mr M Shaba

v

Respondent:
Oxford University Hospital NHS
Foundation Trust

Heard at: Reading

On: 18, 19 and 20 March 2019

Before: Employment Judge Gumbiti-Zimuto
Members: Mrs CM Baggs and Ms HT Edwards

Appearances

For the Claimant: In person

For the Respondent: Mrs H Winstone of Counsel

JUDGMENT

1. The claimant's application for a postponement is refused.
2. The claimant's application to recuse the Employment Judge from considering his case is refused.
3. The claimant's complaints of direct race discrimination and harassment related to race made in claim number 3325723/2017 have been presented out of time and the employment tribunal does not have jurisdiction to consider the claims. It is not just and equitable to extend the time for presentation of the claims.
4. The claimant's complaints of direct race discrimination, harassment related to race and victimisation made in claim number 334336/2018 are not well founded and are dismissed.
5. The claimant's complaint about holiday pay is not well founded and is dismissed.

REASONS

Application for postponement

1. The claimant, Mr Martin Shaba, has made an application for a postponement of this hearing. The basis of his application for a

postponement is that he is not well and is unable to conduct the proceedings today.

2. In considering the application we have had regard to the Presidential Guidance which was issued on 4 December 2013. We have regard to the overriding objective in considering the application. We remind ourselves that the overriding objective requires us to deal with the case in a way which seeks to do justice to the parties: ensuring that the parties are on an equal footing, that cases are dealt with in a way which is proportionate to the complexity and importance of the issues, that we avoid unnecessary formality and have flexibility in the proceedings, that we avoid delays as far as is compatible with the proper consideration of the issues and that we have regard to the saving of expense.
3. Where there is an application to postpone based on medical grounds and medical evidence is supplied, the Presidential Guidance says there should be a statement from the medical practitioner that in their opinion, the applicant is unfit to attend a hearing, state the prognosis of the condition, and give an indication of when that state of affairs may cease.
4. For the purposes of today's application, what we have is a letter which is dated today's date from Dr Holt of Donnington Health Centre who provides a short note stating:

"This patient is not fit to attend and participate in the Employment Tribunal beginning today, 18 March, until 26 March. The reasons are that he is on medication for depression and pain and he has outstanding appointments regarding injuries sustained in April 2018".

5. We note that on the 25 February 2019 the claimant provided the Tribunal with a letter from his GP stating that he was seen on 22 February 2019 and the doctor understood that his employment tribunal case was due to start today and then stated that:

"He [the claimant] is currently feeling overwhelmed with physical and mental health symptoms. He is awaiting treatment from the orthopaedic service for pain to his left upper limb. There is also ongoing back pain. He is under physiotherapy review from musculoskeletal pains.

He has been seeing Talking Space Plus because of his mental health symptoms of low mood and anxiety.

The mental health symptoms have now become so severe, that he has been referred to the Community Health Team at the Warneford Hospital. He awaits their assessment.

Because of the accumulation of these mental and physical health problems, I would be grateful if the tribunal could be deferred to such time as his symptoms are alleviated sufficiently for him to engage in the Court process".

6. The claimant's application for a postponement was based on that letter and also the claimant's letter of 1 March 2019 was considered by Employment Judge Vowles on 15 March 2019 who refused the postponement application.
7. Today we have to consider whether we should grant a postponement on the basis of the information before us. We note that nothing has been added today to what has previously been considered by the Tribunal.
8. Today the claimant is saying that he wants to pursue this case but because he suffers from depression, for which he is taking medication, and because he has a number of appointments for treatment which are due to take place tomorrow (19 March 2019) and in July that we should postpone the case.
9. Any postponement would not simply be until July. The business of the employment tribunal is such that if this case was postponed today, it would not be possible to relist it, without giving this case unfair priority over other cases, before March 2020, it may not be possible to relist the case until April or May 2020. With that in mind, we have to consider this postponement application which is objected to by the respondent.
10. The respondent's objections were originally set out in a letter dated 10 March 2019. The claimant's postponement application dealt with matters going beyond simple medical grounds. The respondent, in resisting the claimant's application, stated that the claimant has not produced clear evidence explaining the nature of the health condition concerned and why it precludes his attendance. There is no statement from a medical practitioner stating that in their opinion the claimant is unfit to attend a hearing. There is a description of low mood and anxiety. There is no prognosis for any alleged condition explained. The employment tribunal is not told when the claimant might be fit to attend. The claimant is clearly able to take steps in the litigation, write complex and lengthy letters advancing his position. This is now a very long running matter, the respondent has eight witnesses warned to attend the hearing and has incurred the cost of instructing Counsel. The respondent says that it would not be proportionate or in the interests of justice to postpone based on the current evidence.
11. The first thing that we should make clear is that we accept that the claimant is ill. We accept that he is ill in circumstances where according to his own explanation he has been ill for a long time and certainly appears to have been ill throughout the existence of these proceedings suffering from depression.
12. We take at face value the comments which have been made by the claimant's GP. However, the criticisms which are made by the respondent that there is a lack of detailed explanation of the nature of the claimant's health condition insofar as it impedes his ability to prepare for the hearing

and lack of a prognosis we think are points which are well made. It should be noted that the laconic note provided from the claimant's GP today says he is not fit to attend but he has attended. It says he cannot participate in the employment tribunal – he has participated and has made this renewed application for a postponement and responded to submissions from the respondent in opposition to his application. He has been able to make a passionate and forcefully argued submission in responding to the respondent's position. The GP's note goes on to point out that the claimant is suffering from depression and pain; that he has outstanding appointments regarding injuries sustained in April 2018, something which the claimant has explained to us in quite graphic detail today. For the purposes of this application we accept at face value that the claimant is suffering from pain as a result of injuries that he has sustained. We note that the claimant lays the blame for his condition in that regard at the door of the respondent which he says has failed to provide him with the treatment he requires. The respondent denies this.

13. The Tribunal can exercise its power to conduct its own proceedings in a way that is in accordance with the overriding objective in order to do justice to the parties, making adjustments to its procedure. For example, by giving extra breaks, changing the times we sit to assist the claimant or taking some other steps required by the claimant.
14. We also take into account the fact that the claimant has today been able to engage fully with the issues in presenting the postponement application that is before us. He was able to articulate forcefully his application for an adjournment.
15. It is in our view significant that there is no evidence of prognosis, there is no evidence that the claimant will be any better in July if this case were to be postponed until July. In practical terms as already indicated, if the case is not given preferential treatment, it will not be listed until after March of next year. On the basis of the material before us there is nothing to indicate that anything will be different then.
16. We have regard to the background in this case. This is a case which involves allegations going back to 2016. If this case is postponed until 2020, then it will be approaching four years after some of the matters that are in contention between the parties occurred. We also take into account that throughout the time this case has been ongoing, the claimant has, according to his own account, been suffering from depression and low mood and has been taking medication. We cannot ignore the way that the case has been conducted and without doing a detailed analysis of all that has taken place in the case, we note the way that the claimant was able to deal with the postponement application in his letter of 1 March 2019; we also note the way that the claimant was able to articulate matters in correspondence with the respondent dated 13 February 2019; we note the way that the claimant was able to deal with a number of points relating to the conduct of this case and applications relating to matters which are pertinent to the way that the case could be presented in a letter to Judge

Vowles which is dated 10 January 2019. All of those matters indicate to us that the claimant is able to argue his points in a clear, coherent and logical way notwithstanding any medical impairment.

17. We recognise as we have already said that he suffers from depression and is on medication but if we set that against the way that the case has been conducted, we can see that it has not affected him to such an extent that he is unable to properly conduct these proceedings.
18. Taking all those matters into account and going back to the overriding objective, we consider that the complexity of the case is such that going ahead today would not disadvantage the claimant. We think it would be proportionate to do so because it would mean that this long running case would begin to reach its conclusion. We have already pointed out that we have the power to adjust our own proceedings and avoid formality and allow for flexibility in the conduct of the proceedings. Continuing with the case would avoid delay. There has been no indication that we would not be able to give proper consideration to the issues that are in dispute in the parties as a result of proceeding today. The only question is concerning the claimant's illness and we have regard to the points which have been made by the respondent in relation to the expense of postponing the case where the matter would have to be relisted next year and the respondent has already incurred Counsel's fees to date.
19. For the avoidance of doubt, that last factor relating to instructing counsel in its defence is a factor we take into account but it is not a factor which we attach any significant store by, recognising as we do the very different financial resources of the respondent and the claimant.
20. Having regard to all the circumstances of this case we consider that the case ought to proceed.

Application to recuse the Employment Judge

21. The Tribunal having announced its decision on the postponement application informed the parties that the matter would proceed on the following day, to start at 1.00 pm. This start time would allow the claimant to attend a supposed medical appointment at the John Radcliffe Hospital in Oxford. (The respondent was unaware of the claimant having any appointment at the John Radcliffe hospital as stated.)
22. There then followed an exchange during which the claimant asked the Employment Judge if he was from Zimbabwe and then proceeded to tell the Tribunal that he had a previous case at Reading Employment Tribunal which was heard by the Employment Judge in 2010. The claimant was asked to state who the parties were in the 2010 case. The claimant was either unable or unwilling to identify the name of the respondent. Later enquires made by the Employment Judge revealed that the hearing of the case referred to took place on 1 April 2011.

23. In objecting to the Employment Judge, the claimant stated: “A Zimbabwean Judge considering a Zimbabwean case twice is not fair.” The claimant then stated that he needed to leave and walked out of the tribunal hearing room. As it was approaching 1.00pm the Tribunal adjourned until 2.00pm.
24. The Employment Judge’s enquiries found that on 1 April 2011, he heard a case involving Mr M Shaba and Oxfordshire County and Voluntary Action. The case number was 2704646/2010. The claimant was in person, the respondent was represented by Counsel, Mr J Michen. The Judgment was that the claimant’s complaint of breach of contract is not well founded and is dismissed. The claim had two parts. The first part concerned the provision of a reference, the claimant complained that the content of the reference was such as to amount to a breach of contract. The second part of the claim concerned the procedure which the respondent dealt with him in relation to a disciplinary process.
25. During the adjournment, the claimant produced a letter to the clerk to the Tribunal. When the Tribunal reconvened to sit after the adjournment the claimant remained outside the hearing room and refused to re-enter.
26. The letter reads as follows:

“Dear Sirs

I am suffering from severe headaches and pains and I am depressed I am going home to take my medication.

Judge Gumbiti:

- (1) Judge Gumbiti is a Zimbabwean and I am a Zimbabwean.*
- (2) My sister was married to the Gumbiti family and she divorced two years ago.*
- (3) I think it is a conflict of interest for a Zimbabwean Judge to deliberate a case involving a Zimbabwean at Reading.*
- (4) Judge Gumbiti deliberated an employment tribunal case about me in 2010-2011.*

Thank you

Martin Shaba”

27. The content of the claimant’s letter was made known to the respondent. The respondent objected to the claimant’s application for the Employment Judge to recuse himself and we were referred to the test for bias which is set out in the well-known case of Porter v Magill and asked to consider whether a fair-minded informed observer aware of the circumstances would conclude that there was a real possibility of bias.
28. The Employment Judge had no recollection of the claimant. Even after having been able to remind himself of the claimant’s earlier case by

reading the Judgment and reasons promulgated following a hearing on 1 April 2011, the Employment Judge had no recollection of the hearing or the claimant himself.

29. We first note that the hearing involving the claimant on 1 April 2011 was almost eight years ago. However, the claimant remembered it. The claimant remembered that the Employment Judge was the Judge who had presided over his case in 2011. If the claimant had a genuine objection to the Employment Judge hearing his case, we would have expected him to raise this at the outset. This is something that he would have been aware of at the start before his application for a postponement was made or even form part of the grounds for the application. However, during the application for a postponement, the claimant made no comment at all about the previous hearing or the fact that he was dissatisfied with the fact that the Judge had previously conducted a hearing involving him or the Judge was from Zimbabwe. It was only after the unanimous decision of the Tribunal had been announced that the claimant immediately said that he wished to ask the Judge some questions and then proceeded to inform the Tribunal that there had been the hearing in “2010” and that he objected to the Judge hearing his case because he is Zimbabwean.
30. The letter produced by the claimant included a statement that reads: *“My sister was married to the Gumbiti family and she divorced two years ago”*. Whether or not this stated fact is correct, is not within the knowledge of the Tribunal. However, it is within the knowledge of the Tribunal that the Gumbiti family into which the claimant’s sister was married is not the Employment Judge’s family and to the best of the Tribunal’s knowledge has no connection whatsoever with the Employment Judge’s family. The unanimous view of the Tribunal is that the claimant more likely than not knew there was no connection between himself and the Judge even if there really was a coincidence in the Employment Judge’s name and the claimant’s sister’s ex-husband.
31. The remainder of the claimant’s letter makes two points. The first is that the Employment Judge presided over the previous case involving the claimant and secondly, the Judge is from Zimbabwe. The fact that the Judge and a party to proceedings are of the same nationality is not a reason for the Judge to recuse himself. The claimant says that there is a conflict of interest for a Zimbabwean Judge to deliberate a case involving a Zimbabwean at Reading. The Tribunal simply does not agree with this proposition. There is no basis for saying that there is a conflict of interest which has been set out by the claimant.
32. The final point that the claimant relates in his letter is that the Employment Judge deliberated on an employment tribunal case *“about me in 2010-2011”*. It is correct that the case against a former employer of the claimant was conducted by the Employment Judge. The case in itself is unremarkable. The Tribunal has had the opportunity of reviewing the Judgment and Reasons in that case and we are unable to form the view that there is a basis for the Employment Judge to recuse himself or that he

should not consider the claimant's present case with an open mind. It involves a completely different set of facts, different legal claims, a completely different employer and other than the claimant, there is no connection between the two cases.

33. The Tribunal's view is that there is no reason for the Employment Judge to recuse himself from hearing this case. The Tribunal has considered whether a well-informed observer aware of all the relevant circumstances in this case would consider that it was fair for the Employment Judge to consider the claimant's case, whether there was a real possibility of bias. We are satisfied that they would conclude that it was fair and there was no real possibility of bias. In the circumstances, we are of the view that the claimant has not established a reason why the Employment Judge should recuse himself.

The claims

34. In claim forms presented on 1 August 2017 and 29 May 2018, the claimant made a number of complaints in which he alleged that he had been the victim of direct race discrimination, harassment related to his race, and victimisation by the respondent. The respondent has defended all the claims and submits that the claims are without merit.
35. In respect of the complaints that arise in the first ET1 – claim number 3325723/2017, it is said that the complaints in that case have all been presented out of time and it is not just and equitable to extend the time for the presentation of those complaints.
36. The Day A for the purposes of the provisions of section 140B of the Equality Act 2010 in the first ET1 is 18 May 2017 and Day B is 20 July 2017. On the face of it, any complaint relating to a matter which occurred prior to 19 February 2017 has been presented outside the time limit for the presentation of complaints. The issues in dispute between the parties that the Tribunal has had to determine in this case arising in the first complaint occur in the period between 31 May and September 2016. It therefore follows that in respect of the first ET1 claim, each and every one of the claimant's complaints is potentially presented out of time. The Tribunal has therefore had to determine whether it has jurisdiction to consider the complaints made on the first ET1 claim.
37. For the avoidance of doubt, it is noted that the claimant's employment with the respondent commenced on 31 May 2016 and came to an end on 2 April 2017. The Tribunal is not dealing with any complaints of discrimination arising out of the termination of the claimant's employment.
38. It is necessary for the Tribunal to say something about the approach that we have taken in dealing with this case. Rule 47 allows the Tribunal to proceed in the absence of a party. In this case the absence is because the claimant refused to participate further in the proceedings following the refusal of the claimant's application for an adjournment.

39. The way that we have proceeded is by considering the witness statements which have been presented on behalf of the respondent and the trial bundle. All the respondent's witnesses' witness statements were signed except for the witness statement produced by Clíodhna Ghuidhir whose statement was unsigned. She was also not present at the hearing on the days that the Tribunal sat. (We understand that had the Tribunal proceeded as originally timetabled it was expected that Clíodhna Ghuidhir would at some point be available to give live evidence.) Although we have read this witness statement, we have attached limited weight to it for those reasons. All the other witnesses for the respondent attended, were present and available for questioning by the Tribunal.
40. The claimant did not produce a witness statement. In the course of the proceedings he has produced a number of documents setting out his case. We have where relevant had regard to those documents. The claimant's version of events is set out in his claim form, accompanying documents to the claim form, and other documents produced by the claimant which are contained in the trial bundle, principally:
- pages 16 – 43 (a document entitled witness statement)
 - pages 63 – 93 (further particulars provided by the claimant)
 - pages 387 – 406 (the claimant's statement in the grievance)
 - pages 118 – 122 (claimant's grounds of complaint in the second ET1).
41. We did not hear live evidence from any witness except we heard from Mr Leigh Shirley, who provided an unsworn commentary of the bodycam footage which is exhibited to his witness statement and was taken on 3 April 2018.
42. The claimant's complaints are made pursuant to sections 13, 26 and 27 of the Equality Act 2010. The claimant complains of direct race discrimination; he complains of less favourable treatment as described in the agreed list of issues (which is contained in the trial bundle at pages 99 -102) agreed at a preliminary hearing conducted by Employment Judge Vowles on 18 May 2018, and 22 October 2018.
43. In our consideration of this case, we have kept in mind the provisions which are contained at section 39(2) paragraphs (c) and (d) of the Equality Act 2010, section 40 of the Equality Act 2010, section 23(1) of the Equality Act 2010, section 108 of the Equality Act 2010 and section 136 of the Equality Act 2010.
44. We have reminded ourselves of the guidance which is contained in the case of Igen v Wong [2005] IRLR 258 and Madarassy v Nomura International [2007] IRLR 246 on the evidence and standard of proof required in proving discrimination.

45. The claimant, as previously stated, did not attend to give evidence in support of his own case, choosing not to participate in the proceedings after the Tribunal refused his application for a postponement. The respondent relied on evidence from
- Mr Leigh Shirley,
 - Ms Cliodhna Ghuidhir,
 - Ms Fiona Jane Bond,
 - Ms Faye Louise Hall,
 - Mrs Rachel Louise Collins,
 - Miss Hayley Denise Price,
 - Mrs Sandra Nicholls, and
 - Ms Suzanna Elizabeth Robinson.
46. All the witnesses (Cliodhna Ghuidhir excepted) provided signed witness statements which the Tribunal has taken into account in arriving at our decisions.

The second claim

47. In our consideration of this case, we deal first with the second claim. The second ET1 was presented on 29 May 2018. This was more than a year after the claimant's employment with the respondent came to an end. The matters giving rise to the second ET1 occurred on 3 April 2018. The claimant's complaint is that the respondent's security officers and a police officer from the Thames Valley Police applied force on the claimant, without his consent, that was not justifiable at law. The force applied was excessive and unreasonable and caused physical injury. The claimant was banned from visiting the Oxford University Hospitals except for emergency purposes (p682).
48. We considered the evidence which was produced by the respondent. The evidence given by Mr Leigh Shirley in his witness statement and the CCTV footage to which Mr Shirley provided unsworn commentary, we considered the evidence of Mrs Collins. From this evidence the Tribunal is satisfied that the claimant was subjected to touching from the security officers. This was to guide him out of the respondent's premises. There were times when he was held down by security officers holding his arms and there were times when the claimant was held down by his legs. We are satisfied that this was to stop the claimant lashing out with his arms and to stop him kicking out with his legs. The claimant was handcuffed by the police.
49. We have also seen bodycam footage showing the application of this force. It shows that the claimant was uncooperative. At one point, the claimant *"became a dead weight and went to the floor"*, the claimant used force and lashed out at security officers, the claimant was at times shouting for help and drawing attention to the incident when people were passing by. The claimant shouted at the security officers who held him that they had broken his hands, that they had broken his arms, that they had broken his elbow, and that they had broken his legs.

50. The conclusion of the Tribunal is that there was the use of force by security officers. The Tribunal considers that from the evidence that we have read, the video footage that we have seen, and the commentary given by Mr Shirley, that the force used by the security officers was appropriate to the circumstances. We further note that insofar as the bodycam footage shows the claimant's treatment once the police officers arrived the way that the claimant was handled by the security officers and police was proportionate to the circumstances.
51. We note that the claimant went to Casualty later in the day and was assessed by an A&E doctor and found to be medically fit. From the bodycam footage we have seen, the claimant did not show any signs of injury after he had been escorted outside the hospital. He is seen gesticulating with his hands, walking and talking without any apparent limitation or difficulties. It would appear that whilst the claimant had shouted that the security officers had broken his hands, arms, elbow and legs, that this is not the case as he was considered medically fit when seen later in the day by an A&E doctor. The bodycam footage does not suggest that the force applied would result in the claimant suffering from broken hands, arms, elbows or legs as he is able to walk freely, gesticulate and talk freely without showing any signs of apparent pain.
52. The conclusion of the Tribunal is that the force used by the security staff and police was appropriate and necessary in the circumstances due to the claimant's behaviour. The force used was such that it did not cause the claimant any injury at all.
53. The force used by the security officers and the police was not less favourable treatment. We are satisfied that, faced with a hypothetical comparator behaving in the way the claimant was behaving, security officers would have acted in the same way. We are not satisfied that the claimant's nationality was any part of the reasons why the security officers acted as they did.
54. Our conclusion is that the conduct complained of by the claimant as amounting to the unfavourable treatment or the less favourable treatment or the detriment in the first claim in the way that he was handled by the police and by the security officers did not occur as he claims. That complaint is not made out.
55. The second feature of the second claim is a complaint that the claimant was banned from the Oxford University Hospitals.
56. In a letter dated 3 April 2018 from the Head of Legal Services, the claimant was informed that he was banned from the Oxford University Hospitals. Part of the letter reads as follows:

"This letter is to inform you that with immediate effect, you may only have access to premises owned or controlled by Oxford University Hospitals

NHS Foundation Trust (OUHFT) for the purposes of obtaining urgent medical treatment in the Emergency Department at the John Radcliffe or Horton General Hospital.

If you attend the John Radcliffe Hospital (or any of the three hospital sites or any other premises under the management of OUHFT) and are not seeking emergency medical treatment, then the Trust security and/or the police will be called and asked to escort you from hospital premises and grounds". (p682)

57. It is important to note that the ban did not preclude the claimant from receiving emergency medical treatment or medical treatment by appointment. We note that on 11 April 2018, the claimant attended and underwent scans and x-rays and tests at the University Hospitals (p 687).
58. The reasons for the claimant's ban arise from the claimant's behaviour at the hospital on 3 April 2018. We are not satisfied this was less favourable treatment. Any comparator whose behaviour and circumstances were the same as, or similar to, the claimant would have been treated in the same way.
59. The Tribunal is further not satisfied that there is any basis to form a view that the treatment was because of the claimant's race, i.e. his nationality.
60. The claimant's description of the incident as taken from the ET1 form includes the following detail:

"At that point, they started physical pushing me towards the steps. They held my suit coat which is now torn, pushing me from the 6th floor to the 2nd floor. At the 2nd floor on my way out of the building, I asked them to allow me to come back and pick up my son that afternoon..."

I was trying to explain and request for a copy of the ban and being allowed back to pick up my son when suddenly the security officers Buddle [sic] me forced me to the floor and kept on assaulting me and dragging me out. In a few minutes, more than five security officers were all over my body, one sitting on my arm, the other on my right, one sitting on my chest and the other on my legs whilst the other was tightly holding my neck and chin and pushing my head on the floor..."

I have no doubt all this was recorded."

61. The claimant wrote to his MP, Annelise Dodds MP. In his letter to her, he included the following passage:

"They held my suit coat which is now torn pushing me from the 6th floor to the 2nd floor. At the 2nd floor on my way out of the building I asked them to allow me to come back to pick up my son that afternoon since he did not have money to board a bus back home. They told me that I could not come back and even my son would not be allowed in the hospital as well. I

then requested to see HR or even the chief executive to explain this to me or to just give me a copy of the ban. They told me that they were given the orders to force me out of the buildings and to warn me not to come back again unless for emergency purposes. I then requested for the police to help so I could get the copy of the ban and also to allow me to come back to pick up my son that afternoon. They agreed to that and they phoned the Thames Valley Police. A few minutes after this arrangement, a lady security officer appeared and she ordered me to go out of the building because I was banned from visiting the four hospitals in March via a delivered signed letter. I told her that I did not receive that letter and I requested for a copy of it and also asked to be allowed to come back later that afternoon to pick up my son who did not have money to come back home. She then ordered the other two security officers to force me out of the building. I was still trying to explain and request for a copy of the ban and being allowed back to pick up my son when suddenly the security officers forcefully bundled me forced me to the floor and kept on assaulting me and dragging me out. In a few minutes, more than five security officers were all over my body, one sitting on my left arm and the other on my right, one sitting on my chest and the other on my legs whilst the other was tightly holding my neck or chin pushing my head on the floor. I cried loudly for help but to no success.”

62. The letter to the MP is, as can be seen, in very similar terms to the complaint that the claimant makes in his ET1 claim. These documents form the claimant's basic account about the incident on 3 April 2018. The basic account given by the claimant (and much of the detail) are not an accurate description of what happened. The main inaccuracies are:
- (1) The claimant was not pushed from the 5th floor to the 2nd floor (the correct position is that the claimant went into a lift with security officers from the 6th floor to the 2nd floor – he did so willingly and no force was used at this stage, there was no physical contact).
 - (2) The security officers did not force the claimant to the floor, assault him or drag him out. There was no-one sitting on the claimant's chest (the claimant became deliberately a deadweight and went to the floor; he was held down whilst on the floor to stop him lashing out and kicking out).
63. Having read the witness statement of Mr Shirley and Mrs Collins as well as viewing the bodycam footage, it is the Tribunal's conclusion that the claimant's account is seriously defective. We consider that there are two possible likely explanations for this: (a) the claimant has deliberately chosen to lie; or (b) the claimant's ability to recall and accurately relate the events is severely impaired. In the view of the Tribunal, whichever of the two is the reason for the inaccuracy of the claimant's account, it renders the claimant an unreliable narrator of events. We contrast that with the respondent's witnesses' evidence which chimes exactly with the recording of events from the bodycam footage and the transcript of the dialogue from

the bodycam footage. The claimant's account does not match with this verifiable evidence.

64. The Tribunal's conclusion on the second claim has affected our view of the claimant's credibility.

The First claim

65. The first claim involves a number of incidents occurring between the claimant and his work colleagues. It is said that certain events and conversations took place. The events and the fact of conversations taking place in many respects is not in dispute between the parties, but what is in dispute is whether the events and conversations have been fairly and properly described by the claimant in the course of his complaints, and whether those conversations and events can properly be said to amount to direct discrimination or harassment related to race.
66. The issues to be determined in the claimant's first ET1 were set out in a document agreed between the parties and contained in the trial bundle at pages 99 - 102. The list of issues records that the respondent is an Acute NHS Teaching Hospital Trust, that the claimant is a black African male and a citizen of Zimbabwe. On 31 May 2016, the claimant commenced employment with the respondent as a medical secretary working in the Vascular Surgery Department supporting the work of its clinicians. The claimant was employed on a fixed term basis for up to a year to cover a maternity absence. The claimant contends that he was discriminated against because of his race while working in the respondent's Vascular Surgery Department and the respondent denies this.
67. On 29 September 2016, the claimant was redeployed, with his agreement, to a different role working in the respondent's ENT department and the claimant does not complain about his treatment in ENT.
68. Did the respondent discriminate against the claimant by treating him less favourably than others because of his race by reason of incidents alleged to have taken place in the respondent's Vascular Surgery Department.
69. The list of issues then sets out a number of events at paragraphs (a) through to (m). The Tribunal will deal with each of those matters individually in the paragraphs which follow.
70. The list of issues sets out an allegation of harassment which involves considering the matters set out at paragraphs (a) to (m) and asking the question whether by reason of any of those matters, if proved, the respondent's employees harassed the claimant by engaging in unwanted conduct related to race which had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

71. It is set out that the claimant makes a complaint about there being no pay in relation to untaken leave.
72. The respondent takes an issue about jurisdiction relating to claims the being presented out of time and paragraphs 5 and 6 deal with the question of remedy.
73. The Tribunal will first deal with the claimant's claim in respect of being owed pay in relation to accrued but untaken annual leave.

Holiday pay

74. The respondent produced a document (p615) which is the claimant's employee leaving form. This shows the claimant's last day of employment with the respondent as being 2 April 2017.
75. The respondent also produced a document (p616) which shows the pay advice report relating to the claimant as of 27 June 2017 and it shows the claimant's annual leave owing at the date of termination of his employment was calculated at £623.12 and that subject to deductions for NHS pension, natural insurance and tax was paid to the claimant on 27 June 2017. The money was paid into the claimant's Barclays Bank account.
76. The evidence that has been put before the Tribunal, other than the assertion made by the claimant in the claim that he is owed holiday pay of a sum which is unspecified, is evidence of the amount being ascertained up to the last date of the claimant's employment and subject to deductions being paid on 27 June 2017 in the sum of £414.70.
77. The claimant's complaint in relation to being owed pay in relation accrued but untaken leave is on the information that has been presented to us unfounded and the claim is therefore dismissed.

Direct discrimination and harassment

78. In the this section of our Judgment, we will deal with the issues as set out in the list of issues at paragraphs (a) to (m). We will deal with those complaints as allegations of direct race discrimination and also as harassment.

(a) By Ms Nicholls saying to the claimant on 31 May 2016: (i) Your president, Mr Mugabe, is a dictator; (ii) You people from abroad bring diseases like AIDS to the UK; How and why did you come to the UK?

79. In dealing with the matters here, the Tribunal refer to the claimant's witness statement as attached to the ET1 claim form. In that document, what the claimant says is that around 31 May 2016, Sandra Nicholls asked the claimant: "*Where do you come from?*". He says that he replied Zimbabwe and that she made the following remarks: "*Your president is a*

dictator”; *“You people from abroad bring diseases like AIDS to the UK”*; *“How and why did you come to the UK?”*.

80. The claimant says that as a result he felt lower than everybody else. An intruder who was not part of the team. He says he felt uncomfortable, unsafe and that he was not welcome or accepted. He says he looked around in disbelief and could see all the secretaries looking down in disbelief to him. He says he felt bad and was very ashamed of himself, surprised and humiliated as he responded to her questions. He says he felt out of place and that this knocked his confidence. The claimant says that the incident made him realise that Sandra Nicholls was willing to be violent towards him.
81. It is not disputed by the respondent that this conversation took place. What is disputed is the claimant’s report of the exchange between himself and Sandra Nicholls. Sandra Nicholls first of all takes issue with the date that the claimant says that this conversation occurred. She says that the claimant started work on 31 May 2016 and that was not the day on which this conversation took place. Her recollection is that the claimant had been working in the department a few days when the conversation took place. She says she started the conversation with the claimant by asking him about himself. She says the claimant told her that he was from Zimbabwe and that as they discussed this, there was no issue at all until she said to the claimant: *“Did you leave because of that horrible man?”*. She continues that she then said: *“Oh I can’t remember his name”* and that somebody else then said: *“Robert Mugabe”* and that Mrs Nicholls then said: *“Yes, that’s him”*. She says at that point, the claimant stared at her, raised his voice and said: *“No”* in a very commanding way. Mrs Nicholls says that she immediately felt that this had been a mistake on her part and says that the conversation ended. She says it was clear that she had said something wrong and she had thought this was because she had strayed into politics which she believes can be sensitive subject matter and also that she had said something negative about Robert Mugabe. She says that she regretted it even though her own personal view of Robert Mugabe was that he was not a good man. She states that she accepted that the claimant might disagree with that and she did not make any other comment and the conversation ended.
82. Mrs Nicholls says that during the conversation, she did not say: *“You people from abroad bring diseases like AIDS to the UK”* and she states categorically that she did not say anything like that. Her account is that the claimant has alleged that she has said things which she did not. She further states that she did not ask the claimant: *“How and why did you come to the UK?”*. The evidence of Mrs Nicholls is that the only thing that she said was the comment about Robert Mugabe.
83. Mrs Nicholls completes her evidence by saying that she has become aware of an article which was written in the Oxford Mail in which the claimant is described as somebody who has fled Zimbabwe and is shown

celebrating at a party that he organised when Robert Mugabe was removed from office.

84. The Tribunal conclude that there was clearly a comment made about former president Robert Mugabe being either a “horrible man” or as the claimant reports “dictator”. The claimant has not given evidence. There are questions about the claimant’s credibility in recalling events. We note that the use of the word “dictator” appears to have first been made considerably later than the date of the actual event itself.
85. Considering the exchange, we are not satisfied that this exchange shows that the claimant was treated less favourably by Mrs Nicholls. This appears to the Tribunal to have been a conversation that two people who are beginning to work together and getting to know each other might have; one asking the other questions about their background. Unfortunately, Mrs Nicholls appears to have said something about which the claimant had some sensitivity.
86. We are unable to reach a conclusion that there is anything connected with race in the conversation other than the mere fact that the topic of conversation was around the claimant’s nationality and the former president of the country from which he comes. We are of the view that a conversation with a person from another country may have resulted in a similar sort of question being asked by Mrs Nicholls about that individual, his country or well-known persons from that country. We are unable to conclude that there was any less favourable treatment of the claimant in relation to this conversation.
87. We have also had regard to the provisions contained in section 27(4) of the Equality Act and we are not satisfied that there has been any harassing conducted as contemplated by section 27 in the way that this discussion took place.
88. Insofar as there is a complaint that there was a comment about “*you people from abroad bring diseases like AIDS to the UK*”, the Tribunal is not satisfied on a balance of probabilities that such comments were made. The Tribunal is not satisfied, on a balance of probabilities, that it has been established that Sandra Nicholls said: “*How and why did you come to the United Kingdom?*”
89. Having regard to the matters set out in paragraph 1(a) and 2 of the list of issues, the Tribunal’s view is that there is nothing established which is less favourable treatment or unwanted conducted amounting to harassment. The claimant’s complaints of direct discrimination and harassment in this respect fail.

(b) By the respondent failing to afford proper training or support to the claimant during June 2016

90. The claimant says that when he joined the Vascular Unit, Hayley Price and Ms Cliodhna Ghuidhir advised him to ask Miss Sandra Nicholls for anything related to his work because she is a senior member of the team with a long history of experience and he says that Miss Nicholls had also done some training with her. The claimant says that after a few days, he felt that Miss Nicholls did not give him proper or enough training and she did not seem interested to explain things to his understanding.
91. Miss Hayley Price says that in the way that the respondent would with all new starters an arrangement was put in place by which the claimant had the support of a nominated colleague in order to show him how things should be done, and she says that the colleague who was assigned to support the claimant was called SG. SG had covered the role that the claimant was doing on a temporary basis before the claimant was recruited. It is said that in the initial weeks, SG sat with the claimant to provide a high level of support and then moved back to her own desk but that the claimant knew to ask her if he had any issues. It is pointed out that the claimant does not make any complaint about the support that he received from SG. Miss Price's evidence is that all members of the administration team in Vascular were helpful and supportive towards the claimant in relation to his role.
92. Miss Nicholls comments on the support provided to the claimant and what she says is that all the team were happy to support the claimant in learning the role and it is relatively easy to do that as they all work in a shared space and necessarily have to cross-cover for each other to get everything done. She says that the claimant knew that he was able to ask for help and he did so throughout his time in the Vascular Department. Miss Nicholls says that though the claimant made allegations against her, in August he was still coming to her for help on things, she always helped him and that that was how it carried on right until the claimant left. Miss Nicholls general observations are that from the outset, the claimant was struggling with the job and over time, he did not really improve. Miss Nicholls points out that there were constant problems with medical records not being obtained when they needed to be and on other occasions, the claimant would arrange to send them back to the medical records department prematurely before the necessary steps had been taken and they were still needed in the Vascular Department.
93. On the information that has been presented, the Tribunal is unable to conclude that the claimant has shown that there was a failure to afford him proper training or support during June 2016, we do not consider that this treatment has been established by the claimant.
94. There was no less favourable treatment related to the claimant's race; there was no detriment and there was no unwanted conduct which was related to the claimant's race.
- (c) *By Mrs Nicholls being threatening or aggressive to the claimant on 14 July by: (i) using a loud and ordering voice; (ii) throwing her arms*

up and down; (iii) making heavy strides back to her desk; (iv) saying she was going home; (v) by accusing the claimant of being threatening

95. The claimant's account of this incident is that on the morning of 14 July, he arrived at work at about 8 o'clock to realise that he had forgotten his smart card at home so he had to go back to pick it up. A smart card is needed in order for him to be able to carry out his work. Later, when he returned, he says that he could see Miss Nicholls making a number of visits to the coffee and tea cabinet which was behind his desk and that on one of her visits and in a loud and ordering voice, she said to him that she needed to tell Miss Price that the claimant had forgotten his smart card and that he went home and therefore had started work late that day. The claimant says that she made herself tea and coffee but she kept on coming behind him and looking at his computer screen. He says that she really made him feel uncomfortable and on her last visit, he saw her throwing her arms up and down and making heavy strides back to her desk and then she sat down on her chair and in a loud voice, said: *"Don't read your personal emails during working time"*. She said that she saw the claimant's emails, read them and she ordered him to stop it. He says she was hitting the floor hard with her feet saying these words: *"You threatened me. I am going home"*. She walked out of the office saying she was going home. The claimant says he kept quiet and struggled to do his job all day long; he did not say a word; he felt very intimidated, harassed. Abused and threatened. The claimant says that he felt harassed, intimidated and bullied and that he left the office, went to the toilet where he cried in shame.
96. Miss Nicholls deals with this in the following way. She says that the claimant came into work and said he did not have his smart card without which he could not use his computer and gain access to the Trust's systems and therefore could not do his work. The claimant went home to get his card and he was gone for a couple of hours. On his return, she noticed that he was not doing any work and that this was not just for a moment but for over an extended period of time. She says that as she moves round the office, which is very small, she could see that on the computer screen in front of him there were images which seemed like hundreds of pushbikes. Miss Nicholls says that she felt that what he was doing was wrong and was not the way that others would behave and it would mean that the rest of the team would have to do more work and so she decided to say something. She made the comment to the claimant that it would be best to look at the internet during his lunch break.
97. Miss Nicholls says that the claimant alleges that she used a loud and ordering voice towards him and that she threw her arms and made heavy strides and said that she was going home and accused him of threatening. She points out that these allegations are not contained in the email exchange that they had at the time. This email exchange is set out at page 190 and 191 of the trial bundle. She says that she would have expected him to raise this had it really been happening and when the claimant subsequently raised this incident with Clíodhna Ghuidhir on 29 July, his

concern had simply been that Miss Nicholls was intruding on him by telling him not to use his computer for personal matters except during his lunch break. Her point being that the claimant's account about this incident has changed over time. She accepts that it is perfectly possible that she was walking backwards and forwards to the place where they make tea and coffee which was where the claimant's desk was and just moving around the office, but she would not have been doing this to an excessive extent. She says it is possible that she might have started to make a cup of tea and a coffee and then been distracted by something and gone back to do it sometime later. She denies making heavy strides or throwing her arms up and she says she does not use a loud or ordering voice towards the claimant. She says in actual fact she was afraid of the claimant. She denies saying that she was leaving the office and she did not say that she was going home.

98. Miss Nicholls says that all she did say to the claimant, and did so in a perfectly calm voice, was that perhaps he should look at the internet during his lunch hour. She accepts that this was being critical of the claimant and may have been unwelcome, but she considers that it was a fair thing to say and it was to her mind amazing that having arrived late, he would then have taken more time out of work.
99. Miss Nicholls says that she does not accept that anything that she did could possibly make the claimant feel he was being threatened or abused or harassed. All that she did was raise with the claimant that he should be working and not looking at pictures of bicycles on the internet and that was a reasonable thing to take up with him.
100. There is a stark contrast between the two accounts given about this behaviour. Miss Nicholls' version of events does not suggest any matter that really needs explaining or anything that is unreasonable conduct that could be considered to be less favourable treatment, a detriment or, alternatively, conduct that is reasonably considered harassment. Considering the information before us, we note that in the contemporaneous emails, there is no mention of the use of a loud voice by Miss Nicholls; there is no complaint about the way that she spoke to the claimant. The nature of the complaint in the contemporaneous emails is what she spoke to him about. That is what he complains about at the emails contained at page 190 of the trial bundle.
101. We therefore conclude that the account given by Miss Nicholls in her witness statement is more likely to be correct than the account which is given by the claimant in his claim form and supporting documents.
102. We note that Miss Nicholls denies that she throws her arms up and down, she denies making heavy strides back to her desk, she denies saying that she was going home, and she denies accusing the claimant.
103. In view of the conclusions that we have reached about the account given by Miss Nicholls being more likely to be correct, we do not find that any of

those allegations made by the claimant in respect of paragraph (c) are made out.

104. We make a specific mention of the contemporaneous email exchange. That email exchange, considered in context, simply does not support the claimant's allegations. Insofar as the question of a threat is concerned, and the allegation that the Miss Nicholl was accused of being threatening, we refer to an email that the claimant sent at 12:18 on 14 July to Miss Nicholls, and we read one sentence from that email. The sentence is as follows:

"I wonder if expressing my feelings is a threat to your personality. I do not seek to rush to speak to Hayley or to anybody before I exhaust all necessary avenues that can help you and make me to work in a team and to respect each other. That is my philosophy."

105. This email formed part of a response to an email which was sent by Miss Nicholls to the claimant at 11:56 and that email includes the following passage. The entirety of the email reads as follows:

"I did not read your email. My eyesight is not that good. It was the bikes I saw. I apologise if all was above board so all OK. I'm a bit of a stickler for the rules and I wait til my lunch break to look at the internet. Feel free to speak to Hayley about this incident please. I hope you're not threatening me so I am happy for you to speak to Hayley on Monday about this incident. If everything we do is above board, all OK."

106. That is the context in which the question of threat arose in this exchange and the Tribunal is satisfied that there is nothing untoward in the way that Miss Nicholls raised these matters with the claimant and that there can be no suggestion that this was either threatening or aggressive on the part of Miss Nicholls. Also, it is clear that this did not relate to race. The question of the threat related to speaking to the line manager, Miss Price. It was not a matter which was related to race at all. The conclusion of the Tribunal is that there was no less favourable treatment. There was no detriment and there was no conduct which was related to race which could be considered to be harassment having regard to the requirements in section 26 of the Equality Act.

(d) By asking the claimant to track notes on Ward 6 in July 2016

107. The claimant's account is that in July 2016, he visited Ward 6 to submit a set of notes for the weekly clinic. He saw Miss Nicholls and another lady who works on the ward talking privately. The claimant says he then went back to his office and within two minutes, Miss Nicholls and the lady had gone into the office and the lady went straight to his desk holding three sets of notes and she asked him to track them in her presence pretending she did not know how to do it. The claimant says that the lady said to him that she hears that he does not know how to track notes. The claimant says he kept quiet and that later on during the day, the lady apologised for

the way that she had spoken to him and that he accepted her apologies. He says that he suspected that Miss Nicholl was behind all this.

108. Miss Nicholl does not deal with this allegation directly. What she says in her evidence is that there were constant problems with medical records. Sometimes records were not obtained when they needed to be and on other occasions, the claimant would arrange to send them back to the medical records department prematurely before the necessary steps had been taken and when they were still needed in the Vascular department.
109. The evidence produced to the Tribunal shows that there were issues about the claimant's work. The issues arose from his dealings with hospital notes and it is said that the claimant failed to process and track notes properly. In respect of these complaints about the claimant's work, which are supported by the performance improvement plan the claimant was subjected to, there is no evidence from which the Tribunal could conclude that this treatment of the claimant in relation to his work in relation to the notes on 6 July 2016 was in any sense connected with the claimant's race. There is clear evidence of action being taken which was justified by the respondent's witnesses arising from the claimant's poor performance. Issues which can be seen being addressed in the claimant's performance reviews under the performance improvement plan (p186).

(e) *By suggesting that the claimant had not properly handled medical notes on 18 and 19 July 2016*

110. The claimant's complaint is that on Monday 18 and Tuesday 19 July, Miss Nicholls and the "same lady ward 6 secretary" accused the claimant of not handing over notes in person to the pre-op assessment. The claimant says that Miss Nicholls and the lady came to his desk to tell him that they had checked with the pre-op assessment (POA) and confirmed that the claimant did not hand over the notes. The claimant says: "*The lady raised her voice to me and was telling me that it was wrong to give false information on EPR and she said this will compromise the safety of patients*". The claimant says he responded by saying that he had personally handed over the notes to the POA. The claimant continues that Miss Nicholls and the lady argued against his version and accused him of not being professional by not telling the truth. The claimant says he then went to POA to look for the notes and a colleague at POA found the notes in their cabinet and the claimant says it was therefore the colleague in POA's fault because she did not track the notes and she apologised. The claimant says that he accepted her apology, took the notes to ward 6, and handed them over to the lady. After about an hour, he says the lady came to his desk and she was very apologetic about the remarks she had made earlier. The claimant says that Miss Nicholls was behind this incident.
111. Miss Nicholls does not specifically deal with this incident on 18 and/or 19 July but what is said about the claimant is that the claimant was not wrongly accused of not handling notes properly. What is said is that there were problems with the claimant's handling of notes and insofar as there

was an issue in relation to the handling of notes, it was because the claimant had failed to deal properly with tasks that were assigned to him. The respondent relies on the evidence of Miss Nicholls that there were constant problems with medical records which included records not being obtained when they were needed.

112. As in the previous issue, it appears to the Tribunal that there were problems with the claimant's work in relation to the handling of hospital notes. This resulted in action being taken from time to time as is evidenced by the performance improvement plan and also critical comments being made to the claimant about his work. The evidence that has been adduced before the Tribunal suggests that there was justification for criticisms in relation to the way that the claimant handled patient notes and that there were genuine problems with this aspect of the claimant's performance.
113. The incidents described on 18 and 19 July have not given rise to any matter which would suggest that the claimant's race was a part of the reason why the matters turned out the way that they did in relation to this part of the case.
114. In respect of the handling of notes, there is no evidence of the claimant being subjected to less favourable treatment. There is no suggestion that any treatment that the claimant received in respect of the handling of notes was related to his race. The evidence clearly shows that the problems arose because of the claimant's poor performance in this regard.
 - (f) *By addressing an issue over confusion caused by the claimant's discussion with a patient's relative because of his pronunciation of "counselling" on 25 July 2016*
115. This point arises from an incident which the claimant says occurred on 25 July 2016 when the daughter of a patient who had had his leg amputated contacted the claimant with a view to seeking advice on how to have him referred to a counsellor. The claimant's version of events and the version of events given by Mrs Nicholls differ greatly. What the claimant says is that after his conversation with the patient's daughter, he went to speak to Miss Nicholls to seek her advice. The claimant states that he had not experienced this before so he needed advice. The claimant says that in response, Miss Nicholls raised her voice saying that his pronunciation of words is wrong and that he should say not 'cancellor' but 'counsellor'. He says that she was demonstrating with her mouth how it is pronounced, and she carried on with what she was doing. The claimant says that he felt really ashamed and humiliated and that he felt discriminated because of the tone and his communication style. When he refers to tone, we assume the claimant is referring to his tone of voice.
116. Miss Nicholls' evidence is that this incident has been misrepresented by the claimant and what actually happened is that the claimant received a telephone call from a patient's daughter and it was the claimant who asked her to get involved and he said it was to do with "*cancelling something*".

Miss Nicholls says she asked the claimant *“What does she want to cancel? Is it an outpatient appointment or a clinic appointment?”* Miss Nicholls says that the claimant then asked the patient’s daughter what it was that she wanted to cancel and it was then it became clear that the claimant thought that the patient was wanting to cancel something.

117. Miss Nicholls says that at that point it occurred to her that the patient’s daughter, whose father had an amputation, was talking about counselling which can be required in such circumstances and it was at that point that Miss Nicholls says that she then said: *“It is ‘counselling’”* and that the patient’s daughter would have to make arrangements via her father’s GP. Miss Nicholls says that all of this took place with the caller still on the phone and not, as is suggested by the claimant, after the telephone call. Miss Nicholls states that afterwards, she and the claimant briefly talked about the situation. Miss Nicholls states that she did not try and get the claimant to change his pronunciation and the claimant did not say he had taken any offence.
118. We accept the respondent’s version of events. We consider that the evidence shows that there was a mutual misunderstanding around ‘counselling’ and ‘cancelling’.
119. We consider that the version of events given by Miss Nicholls is more likely to be correct than the claimant’s account about her mocking his accent. We do not think that it is likely to be correct that in the circumstances described that Miss Nicholls would be mocking the claimant’s accent. It is not from the way that the claimant spoke that the confusion arose; it was from the way that the patient spoke which had resulted in a misunderstanding. There was a need to confirm the need for counselling following an amputation but this was misunderstood, initially by the claimant, and also by Miss Nicholls until she realised the situation to be about counselling and not cancelling. We are not satisfied that the evidence shows that there was any question of the claimant’s race coming into this incident. We do not accept the version of events given by the claimant in his witness statement that Mrs Nicholls was mocking him in the way that is suggested. Mrs Nicholls’ intervention was in order to assist the claimant and we prefer her version of events.
120. In the circumstances, we are not satisfied that the act that the claimant complains of has occurred in the way that the claimant relates. We have come to the conclusion that there is no less favourable treatment identified in respect of this incident.

(g) By Mrs Nicholls intervening in a telephone conversation between the claimant and a patient on 25 July 2016

121. The claimant makes a complaint about another event which occurred on 25 July 2016. What the claimant says about this incident is that at about 4.45pm on that date, whilst he was on a telephone call with a patient, Miss Nicholls grabbed the handset and started talking to the patient and telling

the patient that the claimant did not know what he was trying to explain to the patient. The claimant says that after her conversation with the patient, Miss Nicholls shouted at him, accusing him of wrongly tracking notes to medical records, not printing discharge summary letters and accusing him of working on a Band 4 when he is supposed to be on a Band 3. The claimant says that Miss Nicholls said a lot of things. *"She would not stop"* so he said to her: *"You have said enough. Can you please stop shouting at me?"* and then she stopped. The claimant says that as a result, he felt discriminated against, intimidated, humiliated, abused, bullied and harassed. This is one of a number of incidents which the claimant says he has an audio recording of. The claimant has never produced the audio recording in the proceedings. On a number of occasions, the claimant makes reference to having audio recordings which record confrontations of one sort or another but in no instance has he produced any recordings to support any part of the version of events that he has put forward in relation to the various matters he complains about in these proceedings.

122. Miss Nicholls agrees that on 25 July 2016, there was an occasion when she did intervene when the claimant was talking to a patient and getting nowhere with the conversation. Miss Nicholls says that her sense was that the patient was unhappy, and that the claimant was not able to help so she asked to take over the call. Miss Nicholls says that when she spoke to the patient, the patient quickly explained that he had an operation but then received nothing about follow up which he had been led to believe would be required. Miss Nicholls says she checked the patient's discharge summary form and it said that he would have a six week follow up with the consultant. The medical notes had been wrongly sent away by the claimant without the discharge being printed for the GP and without the follow up appointment being scheduled. Miss Nicholls says she was able to easily resolve this by apologising to the patient and adding him to the relevant consultant's clinic for the following Monday.
123. After the call, Miss Nicholls says that she tried to explain to the claimant that quite often, the discharge summary will give the answer and it is the first place to look, and also about the need to make sure follow up actions are dealt with before notes go away. Miss Nicholls says that she explained the need to try and solve things and not to take simple messages back to the clinicians.
124. Miss Nicholls says it is not true that she grabbed the phone and shouted at the claimant. Miss Nicholls says that the claimant created the issue. The patient missed a follow up because of an error on his part because he had not printed the discharge summary. She states that the claimant had not been prepared to try and solve matters but rather preferred to take the easy option of referring the matter to the consultant who at the time was on leave. Miss Nicholls says it was reasonable for her to talk to the claimant about this and explain how things should be handled.
125. The two versions of events are very different. However, even on the claimant's version of events, there is no basis for saying it was related to

race. However, in any event we prefer Miss Nicholls' account: she was intervening to help and assist in dealing with the patient. There is no suggestion of her acting in a discriminatory way in relation the nature and purpose of her intervention.

126. Miss Nicholls attended to give evidence. The claimant did not attend give evidence. For the reasons we have previously set out we consider the claimant an unreliable narrator of events. We are unable to conclude that the claimant's complaint about events on 25 July is made out. We do not find that there was any conduct which amounts to less favourable treatment in the way that Miss Nicholls behaved in interacting with the claimant on 25 July.

(h) By Ms Nicholls saying in July 2016 that: (i) she did not like the Vascular Consultant who is a foreigner like the claimant and that she did not want to greet the Vascular Consultant; (ii) an interview panel should bring in someone white and English and referring by her body language to the claimant.

127. The claimant's complaint here is that it was a day in July 2016 when Miss Nicholls came to his desk and told him that she did not like one of the Vascular Consultants who is "a foreigner" like the claimant. The claimant says that she said that in most cases, she does not want to greet him. The claimant says that he had observed that this was true and that she did not greet the consultant. The claimant says that he asked Miss Nicholls why she did not like him and that she said: "*He is not a good man*".
128. The claimant continues that there was a job vacancy to recruit a medical secretary in the unit advertised. The claimant overheard Miss Nicholls talking to Miss Hayley Price and that she said that the interviewers (meaning Miss Price and Cliodhna Ghuidhir) needed to bring someone who is white and English and who is not like, and using her body language indicated the claimant.
129. Cliodhna Ghuidhir produced an unsigned witness statement and she was not available to give evidence to the Tribunal. In dealing with this incident, we have not had regard to the evidence that account of this incident.
130. Miss Nicholls does deal with this in her witness statement. Her evidence is emphatic: "*This allegation is a lie*".
131. The claimant states that the Vascular Consultant referred to by the claimant is a very lovely and well-respected man who she has known for about 19 years. She states that she knows that he was born in Kenya and that he has told her about his life. She continues that he is a stickler for good organisation and he often comes into the office and asks why boxes are "here or there" and that "he will challenge junior doctors" if they are sitting in the office talking to the secretaries. She says that he is well known for liking everything to be kept in order but he gets on very well with everybody in the office. Miss Nicholls believes that the incident the

claimant is referring to may have been an occasion when the consultant came into the office and gave some instructions about how he wanted things done. She says that afterwards, there was a comment made by someone in the office about the fact that he always comes in and he tries to organise everybody. She says it was not an ill-meant comment because “*We all like him and know what he is like*”. Miss Nicholls states that she said it in a light-hearted way.

132. Miss Nicholls believes that the claimant is trying to very unfairly develop an issue out of this by misrepresenting what was said whilst having no idea about the relationship with the consultant who is much liked and well known for coming in and making sure that everyone is doing what he wants them to do including the junior doctors.
133. As regards the suggestion that the claimant said that Miss Nicholls said to Miss Price that a vacant post should be filled by someone white and English and not like the claimant, Miss Nicholls categorically denies that she ever made that remark or anything like it. She goes on: had she done so, she would have expected that she would have been challenged by Miss Price about the comments. Miss Nicholls points out that currently she is allocated to work with the consultant about whom the claimant has made these allegations.
134. In respect of this allegation, the evidence comes from Ms Nicholls who denies the allegations. The account given by the claimant is unsupported by evidence from him. We are not satisfied that this allegation has been proved and we find the denial made by Miss Nicholls convincing and credible. We accept her version of events. We therefore are unable to conclude that she had the discriminatory attitude towards the consultant which was described by the claimant and we also accept that she did not make the comments alleged by the claimant about recruiting a white member of staff.

(i) By Mrs Price on 25 September 2016: (i) Forging the claimant's name and relevant dates; and (ii) Raising her voice to the claimant.

135. The claimant's account is that on 27 September 2016, he had a meeting with Miss Price to complete a return to work form. After that, he asked if he could talk to her about emails that he had sent to her before the meeting and she agreed. He then proceeded to raise several matters affecting him and his performance at work including a PIP that he was being subjected to. Among other things that he raised was a document where his name and dates had been forged. During the discussion, the claimant says that we also talked about the diary and audio recordings of this incident and it was at this stage that Miss Price became angry, raised her voice, telling him that the meeting had to end now she walked out of the meeting in anger, leaving him in the office.

136. The claimant says that he followed her to the secretaries' office and then went straight to his desk. The claimant says he saw Miss Price picking up her bags and papers in a hurry and she walked out of the office. He says that he was shocked at her behaviour and attitude and she did not once own up to her responsibility as his line manager after he had raised these issues, some by email, others in face-to-face conversations which he recorded. No recordings or transcripts have been produced by the claimant.
137. Miss Price attended to give evidence and produced a signed witness statement on which she was ready and available to be questioned. In that statement, she puts the date of this incident as 26 September 2016 when she met with the claimant to discuss his return to work. She describes the meeting as difficult, and the claimant as aggressive and intimidating. She says that during the meeting, the claimant told her that she was destroying the team in Vascular and that he had covert recordings that he had made to "take down HR". The claimant told Miss Price that he had recorded conversations with colleagues and in particular he mentioned a recording that he made on 2 August. Miss Price's response was to tell the claimant that it was not appropriate to record colleagues. The claimant responded to that by saying that he was quite willing to "risk everything to win everything". The claimant said that if it came to it, he would say that Miss Price had told him to make these recordings. Miss Price stated that is a lie. She could not believe that he would say that. She says she became extremely upset and went to see Cliodhna Ghuidhir. She felt that the claimant was not manageable and he was not behaving in a way that she has ever encountered from a colleague before.
138. Miss Price denies that she forged the claimant's name and information about dates. What Miss Price says is that she was upset and she was really struggling to cope with the claimant. She did tell him in the meeting that it had to end. She says that she does not believe that she shouted at him although she was upset so her voice may not have been at a normal timbre or pitch. Miss Price says that she did walk out of the office but this was not because she was angry; it was because she was upset.
139. The accounts of both the claimant and Miss Price show a difficult meeting. In the meeting, the claimant refers to covert recordings of colleagues. He said he would blame Miss Price about the recordings if it came to it. We consider that this is something that is likely to make someone upset if it was said to them. We are satisfied that it is more likely than not that Miss Price is correct in what she says. We do not accept the version of events put forward by the claimant. We do not accept that there has been any less favourable treatment of the claimant. There was no forging of notes and no raising of the voice by Miss Price in anger. To the extent that her voice was not normal, we accept that this was because she was upset.
140. This complaint is not proved.

(j) Mrs Ghuidhir speaking to the claimant on 26 September 2016 following a meeting between the claimant and Ms Price after which Ms Price raised concerns about the claimant's conduct

141. On 26 September 2016, Cliodhna Ghuidhir sent an email to the claimant inviting him to a meeting. At the meeting, she raised a number of allegations which had been made by Miss Price concerning a meeting that had taken place the previous day. In that meeting, the claimant says that a number of allegations were made against him, that he had accused Miss Price of destroying the team, that the claimant was willing to use recordings that he had made to take down HR, that he threatened Miss Price. The claimant says that all these were false allegations made against him. The claimant says that Cliodhna Ghuidhir asked him if reflecting on what had happened at the meeting with Miss Price he would do things differently. The claimant says that in the meeting he requested a copy of his performance improvement plan that he had agreed with Miss Price and that had been promised to be given to him in September, but this was refused.
142. This matter is dealt with by Cliodhna Ghuidhir in her unsigned witness statement at paragraphs 65 and 66. In summary, she states that because of a complaint made by Miss Price about the way that a return to work meeting with the claimant had gone, she asked the claimant to see her, which resulted in an exchange of emails and a meeting with the claimant. Cliodhna Ghuidhir says that although the claimant has said that the matter was raised with him in order to victimise him and/or because of his race, that was not true and that what had happened was that she was calling the meeting because Miss Price had been very upset after the meeting and she had come to see Cliodhna Ghuidhir about it as her line manager, because she felt that the claimant was behaving badly and she was struggling to cope with him. Cliodhna Ghuidhir says that not raising this would have been negligent in her duty of care towards Miss Price. She says that is the reason why she raised it and not for any other reason and that anyone else in the same circumstances would have been treated in exactly the same way.
143. The Tribunal has also had an opportunity to consider the exchange of emails which gave rise to the meeting between Cliodhna Ghuidhir and the claimant, emails sent by the claimant to Cliodhna Ghuidhir and to Susan Parkinson and an email sent by Miss Price to the claimant after this meeting. It is clear from those emails that an issue had arisen as a result of the way that the meeting between the claimant and Miss Price gone. A complaint was made by Miss Price to Cliodhna Ghuidhir. The meeting between the claimant and Cliodhna Ghuidhir appears to have been relatively uncontroversial in terms of what had happened in the meeting except for one aspect of it where Cliodhna Ghuidhir does not accept that there was a refusal to give the claimant any particular documentation in relation to his performance improvement plan. She says that the claimant had been provided with it throughout. Otherwise, the claimant's account of the meeting (see p328) is largely agreed by Cliodhna Ghuidhir. The

attitude towards Miss Price is set out in an email on 29 September 2016 (see p326) which forms part of a chain of emails around this issue.

144. Having considered the contemporaneous emails, comparing the conflicting account of Cliodhna Ghuidhir with the claimant, noting that the account given by the claimant and the account given by Cliodhna Ghuidhir are both unsigned accounts which were not possible to test by questioning. We have formed the view that there was a genuine issue of dispute between employees that Cliodhna Ghuidhir as a manager had to deal with. It would have been a dereliction of her duty as a manager not to have addressed the issue.
145. Considering the way that the matter was dealt with by Cliodhna Ghuidhir, based on the claimant's account of the meeting, there is no indication that his race played any part in the way that he was treated. The actions of Cliodhna Ghuidhir appear on the face of it to have been proper management actions which cannot be criticised as being inappropriate on the face of the information that is before us. This complaint again, in our view, is one which has not been made out on the balance of probabilities.
146. We are unable to conclude that there was any less favourable treatment of the claimant in respect of the meeting that took place on 26 September. We are unable to conclude that there was any victimisation of the claimant. There was no conduct which in our view could constitute harassment.

(k) By Ms Hall on 2 August 2016: (i) raising a concern about the claimant's performance (in that she believed letters had been sent to patients without being reviewed by clinicians or that patients' records had been sent back to medical records without letters or without approved letters; (ii) being angered by the claimant's performance; (iii) charging towards the claimant; (iv) saying the claimant should leave his job; (v) saying we do not want to work with claimant; (vi) having to be restrained by colleagues; (vii) raising her voice and saying the claimant was dangerous.

147. The claimant complains about the way he was spoken to by Ms Hall on 2 August 2016 about some letters to patients. The claimant says that she spoke to him in a loud voice which attracted attention in the office.
148. The claimant says he accepted that he had made a mistake politely and calmly. The claimant says that Ms Hall raised her voice shouted at him and raised the attention of everyone in the office when she walked out of the office angry. When she returned the claimant says Ms Hall raised her voice again, shouting and accusing the claimant of editing the letters. The claimant says that Ms Hall then started charging at him, shouting at him, hitting the ground hard with her feet and pointing her fingers at him saying: "You should leave the office. You should leave the job." "I am not going to work in this office as long as you're here. You should go home. We don't want to work with you in this department."

149. The claimant says that all this is recorded. He has never produced a recording or transcript. The claimant says this was all witnessed by Cliodhna Ghuidhir and Miss Nicholls. The claimant describes Miss Nicholls as charging at him and shouting at him. The claimant describes it as “a drama in the jungle”. Ending with Miss Hall packing her bag and walking out of the office, followed by Miss Nicholls, and Miss Hall saying she won’t be back until the claimant leaves the office.
150. The claimant says that he was very intimidated, threatened, racially abused, harassed and humiliated in the presence of the manager and the team. He was reduced to crying, ashamed of himself, fearful, helpless and “really terrified”. He said after about 20 minutes, he went back to the office and started working as if nothing had happened.
151. Ms Hall made a statement in which she deals with this incident on 2 August 2016. She says she spoke to the claimant and explained the issue that rose about the letters. She says a few minutes later, the claimant called her over and asked her to explain the issue again which she did. At that point, Cliodhna Ghuidhir happened to be in their office and asked Ms Hall to tell her what had happened. The claimant left the office for a while when the claimant came back it was clear that he was very angry. Ms Hall says that he called her over to his desk and he aggressively started asking why her initials were on the letters. Ms Hall says that she became angry and she walked away. The claimant adopted a childish and sarcastic voice and said that she was a liar.
152. Ms Hall agrees that she did raise her voice towards the claimant. She says she was angry, upset and shouted in her frustration. She took her coat and bag and walked out of the office. When she went back to the office, she told the claimant that she was sorry for shouting at him. The claimant also apologised to her. She says the claimant lies when he says Miss Nicholls had to be restrained in this incident.
153. Miss Nicholls gives evidence about the 2 August. While the incident took place she did not want to be present and so she went to the office next door. She says that she left before things got heated.
154. The evidence presented to us suggests that there was a serious confrontation between the claimant and his work colleagues on 2 August. There is a significant dispute between the claimant and his colleagues as to who was at fault. In some respects the accounts are similar. We accept the account which is given by Ms Hall and we recognise that the claimant’s account may well be his perspective of the incident which, insofar as it chimes with that given by the respondent, appears to have been accepted.
155. We note that Ms Hall was willing to accept that there were aspects of her behaviour which were unacceptable, shouting at the claimant, and that she apologised. We compare that with the way that the claimant describes this incident. We note that the claimant is not recorded as accepting

responsibility to Ms Hall for any error on his part although he is recorded by others as to some extent accepting his error in relation to this incident.

156. The incident arose where two people lost their tempers and said things to each other for which they subsequently apologised. This was an office where there was developing tension involving the claimant. The way that this incident is described by all the participants does not suggest an issue of race arises.
157. The was conduct was not harassment related to race. The behaviour of Ms Hall was not a detriment because the claimant had made a complaint of discrimination. Ms Hall was not reacting to any protected act by the claimant in the way that she behaved.
158. Whilst the claimant found unacceptable the way Ms Hall behaved on this occasion, we are not satisfied that it was less favourable treatment of the claimant on the grounds of his race. Ms Hall would have behaved in the way that she did with anyone in similar circumstances she lost her temper because she was angered by the way that the claimant had responded to her when they were discussing the difficulties that had arisen with letters to patients.

(l) By Ms Cliodhna Ghuidhir, on 5 August 2016, raising with the claimant his alleged failure to deliver notes to Warin Ward where they were required and that the notes were found in the claimant's drawer

159. This complaint appears to relate to an allegation that on Friday 5 August 2016, the claimant had been required to provide some notes to Warin department staff but had failed to do so. On Tuesday 9 August, Cliodhna Ghuidhir accused the claimant of not delivering the notes to the Warin department after he had been requested to do so and she also accused him of not telling the truth about the incident.
160. Cliodhna Ghuidhir says that there was an issue around patient notes not being sent to Warin Ward by the claimant. She met the claimant for a probationary review meeting pursuant to a performance improvement plan. During the meeting, Cliodhna Ghuidhir told the claimant that his performance was not at an acceptable level; that some of his dealings with colleagues were unprofessional and that he had been antagonistic towards Ms Hall on 2 August.
161. Based on the two unsigned versions of events the conclusion of the Tribunal is that there was no less favourable treatment of the claimant. There was no detriment to the claimant. There was no conduct related to the claimant's race. Issues were raised about the claimant's performance during the course of the performance improvement review. In raising them in the way that she did, Cliodhna Ghuidhir was not discriminating against the claimant on the grounds of his race. There was no less favourable treatment.

(m) By Ms Dickerson: (i) On a day between June and September 2016 raising with the claimant concerns in relation to incorrect requests for medical records; (ii) On a day between June and September 2016 asking to see the claimant's identification when he was in the medical records library; (iii) On a day between June and September 2016 telling the claimant that his ID badge must be visible; (iv) In June 2016 telling the claimant he did not deserve his job. She would ensure he was sacked or that he did not get a reference and these allegations are false and misleading

162. This part of the claimant's complaint concerns events which in part go back to December 2015 when the claimant was working at the Trust but employed through an agency in a role which is different to the one that the claimant was employed in when the other events which this case concerned occurred.
163. As part of the claimant's grievance process, the claimant's allegations were set out in a table. The table set out allegations that the claimant made against Christine Dickerson. Part of that table appears at pages 446–448 of the trial bundle and the matters which are set out in paragraph (m) of the list of issues arise there. You have the claimant's allegations on the one side and the respondent's by Mrs Dickerson on the other. It is clear from a perusal of the pages of that document that there is no indication of the claimant's race playing any part in the issues of concern that were raised about the claimant's incorrect dealings with medical records. There is no less favourable treatment on that ground. There is no detriment in relation to that. There is no harassment related to race.
164. In respect of the claimant being asked to produce identification and have it visible. There is no indication that the claimant's race played any part in any such request. There is no detriment to the claimant in this and there is no less favourable.
165. Ms Dickerson in the investigation into the grievance denied that she told the claimant that he did not deserve his job. However, the context in which this is alleged to have been said does not arise from anything to do with race but a suggestion that the claimant was considered incapable of doing his job.
166. In the absence of the claimant attending to give evidence in support of his case and having regard to the fact that the Tribunal considers that the claimant's reporting of events in the documents he has produced is unreliable, we are unable to draw any conclusion that the claimant's race plays any part in the actions of Ms Dickerson. We note that the claimant's allegations against Ms Dickerson to the Trust made no reference to the claimant's race as a factor.
167. The complaint set out in part (m) of the list of issues in our view is not less favourable treatment of the claimant. Those allegations in our view have

not been proved. We are not satisfied that the matters complained of by the claimant occurred as he alleges. We are unable to conclude that there was detriment to the claimant and we are unable to find that there was conduct which amounts to harassment within the meaning of the Equality Act.

Time limits and jurisdiction

168. The time for presentation of the claimant's complaints had expired by the date that the claimant presented his case to the employment tribunal. The last event about which the Tribunal is concerned occurred in about September 2016. The claim form was presented on 1 August 2017. The time limit for presentation of complaints would have expired on 2 May 2017, taking into account the early conciliation provisions in this case.
169. All the complaints in the first claim are presented out of time.
170. The claimant has not attended to give evidence and in the material that has been provided to the Tribunal, there has been no explanation for why there was a failure to present the complaints within time.
171. We remind ourselves that the burden of showing that it is just and equitable to extend the time for presentation of complaints of discrimination is upon the claimant. We are unable to ascertain in respect of the matters which are put forward in the claim form a reason for the claimant's delay in presenting his claim. We note and take into account that this is a case where the claimant's employment ended on 2 April 2017 and that even a complaint about the ending of his employment would have been out of time.
172. We further take into account the fact that the claimant's claims, for the reasons that we have set out, do not have merit.
173. The conclusion of the Tribunal is that the claimant's complaints have been presented outside the time limit for the presentation of complaints. It is not just and equitable to extend time for the presentation of complaints. The complaints are therefore dismissed.
174. The conclusion of the Tribunal is that all the claimant's complaints presented in both claims 3325723/2017 and 3334336/2018 are dismissed.

Employment Judge Gumbiti-Zimuto

Date: 14 May 2019

Judgment and Reasons

Sent to the parties on: ..16.05.19.....

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For the Tribunal Office

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