



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Mackenzie

First Respondent: South Tees Hospitals NHS Foundation Trust

Second Respondent: Mr Raghieb Hanif

Heard at: Teesside Employment Tribunal

On: 10th, 11th, 12th, 13th, 14th, 17th July 2023 (deliberations: 24th July 2023)

Before: Employment Judge Sweeney
Brenda Kirby
Gerard Gallagher

Representation:

For the Claimant: Sarah Ismail, counsel

For the First Respondent: Lena Amartey, counsel

For the Second Respondent: Paul Hargreaves, solicitor

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is as follows:

1. **The complaints of harassment related to race and or religion are not well founded and are dismissed.**

REASONS

The Claimant's claims

1. By a Claim Form presented on **20 April 2022**, the Claimant brought a claim of harassment related to race and/or religion. Her claim was against her employer Trust, the First Respondent and Mr Raghieb Hanif, a porter employed by the Trust.
2. On **12 September 2022**, the Claimant applied to amend her Claim Form to add additional complaints of harassment relating to conversations between **R2 and John Seed** and **Tony Moore**. The amendment was subsequently permitted and an amended Claim Form was served setting out the additional complaints.

3. Up until **05 July 2023** the Second Respondent was unrepresented in these proceedings. On that date Newtons Solicitors came on the record.
4. The Claimant, the First Respondent and the Second Respondent shall hereafter be referred to as '**C**', '**R1**' and '**R2**' respectively. At the outset of the hearing, the Tribunal discussed the issues with all three legal representatives. It was noted by all that this was an unusual case. In straightforward terms, **C** had been accused by **R2** of race discrimination. She now accused **R2** of harassing her by: falsely and maliciously accusing her of racial discrimination both to her employer (**R1**) and to her professional body, the Nursing and Midwifery Council ('**NMC**'); spreading rumours of her suspension for making racial comments and by dishonestly and maliciously telling two other employees of **R1** that she had physically manhandled him.
5. In legal terms, **C**'s case was that:
 - 5.1 **R2** engaged in unwanted conduct related to race and/or religion and
 - 5.2 The conduct had the purpose of
 - 5.2.1 Violating her dignity or
 - 5.2.2 Creating an intimidating, hostile, degrading, humiliating or offensive environment for her.
 - 5.2.3 **R2** was liable to **C** for his own acts of harassment.
 - 5.2.4 **R1** was liable to **C** for **R2**'s acts of harassment in that they were done in the course of employment
6. Thus, the things complained of as acts of harassment were those things allegedly done by **R2**. There was no 'freestanding' complaint of harassment against **R1**. There was no complaint (at least until the application to amend referred to in paragraph 10.2 below) that anyone else employed by **R1** engaged in unwanted conduct related to race and/or religion which had either the purpose or effect of violating **C**'s dignity or creating the environment in section 26(1)(b)(ii) Equality Act 2010 ('the proscribed environment').
7. Harassment related to a protected characteristic is only actionable if it has the purpose or the effect of violating a complainant's dignity or of creating the proscribed environment. At the outset of the hearing, the Employment Judge asked counsel whether **C**'s complaints were being advanced on the basis that **R2**'s conduct had the 'purpose' referred to in section 26, or the 'effect' or both. Counsel confirmed that the case was put firmly on the 'purpose' of **R2**'s conduct being to violate **C**'s dignity or to create for her the proscribed environment. She was not relying on the 'effect' of the conduct, for reasons which are explained in our conclusions.

8. The representatives confirmed that they had discussed this particular issue outside the tribunal and to that end had drawn up a list of issues reflecting **C**'s case.
9. We observed how unsatisfactory it was that a list of issues was not drawn up until the first day of the hearing. We noted that there had been a direction for this to have been done by **22 August 2022**, yet here we were, on **10 July 2023**, the first day of the hearing, being told that it had only just been agreed. Even then, when discussing the issues, it was apparent that there was uncertainty with regards to the issues regarding the ACAS Code of Practice to such an extent that we were told on the morning of the second day that the issues were not yet agreed.

Applications prior to hearing evidence

10. We heard two applications before hearing oral evidence, namely:
 - 10.1 An application by **R1** for an anonymity order in respect of individuals identified in the bundle but who were not involved as witnesses – this was made in advance of the hearing and noted on the first day, **Monday 10 July 2023**. Counsel for **R1** relied on what had already been submitted in writing. **R2** and **C** adopted 'neutral' positions on the application. We said that we would first read into the case and give our decision the next morning, **Tuesday 11 July**.
 - 10.2 An application by **C** to amend the Claim Form (and the list of issues) to add 'freestanding' complaints of harassment related to race and/or religion against **R1** arising out of its handling of **R2**'s complaints against her and her complaints against **R2**. This application was intimated on the first day but had not been reduced to writing. Counsel did so – adding the wording to the draft list of issues – and made the application on the second day of the hearing,
11. For reasons which were given to the parties at the time, we refused both applications on the morning of the second day. It was not until midday on **11 July 2023** that we were then able to hear oral evidence.
12. The final agreed list of issues is attached as an **Appendix** to this judgment. The parties prepared an agreed chronology which was given to the Tribunal on the final day of the hearing, **17 July 2023**. There was an agreed bundle of documents running to **543** pages. A series of WhatsApp messages was added [**pages 544-549**]. Finally, there were three short audio recordings of messages left by **R2** for Mr. Moore, who was one of **C**'s witnesses.

Witness evidence

13. In addition to **C**'s own evidence, she called the following witnesses:

- 13.1 John Gray (a Nursing Assistant, employed by **R1**)
 - 13.2 Scott Mackenzie (**C**'s husband)
 - 13.3 Lisa Hebron (Manager of Paediatric Accident and Emergency, employed by **R1**)
 - 13.4 John Seed (a Porter, employed by **R1**)
 - 13.5 Tony Moore (a Nurse, employed by **R1**)
 - 13.6 Richard Dargue (a Nurse, employed by **R1**)
14. **R1** called the following witnesses:
- 14.1 Nicola Metcalfe (then Head of Nursing, employed by **R1** and the manager who investigated **R2**'s complaints against **C** and others)
 - 14.2 Michael Souter (then Senior General Manager for Emergency and Acute Medicine, employed by **R1** and manager who commissioned the investigation into **R2**'s complaints).
 - 14.3 Louise Lockey (Matron, employed by **R1**, and manager who investigated **C**'s complaints against **R2**).
 - 14.4 Sarah Robson (HR Consultant/HR Advisor, employed by **R1**)
15. **R1** also provided a witness statement from Stuart Finn the contents of which were not disputed. Mr Finn had been the replacement commissioning manager who commissioned the investigation into **C**'s complaints against **R2**.
16. **R2** gave evidence on his own behalf. He called no witnesses but provided two emails from Jo Mohan and PC Robinson.

Findings of fact

17. Ordinarily, we would not set out our views of witnesses but would make appropriate observations at pertinent points in setting out our findings of fact. However, in this case we considered it helpful to provide a brief overview of the key protagonists.

The Claimant ('C'), Mrs Mackenzie

18. Ever since she qualified as a nurse in **2009**, **C** has been employed by **R1**. During the period relevant to these proceedings, she worked in **R1**'s adult Accident and Emergency department ('**A&E**') at the James Cook University Hospital in Middlesbrough ('**James Cook**'). She has worked at the level of Senior Nursing Sister (grade B7) since **2018** and in the period **January** to **July 2022** she 'acted

up' into the role of Acting Manager of the emergency department. She is white British. We found **C** to be an honest witness and a dedicated senior nurse. We were struck by how deeply offended and hurt she was by the fact that **R2** made a complaint of racial harassment against her to her employer and especially to her professional body. She felt from the very outset that the very making of the allegation was malicious. She was by and large consistent in her evidence. There were only a couple of aspects of her evidence which gave us any cause to doubt her version of events and that was more to do with reliability of her account as opposed to its honesty.

The Second Respondent ('R2'), Mr Hanif

19. **R2** is a British Muslim of Asian – Pakistani – descent. He was employed by **R1** as a hospital porter (grade B2) from a date in **2019** to **31 May 2022** on which date his employment ended by his resignation. During the period relevant to these proceedings, he too worked in the **A&E** department, at James Cook. **R2's** line manager was **RA**.
20. **R2** has been diagnosed and treated for thyroid cancer which is now in remission. Tragically, he lost his young daughter. During the period relevant to these proceedings his mother was very ill and undergoing dialysis. **R2** was concerned about her welfare and doing what he could to look after her. He has experienced some racism in life. He was stabbed in an attack which he believes was racist in nature. He has been subjected to racist abuse in previous employment when working as a doorman at a bar in Middlesbrough and has generally experienced some unpleasant comments related to his race or religion. We record these only because they go some way to explaining **R2's** perceptions of events which form the subject of these proceedings. In our assessment, **R2's** life experiences outside James Cook Hospital were such that they resulted in him holding to views which others of a different background and experience would not. He is more sensitive to what he perceives as differences in treatment or in manner or tone of voice and more likely to attribute any slight or perceived slight as being racially motivated. As a witness, we found him to be prone to using exaggerated language, sometimes deliberately so (especially when being challenged) but, more often, because of an inability to express himself in more moderate terms.
21. Prior to and following the incident we are about to come to ('the changing room incident') **R2** had developed a bit of a reputation among senior nurses for 'going missing' on shift. This was euphemistically referred to in **C's** witness statements as a concern for his 'visibility'. **C** confirmed in evidence that, by this, she believed **R2** to have a tendency to 'skive' at work. We do not find that this perception had anything whatsoever to do with **R2's** race or religion but was generated by **C's** genuine awareness of the 'visibility' or lack of visibility of porters (and other staff). This awareness was based on her deep knowledge of the A&E environment and the inherent awareness and sense she had, gained through experience, of whether staff were available or not when jobs needed doing. As a senior sister she would need to develop an awareness of the 'visibility' of staff to run an efficient shift. We

are satisfied that **C** did have such awareness and noting that **R2** 'lacked visibility' for lengthy periods of time when jobs needed doing, she formed the view that he had a tendency to 'skive'. She developed the same awareness for all porters and staff and, had anyone else been out of sight to the extent she perceived **R2** to be, she would have believed them to be skiving too, irrespective of race or religion.

The changing room incident – 29 April 2021

22. Some key facts regarding what we call 'the changing room incident' are not in dispute: on **29 April 2021**, prior to the end of shift being announced, **R2** went to the changing male room. Shortly thereafter, **C**, with **JW** standing behind her, knocked on the door. **R2** answered, opening the door slightly, just enough to poke his head through. **C** spoke to **R2** making it unequivocally clear that he was to leave the changing room, return to the department and not to go home before the all-clear was given for the end of the shift. At the time this happened, **John Gray ('JG')**, a nursing assistant, was also in the changing room. **R2** and **JG** left the changing room and returned to the department.
23. Although those broad facts were not in dispute, there was a major dispute about whether **R2** went to the changing room with permission and/or with the intention to break his fast and/or that, when in the changing room, **R2** had anything to eat or drink. **C**'s case was squarely put on the basis that **R2** had lied: that not only did he not eat or drink anything but that that was not his intention in going to the changing room in the first place. His only intention was to knock off early without having been given the 'all clear'. **R2** denied this. The relevance of the dispute about eating or drinking was that it was said to go to **R2**'s credibility. If we were to find that **R2** deliberately/knowingly lied about this – as was asserted - this would in turn be relevant to his credibility and to whether he had acted maliciously or in bad faith against **C** by falsely accusing her of racial discrimination. Therefore, we were fully aware of the importance of the issue to **C**'s case. **C** relied on **JG**'s evidence as well as what she contended were subsequent contradictory accounts of the incident given by **R2** and on a Facebook post of **R2**'s dated **07 April 2022** [page 394].
24. Given the importance this issue assumed in the proceedings, it is important that we set out the contrasting positions and the evidence before arriving at our findings. There have been various accounts given of what was said and done in respect of a very brief incident in the male changing room on **29 April 2021**. The accounts have been given at various intervals but the first being some 5 months after the event. We set out below the accounts of three of the four individuals involved in that incident.

R2's account of the changing room incident

25. **R2**'s first written account of the event was in an email of **24 September 2021** addressed to Debbie Appleton (**'DA'**), an HR adviser [page 149]. **R2** said:

“Yeah some of the issues was one of them when Sarah took me out of be changing rooms when everyone else was in there but only told me to get out the changing rooms and I was only getting a drink I wasn’t getting changed or was I leaving I simply was getting a drink and talking to other staff in the changing rooms, I didn’t like she did that only to me when other staff were there I don’t like the way she speaks to me I find her rude and Disrespectful towards Me more and more things happen I now know this is a race problem I believe if your Asian you get treated different in my opinion.”

26. **R2** was then interviewed on **19 October 2021** where the note records a brief account of the incident [**page 175**]: *“In April/May I was fasting, I had just gone to get something to eat, Sarah asked me to go back to work, I said that I was fasting, I was hungry I had not eaten for 14 hours, I expect respect as I am religious, I pray every day. When Sarah told me to go back to work I found this humiliating. I did pull her the next day, I said that I was fasting, I told her I was doing Ramadan, she humiliated me. I asked why she pulled me when I was fasting.”*
27. **R2** next refers to the incident in an email to the NMC on **15 November 2021** [**page 211-212**]: *“Sarah Mckenzie is a bully who pulled me out the staff room while I was breaking fast during Ramadan I was eating and she told me to get out the room and embarrassed me in front of everyone I believe his behaviour is racial motivated, she is a known bully.”*
28. He again refers to the changing room incident in another email to the NMC on **15 January 2022** [**page 274**]: *“She wouldn’t let me eat my dinner when I was fasting during Ramadan last year and forced me out a changing room even when other people were there.”*
29. The next account by **R2** that we could see was in his grounds of resistance [**page 58**] dated **27 May 2022** where he said: *“At approximately 19:25 the Second Respondent went to the staff changing room to break his fast. He accessed his bag from the changing room which contained food and drink and broke his fast. Within minutes of breaking his fast, the Claimant knocked on the changing rooms door and demanded that he resume his duties. The tone of the Claimant’s voice was threatening, loud and belittling. Jane Weir was in attendance with her. The Second Respondent tried to explain to the Claimant that he was observing Ramadan and needed to break his fast. The Claimant replied stating ‘you have not been excused’ and walked off...On leaving the changing room, the Claimant continued to berate the Second Respondent in front of other staff, shouting ‘that he needed to work together with her and not just walk off’. The Second Respondent felt humiliated and undermined and returned to his shift.”*
30. Then we had **R2**’s witness statement [**page 107** of the witness bundle] where he said: *“Sarah also didn’t let me have my food when it was Ramadan and humiliated me in front of staff by forcing me out the door with Jane Weir when Jane knew I was going to break my fast and I even explained to Sarah I was breaking my fast but she said no I want you out on the shop floor and I can’t just go wandering off...”*

31. In cross examination **R2** said that he told **JW** in advance what he was doing, that he was going to the changing room, that he did not feel well and was going to break his fast. He said that, when he got to the changing room, he had a drink and something to eat, namely some coke and a cheese savoury sandwich – the nature of the drink and sandwich were mentioned for the first time in cross-examination.

C's account of the changing room incident

32. **C** was first asked to recall the incident on **05 November 2021** (during the investigation into **R2's** complaints) [page 183]. **C** said she saw **R2** at 7.05pm on her walk round; that she finished her walk round and returned to the main department noticing that **R2** had not appeared. She said that she went to the changing room and knocked at the door explaining that the day shift had not yet been sent home and the department was busy, that there were transfers that needed to be done before she sent the shift home. She said that **R2** did not say anything to her and that he returned to the main department. In her written log [page 246] **C** said the same thing.

33. In her email of **10 November 2021** [page 197] she said much the same thing: '*I explained that no staff were yet leaving shift as the department was busy and we needed to complete the transfers prior to me sending the day shift home.*' Next came her witness statement where, at paragraph 7, **C** said that it was about 7.05pm when she went to the changing room door and that when **R2** opened the door, she told him she had not sent any day shift staff home, the department was still busy and there were multiple patient transfers they needed to do before the end of the shift. She told him she needed him to come back out and complete jobs. She says that **C** did not say anything to her. **C's** account was consistent.

JG's account of the changing room incident

34. **C** relied heavily on **JG's** evidence that **R2** was lying about what happened about the changing room incident. **JG** first had cause to recall what happened on **29 April 2021** in mid-late **November 2021** when he was speaking to **C** – almost 7 months after the event. He provided a written statement dated **19 November 2021** [page 227]. We find that the reason **JG** provided a statement is that **C** asked him to do so and that is why he signed a typed statement at page 227. In that statement, he said he went to the changing room at approximately 7.10pm; that **R2** was already there getting changed. **JG** described how there was a knock on the door by the senior nurses in charge. He said **C** asked **R2** why he was getting changed as he had not completed his duty and there were still things that needed doing before the night porter took over. **JG** recalled that **C** had '*asked him to come out until everything had been checked and the rest of the day staff had the clearance to leave the department.*' He went on to say that **R2** '*left the changing room with myself we stood outside until we were told to leave.*' **JG** says what he recalled **R2** saying about Ramadan.

35. The next account given by **JG** was when, as part of the investigation carried out by Nicola Metcalfe ('**NM**') he was interviewed **JG** on **22 November 2021**. A note of the interview signed by **JG** on **19 January 2022** was at [pages 231-233]. **JG** told **NM** that he was in the changing room on **29 April 2021** when **C** came to speak to **R2**. He explained that **R2** was already in the changing room when **JG** got there at about 7.10pm. He gave an account of what happened when **C** knocked on the door:

"Sarah said to Raghib, you've only done a ½ shift, there's no night porter coming in and the oxygen isn't changed.

Raghib said it's Ramadan and I need to go home to pray.

He was then saying to me, do you think I'm going to get in trouble – I just said, I don't know – if you don't do your job, I don't know."

Sarah took the lead, she wasn't overbearing – she just said come on you've only worked a half shift, there's work to be done."

36. The interview note records that **JG** said to **NM** that he could not recall if anyone else was in the changing room and he did not see **R2** taking any food/drink when he was in the room. At the end of the interview when asked if **R2** was changed when **JG** saw him in the changing room. **JG** said that he was not sure, that **R2** had his bag and that was all he could remember. He confirmed that he had prepared a statement the previous week because he had heard gossip that **C** had shouted at **R2** and he knew this not to be the case. That is a reference to the statement at **page 227** of the bundle. **NM** understood from her discussion with **JG** that, when **C** was speaking to **R2** at the door of the changing room, **JG** had heard **R2** tell **C** that it was Ramadan and that he needed to pray, by way of an explanation for him being in the changing room [page 355].

37. A further account of the changing room incident was given by **JG** in an email dated **18 February 2022** [page 336]. The purpose of this email was not explained to us but, as is apparent from **page 336**, it is clear that it was given to **C** on that date as a statement, we infer, for the purposes of litigation (early conciliation having been started on **08 February 2022**). In that email, **JG** says that he went to the changing room at around 7pm. **JG** describes that **R2** was stood near the lockers with his bag over his shoulder. He says that **C** asked **R2** why he was there as all the jobs have not been done/completed and that **R2** did not reply. He said that **C** said 'you have only done half a shift and no glove/gas bottles have been checked and there is no night porter'. He says she then asked **R2** to come out and wait until the day team were clear to leave. He says that he and **R2** left the changing room together and stood near the sluice room. He says that **R2** kept asking if he, **R2**, would get into trouble and that they were then released from the department.

38. The next time **JG** was asked to recount the conversation was when it was to be reduced to writing for these proceedings on **01 December 2022**. In his witness statement, **JG** says gave a bit more detail about the changing room incident. He describes how he got to the changing room at about 7.05pm. He describes the position of **R2**, that he was wearing his work clothes, had his sports bag on his shoulder and that he was looking at his phone. He said he heard **C** say in a firm tone: *“What are you doing in here? You haven’t completed your jobs. We haven’t got a night porter. The gloves haven’t been checked. You need to come out.”* **JG** added that **R2** said nothing in reply to **C**. **JG** said that they both left the changing room and they both stood near the main sluice. He said in paragraph 12 of his witness statement that **C** continued on her walk round, and then when she came back to the main sluice with **JW** said: *“You have only been on half a shift and you have not completed your jobs yet.”* He said that **R2** did not say anything to **C** but kept asking him whether he was going to get into trouble. **JG** goes on to say that when they heard the tannoy announcing ‘day staff home’ he and **R2** went back to the changing room, that when in the changing room, **R2** had his bag on his left shoulder and his phone in his right hand. **JG** said it was at this point where **R2** said he needed to get home to pray because it was Ramadan.
39. We considered the detail of **JG**’s account of what was said (or not said) and the sequence of events to be inconsistent and unreliable. In his very first account [**page 227**] he said he overheard **C** saying ‘*there was still things needed doing before the night porter took over*’. In paragraph 7 of his witness statement, he says virtually the opposite, that he heard **C** say: ‘*You haven’t completed your jobs. We haven’t got a night porter.*’ In his first account [**page 227**] his signed statement reads very much as if he is saying that **C** said something directly in reply to **C** as she was speaking to him at the door. In the note of his account to **NM** and **DA** [**page 228**], that too reads as if **JG** says **R2** replied directly to **C** that it was Ramadan and that he needed to go home to pray. This was consistent with what **R2** had always maintained and inconsistent with what **C** maintained. In **JG**’s first written statement he said that when he went to the changing room, **R2** was getting changed. However, later, he said he was not getting changed, that he tended to leave in his porter’s top and trousers.
40. There were variations in respect of the timing of things. In his oral evidence, **JG** said that he had probably written the time down incorrectly in paragraph 3 of his witness statement, where it said 7.05pm. Although anyone can be forgiven for not knowing the time or precise time of a brief event some months or years in the past, this was a case of changing the stated times. Further, referring to that part of his statement on **page 227** where **JG** describes what **C** said when standing at the changing room door **JG**, Ms Amartey asked why **JG** said that **R2** replied to C, whereas in his witness statement at paragraph 7 he says that **R2** said nothing in reply. **JG** explained that where on **page 227** **R2** referred to Ramadan and praying this was during the time after **C** had left and **R2** had shut the door, leaving just him and **R2** in the room. If that was right, this differed further from the account given by **JG** in paragraph 14 of his witness statement, where **JG** says **R2** mentioned

Ramadan and the need to pray only after the 'all clear' had been given and when they were back in the changing room on a second occasion.

41. We did not find **R2** to be a consistent or reliable witness on this event either and we were very dubious about his professed ability, sitting here at the witness table in **July 2023**, to recall the precise sandwich that he had in his bag back in **April 2021**. This detail had never been mentioned before. He was, we felt, generally prone to exaggerate and to use heightened language, especially when challenged and under pressure.
42. Albeit consistent, we did not find **C's** detailed account of what she said to be reliable (we are referring to her evidence that she told **R2** about the need to transfer multiple patients – see paragraph 52 below).
43. We did not hear evidence from **JW** (the fourth person involved in the incident). This would have been of benefit to the Tribunal not only as to the exchange between her and **R2** before he went to the changing room but also as to what happened when she and **C** went to the changing room. The only direct evidence of what was said between **R2** and **JW** before **R2** went to the changing room was that of **R2**. There was a note of **JW's** interview, undertaken by **NM** and **DA** when investigating **R2's** complaint, evidence of which was given by **NM**. In that interview, **JW** told **NM** that **R2** had asked to go home.
44. Our concern about reliability of the witnesses has much do with the passage of time and the context in which each of the protagonists came to give their recollections of the event. We considered the truth of what happened to consist of a combination of the differing accounts. We have arrived at our conclusions by making findings of primary facts and drawing inferences from them. Having set out the various positions and evidence, we now turn to our findings on the changing room incident.

The Tribunal's findings on the changing room incident

45. The **29th of April 2021** fell during the month of Ramadan. **R2** normally fasts during Ramadan. In 2021, he had attempted to do so but had found it difficult because of his poor health, meaning that he struggled to fast continuously between sunrise and sunset.
46. **R2** had been working a late shift that day (1.20pm to 7.40pm). Ordinarily, a night shift porter would take over from **R2**. On **29 April 2021**, owing to staff shortages, there was no night shift porter to take over from **R2** at the end of his shift. The porters were expected to work to a check list. Prior to leaving their shift, the expectation was that they would check that no outstanding jobs remained to be done. This check list had been introduced by management before **April 2021**, although we were never given an accurate time. We accept **R2's** evidence that the Porters had expressed concern about the use of the check-list, the concern being

that they regarded it as unrealistic for a single porter to check everything on the list and that (rightly or wrongly) it was not generally observed by them or enforced.

47. **C** had worked a long day shift on **29 April 2021** (7am to 7.40pm) and was handing over to a fellow B7 Sister, Jane Weir (**JW**), who was covering the night shift. When one senior nurse hands over to another, they do a 'walk round' together make sure that everything is in order before giving the 'all clear' to the dayshift staff that they can finish their shift and go home. The all-clear is ordinarily announced over the tannoy system with the direction '*day staff home*' or words to that effect. Around this time, there had been a concern among management that staff had been leaving shift earlier than they should. In the week or so before **29 April**, the porters and other staff, such as **JG**, had been reminded not to leave shift before all checks had been completed and the all-clear had been given. The all-clear can be given can be any time between 7pm and 7.40pm.
48. Shortly before **C** and **JW** commenced their walk round, **R2** spoke to **JW** when she was by the 'sluice'. This was at approximately 7pm-7.05pm. **R2** asked her for permission to leave his shift to break his fast. We were absolutely clear on that. What was unclear was whether **R2** asked **JW** if he could go home to break his fast or whether he asked to go to the changing room to break his fast or whether he mentioned either going home or going to the changing room at all. We accept that **R2** believed his tasks to be complete. Given the time of day, the proximity to the end of the shift and **R2**'s belief that his jobs were complete, we find it more likely than not that **R2** asked **JW** if he could go home to break his fast as he needed to eat. We infer that **JW** told **R2** that he could break his fast but he could not go home earlier than others, reminding him of the earlier message about this. We considered the possibility that **R2** might then have gone on to ask **JW** if he could, in that case, go to the changing room to break his fast as he was not feeling well. However, we found that to be unlikely. Had he done so, we would have expected **JW** to have mentioned this to **C** this when **C** went looking for **R2** in the changing room and we accepted **C**'s evidence that **JW** did not say anything to her about **R2** having to fast. When he approached **JW**, asking if he could go home to break his fast, we infer that he had hoped she would give him the-all clear to go home.
49. **C** and **JW** started their walk round very shortly after **JW** spoke to **R2**. As they were walking, **C** saw **R2** in the corridor in the vicinity of the changing room. This was a fleeting observation. However, she formed the immediate impression that he looked guilty. We are satisfied that she did so because **R2** was 'on her radar' given his reputation in her mind for 'going missing' or skiving. She perceived that **R2** had stopped in his tracks. She also made the immediate assumption that he believed he had been caught skiving. The recent reminder to porters that they should not leave their shifts early was very in much in **C**'s mind at the time. **C** did not say anything to **R2** at the time. She simply continued on her round with **JW**.
50. When **JW** said to **R2** that he could break his fast but not go home before anyone else, **R2** took this as a green light to go to the changing room. **JW** had said only that he could not leave the shift before others were allowed to leave. He believed

this gave him the go ahead to go to the changing room to break his fast, provided he did not leave the hospital before the all-clear was given. We are satisfied that he had no intention of going back to his work because just like **JG**, **R2** also believed his tasks to be complete and he was simply going to await the all-clear announcement, as **JW** had reminded him. At that point, he would have left the changing room and gone home. Within only a few minutes of **R2** entering the changing room, however, he was joined by **JG**.

51. When **C** and **JW** returned to the nurses' station **C** noted that **R2** was not 'visible' to her. She quickly surmised that **R2** must be in the changing room as he had been in that general area when she last saw him and, we infer, she must have said as much to **JW**. **C** and **JW** then went to the male changing room together. **C** took the lead, with **JW** behind her. She knocked on the door. Upon hearing the knock, **R2** opened it slightly and popped his head out. Seeing **R2**, this confirmed **C**'s earlier suspicion that he was guilty of something. She inferred that he was intending to leave shift early prior to the all-clear and prior to her satisfaction that all checks had been completed. She made it clear to **R2** that he was not to leave and that he must return to the department to complete any outstanding tasks. **C** was not happy with **R2** and we find that she spoke to him firmly and in a direct manner and by doing so, making it clear to him that she was unhappy that he should not be in the changing room before the all-clear had been given. In the circumstances, we find it more likely than not that her manner was a little abrupt.
52. We had to consider what it was that **C** did or did not say to **R2** at the door to the changing room. We find that **C** did not tell **R2** that multiple transfers remained to be done. We conclude that she is simply mistaken in her recollection about this. Had she said this to **R2**, and had there been a need for multiple transfers we would have expected one of two things, either:
 - 52.1 We would have heard evidence that **R2** after leaving the changing went about the task of transferring the patients and completing his other tasks, OR
 - 52.2 We would have heard evidence that **R2** did not in fact transfer the patients resulting in some performance-related discussions between managers and **R2** or even between managers about the incomplete state in which **R2** had left the shift.
53. However, there was no evidence that when **R2** left the changing room that he attended to any uncompleted tasks, let alone the transfer of patients. Nor was there evidence that his remaining tasks in fact remained incomplete. On the contrary, both **JG** and **R2** said that he did not undertake any outstanding tasks. **R2** and **JG** merely waited near the nurses' station until given the all-clear (see paragraph 64 below). If **R2**, having been directed to leave the changing room, had then idly stood about without completing essential tasks and given that he was already on **C**'s radar as a 'skiver', it is highly likely that **C** would have had further words with him, or if not, then with someone else in management. That did not happen. It is more

likely than not, as both **JG** and **R2** separately maintained, that neither of them had, in fact, any remaining tasks to do. From these findings, we infer that what **C** said to **R2** at the door of the changing room was that he was to come out and return to the department until everything had been checked and the rest of the day staff had the clearance to leave the department. No specific task was mentioned by **C**. It was just that **C** had not yet satisfied herself that all tasks had been completed, whether by reference to the check-list or otherwise. We conclude that the checks were then done and the staff were subsequently given the all-clear without any further word.

54. Overall, the gist of everyone's evidence was the same: that **C** told **R2** he had to return to the department and await the all-clear. It is in the details of what was said or not said where they disagree, where recollections differ and where accounts have changed slightly over time. Given the passage of time, we find that those involved have come to reconstruct the detail what was said during an extremely short exchange many months later in the context of a dispute. We have no doubt that, when, on **05 November 2021**, she first had to cast her mind back to this incident, that **C** genuinely believed that there patient transfers had been outstanding and that she said as much to **R2** at the door of the changing room. We have no doubt that she still genuinely believes **C** had not completed his tasks and that he was, in fact, skiving in the changing room. We have no doubt that **JG** genuinely believes that **C** said something about tasks at the door of the changing room, albeit his recollection of what was said fluctuated and changed. However, when **C** and **JG** came to recall those details they did so in the context of being outraged at an allegation that **C** was racially discriminating against **R2**. They both believed that **C** was in the right to tell **R2** to get back to the department and, looking back, they have, we infer, convinced themselves that there must have been outstanding tasks for **R2** to complete. Aware of the sort of tasks that might have been outstanding, their narrative has led to them filling in the details: thus, the varying references to oxygen bottles, gloves, patient transfers. Their recollections are also most likely to be tainted by their view of **R2** as being a 'skiver' and therefore more likely than not, as they see things, to have been shirking his responsibilities.
55. Further, we find it more likely than not that **C** and **JG** spoke about the event in **November 2021** after **C** had been interviewed by **NM** and that **JG** was asked by **C** to make a statement in support of her. It is likely that their individual accounts became somewhat distorted upon discussion. That the details have changed or are not borne out on a close examination is not to say that those recollections were advanced untruthfully. We are entirely satisfied that neither **JG** nor **C** knowingly said anything that was false as regards their recollection of **29 April 2021**.
56. Turning to how **R2** responded to **C** at the door of the changing room, we find that **R2** did not tell her that he had been in the changing room breaking fast. We find it more likely than not that he said nothing on the subject. Having recently spoken to **JW**, he believed that **C** must have known about what he had said to **JW** about breaking his fast, especially upon seeing that **JW** was standing behind **C** at the

time. **JW** did not, at that juncture speak up. **R2** assumed that **C** was aware that he and **JW** had spoken earlier and that because he had mentioned fasting to **JW** that they would both know why he was in the changing room. **R2** did approach **C** the next day to explain that he had only gone to the changing room to break his fast. This was in the car park outside work. We find that by the time he recounted these events many months later, he had come to believe that he was reminding **C** about what he had said the previous day, whereas in fact the first time he mentioned fasting to **C** personally was on **30 April 2021**.

57. As to the dispute about whether **R2** in fact ate some food or drank anything in the changing room we were satisfied that **R2** did not eat or drink anything in the presence of **JG**. We were very clear on that. However, what was less clear was whether, in the time before **JG** arrived, **R2** had a drink or a bite to eat. That was a more difficult factual dispute. **JG** could not assist on this because he was not there. Only **R2** could speak to what happened before **JG** arrived. On this issue we did not find **R2** to be a consistent or reliable witness and, as alluded to above, we did not accept that, sitting at the witness table in **July 2023**, he was able to recall the precise sandwich in his bag back in **April 2021**. That is not to say that he did not have any food or drink in his bag at the time. In fact, we find it more likely that he did.
58. This whole episode happened over a short period of time. There was only a couple of minutes or so between **R2** entering the changing room and **JG** entering it. There was then only a further couple of minutes or so before **C** knocked on the door. In the short period of time between **R2** and **JG** entering the room, we conclude it unlikely that **C** took his food and drink from the bag and that he ate all or some of it only to return it to the bag before **JG** arrived and without **JG** seeing any trace of this. We infer that **R2** did not, in fact, eat or drink anything. However, we accept and find that he went with that intention. He had intended to stay in the changing room until the all-clear was announced, which could have been anything between 10 and 30 minutes. As it happened, things were rapidly overtaken when **C** knocked at the door, which was itself within about a couple of minutes or so of **JG** entering the changing room.
59. Of course, it was **C**'s case that **R2** lied by saying not just that he had been eating but that he lied in saying that he had gone to the changing room with the intention to eat or drink. We do not accept that. When **R2** first recounted the incident of **29 April 2021** on page 149, it was some 5 months later in the context of him explaining to **DA** that he felt **C**'s manner towards him was rude and disrespectful and that he regarded her manner to be due to 'a race problem'. The main issue for him was not that he was eating or drinking at the time. For him the issue was how he had been spoken to – or at least how he perceived **C** to speak to him. In his email, he merely says '*I was only getting a drink*'. This changed somewhat when interviewed by **NM** and **DA**, where he said he had gone to get something to eat. In neither of those accounts does he say he actually had anything to eat or to drink. Similarly on page 192, **R2** said he was going to eat and drink. That was, we find, how he genuinely recalled it at the time.

60. It is on **page 204**, in describing the incident in the email of **12 November 2021**, where **R2** first says he was pulled out while he was eating (which, if taken literally, suggests he was in the act of eating). Then on **page 212**, he again refers to being pulled out while breaking fast. On **page 274**, in his email of **15 January 2022**, he says '*she wouldn't let me eat my dinner.*' These statements are incorrect insofar as they convey that he was eating. However, that is not to say that we find **R2** to be deliberately lying when he refers to having been eating at the time he was pulled out. We find that it is no more than loose language and an imprecise way of expressing himself. It is in keeping with our assessment of **R2** as being a person prone to exaggeration in his use of language. To him, five months or so down the road, it is of no importance whether the words he uses convey that he went there to have a drink or food or that he was drinking or eating when **C** knocked at the door. It is a distinction, to him, of no significance. His point was and always remained that he did not like the manner or way in which **C** addressed him and it was that manner which he regarded as being due to a 'race problem'. We shall return to matters such as 'malice' and bad faith in our conclusions, but we record here that we did not consider this description of him 'eating' to be a significant change or departure from the overall gist of the complaint. It was an exaggerated detail but not one which we considered to be malicious or knowingly false. The essence of **C**'s complaint remained the same.
61. At the time **C** was speaking to **R2** at the door of the changing room, she did not know that there was someone else was in the changing room at the same time, namely **JG**. Had she known, we are satisfied she would have told him the same and would have been equally firm in her manner.
62. As soon as **C** spoke to **R2** – which was for a matter of seconds – she and **JW** returned to the nurses' area. While still together in the changing room at this stage, **R2** said to **JG** that he was worried about being in trouble. He was concerned that **C** might think he was skiving, which is precisely what she was thinking. He genuinely felt that he was going to get into trouble. This feeling was, we find, induced in him by the firm and direct manner in which **C** had spoken to him.
63. Both **JG** and **R2** left the changing rooms shortly after this and returned to the department. They both waited in the area of the nurses' station until they were given the all-clear to go home. It is more likely than not, and we so find, that **C** said something to **R2** in the presence of **JW** and **C** and that it was to the effect that **C** had only done half a shift and that it was important that everyone worked together. **C** was, at this point, still unaware that **JG** had been in the changing room and we find that **R2** took this as singling him out in circumstances where he and **JG** were both there and where **JG** had been intending to leave the shift earlier than permitted. **JG** did not speak up to say that he had been in the changing room. He kept his head down.
64. We must also address a further dispute regarding **29 April 2021**, which is whether there were had been any outstanding jobs for **R2** to complete. We have to an extent

touched on this in paragraph 53 above. Again, there were unsurprising inconsistencies given the length of time between the event and the recollections. In paragraph 7 of her witness statement, **C** said that there were multiple transfers of patients to be done before the end of the shift and that she told **R2** this at the door of the changing room. In his first written account [page 227] **JG** did not mention anything had seen said about any particular tasks. He recounted that **C** had said things still needed doing and that she asked him to come out until everything had been checked. In the interview with **NM** [page 231] he said that **C** told **C** that the oxygen had not been changed. In the email of 18 February 2022 [page 336] he said that **C** told **R2** that no glove/gas bottles have been checked. In his witness statement, at paragraph 7, **JG** recounted that **C** had told **R2** that the gloves hadn't been checked. We find that checks needed to be done to ensure that things like patient transfers had been completed and oxygen tanks/bottles had been changed. However, we considered it unlikely that the tasks had not in fact been completed. Otherwise, **R2** would have had to do them on leaving the changing room and no one who gave evidence said that he went to do any such tasks. Those being safety critical tasks, had they not been done before **R2** left, there would, we infer, have been an escalation, which there wasn't. It is based on these findings that we infer that the issue was not that **R2** had not completed tasks but that he was not to leave until the B7s were satisfied that the tasks had been completed. They must have been so satisfied because they released the day staff, including **R2** without the need for him to undertake any further work. It is no surprise to the Tribunal that there were inconsistent recollections of an event which had occurred many months earlier. We concluded that whilst recollections of precisely what was said on 29 April 2021 have altered or have not stood up to scrutiny, no-one did so with a view to putting forward a deliberately false account.

65. The next day, 30 April 2021, **R2** approached **C** in the car park and said, in essence, that he hoped that **C** had not got the wrong impression, that he wasn't intending to leave for home but was only there to break his fast because he was unwell. **C** said that was fine, so long as he told a B7 in future. **C** did not challenge his assertion that he had only been in the changing room to break his fast. **R2** thanked **C**. Although **C** believed genuinely and reasonably – based on her understanding at the time - that **R2** had been looking to leave early before he was given authority, she did not take it any further. It only resurfaced as an issue in September 2021, after a discussion between **R2** and **DA**, which we address below. In that time, there was ample scope for recollections to fade and change according to the particular narrative being described at the time and that is what we find happened in this case.

66. We would add that this is part of the problem in waiting five months or so before raising an issue. **R2** had by then come to believe that, because it was Ramadan, and because he had mentioned fasting to **JW**, that he had also mentioned this to **C** when she spoke to him at the changing room door. He had, we find, come to replay it in his mind and convinced himself of this, whereas in fact, he only mentioned this to **C** the following day.

June 2021: R2 on sick leave

67. **R2** commenced a period of sick leave on **08 June 2021** which lasted into **September 2021**. The reason given for his absence was stress and anxiety relating to his mother's poor health. In **July 2021**, **R2** was referred to Occupational Health. An occupational health physician, Dr McKeown, prepared a report for the benefit of Leanne Sankey, the Emergency Department Manager. The report [page 138] said among other things that **R2** felt targeted by the senior management although his own manager was said to be very supportive; that he intended to return to work in **August 2021** and did not want a phased return; that he would like in the near future to consider redeployment. The doctor recommended that night work be avoided if at all possible as **R2** found it difficult. The reference to **R2's** mother's health was to the fact that she was seriously unwell and was undergoing, among other things, dialysis. His mother's health was a matter of stress and anxiety for **R2** and her wellbeing was on his mind. He wanted to spend time with her when not at work.

September 2021: R2's return from a period of sick leave

68. Although we were unable to discern when it was agreed or with whom, it was common ground that **R2** had agreed to return on a phased return to work despite having originally said to occupational health back in July that he did not wish to return on a phased basis. **R2** knew that he was returning to work on a phased return doing shifts of 6 hours duration in the first week, followed by shifts of 8 hours duration in the second week. This was not in dispute and in any event, we infer this from the email of **14 September 2021 @ 14:01** between **RA** and **R2** [page 145].

69. For the purposes of these proceedings, there are three relevant with the following start and finish times:

- 69.1 SLM shift (11.20 to 00:00)
- 69.2 Day shift (07:00 to 19.40)
- 69.3 Night shift (19:00 to 07:00)

70. **R2** returned to work in **September 2021** on a date which is unclear but which was shortly before **11 September 2021**. By this time, he had been absent on sick-leave for approximately three months. His first shift back from that period of absence was a night shift. He started at 19:00 (the normal nightshift start-time) and he finished at 01:20am.

71. There was a dispute between the parties as to the start times **R2** was to work upon his phased return to work. Although there may have been no doubt in the mind of **C** or other managers about **R2's** start time, to any neutral observer – and certainly to the tribunal - there was a lack of clarity as to the times **R2** was told he was required to start work on his phased shifts. We have read the series of emails at pages 143-146. Nowhere does **RA** say expressly that she told **R2** what times he was to start work. We could see no adequate evidence to establish that anyone

had spoken to **R2** prior to him returning to work in **September 2021** to tell him expressly what time he was required to start (as opposed to how long he would work on each shift during the phased return). The nearest documentary evidence was the email from **RA** to **R2** on **14 September 2021** at 14:39 [pages **144-145**] where she says: “... *when I spoke to you prior to your return your shift start times were written on the roster, when assigning a graduated return unless it’s a night shift we would adjust start times as this helps us to cover the busier part of the shift.... Did you check the roster on your return last week as the times were written on prior to your return?*” However, that email was sent after the dispute about times arose and does not say that **R2** was told the start times, only that when **RA** spoke to him the start times had been written on a roster. If she had expressly told him, we would have expected her to have said that rather than simply asking whether he had checked the times written on the roster. We infer from this that **RA** did not tell him and that she was leaving it to **R2** to check. It is more likely, and we so find, that **RA** assumed that **R2** would know not to start at the normal start time of the SLM or day shift but at whatever time was stated on the roster.

72. We also find that **R2** assumed he would start at the normal start of shift time. If anyone in a position of management within **R1** – whether that be **RA** or anyone from HR – had clearly set out in writing in advance to **R2** what his start times and finish times were to be on a phased return-to-work, we have not seen it. We conclude from the email correspondence, from the absence of any written plan and from **R2**’s own evidence on this issue, which we accept, that no-one from management had contacted him prior to his return to work to spell these things out in simple terms.
73. **R2** had been absent on sick leave before. He had, on at least one occasion, returned on a phased basis and started at the normal shift start times. This prior experience also gave him to understand that he would start at the normal shift time and work the first six hours of the shift. **R2** had been in contact with HR before his return in **September**. It would not be usual, in our experience, for any HR advisor to stipulate start times without any input from a manager. It is more likely, and in light of **R2**’s evidence, we so find that **R2** was told that his normal start-time would apply unless told otherwise by managers. This – and his previous experience - is the most likely explanation for him turning up on night shift at the beginning of the shift and for his belief that he would be starting at 7am on the day shift.
74. His next shift, on **11 September 2021**, was to be a day shift, the normal start time of which is 07:00. **R2** turned up for work, again, at the start of the shift. We are satisfied, and so find, that he genuinely believed that this was the time he was expected to start work on **11 September 2021**. We find it difficult to envisage that he would have turned up for work 6 hours before his due start time.
75. When an employee returns from a period of sick leave, a manager is supposed to undertake a return-to-work interview. Ordinarily that would be the line-manager’s role. **R2**’s return-to-work interview took place on **11 September 2021**. **C** undertook this exercise rather than leave it for **RA** to have to pick up. There was no particular

reason other than that she noted it had to be done. As far as she was concerned, she was just being efficient. However, **C** would not be managing **R2**'s phased return. That was always going to be for **RA**.

76. **C** understood **R2**'s start time to be 13.20pm. She did so because that time had been entered on to the paper copy of the roster. Although there was nothing on the paper roster to say that was a start time or a finish time, she understood from her knowledge of the department and the demands on it that it indicated the start time. During the return to work interview she asked **R2** why he had started at 7am. **R2**, when he was shown the roster, said that he understood that to be his finish time. We observe that a finish time of 13.20 would not be inconsistent with him starting at the normal start time and working 6 hours on the day shift. **C** pointed out that if the time on the roster had meant to indicate a finish time, it would make no sense for the second week when **R2** was to be working an SLM shift. The time marked on the roster for the following week was 15:20. If **R2** started at the normal shift start-time of 12:00 (or 11.20am, which they discussed) and finished at 15:20, that would result in him working only 4 hours as opposed to the 8 hours he was supposed to work on the phased or graduated return. **C** perceived **R2** to become defensive at this point when he replied that his hours had been agreed with occupational health and HR. We find that **R2** was somewhat defensive but only in trying to convey what he understood to be the position, rightly or wrongly. As we have found, **R2** tends to use more heightened language when challenged. He was here being challenged by **C** in circumstances where he, with some validity, believed his start times to be the normal times and that no one had told him otherwise. **C** said that she would speak to his line manager, **RA**, about it. As **C** confirmed in evidence, there was no further conversation about the hours. She felt uncomfortable about pursuing it by what she took to be **R2**'s defensive reaction and because – as she put it in evidence - if he had continued to question it, she did not have any answers to give him.

77. That same day, **11 September 2021**, at 14:17, **R2** emailed HR regarding the start times. Although the email begins '*just following up on previous email*', there was no previous email in the bundle. In any event, **R2** expressed a belief that his start time had been changed. He said:

"I've been to work today and my work times have been changed on the rota and I wasn't informed of this, can you just ask them to let me know for future purposes to let me know if things get changed and if I can do it please as I have mum to look after and sort out and I'm only on phased return this week and next week but the times had been changed and I didn't know but I'm doing my normal time as I had already sorted things out regarding getting care in for my poorly mum, was just letting you know as this had caused me issues before my shifts getting changed and not even been getting told about it."

78. There then followed an exchange of emails between **R2** and his line manager, **RA** some of which we have referred to above. In his email of **14 September 2021** to **RA** and HR [page 144] **R2** attached photos from the "e roster", making the point

that it did not show any times he was due to start and that was the rota that he had looked at prior to **11 September 2021**. He added: "*If I was asked can I start at 3.20 I wouldn't have had an issue and I'd have got my mum sorted out a week ago that's all but I wasn't asked or made aware*". This prompted a reply from **RA** who explained that night shifts start on their normal start times because that is when they were busy and that they would not start someone on their shift in the middle of the night. She explained that day shifts are different because they are not as busy in the morning, so that starting a graduated return later in the shift helps to support the department. She also pointed out that the paper copy roster is the official roster. **R2** finished this conversation by saying that he did not want to get into an argument over this, that he was just asking for notice. He put it down to miscommunication.

79. So far then, it is clear that there have been assumptions on both parts: on **R2's** part that he would start his normal shift time and finish 6 or 8 hours later as the case may be; on **C** and **RA's** part that he was to start on the time entered on the rota and finish 6 or 8 hours later. **R2's** assumption was based on his previous experience, his contact with HR and the absence of any specific instruction to the contrary. **C's** assumption was based on her knowledge of the department and the demands on it. What this boils down to, we find, is a genuine misunderstanding as a result of poor communication. We must observe that it was, we conclude, a wholly avoidable misunderstanding. We consider **R2's** interpretation of the time on the roster as a finish time to be objectively wrong. However, we also consider it to have been genuinely held. He had not thought through the consequences of starting the SLM shift at 11.20am and finishing at 15:20pm and when it was pointed out to him, he became defensive. There was another reason for him becoming defensive and that was that he had settled in his own mind that he was to start at his normal shift times during the phased return to work and he had made arrangements to be with his mother based on that understanding. Starting and finishing at different times would mean that he would have to rearrange things at a difficult time, which put him on edge. We would observe that it is management responsibility to ensure that **R2** knew in advance of returning to work precisely what his start and finish times were. Nobody explained that to him. They failed to do so, on balance, because they considered it obvious to them.

80. On **12 September 2021**, Richard Dargue, another B7 nurse, noted that **R2** had left his shift early. We have no doubt that Mr Dargue was a genuine witness but we do not accept that **R2** said to him that he had agreed the times with **C**. We consider he is wrong about this. We find that **R2** said that he had discussed the matter with **C** the day before. It is more likely than not, and we so find, that Mr Dargue – understandably - took **R2** to mean that the time had been agreed with **C**. We accept **R2's** evidence that **C** had not said to him that he must start the next shift on **12 September 2021** at 15.20pm. She simply showed him the rota and pointed out to **R2** that his interpretation must be wrong but finished by saying that she would speak to **RA**. As far as matters had been left the day before, **C** was going to speak to **RA** about the start times. **R2** did not understand **C** to have instructed him to start at 15.20pm.

81. Whatever **R2**'s understanding, Mr Dargue spoke to **C** on **12 September 2021** and asked her why she had agreed to **R2** starting at 12pm and finishing at 3.20pm. That is, after all, what he had understood the Claimant to be saying to him. She explained that she had not agreed this. She immediately regarded the Claimant as having lied about this to Mr Dargue. This genuine belief on her part made her wary of **R2**.
82. From **11 September 2021** to **24 September 2021**, we find that the atmosphere between **C** and **R2** was a little frosty. Rightly or wrongly, **C** began to form the impression that **R2** was avoiding her, noting that on **20 September 2021**, he made no eye contact with her and that he walked away when she went to the nurses' station. **C** was, we find, angry with **R2** for, as she saw it, lying to Richard Dargue about what she had supposedly said regarding start and finish times. She was, we find, on the look-out for and more sensitive to **R2**'s conduct at work and his whereabouts. She believed the lack of eye-contact to be a recognition on the part of **R2** that he was aware that **C** was on to him, so to speak, in that he knew that she would have known he had lied to **Richard Dargue**. **C** began to keep a log of conversations as a result of **R2** questioning his shift times and this avoidance of eye contact. She was advised to do so by her trade union. We infer from this that she was concerned that **R2** might make some, as she regarded it, unfounded complaint against her. The log was reproduced at [pages 246-254]. **C** started the log on **20 September 2021** and added the events relating to the 5 dates prior to then at some point after **05 November 2021**. It is highly likely that **C** did not, in this period, exchange much in the way of pleasantries with **R2** and that he perceived her to be keeping an eye on him leading him to avert his gaze when she was looking at him.

24 September 2021: the 'samples incident'

83. On **24 September 2021**, **C** was aware that some samples which were to be taken to the labs had been sitting on the desk for at least 30 minutes. We refer to this as 'the samples incident'. This task is something within the remit of a porter and one which a porter would be expected to do as a matter of routine. **C** had been keeping an eye out for **R2** and was suspicious that he was skiving, based on her knowledge that there were no patient transfers which he would have been undertaking, his lack of 'visibility' and her belief that he had a propensity to 'skive'. Therefore, she used the internal paging system to message **R2** directly to ask where he was and to ask him to come to the nurses' station. We would expect her to have an eye on who is around and who is not, especially when tasks had to be performed and, as in this case, some samples were awaiting collection.
84. When **R2** arrived on the scene, **C** told him to take the samples to the labs, pointing out that the samples had been sitting there for at least 30 minutes. It may have been phrased in the form of a question along the lines of, '*would you mind taking..*,' but it was intended as and delivered as an instruction to **R2** and it was understood by him to be just that. We would add that we find it totally understandable,

reasonable and acceptable that **R2** should be instructed by **C**, a senior nurse. to undertake this task, whether he had previously been busy or not. We do not agree with **R2** that **C** said this 'aggressively' (a word he used in his evidence to the Tribunal) but we accept and find that he regarded **C**'s tone of voice as more pointed than was strictly necessary. We find on the balance of probabilities that **C** spoke to him in a firm and abrupt or slightly prickly tone of voice – she was after all, frustrated by him for the reasons set out above and she regarded him as having lied to Richard Dargue. When asked by the Tribunal Judge what he meant by 'aggressive', **R2** said it was '*as if talking down to you*'. We considered that the word 'aggressive' was an exaggeration but an innocent exaggeration, it being the most suitable word **R2** could muster in his range of vocabulary. We must make clear that we find that **R2** was not in fact subjected to any unfair or different treatment by **C** in asking or instructing him to take the samples to the lab – even if delivered in a somewhat prickly tone of voice - and we do not accept that **C** talked down to **R2**. However, we find that **R2** genuinely perceived and felt that he was being talked down to and belittled. When asked by **C** to take the samples, he then responded rather indignantly and somewhat more pointedly to **C** "*I've been busy haven't I*". He then proceeded to take the samples to the lab.

85. The Respondent Trust welcomes 'volunteers' to do some basic tasks within the hospital. A volunteer is just that: a person who volunteers to come to the department to do helpful things such as making tea for patients, speaking to patient, getting them sandwiches etc... A volunteer could legitimately be asked to take samples to a lab, as that was something that had started during lockdown. Although **C** did not accept that a volunteer was present at the nurses' station when she had asked **R2** to take the samples to the lab, we find that there was a 'volunteer' present in the department, if not right by the nurses' station, certainly in the nearby area. **C** could have asked the volunteer to take the sample prior to paging **R2**. That she did not, we are sure, was a result of multiple factors: **C** was and is a busy senior nurse in a busy department with many things to do; **C** was working on the correct premise that the task is something a porter would ordinarily do and the volunteer would not be the first port of call; **C** did not know where **R2** was and when he might arrive back in the area to take the samples. We find that by the time **C** realised that at least 30 minutes had elapsed, she was of the view that **R2** had been skiving, that she would message him directly and that he should take the sample rather than go out of her way to find someone else. This resulted in what we conclude was the prickly exchange between the two. **R2** could sense **C**'s frustration. His reaction, his sense of indignation was based on his perception of **C**'s tone of voice, his belief that **C** had exaggerated the length of time the samples had been sitting on the desk and his thought process that, if they had been there that long and were so urgent, why **C** had not asked the volunteer to have taken them? He felt that he was unjustifiably being told off and singled out, or belittled. He attributed this to his race or religion.

86. After **R2** had returned from taking the samples to the labs, **C** noticed that he had picked up the key to the linen cupboard and then, as she perceived it, went 'missing' for what she describes as a significant period of time. Genuinely

suspicious as to **R2**'s whereabouts, and on a higher degree of alert because of the recent situation regarding shift times, **C** asked a colleague, Sister Ramsay, to go to the linen cupboard and, essentially, check up on **R2**. Sister Ramsay did so and reported back to **C** that she had seen **R2** in the linen cupboard and that he appeared to be hiding. **C** told Michael Souter ('**MS**') about this when they met about other things at a scheduled meeting later that day at 2pm.

87. It was around this time that **MS** had first met **R2**, who came to **MS**'s office to vent a number of issues he said he had experienced at work. Among other things, he told **MS** that he felt he was being treated unfairly, that there was an unfair allocation of shifts and he believed there was inequality within the department suggesting, in his case, that this was due to his race but also that the senior members of staff were friends. He said to **MS** that he would like to move to another department.

R2 speaks to HR

88. At 10:23 pm on **24 September 2021**, **R2** emailed Debbie Appleton ('**DA**'), HR Consultant [page 149]. It is clear from the content that he had spoken to her before the email and was setting out in that email what was subsequently treated by **R1** as a Dignity at Work complaint. It also contains the words which formed the basis of **C**'s first allegation of harassment against **R2** in these proceedings. In the email he said among other things:

"Yeah some of the issues was one of them when Sarah took me out of be changing rooms when everyone else was in there but only told me to get out the changing rooms and I was only getting a drink I wasn't getting changed or was I leaving I simply was getting a drink and talking to other staff in the changing rooms, I didn't like she did that only to me when other staff were there I don't like the way she speaks to me I find her rude and Disrespectful towards Me more and more things happen I now know this is a race problem I believe if your Asian you get treated different in my opinion."

89. The catalyst for **R2** complaining against **C** was the issue with the samples and his perception that **C** was, essentially, picking on him. We infer from the email, that when he spoke to **DA** he was asked about whether there were any other issues. This resulted in **R2** sending the email at page 149, in which he referred to the episode in the changing room on **29 April 2021**. **R2** mentioned this in an email to **DA** at 12:13 on **24 September 2021** where he said: '*feel free to pop down to a and e Sarah Mckenzie is on you can get me and her in office she was the one who kicked me out the changing rooms you can come down and speak to us I can do that to sort it out the more things that are sorted out the better*' [page 150].

90. In his email to **DA**, **R2** said that he did not believe that **C** or his line manager liked him because he is Asian and that they are bullying him for no reason other than that he was Asian and Muslim. He said that they needed '*to be spoken to and warned of there [sic] conducts*'. He said he was still wanting other work and asked her to look out for redeployment.

91. **R2** again expressed his desire for redeployment in a message to Steven McKenna, Matron, on **25 September 2021 [page 152]**. He mentioned to Mr McKenna the events of the day before regarding the issue with the samples. We should observe that the message refers to COVID swabs but it is common ground that it is about the same incident on **24 September** whether it be blood samples or COVID swabs. On **27 September 2021**, Mr McKenna told **C** that **R2** was 'on her case' about going to the labs – a reference to **24 September 2021**. **C** continued to be wary of **R2** and noted further occasions where, as she saw things, he avoided eye contact with her.

R2 interviewed in connection with his complaints

92. On **19 October 2021**, **R2** met with Nicola Metcalf ('**NM**'), Matron Medical Services and **DA** regarding his complaints. There is a note of the meeting at [**pages 173 – 176**]. **NM** reiterated the need to maintain confidentiality and not to discuss the details of the investigation or the content of the meeting with any colleagues. **R2** described how **RA** would ask where he was going but not ask the same of other porters. He said that he believed he was treated differently because of his race, by **RA** and **C**. He said that **RA** has been telling people that he, **R2**, has reported her and that she has been 'getting cuddles'. He said there was no confidentiality. As regards **C**, the note records that he described how he liked and enjoyed it at the beginning when **C** was in charge. He went on to give an account of the changing room incident as follows:

"In April/May I was fasting, I had just gone to get something to eat, Sarah asked me to go back to work, I said that I was fasting, I was hungry I had not eaten for 14 hours, I expect respect as I am religious, I pray every day. When Sarah told me to go back to work I found this humiliating. I did pull her the next day, I said that I was fasting, I told her I was doing Ramadan, she humiliated me. I asked why she pulled me when I was fasting."

93. **R2** when asked directly said that he believed **C** was being racist. He went on to mention the incident regarding the 'bloods sample'. On **30 October 2021**, **R2** emailed **NM [page 179]**. He asked to be moved from A&E to theatres as he was desperate, that he wanted to leave

'because of the behaviours whats happening towards me I'm not enjoying work the management haven't been great towards me and I want a fresh start away from the bullying and harassment towards me...'

94. He added that he believed it was racist on A&E. **NM** replied after meeting with **R2** on Monday **01 November 2021 [page 177]** at which he raised another allegation regarding **RA**. It suggested during the proceedings before the tribunal that **R2** was looking to move out of the department and that if he did he would withdraw his complaints. However, **R2** was not saying he would withdraw his complaints if he was moved to another department. On the contrary, he said he did not want to move until the investigation was complete.

C interviewed in connection with R2's complaint

95. On **05 November 2021**, **C** attended a meeting regarding a dignity at work complaint with **NM**, Matron and **DA**, which she believed was a complaint about **RA**. She believed she was attending to be asked questions as a potential witness. In fact, she was informed for the first time that there was a dignity at work complaint against her by **R2**. A note of that meeting was at **pages 182 – 186**. **NM** explained the need to maintain confidentiality and not to discuss the details of the investigation or the content of the meeting with colleagues. **NM** said that they had received information which suggested that she told **R2** to go back to work, when he was getting a drink following a long period of fasting. This was a reference to the changing room incident on **29 April 2021**, just over 6 months earlier. **C** gave her account of what had happened. **NM** said that they had been made aware of another issue regarding bloods needing to be taken to the path labs. **C** gave her account of what happened but before doing so said that she felt the need to explain what had happened the previous week. She went on to tell **NM** about what she and **R2** discussed about start times on **11 September 2021**.

96. **C** described how she felt that **R2** went missing, would not take instruction, did his own thing and returned to work at times when he wanted to and that he worked the quieter times with shorter hours. She expressed the view that **R2** does what he wants because he knows that no-one will question him. She said that she felt the need to keep a log so that she could remember the correct wording of conversations as she feels she has a memory like a sieve sometimes.

97. On **06 November 2021**, **R2** emailed a number of people, including occupational health, **MS** and **DA** [**page187**]. He asked them to write a letter to A&E management to put in place that he leaves A&E and get redeployed. He gave his reason for this request that he is *"suffering bullying and racial harassment and I want to leave it's affecting my health and mental health and I want at least a date to leave A&E and be transferred elsewhere I'm unhappy there."* He asked to be redeployed before Christmas.

R2's first email to the NMC

98. On the same day, he emailed the NMC to make the NMC aware of his complaint regarding 2 nurses, **C** and **RA** [**page188**]. He expressed confusion as to why they had not been suspended pending investigation. **R2** had been for some advice to the Citizens Advice Bureau (**CAB**) and sent this email following that visit. He expressed his belief that **C** and **RA** were bullies and racist. He asked for the NMC to investigate.

99. On **10 November 2021**, **C** emailed Jane Herdman in HR and Matron Steven McKenna, raising a dignity at work complaint against **R2** [**pages 217 – 219**]. She said she felt unsafe to work around **R2**. She referred to the changing room incident, the shift start times, the samples issue, the linen-room cupboard, the avoidance of eye contact. She said that she did not feel comfortable managing him. She referred

to the 'persistent allegations he is making about the senior team' and that she feared being accused of another false allegation when next on shift together. **C** asked HR to take action as she felt she was being harassed.

100. All that **C** was aware of at this stage was that **R2** was unhappy with two things: that he had been told to go back to work on **29 April 2021** when he had gone to get a drink during a period of fasting and that he had been told to take bloods/samples to the labs in a manner which he found unacceptable and which he had attributed to being of a different race and religion. It is one thing for **C** to deny that she had done anything wrong in both instances but another to complain of harassment by dint of **R2** raising those concerns. The other matters which **C** raised in her complaint namely, the fairly recent avoidance of eye contact, the discussion regarding of shift times and as she saw it, the tendency of **R2** to skive seemed a rather odd basis, in our experience and judgement, to warrant a senior employee describing this as and advancing it as a complaint of harassment of her by a porter, the most junior graded employee in the department. Although unusual and, we find a retaliatory act, we conclude that she genuinely considered this to be the correct and reasonable way of responding to **R2**'s complaint as she was saying it as she saw it and believed.

101. On **10 November 2021**, **R2** replied to an email from **NM** regarding the changing room incident. He said:

"Jane Weir came with her and Sarah pulled me and told me to get out the office even tho I told her I was going to eat and drink as my fast was about to open but why come for me when I told her I was going to drink and eat I'll be out in a min and embarrass me in front of others they was other staff there they was 1 health care I'll speak to who was getting changed let me ask him if it's ok to use his name and give his name as he was getting changed he seen it I'll get back to you with his name I'll ask him first." [page 192].

102. On **12 November 2021** **DA** emailed **R2** [page 205] attaching a letter [pages 202-203] confirming the matters being investigated under 6 bullet points. **R2** replied [page 204] and as regards the allegation against **C** said:

"Yeah Sarah Mckenzie come to the changing rooms to pull me out while I was eating during Ramadan after I told her I was going to eat Jane Weir was there, I was told to get back on the shop floor and she shouted at me in front of me jock gray was there but I don't know if he will remember but he was there this was April/May when fasting was happening during a day shift."

103. That same day, **12 November 2021**, **C** commenced a period of sick leave. As she described it in her witness statement, she was offended by **C**'s allegations against her that she had discriminated against him. We could see with our own eyes how the allegation of racial discrimination had affected **C**. She resented the allegation. She felt deeply offended and upset by what she saw as a slur on her reputation and integrity and she was satisfied that the allegation was untrue. She completed the entries in her log from **pages 251-254** in **November 2021**. She later

sent the whole of her log [pages 246-254] to Joanna Gladwin on 24 November 2021 [page 244].

R2's second email to the NMC

104. On 15 November 2021, R2 emailed the NMC, the ECHR and NHS England [page 211-212]. As regards C, he said that she: *"is a bully who pulled me out the staff room while I was breaking fast during Ramadan I was eating and she told me to get out the room and embarrassed me in front of everyone I believe this behaviour is racial motivated, she is a known bully."*

Lisa Hebron

105. On 15 November 2021, C spoke to Lisa Hebron who told her that R2 was telling people in the department that she and RA had been suspended for making racist comments about him. C noted this in her log [page 252]. Lisa Hebron is a B7 nurse and a good friend of C's. Lisa Hebron had been made aware of R2's complaint against C by C and by other senior managers, namely Matron McKenna and MS. Two nursing sisters, Alex Blair and Lucy Ripley, asked Ms Hebron how C and RA were doing in the circumstances. When Ms Hebron asked what they meant by the 'circumstances', they said 'suspension'. Ms Hebron asked who had told them that they were suspended and they said that R2 had been saying this to others. Later the same day, another colleague, Emma Clark, told Ms Hebron that Michelle Morning had been told by R2 that C was suspended for making racist comments. Just before this, Ms Hebron had been on the telephone to C. After she spoke to Ms Clark, Ms Hebron went to see MS to tell him what she had been told.

106. The following day, 16 November 2021, at 16:18, MS sent a WhatsApp message to a group of B7 managers. There were 20 people in the WhatsApp group in addition to MS. He informed the managers that he had had a number of issues escalated to him in relation to gossip and rumours within the emergency department in relation to the current status of C and RA. He clarified that neither had been suspended and that both were currently on sick leave. He asked the Band 7s to *'suppress any inappropriate and unprofessional conversations within the department and escalate any behaviours witnessed or escalated to'* them to him.

107. We are satisfied that gossip within the department was rife. It is unfortunate but also nigh on impossible to contain gossip in a work-place, especially regarding a matter such as this. We have no doubt that R2 mentioned to some people in November 2021 that he had made a complaint against C and RA – John Seed for one. We are equally satisfied and so find that C spoke to others both of the fact that R2 had made complaints against her and RA and that she had brought a complaint against R2. C had, in her own dignity at work complaint against R2, referred to the *'persistent allegations against senior management'*. That in itself demonstrates that C and others had spoken about R2 and allegations which he had made. C is both a colleague and a friend of RA and we infer from her

relationship, her deep sense of injustice and that comment that she and **RA** spoke about the events. She had also spoken to Lisa Hebron about them. **C** and **JG** had spoken about the changing room incident and she also spoke to **John Seed**. Although **NM** had asked both sides not to speak about the complaints, both had done so.

108. On **16 November 2021**, **C** spoke to Jude Cooper of Occupational Health. **C** discussed the complaints against her with Jude Cooper. **C** believed from what she had been told by Ms Cooper that **R2** had '*done this before*' at a previous Trust, i.e. that he had made complaints of race and religious discrimination. The next day **C** and **RA** – both of whom were still absent on sick leave – met with Lindsay Garcia (Deputy Head of Nursing) and Joanne Beider of HR. In her log at [page 252] **C** said that they met '*regarding concerns we have that multiple leaders are aware about of [sic] his behaviour in the trust and concerning that he is in practice. Stated that we feel nothing is being done from our side to support us in being off work or a plan for returning.*' In her witness statement at paragraph 48, **C** said that she complained because she considered her employer to be aware of **R2**'s tendency to make allegations of racism and that multiple leaders were aware of this.
109. Following the meeting, **C** emailed Joanna Gladwin of HR [page 216] saying: "*Today I have met with Lindsay Garcia and Jo Beider. After discussion with them I would like to formally raise a dignity at work case against*' **R2**. We could not help but feel that a significant factor in the bringing of this dignity at work complaint by **C** was the knowledge (which **C** now had) that **R2** had made allegations of racial harassment against others within the Trust and the belief that he had previously made allegations of discrimination in another Trust. We find that **C**, feeling a deep sense of injustice and fixed in her belief that she and her colleague, **RA**, had done nothing other than try to manage **R2** professionally, that **R2** was using his race, religion and ethnicity to avoid proper management and that something had to be done about this. We consider that the decision to submit a formal dignity at work complaint by **C** was a retaliatory act on her part to address this situation. She believed **R2** was maliciously making false allegations against her with no evidence and that he was defaming her.
110. To the extent that it was said that **R2** was the source of a rumour that **C** had been suspended for making racist remarks, there was no direct evidence of this. There was only indirect evidence. Ms Hebron's evidence was, at best, to the effect that '*A told me that B told them...*'. We were not satisfied from the evidence adduced that **R2** had started these rumours. There was direct evidence from **John Seed** that **R2** told him that **C** had been suspended – not for making racist remarks but because of the changing room incident. We consider that evidence now and make our findings on it.

November 2021: conversation between R2 and John Seed

111. Sometime in **November 2021**, **R2** telephoned **John Seed** ('**JS**') a fellow porter at a time when **JS** was absent on long term sick leave. Although **R2** says he never

spoke to **JS** at that time about **C**, we find that he did. It was a personal and private conversation between two people who were, at the time at least, on friendly terms. **R2** did not intend or expect anything discussed between them to get back to **C** and he had no reason to suppose that it would. There was a dispute as to what was said. **JS's** account of what was said was first reduced to writing in **December 2022**. **JS** was very unsure about when he returned to work from sick leave. However, at some after he returned, he spoke to **C**. He saw that she did not look herself and asked if she was okay. **C** then told **JS** that she was under investigation and told him what it was about. We infer that this was a reference to the NMC investigation. This conversation took place shortly before a preliminary hearing in these proceedings which was held on **21 July 2022**. **C** was by then aware that **R1's** investigation was closed. She had by then commenced proceedings against **R1** and **R2**. She told **JS** about the proceedings. Upon speaking to **JS** she asked him to assist and provide a statement in these proceedings, which he did in **December 2022**. By the time she became aware of this conversation, **R2** had left **R2's** employment (he left on **31 May 2022**).

112. We find that the substance of the conversation in **November 2021** was that **R2** said to **JS** that **C** had in essence 'pulled him' out of the changing room when he went there to break his fast. We also find that **R2** said to **JS** 'Sarah's been suspended eh?' What is less clear is whether **R2** said that in order to spread a rumour that **C** had been suspended or whether he himself was repeating a rumour that he had heard. We note that **JS** said in his witness statement that **C** put it as a question. There was a 'question mark'. **R2** had not been told what was happening with regards **C's** and **RA's** employment. What is not in dispute is that two senior sisters were absent on sick-leave and that rumours about their absence and the reasons for their absence were rife. One of the rumours was that they had been suspended. We infer, from the fact that he phrased it as a question to **JS**, that this rumour had come to **R2's** attention. Of course, **R2** should not have been discussing this at all – but as we have found, neither should **C** have been discussing the issues with others. When **JS** asked **R2** what it was about, he told **JS** about the changing room incident, thus breaching confidentiality – not being the first or last to do so.
113. **JS** also referred in his witness statement to a second incident which he says **R2** described to him over the phone in **November 2021**, where **R2** had said something about a seminar room, that **C** had come in and pulled him up by the neck of his T-shirt, telling him to get out and get back to work. We were not satisfied that **R2** said anything about a seminar room or about **C** pulling him out of the prayer room by his collar. We find that **JS** has confused a number of references he has heard from different sources to 'praying', being 'pulled' out of a room and that has blended a number of scenarios together believing that this is what was said to him. When **JS** came to recount the **November 2021** telephone discussion in **July 2022** it was some 8 months after the incident. By that time, there had been rumours and gossip in the workplace. We find that with the passage of time the memory of the conversation has changed. Ms Ismail, on behalf of **C**, put to **R2** that **JS's** recollection of what **R2** said was very similar to the account given by Tony Moore. She relied on this as supporting the reliability of **JS's** account. The concern we had

with this was when **JS** spoke to **C** in **July 2021**, she had by then spoken to Tony Moore (whose evidence we accepted and shall come on to in due course). We find that **C** discussed her legal case with **JS** and on the balance of probabilities repeated what **TM** had told her. **TM** spoke to **C** in **May or June**, not in **July 2022** as pleaded in paragraph 29 of the Amended Grounds of Resistance [**page 82**]. We were not satisfied that **JS** was not then or now repeating a mix of things that had come to his attention via his own personal conversation with **R2**, gossip at work and through his discussion with **C**. In brief, we did not consider **JS**'s account to be a reliable recollection.

Investigation of R2's complaints

114. On **17 November 2021**, **MS** wrote to **R2** confirming that the Trust would formally investigate his complaint under the Dignity at Work Policy and Procedure [**page 220**]. The allegation was stated as follows:

"In April/May 2021 whilst you were fasting, Sarah McKenzie asked you to go back to work. When you advised her you were fasting she humiliated you in front of other members of staff."

115. The letter added:

"The details of the allegations and this investigation are confidential and should not be discussed with any witnesses or colleagues, with the exception of course of your chosen representative. Failure to maintain confidentiality will be regarded as a disciplinary matter itself."

116. The same day, **R2** emailed **NM** [**page 224**] in which he said:

"Sarah she pulled me out the changing rooms when I was fasting and eating food and told me to get out but only pulled me out and no one else when I told her I was fasting she said I should have told her but I did tell her that I wasn't going home I was eating I told her this."

117. On **23 November 2021**, **NM** and **DA** interviewed **JW**. They prepared notes of that meeting [**pages 238 – 241**]. The notes record that **JW** told them that when she came on to start nightshift she spoke to **C**, who explained to her that there was to be no night porter and that **R2** had been asked to check oxygen to manage a patient safety concern. She said that when **JW** went to the sluice, **R2** approached her asking if it was ok to go as he needed to break his fast. The note records her as saying to **NM** that she reminded him of the recent message about not leaving earlier than others due to others being left behind and explained that it would only be about 10 minutes there being only a few checks to complete. She said that 'Jock' (that is **JG**) asked to leave early as his area was finished, that she challenged this telling him that he could not leave in line with the recent announcement. **JW** went on to say that **C** explained to her that she would be annoyed if **R2** was in the changing rooms leaving the department as she had just had a conversation with

him about changing gas bottles in resus (resuscitation). **JW** went on to say that **R2** had been allowed to leave early, at 7.05pm on the last three shifts, due to everything being complete, and that this is used as a reward/incentive in the department.

118. On **03 December 2021**, **MS** emailed **R2** [page 510] saying:

“Following meetings with witnesses the investigation team have raised concerns that witnesses have stated that you have spoken to them about the investigation. The investigation is confidential and as such influencing witnesses and interfering with the investigation is a serious issue which may require a more formal approach should it continue. All parties are expected to maintain full confidentiality and refrain from discussions regarding the investigation with anyone other than their representative, buddy or the investigating team.”

Investigation of C’s complaint

119. On **13 December 2021**, Beth Swanson, Assistant Director of Nursing commissioned Louise Lockey to investigate **C**’s complaint against **R2**, which was stated as being:

*“**R2** has spoken to staff stating **C** has been suspended for sending racially abusive emails and for bullying and harassing him.”*

120. The reference to ‘racially abusive emails’ is inexplicable. **C** had never suggested that **R2** had said anything about emails. **R1** accepts that this was an error. No one has been able to explain satisfactorily how it came to be put in this way. Beth Swanson subsequently passed over the role of Commissioning Manager to Stuart Finn, Service Manager.

121. **C** was interviewed again about the changing room incident on **22 December 2021**. The note of that meeting was at **pages 262 -264**. Later that day, **NM** and **DA** met with **MS** via Microsoft Teams to provide their assessment of **R2**’s complaint against **C**. **NM**’s view was that **C** asked **R2** to go back to work to complete patient safety tasks which were on the porters’ checklist (such as oxygen bottle checks) prior to leaving for home. She confirmed her view that **C** was not overbearing towards **R2** and that this was no more than a reasonable management request. She said to **MS** that she was comfortable that **C** had not asked **R2** to do this because of his race but to ensure patient safety.

122. Two days later, on Christmas eve, **MS** rang **C**. He told her that **R2**’s complaints against her had been investigated and would not be upheld. He asked her when she would be able to return to work. **MS** called **C** promptly to reassure her that the complaint against her was going nowhere and was at an end. He had her interests at heart in doing so. He did not want her to have to wait longer, especially over the Christmas period, without knowing what was to happen. He was conscious that she was absent on sick leave with stress and anxiety. He offered to support her on

her return to work and told her that the Trust would be providing the outcome of the investigation to the NMC in due course. Whilst it is right to say that the investigation into the complaint against **C** was considered by **MS** to be at an end, that was not the case for **R2**'s complaints against others. Investigations into those complaints were ongoing.

123. Although **MS** acted to reassure **C** and he was of the view that the complaint against her was at an end, rather oddly, **NM** continued to investigate it. On **20 January 2022**, she emailed **R2** asking him some further questions regarding the changing room incident [page 279]. We infer a number of things from this: that **NM** had not told **MS** that her investigation was complete but had expressed her view to **MS** that the complaint was, in essence, going nowhere; that **MS** had, so to speak, jumped the gun in contacting **C** (albeit he did so altruistically) and that, as far as **R2** was concerned, he was under the impression that his complaint was still being investigated. He was not aware that **C** had been told by **MS** that his (i.e. **R2**) complaint was not going to be upheld. He responded to the questions he was asked that same day [page 278-279].

124. We find that **C** was being given the 'heads up' by **MS** that she need not worry about the complaint that was made against her. Whilst that might have been the correct and just outcome, from a procedural point of view – were he to have known about it - we can see why **R2** might be dissatisfied with this approach. No investigation report had by then been reduced to writing by **NM**. No-one had told **R2** that his complaint against **C** was going nowhere and he still being asked about the incident in **January 2022**. No-one had written formally to **C** to say that the investigation was closed. We would observe that **MS**, in his desire to put **C**'s mind at ease, in the end did not assist either **C** or **R2**. Firstly, his altruism was subsequently not seen as such by **C** when she saw in **R1**'s email to the NMC that **R2**'s complaints against her were still being investigated (see paragraph 128 below). Secondly, **R2** would undoubtedly be concerned if he had learned that, before his complaint had been closed off, a senior manager had told the alleged perpetrator that no action would be taken against her. We were aware that the investigation into **R2**'s complaints revealed some wider perceptions of a clique or closeness among managers – and there were some traits of this closeness apparent to us in these proceedings, namely: **C** and **RA** having access to Lindsay Garcia to discuss **R2** during an investigation into their conduct following complaints raised by **R2**; Matron McKenna raising on behalf of **C** a dignity at work complaint before **C** had done so and **MS** giving **C** the heads up that the complaint against her was going nowhere before **NM** had completed her report. Such things would do nothing to dispel perceptions among more junior staff that management were too close and part of what they considered to be a 'clique'.

125. Carrying on with the sequence of events, on **04 January 2022**, **C** returned to work and into the acting up position of Acting Manager. She was pleased and relieved to hear the complaints against her had not been upheld and this reduced her stress and anxiety.

126. On **15 January 2022**, **R2** again emailed the NMC (Amanda Moore) [**page 272-275**]. He did so in reply to a request for information from Amanda Moore [**page 275-276**]. As regards **C**, he said:

“She wouldn’t let me eat my dinner when I was fasting during Ramadan last year and forced me out a changing room even when other people were there. She was making me work more jobs than other staff and belittling me in front of staff mocking my appearance and mocking me in front of staff and in front of patients...I believe she is a racist all 3 for there behaviour towards me [sic].”

127. We were satisfied that at no time did **C** ‘mock’ **R2**’s appearance or mock him in front of staff. This was, in our judgement, another example of **R2**’s questionable ability to express himself without slipping into the use of exaggerated language. In his oral evidence he said that this was a reference to **C** once commenting that his top had not been ironed. **C** denied that she had done so, saying that she had never ironed her uniform in 14 years. However, we find that it is likely that **C** did say something perfectly innocent, not in a mocking way, but perhaps in a light-hearted way with no ill will or intent. It was an odd comment for him to invent. If **R2** were simply inventing this, we would have expected him to have embellished the allegation of ‘mocking’. However, what he described as ‘mocking his appearance’ in front of others was a very minor, passing reference to his top not being ironed. That he unreasonably saw this as ‘mocking’ him is consistent with our assessment of **R2** overall, namely that he perceives slights where others would not and uses heightened or exaggerated language to describe things. There is no reason whatsoever for **C** to have remembered saying such a minor thing. That she denied it in these proceedings is unsurprising given the respective positions the parties have adopted. As far as she is concerned, this is simply another lie by **R2**.

128. On **24 January 2022**, Amanda Moore of the NMC wrote to Hilary Lloyd of **R1** asking for some information regarding **C** [**page 283-284**]. Hilary Lloyd responded on **31 January 2022** [**page 285**]. In addition to providing information regarding the complaints against others, she said in relation to **C**: *“allegations are currently being investigated under the Trust Dignity at Work policy. The outcome of the investigation is pending. A copy of the outcome letter can be forwarded once complete.”*

129. On **07 February 2022**, **C** received a letter from the NMC informing her that it was looking into a concern raised by **R2** about her practice as a nurse [**pages 292-310**]. Enclosed with the letter were **R2**’s emails of **06 November 2021**, **15 November 2021** and **15 January 2022** as well as **R1**’s email of **31 January 2022** referred to in paragraph 128 above. The following day, **C** commenced ACAS early conciliation as the first step in bringing these proceedings.

130. On **18 March 2022**, **NM** produced two reports: one into the complaint against **C** [**pages 351-356**] and another report into **R2**’s complaints against three other employees. She recommended that the complaint against **C** should not be upheld.

As we have set out above, that is something **C** had already been told approximately three months earlier.

Tony Moore

131. Tony Moore ('**TM**') is a nurse, having qualified in **September 2022**. He was away from the A&E department from about **January 2021 to September 2022**, when he was completing his training in placements such as cardio-research, ward 36 and endoscopy. His sister is also a nurse. She works in A&E. When away from A&E, **TM** did not keep in contact with anyone there, save for his sister. On **06 April 2022**, **R2** bumped into **TM**. As they were on friendly terms from **TM**'s time in A&E, they had a chat, mainly exchanging pleasantries and talking about football, family, including **R2**'s mother. **R2** asked **TM** if he had heard about **C**, that she had walked into the male changing room when he was praying and pulled him off his prayer mat by his ear.

132. **TM** was an impressive witness. We accepted his evidence as a reasonably good recollection of what happened when he bumped into **R2** on Linthorpe Road, Middlesbrough and of what **R2** had said to him. Later that day, he told his sister that he had bumped into **R2**. However, he did not anything that **R2** had said to him, just that he had bumped into him on the street. **TM**'s sister subsequently told **C** that **TM** had bumped into **R2** and **C** in turn called **TM**. It was in approximately May or June when **C** called **TM**. **C** told **TM** that there was an investigation and that she was aware that he was friendly with **R2**. She asked if **R2** had disclosed anything about her and whether he would give a statement. **TM** agreed and he said what **R2** had told him, as set out in paragraph 3 of **TM**'s witness statement. We find that **R2** did say broadly what is set out in **TM**'s witness statement. **R2** was, we find, embellishing his account against **C**. He was by now probably intent on leaving the Trust and was, we find, reckless and indifferent as to what damage he might cause to her reputation. This was more than an injudicious use of language. It was invention.

133. **TM** would not have mentioned this conversation to anyone had **C** not asked him to tell her what **R2** said. We infer that she was keen to know what had been said, in the hope that she could use it against **R2** in these proceedings and in her response to the NMC investigation.

134. On **01 September 2022**, the NMC informed the Claimant that **R2**'s complaint against her was closed and no further investigation would be undertaken [page 422].

Relevant law

135. Section 40(1)(a) EqA 2010 provides that an employer 'A' **must not, in relation to employment by 'A' harass a person**, 'B' who is an employee of A's.

136. The concept of harassment is then defined in section 26 EqA which provides:

- (1) A person (A) harasses another (B) if--
 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of--
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account--
 - (a) The perception of B.
 - (b) The other circumstances of the case.
 - (c) Whether it is reasonable for the conduct to have that effect.

137. **Unwanted conduct** is just that: conduct which is not wanted or 'welcomed' or 'invited' by the complainant (see ECHR Code of Practice on Employment, paragraph 7.8). This does not mean that express objection must be made to the conduct before it can be said to be unwanted. Clearly, conduct by 'A' which is by any standards, or self-evidently, offensive will almost automatically be regarded as unwanted, whether objected to or not. Further, conduct which is not directed at 'A' may amount to unwanted conduct.

138. The unwanted conduct must be **related to the protected characteristic**. In considering whether it is so related, the intention of those engaged in the unwanted conduct is not a determinative factor although it may be part of the overall objective assessment which a tribunal must undertake. It is not enough that the alleged perpetrator has acted or failed to act in the way complained of. There must be something in the conduct of the perpetrator that is related to race. The phrase 'related to' is wider than the phrase '*because of*' (which is used elsewhere in the legislation) and requires a broader inquiry. However, the necessary relationship between the conduct complained of and the protected characteristic is not established simply by the fact that the Claimant is of a particular race and that the conduct has the proscribed effect.

139. Other than in perhaps cases of overt racial abuse or inherently racist conduct, consideration of whether conduct has the '**purpose**' of violating a person's dignity or of creating for them the proscribed environment in section 26 EqA 2010, almost always requires an examination of the alleged perpetrator's intentions. The Tribunal's task is to determine the result or effect intended or sought by the perpetrator – to ask whether the perpetrator intended to produce the proscribed consequences. In most cases, whether a perpetrator had the proscribed 'purpose'

is likely to depend on what inferences it is proper to draw from the facts and surrounding circumstances. As set out in paragraph 98 above, while conduct not directed at 'A' may nonetheless be regarded as 'unwanted', the fact that it is not directed at 'A' may be one such relevant factor or circumstance to consider (along with the other circumstances). We take this from the observation of HHJ David Richardson at paragraph 24 of the decision of the EAT in **Cam v Matrix Service Development and Training Ltd** [2013] UKEAT/0302/12.

140. If conduct is found to have had the proscribed purpose, it does not matter that it did not in fact have the proscribed effect, albeit such a situation will be rare: **Richmond Pharmacology v Dhaliwal** @ para 14.

141. In deciding whether conduct has the '**effect of**' violating a person's dignity or of creating for them the proscribed environment, the perception of the person claiming harassment is a key component in determining whether harassment has occurred. In Dhaliwal @ para 15, Underhill J (as he then was) said:

"The proscribed circumstances are, of their nature, concerned with the feelings of the putative victim: that is, the victim must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created. That can, if you like, be described as introducing a 'subjective' element; but overall the criterion is objective because what the tribunal is required to consider is whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so...It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question."

142. If there is no awareness of the conduct there can be no perception: see **Greasley-Adams v Royal Mail Group Limited** [2023] EAT 86 relying on the opinion of Underhill LJ in **Pemberton v Inwood** [2018] I.C.R. 1291 @ para 88.

Bad faith

143. If 'B' alleges that 'A' has contravened the Equality Act (for example by alleging that A has treated him less favourably on grounds of race or for racially harassing him) B does a 'protected act' within the meaning of and for the purposes of section 27 EqA. Consequently, if A then subjects B to a detriment because B has done such an act, this will constitute victimisation of B. However, section 27(3) states that: "*giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.*"

144. It is notable that section 27(3) requires that the 'allegation' or 'information' be **both** false and given or made in bad faith. False means 'wrong, erroneous or incorrect': **GMB Union v Fenton** [2004] UKEAT/0798/02/RN per Burton J @ para 41. Thus an allegation may be false but not advanced in bad faith nonetheless remains a protected act for the purposes of section 27 EqA. What is meant by 'bad

faith'? Specifically in respect of section 27(3) in **Saad v Southampton University Hospitals NHS Trust** [2018] IRLR 1007 Eady J said @ para 43:

*“...The ET is simply required to find whether that evidence, information or allegation is true or false; if false, it must then determine whether it was given or made by the employee in bad faith. And that must mean that it has to determine whether the employee has given the evidence or information or made the allegation honestly: to paraphrase Auld LJ in **Street**, absent other context, bad faith has a core meaning of dishonesty. In this context... it has to be at the bad faith stage that the ET turns its attention to the question whether the employee has made the allegation honestly or not.”*

Burden of proof

145. Proving discrimination can be very difficult. As Lord Rodger of Earlsferry said in **Shamoon** (@para 143):

“Discrimination is rarely open and may not even be conscious. It will usually be proved only as a matter of inference: Nagarajan v London Regional Transport [1999] I.C.R. 877 e – h, per Lord Nicholls. The important point is that there are no restrictions on the types of evidence on which a tribunal can be asked to find the facts from which to draw the necessary inference. In Chief Constable of West Yorkshire Police v Vento [2001] IRLR 124 the Employment Appeal Tribunal discussed some of the kinds of evidence that are used and how they should be approached. In particular, Lindsay J pointed out, at p.125, para 7, that one permissible way of judging how an employer would have treated a male employee in cases which, while not identical, were also now wholly dissimilar. Despite the differences, the tribunal may be able to use that evidence as a sound basis for inferring how the employer would have treated a male employee in the same circumstances as the applicant. Of course, a tribunal cannot draw inferences from thin air, but it can draw them by using its good sense to evaluate the evidence, including the comparisons offered: p.126, para 12.”

146. To assist complainants in establishing discrimination, the Equality Act 2010 provides for a reversal of the burden of proof in certain circumstances.

147. **Section 136** Equality Act 2010 provides that:

- (2) *If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred;*
- (3) *But subsection (2) does not apply if A shows that A did not contravene the provision*

148. This section, otherwise known as the burden of proof provision, lays down a two-stage process for determining whether the burden shifts to the employer. However, it is not obligatory for Employment Tribunals to apply that process. Whether there is a need to resort to the burden of proof provision will vary in every given case. Where there is room for doubt as to the facts necessary to establish

discrimination, the burden of proof provision will have a role to play. However, where the tribunal is in a position to make positive findings on the evidence one way or the other, there is little to be gained by otherwise reverting to the provision: **Hewage v Grampian Health Board** [2012] I.C.R. 1054.

149. In cases where the tribunal is not in a position to make positive findings, s136(2) means that if there are facts from which the tribunal could properly conclude, in the absence of any other explanation, that A had failed to make reasonable adjustments or harassed B, it must so conclude unless A satisfies it otherwise. In considering whether it could properly so conclude, the tribunal must consider all the evidence, not just that adduced by the Claimant but also that of the Respondent. That is the first stage, which is often referred to as the 'prima facie' case. The second stage is only reached if there is a prima facie case. At this stage, it is for A to show that he did not breach the statutory provision in question. Therefore, the Tribunal must carefully consider A's explanation for the conduct or treatment in question: **Madarassy v Nomura International plc** [2007] I.C.R. 867, CA; **Igen Ltd v Wong** [2005] I.C.R. 931, CA.

Discussion and conclusions

150. Although this claim is not a claim of victimisation, section 27 EqA is of some assistance, in that the harassment complaint has been advanced by **C** squarely on the basis that **R2**'s allegations against her and statements made by him to others about her were both false and made or given maliciously – that is, in bad faith. Section 27(3) and the few cases on this point dealing with 'falsity' and 'bad faith' are, therefore, likely to have some application to such a case as this (see paragraph 144 above).

151. One of the issues raised by the tribunal at the outset of the hearing was whether **C** was advancing her claim under section 26 EqA on the basis of the alleged unwanted conduct having the proscribed 'purpose' or 'effect' or both, or in the alternative. Ms Ismail, and her instructing solicitor, confirmed that the case was being advanced squarely on the basis that the allegations levelled against **C** by **R2** were false and malicious allegations as were statements made by him to others and that all were done with the 'purpose' of creating the proscribed environment, as opposed to the 'effect'. As it happened it seemed to the Tribunal judge, having heard all the evidence that there might be circumstances where a complaint of discrimination could be false and in bad faith – but was not made for the purpose of creating the proscribed purpose but could well have the proscribed 'effect' (for example, the **John Seed** and **Tony Moore** examples). This was raised with the legal representatives although no-one arrived at a firm position on it. Ms Ismail suggested that, in those instances only, we may, depending on our findings, have to look at the 'effect' after all.

152. As a tribunal, we are and were astute to the fact that some people may and will knowingly use a protected characteristic tactically, perhaps to make trouble for someone else or to gain some advantage for themselves. An often-heard phrase

is that a person has '*played the race card*', for example. This divisive and pejorative term is meant to convey that a person has made allegations (or threatened to make allegations) of discrimination which they know not to be true or that they are knowingly using their race as a convenient explanation for otherwise non-racial treatment and that they are using it to their particular advantage. Quintessentially, such a person acts in bad faith. This case involves **C** alleging, in effect, that **R2** was '*playing the race card*' against **C** and that by doing so, he thereby harassed her within the meaning of section 26 EqA. We considered the suggestion that **R2** made these allegations in bad faith in order to get a transfer out of the department. However, although it is right to say that he wanted a move from A&E, he wished the matters to be investigated first. In our judgement, that did not sit comfortably with him pursuing the allegations in 'bad faith'. If he was seeking to gain that advantage and was raising knowingly false allegations in order to achieve that goal, we would have expected him to have been pushing for an earlier move

153. Following a thorough examination of the evidence, consideration of the respective submissions and application of the legal principles to our findings of fact, it is our conclusion that the Claimant has not established that she has been subjected to harassment related to race. In simple headline terms, C's claim fails because:

153.1 Save for one matter (the Tony Moore conversation) she has not established that what the Claimant said/alleged was both false and in bad faith;

153.2 We were satisfied that **R2's** purpose was not, in relation to any of his conduct, to violate **C's** dignity or to create the proscribed environment.

153.3 In the case of the Tony Moore conversation, we were satisfied that **R2's** conduct did not have the effect of violating **C's** dignity or of creating the proscribed environment.

154. We have not set out in our reasoning any conclusions as to whether **R2's** conduct 'related to race or religion'. That was issue 1.2 in the agreed list of issues. Ms Amartey, on behalf of **R1**, made some compelling submissions on this subject in her closing submissions. We proceeded on the working hypothesis that the unwanted conduct complained of was indeed related to race or religion but emphasise that we found it unnecessary in the end to arrive at any firm conclusion on that point. Nor, in the end did we have to grapple with issue 1.4 to 1.7.

155. We subjected the allegations made by **R2** against **C** to careful scrutiny. This was a necessary exercise as **C's** case was put firmly on the basis that the allegations were false and made maliciously (in other words in bad faith). It was common ground that she had to establish both these things. This analysis required us to consider (a) the actual words used by **R2** and (b) the perceptions, beliefs and intention of **R2**.

156. Having stated our conclusion, we turn now to the detailed reasoning on each of the allegations against **R2**.

The trigger for R2 complaining to HR about C

157. We began by considering what it was that led **R2** to speak to HR in **September 2021** regarding **C**. It was, we concluded, the episode regarding the lab samples. That was the trigger (see paragraph 83-90 of our findings of fact). Inasmuch as we concluded **C**, in her management of **R2**, not to be motivated by race or religion, we concluded that **R2**'s belief that he was being singled out and talked down to on this occasion by **C** and that this was due to a difference of race or religion was a genuinely held belief on his part. Whilst it may not have been a reasonable belief when considered objectively, nevertheless there was some evidential basis for it, namely that **C** was firm with **R2** at the changing room door and was again firm and a little prickly with him in respect of the samples incident. More importantly, it was a genuinely held belief of **R2**'s based on a perception that **C** did not speak to others in the same way. This belief and perception may be unjustifiable and wrong but that is a different issue.

158. That he spoke to Debbie Appleton (**DA**) of HR on the day of the samples incident and expressed his belief that he finds the way **C** speaks to him to be rude and disrespectful supports our conclusion that – rightly or wrongly – he perceived something in **C**'s tone that day. It may well be that being spoken to firmly by a manager would not generate a belief of racial discrimination in many or even most people and it may be incomprehensible to **C**. However, we are satisfied that it did in **R2**'s case. The explanation for **R2**'s belief is almost certainly complex and not the result of any one identifiable event. It has, in our judgement, nothing to do with **C**. It is more likely than not a result of societal factors and life experiences beyond **C**. She was unfortunate in having been identified by **R2** as a racist, a suggestion which we as an independent tribunal having examined all the evidence before us very carefully, reject. She found herself in the firing line, something which we can see was unfair and very upsetting for her, especially when she was referred to her professional body, the NMC.

159. Having spoken to **DA** it was of no surprise to us that, she, as an HR adviser, went on to ask **R2** if there were any other examples or instances of treatment in support of his belief that there was any discriminatory motivation. Referring to our finding in paragraph 89-90 above, **R2** then applied his mind to situations where he believed he had been treated differently by **C** in the past. This resulted in his email at **page 149**. It was in that email that he raised the changing room incident from some five months earlier. He raised the matter in response to his discussion with **DA**. That then took us on to considering the first controversial incident in these proceedings.

The initial allegation against C by R2: - the changing room incident

160. We were not satisfied that the allegation relating to the changing room incident and the allegations and comments subsequently made by **R2** in his emails to the NMC were made maliciously or in bad faith. There were subsequent differences of emphasis in what **R2** said he was doing in the changing room before or at the point at which **C** knocked on the door but those differences were not, in our judgement,

advanced by **R2** in the knowledge or belief that they were untrue. **R2** could be said to be injudicious or even reckless at times in the words he used to describe the event but that is not enough to render his perception of the events and the underlying allegation malicious or in bad faith. He was in our judgement impetuous in his use of language. We refer back to our finding that **R2** has a tendency to use exaggerated or heightened language, especially when under challenge. Whilst we were satisfied that he exaggerated in saying he was 'eating' or 'having dinner', however, it was not such that in our judgement rendered the allegation false. He had, after all, mentioned that he had been fasting to **JW** and the need to break his fast and he did, we found, go to the changing room with the intention of doing so. That he subsequently used the language of 'eating' or 'having dinner' was not enough to render the allegation false and certainly not enough for us to conclude that it was put forward in bad faith.

161. The substance of the allegation regarding the changing room incident was that **C**, in removing him from the changing rooms and directing him to return to work, treated him less favourably on grounds of race, than she treated others of a different race or religion – in particular, **JG**. **JG** was in the changing room with **C** at the time. As **R2** perceived it, he was the one who was being hauled back on to the department. Of course, **C** did not know that **JG** was present but that was a detail lost on **R2**.

The email of 24 September 2021

162. It was **C**'s case that this email contained not only knowingly false information or allegations but a falsely stated belief that **C**'s conduct was related to **R2**'s race. Therefore, we carefully considered the email to see whether it contained a false statement or allegation and if so whether, we could conclude that **R2** knew or believed that what he stated was untrue. We concluded that there was nothing 'false' in the statement '*Sarah took me out of the changing rooms*'. While one might quibble with the word '*took*', the substance of the statement is that he was directed to get out of the room and go back to work. That is precisely what happened. To that extent, **C** did take him out of the changing room. We considered the statement '*I didn't like she did that only to me when other staff were there.*' That too, we concluded, was factually correct. **R2** did not like the fact that he was taken out of the changing room when **John Gray** was present. He felt that he was in some trouble. Again, whilst there was an argument as to whether there were other staff in the room (in the plural sense), it is factually correct that one other member of staff was present, namely John Gray – even though **C** did not know this at the time. The further statement '*I now know this is a race problem I believe if your [sic] Asian you get treated different in my opinion*' is, in substance, a statement of belief. **C** invited us to conclude that this was a false belief. However, we do not agree. Rightly or wrongly, and whether reasonable or not, **R2** genuinely believed this. Furthermore, it is not a statement of belief directed solely at **C**. It was statement of belief by **R2** that if you are Asian, you are and will be treated differently by management. Sadly, it is a view of life that **R2** holds to and which has had unfortunate and distressing consequences for **C** and perhaps others in her situation who wrongly find themselves on the receiving end of **R2**'s viewpoint.

163. **C** relied on two further things in support of her case that the allegation of racial discrimination contained in the email was both false and malicious:

163.1 That the statement "*I was only getting a drink I wasn't getting changed or was I leaving I was simply getting a drink and talking to other staff in the changing rooms*" was a lie.

163.2 That **R2**'s account of what happened and what he said he had been doing in the changing room changed over time.

164. We did not conclude that **R2** was lying in the email when he said: '*I was only getting a drink*'. We refer to our findings in paragraphs 59-60 above. To the extent that it was suggested by **C** that the facebook post on **page 394** demonstrated that **R2** was lying about fasting during Ramadan on **29 April 2021**, we do not accept this. The post says '*first time in 4 years I've been able to fast and do Ramadan properly*' (our emphasis). That is not inconsistent with **R2** fasting on and off or breaking fast early and therefore not doing Ramadan 'properly'. Considering the post as a whole, we do not draw the inference which we were invited to, namely that **R2** was not fasting at all during Ramadan in 2021.

165. Nor did **C** establish that the part of the email where **R2** said '*I wasn't getting changed or was I leaving*' was false or a lie. **R2** was not getting changed, nor was he leaving. He was, if anything, doing exactly what **JG** was doing. They both went to the changing room early and both intended to wait for the all-clear announcement and not have to return to the department before leaving for the night.

166. We scrutinised the various emails of **R2** relied on by **C** as constituting different and changing accounts of the incident.

The email of 10 November 2021 to NM [page 192]

167. We refer to our findings in paragraph 59 above. In our judgement there was nothing in that email that so significantly differed from the account given in the email at **page 149** that led us to conclude that the contents of the email on **page 149** were false and that **R2** was knowingly putting forward a false statement in either the email on **page 149** or in the email at **page 192**. Whilst it is not correct that **R2** told **C** that he was going to eat and drink' he did ask **JW** to go home in order to break his fast. It is a matter of interpretation of the email on **page 192** as to whether '*even though I told her*', is referring to **C** or to **JW**. We bear in mind that **R2**'s ability to express himself in writing is not his strong point and as such there is scope for misinterpretation. We were certainly not satisfied that anything in that email was put forward by **R2** in bad faith, knowing it to be untrue.

The email of 12 November 2021 to DA [page 204-205]

168. There, **R2** says that **C** ‘*pulled him out of the changing room*’. In our judgement, that was not meant to be a literal ‘pulling’ but ‘pulled’ in the sense of being instructed to get back to work. It is the sort of word anyone would reasonably use to describe the situation under scrutiny. Further, although it is not factually correct – and therefore is ‘false’ – to say that when **C** pulled **R2** out of the changing room he ‘was eating’, this was not, in our judgment, advanced by **R2** in bad faith. We did not take him to mean that he was literally eating at the very moment he was ‘pulled’ or called out by **C**. It was him injudiciously expressing that he had gone to the changing room to break his fast. A person better schooled at expressing himself might have put it differently. We must resist the temptation to pore over every word. This is not a pedantic assessment of the written word but a question of having to look at the substance or essence of what is being alleged.

169. We conclude that it was factually wrong – and therefore false - for **R2** to say that he told **C** that he had gone to eat. He had not said this to **C** on **29 April 2021**. However, we were not at all satisfied that **R2** said this knowing or believing it to be false. He had spoken to **JW** on **29 April 2021** about the need to break his fast. He also spoke to **C** the next morning to say that he had gone there to break his fast. By the time he came to recount the events of **29 April 2021**, after his meeting with **DA**, some five months or so had elapsed. We conclude that **R2** was simply wrong about this. He had come to believe that he had told **C** on the day as well as the following day. We arrived at the same conclusion in relation to that part of **page 204** where he says, ‘*she shouted at me in front of me jock gray was there*’. It is wrong – and therefore, false – to say that **C** shouted at **R2**. She did not. At most, **C** was firm and direct and somewhat prickly with him. She was, after all, suspicious of **R2** having already formed the view that he looked guilty when she earlier saw him in the corridor. This injudicious exaggeration of language on the part of **R2** does not equate to bad faith. We noted that **R2** volunteered the name of a witness to the event, **JG**, which rather sat uncomfortably with the suggestion that he described **C** as ‘shouting’ in bad faith. Surely it would be better for him, if knowingly advancing a false statement, not to mention any witness to the event.

The NMC emails

170. All three NMC emails were received by **C** at the same time. In the first one, dated **06 November 2021 [page 188]**, in the first two paragraphs he is asking questions. He raised what he had been told to by the Citizens Advice Bureau. He expressed a belief that the nurses are racist. He was essentially repeating what he had already said in his email of **24 September 2021**. We have already concluded that this belief was not advanced maliciously or in bad faith in **September** and it had not become a case of bad faith to say the same thing to the NMC in **November**. Nothing had happened in the interim to change **C**’s perception or belief. Furthermore, we were satisfied that **R2**’s purpose in contacting the NMC in this way was to take the matter wider to whatever body he felt he could so that the matters would be investigated. We conclude that he was expecting and hoping that **C** and **RA** should be suspended pending investigation but that was not his purpose in writing to the NMC.

The email of 15 November 2021 to the NMC [pages 211-212]

171. The central allegation was repeated in this email. **R2** goes on to say that **C** is a 'known bully'. In his evidence to the Tribunal, **R2** said that he saw **C** in this way and that others perceived her to be a bully. We could see no factual basis for such a statement. However, we were conscious that we were not examining the life and times of the Respondent's A and E department over a period of years from the perspective of others. In as much as we saw absolutely no trace of it in **C**, we could not and did not conclude that by advancing the injudiciously expressed statement that **C** was a 'known bully' that he did so in bad faith, knowing it to be untrue. Certainly nothing that we saw or heard would merit such a description of **C** but it does not follow from this that **R2** acted in bad faith in so describing her.

The email of 15 January 2022 [pages 272-275].

172. The repetition in this email of the allegation relating to the changing room incident was not, in our judgement, substantially different to the original allegation. It is poorly phrased in saying '*she wouldn't let me eat my dinner when I was fasting during Ramadan...*' However, wrong – and false - as it is when read literally, regrettably, that is how **R2** had come to see and to express things.

173. It is false to say that **C** mocked his appearance and belittled him but referring to our findings (see paragraph 127 above) there was a single, passing reference to his top not being ironed. Does he advance these falsities (which we have found to be false in the sense that they are incorrect or erroneous) knowing them to be false and in bad faith. Again, we do not believe so. Sadly, **R2** believes that he was belittled by **C** because he did not like the tone of her voice and feels that she looked down on him because of his racial and religious makeup.

Spreading rumours that C was suspended: on or around 12 November 2021

174. **C** has not established on the evidence that **R2** spread rumours about her suspension and/or that the reason for this was that she had made racist comments about him. There was certainly a suspicion and belief that he had been doing so. However, referring back to our findings of fact, there was considerable gossip and rumour going around at the time. That **R2** mentioned **C**'s suspension to **JS** in **November 2021** does not prove that he was the source of these rumours. It was, as we have set out in our findings, described in **JS**'s written witness statement as a question. There was no direct evidence that **R2** had said to anyone that **C** had been suspended for making racist remarks to him, something which he denied. Lisa Hebron's evidence was very much second and third hand and whilst we carefully considered what she said, it was insufficient, to prove to the civil standard that **R2** was the source of the gossip.

The conversation with John Seed in or around November 2021

175. There were three aspects to this conversation:

175.1 That **R2** told **JS** that **C** was suspended,

175.2 That **R2** told **JS** that **C** had one into the changing room when he had just finished fasting and was having something to eat and drink and she told him to 'get out now'

175.3 That **R2** told **JS** of another incident where **C** had walked into the seminar room when **R2** was on his knees praying and asked him what he was doing and pulled him up by the neck of his t-shirt, telling him to 'get out and get back to work'.

176. We have set out our findings and conclusions in respect of the first part. It has not been established that **R2** was spreading rumours about **C**'s suspension. The reference during this conversation to suspension was insufficient to establish that **R2** was spreading a rumour. **JG** was recounting a conversation some 8 months after the event. The second part is not 'false' in that **C** was in substance telling **R2** to get out of the changing room. As regards the third part regarding the 'seminar room' we were not satisfied **R2** said this (see our findings at paragraph 113 above). This was so even though we found that he said something similar to **Tony Moore** (for which, see our conclusions below).

177. There was an additional difficulty for **C** insofar as she maintained the conversation between **R2** and **JS** said to amount to an act of harassment which had as its purpose the violation of **C**'s dignity or of creating the proscribed environment. That conversation was a private conversation. **R2** did not intend the conversation to be passed on to **C** – and it wasn't in fact passed on for a period of some 8 months. Whatever was or was not said during that conversation it was not said for the proscribed purpose. **R2** did not intend anything to be for **C**'s ears.

178. Although **C**'s case was not advanced on the basis that the conduct had the 'effect' of violating **C**'s dignity or of creating the proscribed environment, nevertheless we considered this – the Employment Judge having expressly raised the matter with the legal representatives again in submissions. We concluded that by the time the conversation came to **C**'s attention it did not actually have the proscribed effect on her. If anything, it had the effect of boosting **C**'s perception of the strength of her case against him, in that she would be able to refer to the conversation in her litigation against **R2** – and indeed, she amended the Claim to add it as a further allegation of harassment.

Tony Moore conversation: 06 April 2021

179. We refer to our findings on this in paragraphs 131-132 above. What **R2** said to **TM** was false. It was made recklessly without any regard for **C**'s reputation. In saying this, we are satisfied that **R2** knew it was not true. He had knowingly embellished the changing incident to **TM**. It went beyond his more normal injudicious or impetuous use of language. It was conduct that related to race and/or

religion. We were satisfied that it was ‘unwanted’ conduct in that no-one would want such a falsity to be said about them.

180. We concluded that it was made maliciously or in bad faith, in the sense that **R2** by saying it knew it to be untrue.

181. However, we concluded that this comment did not amount to harassment within the meaning of section 26 Equality Act 2010. The Employment Judge raised this question of ‘purpose’ and ‘effect’ with the legal representatives at the beginning and again at the end of the hearing. The case was advanced firmly on the basis that **R2**’s purpose was to violate **C**’s dignity or create the proscribed environment. It was not advanced on the basis that his conduct had that effect. This was in a way understandable, in that if the allegations were made in good faith, it was accepted that they could not reasonably be said to have the proscribed effect – otherwise every complaint of racial (or other) harassment could itself be the subject of a harassment complaint. But ‘bad faith’ is just the beginning of the assessment. That something is done in bad faith is one thing but that does not mean that its purpose is the one legislated for in section 26. If something is done in ‘bad faith’ it may be relatively easy to conclude that it was for the proscribed ‘purpose’ but in some cases it may not be. This was one such case, in our judgement. As we have found, **R2** did not intend his discussion with **TM** to get back to **C**. We were satisfied that it was not **R2**’s purpose to violate **C**’s dignity or to create the proscribed environment. We conclude that **R2** said what he said out of a desire for self-glorification in the eyes of **TM**, to garner sympathy and **R2** was wholly indifferent and reckless to any damage he might cause to **C**’s reputation.

182. Such unwanted conduct, if not done for the proscribed purpose, can still have the proscribed effect. Even though **C** had not advanced the case on the basis of ‘effect’, we considered it important to address this. We had seen the effect on the Claimant of the initial complaint and of the referral to the NMC.

183. Having considered it carefully, however, we concluded that when **C** heard from **TM** what **R2** had said, it did not in fact have the proscribed effect on her. In our judgement, it was a case of ‘grist to the mill’. It was something useful she could use in the litigation against him. That is why she had called **TM** – to gather some useful information evidence in support of her case against **R2**. However, it did not actually, at this stage of proceedings, have the proscribed effect on her. It was then formulated into a complaint of harassment. However, for it to amount to harassment it must actually have the effect of violating dignity or creating the sort of environment referred to in section 26 EqA. Knowing what **R2** said to be fantastical and absurd she did not actually perceive it to be harassment. Even if we were wrong about this, and that **C** did perceive it to have the proscribed effect, we conclude that in the circumstances in which it came to light it would not be reasonable for it to have that effect. **C** had contacted **TM** in the expectation that **R2** had said something negative about her. Having done so, then to be told what **TM** told her and knowing it to be fantastical and absurd, it is not reasonable for this to have the effect in section 26(1)(b)(i) or (ii).

Concluding remarks

184. By reference to the final agreed list of issues, our conclusions therefore are as follows:
- 184.1 As regards paragraphs 1.1.1, 1.1.3, 1.1.4, 1.1.5, **R2** did not make these allegations or statements maliciously or in bad faith, knowing or believing them to be false. His purpose was not to violate **C**'s dignity or to create the proscribed environment in section 26 EqA 2010. It being accepted that, in such circumstances, the conduct could not be said to have the proscribed effect, these complaints of harassment must fail and be dismissed.
- 184.2 As regards 1.1.2, **C** has not established that **R2** said to members of the Trust's staff that **C** had been suspended for making racist comments about him. This complaint must therefore fail and be dismissed.
- 184.3 As regards 1.1.6, **C** has not established that **R2** had informed Mr Seed of a second incident. Insofar as there was a reference to suspension **R2** was not spreading any rumour. His purpose was not to violate **C**'s dignity or to create for her the proscribed environment. Nothing he said in relation to the changing room incident was false or said in bad faith. This complaint must therefore fail and be dismissed.
- 184.4 As regards 1.1.7, **C** has established that **R2** told Tony Moore that she had gone to the male changing room when he was praying and had pulled him off his prayer mat by his ear when he had finished fasting. This was false and was said maliciously, in bad faith in that **R2** knew it to be false. However distasteful, **R2**'s purpose was not to violate **C**'s dignity or to create for her the proscribed environment. Nor did it in fact have the proscribed effect on **C** as she did not perceive it as such. Even if she did, it is not reasonable to conclude that it had the effect having regard to the overall circumstances including the context in which the remark was obtained and relayed to her.
185. A person's perception of their treatment in any given situation is often informed by their own life experiences. A person may have a 'sense' that they have not been taken seriously or that they have been treated differently by a manager who – when viewed objectively - is in fact doing nothing other than managing them efficiently. Sometimes the smallest thing, for example a particular tone of voice or mannerism, a surreptitious glance here and there can be all that is needed to trigger a sense of being treated differently, especially if that person has a different tone or manner when interacting with others of a different race or background. From that, it may not take much for the person to put this down to them being of a different race, culture, religion, sex, sexual orientation or whatever. Some will be more sensitive than others. Racial discrimination can generate feelings of anger, frustration or fear in those who experience it. Those who have experienced racial discrimination can and often do become suspicious of the actions of others even where those others are not in any way motivated by race. In our judgement the life experiences of **R2** led him to suspect that **C**'s 'managerial' interactions with him, which he perceived to be different to her interaction with white staff, were motivated consciously or

unconsciously by race or religion. Sadly, when **C** was simply doing her job – by keeping an eye out for a person she believed, on reasonable grounds, to be slacking or skiving, or by instructing him to leave a changing room before staff were given the all-clear, or by telling him firmly to take samples to the labs – all of these things were genuinely perceived by **R2** as examples of **C** singling him out or over monitoring of him and that the reason for it was due to race.

186. We are sure this decision will come as a disappointment to C. However, we hope that she is able to move on and put these sad, unfortunate events behind her.

Employment Judge Sweeney

Date: 11 August 2023

APPENDIX

1. Harassment related to race and/or religion/belief

1.1 Was the Claimant subjected to unwanted conduct namely, malicious allegations made by the 2nd Respondent? The Claimant relies upon the following alleged allegations made by Mr Hanif:

1.1.1 On or around 24 September 2021, made the following complaint to the First Respondent in an email:

“Yeah some of the issues was one of them when Sarah took me out of be changing rooms when everyone else was in there but only told me to get out the changing rooms and I was only getting a drink I wasn’t getting changed or was I leaving I simply was getting a drink and talking to other staff in the changing rooms, I didn’t like she did that only to me when other staff were there I don’t like the way she speaks to me I find her rude and Disrespectful towards Me more and more things happen I now know this is a race problem I believe if your Asian you get treated different in my opinion.”

1.1.2 On or around 12 November 2021, when the Claimant had gone on sick leave, Mr Hanif said to members of the Trust’s staff namely Alexandra Blair, Lucy Ripley, Michelle Morning that the Claimant had been suspended for making racist comments about him.

1.1.3 Mr Hanif’s email to the NMC dated 6 November 2021 (page 188) in which he names the Claimant and states: he has complained about her; he is confused why she has not been suspended by the Trust; he believes under guidelines, suspension is a must; and that the claimant needs suspending with what’s happened ; that he believes the Claimant’s treatment of him has been racial discrimination towards [him] and bullying towards [him] and states Racism is a serious subject do I believe these nurses [including the claimant] are racist yes I do believe they are racist and have issues with ethnic minorities these nurses are bullies and need looking in too (sic) (paragraph 30(vi)(a) of the GoC)

1.1.4 Mr Hanif’s email to the NMC dated 15 November 2021 (page 211-212) in which he states Sarah Mackenzie [the Claimant] is a bully who pulled me out of the staff room while I was breaking fast during Ramadan I was eating and she told me to get out the room and embarrassed me in front of everyone I believe this is racial (sic) motivated, she is a known bully (paragraph 30(vi)(b) of the GoC)

1.1.5 Mr Hanif’s email to the NMC dated 15 January 2022 (page 274-275) in which he states Sarah Mackenzie from a and eshe wouldn’t let me eat my dinner when I was fasting during Ramadan last year and forced me out a changing room even when other people were there – she was

making me work more jobs than other staff and belittling me in front of staff mocking my appearance and mocking me in front of staff and in front of patients – I believe she is a racist (paragraph 30(iv)(c) of the GoC).

1.1.6 That Mr Hanif had said to John Seed in or around November 2021 “So, Sarah has been suspended, eh” and said that the Claimant had gone into the changing room when he had been in there and it was when he had just finished fasting and was having something to eat and drink and she had told him to ‘get out now’. He then informed Mr Seed of a second incident where the Claimant had walked into the seminar room when Mr. Hanif was on his knees praying and asked him what he was doing and pulled him up by the neck of his t-shirt and hold him to ‘get out and get back to work.’

1.1.7 That Mr Hanif had told Tony Moore in or around April 2022 that the Claimant had walked into the male changing room when he was praying and had pulled him off his prayer mat by his ear and that Mr. Hanif had reported this to managers there when he had just finished fasting and he was having something to eat and drink and the Claimant told him to ‘get out now’

1.2 Was that conduct, namely the allegations and alleged allegations made by Mr Hanif, related to race and/or religion/belief? If so, what is the religion/belief? The Claimant relies upon Mr Hanif’s race (British-Pakistani). The religion/belief relied upon by the Claimant is Mr Hanif’s religion/belief (Muslim).

1.3 If so, did that conduct have the purpose of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

1.4 To what extent were the matters outlined above committed in the course of the Second Respondent’s employment?

1.5 To what extent is the First Respondent vicariously liable for the acts of the Second Respondent? The First Respondent contends that it took all reasonable steps to prevent the alleged harassment from occurring.

1.6 What steps did the First Respondent take to prevent the alleged harassment of the Claimant by the Second Respondent?

1.7 If the First Respondent took any such steps, were they all of the reasonable steps the First Respondent could have taken?

2. Time limits

2.1 Has the Claimant presented her claim out of time in respect of any matter which occurred prior to 9 November 2021?

2.2 If so, would it be just and equitable to extend the time for presentation of that part of the claim?

3. Remedy

- 3.1 The Claimant seeks a declaration, an award of compensation for injury to feelings, an award of aggravated damages, interest and recommendations applicable to the Second Respondent. Are the recommendations sought in order to obviate and/or to reduce the adverse effect upon the Claimant of the Second Respondent's complaints, or some of them, against her (see paragraph 34 of the POC).
- 3.2 In raising a grievance with the First respondent about the Second Respondent's allegations against her, such as she knew of them at the time, has the Claimant complied with any applicable ACAS Code of Practice.
- 3.3 Did the Claimant unreasonably fail to comply with the ACAS code of conduct such that it is just and equitable to reduce the award?
- 3.4 If so, what percentage reduction is appropriate?
- 3.5 Did the First Respondent unreasonably fail to comply with the ACAS code of conduct such that it is just and equitable to increase the award?
- 3.6 If so, what percentage increase is appropriate?