



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr L Cyrus  
**Respondent:** Surrey and Borders Partnership NHS Foundation Trust  
**Heard at:** London South                      **On:** 15,16,17,18 November 2022  
**Before:** Employment Judge Sekhon  
Ms J Jerram  
Mr J Turley

## Representation

**Claimant:** In person  
**Respondent:** Ms Patterson, Counsel

# RESERVED JUDGMENT

The unanimous decision and judgment of the Tribunal is that:

1. The claim for direct race discrimination under Section 13 Equality Act 2010 is not well founded and is dismissed.
2. The claims for harassment (race) under Section 26 Equality Act 2010 are not well founded and are dismissed.
3. The claim for victimisation (race) under Section 27 Equality Act 2010 is not well founded and is dismissed.

# REASONS

## Summary

1. This is the reserved judgment with reasons following the hearing from 15-18 November 2022.
2. Mr Cyrus (“the Claimant”) was employed as a bank worker as a property project manager (Band 8a) by the Respondent, Surrey and Borders Partnership NHS Trust (“Respondent Trust”), on 6 April 2021 until he was dismissed on 4 May 2021. His last day of employment was 4 May 2021, but he was paid until the end of May 2021. The Respondent is an NHS Trust providing health and social care services for people in Surrey and Northeast Hampshire and drugs and alcohol services in Surrey and Brighton.

3. The key personnel at the Respondent Trust and referred to in this judgment are listed below: -
  - (a) Ms Angela Borst, HR Business Partner.
  - (b) Ms Susie Gray, Director of Property Operations.
  - (c) Mr David Mander (Witness), Associate Director of Property Operations.
  - (d) Mr Yogesh Ramloll (Witness), Head of Facilities Management.
  - (e) Mr Raj Rutah, Clinical Lead of Engagement and Transformation (Chief Medical Officer's Office)
4. Mr Cyrus notified ACAS under the early conciliation procedure on 24 May 2021. The ACAS certificate was issued on 25 June 2021.
5. By a claim form received on 30 June 2021, Mr Cyrus seeks compensation for direct race discrimination, harassment related to race and victimisation.
6. The Respondent Trust resists the claim by ET3 dated 9 August 2020, denying that Mr Cyrus was discriminated or harassed on the grounds of race or that he was victimised.

### **Claims and Issues**

7. The issues were clarified at the preliminary case management hearing on 11 August 2022 before Employment Judge Andrews who prepared a List of agreed Issues. A final copy of the agreed List of Issues is dated 8 September 2022 and at pages 48, 49 of the bundle.
8. Employment Judge Andrews dismissed the claim of unfair dismissal as Mr Cyrus did not have sufficient continuous service to bring such a claim.
9. Employment Judge Andrews laid down directions for both parties to comply with in preparation for the final hearing.
10. Mr Cyrus subsequently made applications to the Tribunal for disclosure of his calendar and emails whilst working for the Respondent Trust and for witness orders for the HR director, Ms Angela Borst, and Mr Mander's manager, Mr Raj Rutah, Clinical Lead of Engagement and Transformation (Chief Medical Officer's Office).
11. On 2 September 2022, Employment Judge Andrews suggested that Mr Cyrus review whether the disclosure of documents was relevant or necessary after disclosure had taken place between the parties. The Tribunal note that Mr Cyrus' diary entries are disclosed at page 432 of the bundle.

12. On 31 October 2022, Acting Regional Employment Judge Balogun, refused Mr Cyrus' application for witness orders and the reconsideration thereafter on 4 November 2022.

### **Procedure and Hearing**

13. The case was listed for a 4-day public final hearing to take place in person. This was a pleaded claim for direct race discrimination (Section 13 Equality Act 2010), harassment (race) (Section 26 Equality Act 2010), victimisation (race) (Section 27 Equality Act 2010).
14. Mr Cyrus appeared in person and was without legal representation. The Respondent Trust was represented by Ms Patterson, Counsel.
15. The Tribunal had an indexed bundle from the Respondent Trust running to 629 pages together with a cast list, chronology, and essential reading list. These were not agreed by Mr Cyrus prior to these being sent to the Tribunal.
16. Mr Cyrus had produced a witness statement dated 10 November 2022 and the Respondent Trust produced statements from Mr Mander dated 10 November 2022 and Mr Ramloll dated 9 November 2022 and called them to give evidence.
17. The Tribunal spent the first 1.5 hours reading the documents from the essential reading list and the witness statements.

### **Amendment to the List of Issues**

18. At the outset of the hearing, both parties confirmed that the agreed List of Issues did not need to be amended / altered and the Tribunal confirmed that these were the only issues that they would hear evidence on and determine at the final hearing.
19. However, during cross examination Mr Cyrus clarified in his evidence that: -
  - (a) Allegation 2.1.1 was incorrect and should read, "On 22 April 2021, the Claimant met with Mr Mander, the day before Mr Mander went on annual leave and at this meeting Mr Mander said, "I have two black managers in the same room as me that I manage.".
  - (b) Allegation 2.1.2 did not take place as there was only one incident when Mr Mander referred to having two black men in the room.
  - (c) Allegation 2.1.6 was incorrect as the bullying and harassment that Mr Ramloll carried out was not because of the Claimant's race.
20. The Tribunal amended the List of Issues to remove allegations 2.1.2 and 2.1.6 and amended allegation 2.1.1 as set out above. Both parties agreed these amendments. The Tribunal agreed that Ms Patterson could put questions to the Respondent Trust witnesses on the new allegation 2.1.1.

21. The Amended List of Issues for the Tribunal to consider are as follows: -

**1 Direct discrimination on the grounds of race (s.13 Equality Act 2010)**

- 1.1 Has the Respondent treated the Claimant less favourably than it treated or would treat others?
  - 1.1.1 The Claimant relies on his dismissal by David Mander on 4 May 2021 as the less favourable treatment relied upon.
- 1.2 If there has been less favourable treatment, was the reason for such treatment the protected characteristic of race?
- 1.3 In respect of the allegations of discrimination on the grounds of the Claimant's race, the comparator relied on by the Claimant is:
  - 1.3.1 The Claimant relies on an actual comparator, namely a white female colleague who also worked as a bank worker at the same time as the Claimant and also reported directly to Mr Mander.

**2 Harassment (s.26 Equality Act 2010)**

- 2.1 Did the Respondent act as follows:
  - 2.1.1 On 22 April 2021, the Claimant met with Mr Mander, the day before Mr Mander went on annual leave and at this meeting Mr Mander said, "I have two black managers in the same room as me that I manage".
  - 2.1.2 On 3 May 2021, Mr Mander described that he had had freckles and one day he woke up to find that the freckles had grown into one thin line across his face which made him half black.
  - 2.1.3 At the only other meeting held with the Claimant after his induction (the first meeting with Mr Mander after his appointment and prior to 4 May 2021) in a meeting in Leatherhead, Mr Mander entered the room and said "smile so I can see your teeth as it is rather dark in here and I cannot see you."
  - 2.1.4 At the same meeting as that described at 2.1.1 above, Mr Mander called the Claimant a liar.
- 2.2 If the Respondent did any or all of those things, did such action or inaction amount to unwanted conduct related to the Claimant's race?
- 2.3 If so, did the conduct have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, having regard to all the circumstances and whether it is reasonable for it to have that effect?

**3 Victimisation (s.27 Equality Act 2010)**

- 3.1 Did the Claimant perform a protected act? The Claimant alleges:
  - 3.1.1 On 4 May 2021, at a meeting with Mr Mander, the Claimant complained to Mr Mander that the unwanted conduct referred to in his email of 30 April 2021 were acts of discrimination.  
(Mr Cyrus seeks to amend his ET1 and for this issue to read, "On 4 May 2021, at a meeting with Mr Mander, the Claimant complained to Mr Mander that the unwanted conduct set out in allegation 2.1.1 above were acts of discrimination")

- 3.2 Insofar as the protected act relied on constitutes allegations made by the Claimant, is the Claimant prevented from relying on those allegations because they were false and not made in good faith?
- 3.3 Has the Respondent subjected the Claimant to a detriment because he had done a protected act? The Claimant relies on the following alleged detriments:
  - 3.3.1 The Claimant alleges that he was dismissed.”

### Mr Cyrus' concerns

22. Following a discussion with the parties at the outset of the hearing, Mr Cyrus confirmed that he agreed the bundle and there were no additional documents that he wished to put before the Tribunal and that neither party had any reasonable adjustments that they required for the hearing.
23. However, during the hearing and in his submissions, Mr Cyrus stated that the Respondent Trust had failed to include the documents that he had worked on whilst employed by the Respondent Trust to show that he had done a poor job. The Tribunal note that Mr Cyrus had not made an application for these documents since the Respondent Trust has provided disclosure and had agreed the bundle for the hearing before the hearing commenced.
24. Mr Cyrus raised his concerns that his request for a witness order for Ms Borst and Mr Rutah had been refused. The Tribunal informed him that it is for the Respondent to defend their case and if they have failed to bring witnesses that would assist them in doing so, that the Tribunal could draw an inference from this. The Tribunal also explained what had been stated in correspondence to Mr Cyrus previously from the Tribunal, namely that,  
  
*“If you secure the attendance of a witness under a witness order, they are your witness and any evidence they give is evidence in your case, whether it supports it or not. You cannot cross examine your own witness. There is therefore no point in applying for a witness order if the witness is unlikely to give evidence that is favourable to your case.”*
25. Both parties directed the Tribunal to the documents they considered relevant during the hearing.
26. Mr Cyrus did not ask the Respondent Trust witnesses about all the issues in the Amended List of Issues during cross examination. The Tribunal informed him several times that if he wished to do so he should ensure that he puts his case to the Respondent Trust witnesses on the issues where there is a dispute. Mr Cyrus confirmed that he noted the Respondent Trust witnesses disputed his evidence and that he did not consider it necessary to ask questions about those issues.
27. Mr Cyrus requested that Mr Ramloll not be present when he cross examined Mr Mander so that he could not give the same answers. The Tribunal refused this request and informed Mr Cyrus that this is a public hearing, and it would therefore not be appropriate to do so.

**Liability / Remedy hearing**

28. The Tribunal decided it would hear evidence and submissions in respect of liability and remedy and would reserve judgment so that written reasons would be sent to both parties.
29. During Mr Cyrus' cross examination towards the end of day 1, Ms Patterson raised that Mr Cyrus had not responded to the Respondent Trust's request of 3 November 2022 for documents in support of the Schedule of Loss including payslips since December 2021, details of jobs sought from May to December 2021 and details of Universal credit payments.
30. Mr Cyrus confirmed that he would send this documentation on the evening of 15 November. The Tribunal agreed that they would allow further time for Ms Patterson to cross examine Mr Cyrus on remedy later in the hearing but that if this documentation was not available by this time, then the Tribunal may defer resolving remedy at this hearing until this documentation is available.
31. Ms Patterson confirmed on 16 November 2021 that Mr Cyrus had sent some documentation relating to a job offer made in November 2021 to commence in January 2022, but that payslips and details of Universal Credit were outstanding. Mr Cyrus stated that he could provide his bank statements to show his pay but that he was having difficulty accessing information about his job searches from May to December 2021.
32. The Tribunal decided that due to Mr Cyrus' delay in providing documentation to the Respondent Trust and Tribunal supporting the compensation claimed in the Schedule of Loss that it would not be possible to hear submissions and evidence on remedy at this hearing until this documentation is available.
33. The Tribunal advised both parties of their decision and told Mr Cyrus to send the documentation on remedy to the Respondent Trust as soon as possible. The Tribunal noted that Mr Cyrus had failed to follow the Order laid down by Employment Judge Andrews and advised him that this resulted in the Tribunal not being able to decide remedy at this hearing.

**Claimant's application to amend the ET1**

34. In Ms Patterson's closing submissions, she stated that the claim for victimisation now fails on the grounds that Mr Cyrus had accepted during the course of the hearing that the bullying conduct he alleges Mr Ramloll carried out in his email of 30 April 2021 was not based on race. As a result, the fact that Mr Cyrus told Mr Mander on 4 May 2021 about Mr Ramloll's conduct cannot be a protected act for the purposes of the legislation and paragraph 3 of the List of Issues is no longer in issue.
35. The Tribunal clarified the position with Mr Cyrus, and he stated that it was his case that the protected act was that he told Mr Mander on 4 May 2021 about Mr Mander's own discriminatory conduct towards him, and he had understood his

case to be this. He confirmed that it was not his case that he told Mr Mander about Mr Ramloll's conduct as he accepts this was not because of his race.

36. The Tribunal asked Mr Cyrus to refer to the relevant part of the ET1 in which he sets out that his case was that he told Mr Mander about his discriminatory conduct. After reviewing this, Mr Cyrus confirmed that this was not pleaded in the ET1 and that the ET1 had been pleaded on the basis that he told Mr Mander about Mr Ramloll's conduct.
37. The Tribunal clarified with Mr Cyrus whether he wished to amend his claim on victimisation and he confirmed that he wished to do so. Ms Patterson submitted that Mr Cyrus was seeking to amend his ET1 on victimisation and not simply on the Amended List of Issues. The Tribunal agreed with Ms Patterson's analysis.
38. Ms Patterson objected to this very late application and made submissions on why these late amendments to the ET1 should not be allowed by the Tribunal. The Tribunal asked questions of Mr Cyrus to obtain his response. The Tribunal confirmed that they would consider Mr Cyrus' application to amend the ET1 in their judgment. This is discussed below.

### **Relevant Law**

39. By section 39(2) Equality Act 2010, an employer must not discriminate against an employee by subjecting him to a detriment or dismissing him. By section 40 Equality Act 2010 an employer must not harass his employee.

### **Direct discrimination - Section 13 Equality Act 2010.**

40. A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
41. By section 9 Equality Act 2010, race is a protected characteristic and race includes colour; nationality; ethnic or national origins.
42. In cases of direct discrimination, by s23(1) and (2)(a) Equality Act 2010, it is provided that there must be no material difference between the circumstances of the Claimant's case and that of his or her comparator and that (for these purposes) the 'circumstances' include the Claimant's and comparator's abilities.
43. The requirement for comparison in the same or not materially different circumstances applies equally to actual and to hypothetical comparators, as highlighted in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11.

### **Harassment - Section 26 Equality Act 2010**

44. (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.

### **Victimisation – Section 27 Equality Act 2010**

45. (1) A person (A) victimises another person (B) if A subjects B to a detriment because:
- (a) B does a protected act, or
  - (b) A believes that B has done, or may do, a protected act.
- (2) Each of the following is a protected act:
- (a) bringing proceedings under this Act;
  - (b) giving evidence or information in connection with proceedings under this Act;
  - (c) doing any other thing for the purposes of or in connection with this Act;
  - (d) making an allegation (whether or not express) that A or another person has contravened this Act.
46. The burden of proof is set out in Section 136 (2) Equality Act 2010. This provides:
- “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.”
47. Section 136 (3) provides that Section 136 (2) does not apply if A shows that A did not contravene the provision.
48. The guidance in *Igen Ltd v Wong* 2005 ICR 931 and *Barton v Investec Henderson Crosthwaite Securities Ltd* 2003 CR 1205 EAT provides guidance on a 2-stage approach for the Tribunal to adopt. The Tribunal does not consider it necessary to set out the full guidance. However, in summary, at stage one the Claimant is required to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, (now any other explanation) that the Respondent has committed an act of discrimination.
49. The focus at stage one is on the facts, the employer's explanation is a matter for stage two which explanation must be in no sense whatsoever on the protected ground and the evidence for which is required to be cogent. If the employer is unable to do so, we must hold that the provision was contravened, and discrimination did occur.
50. The Tribunal notes the guidance is no more than that and not a substitute for the Statutory language in Section 136. The recent Supreme Court case of *Efobi v Royal Mail Group Ltd* [2021] UKSC 33 reiterates the above guidance. The case



also gives guidance on how a Tribunal should deal with the absence of a witness and whether and adverse inference can be drawn from this.

51. In *Laing v Manchester City Council* 2006 ICR 1519 EAT, the EAT stated that its interpretation of *Igen* was that a Tribunal can at stage one have regard to facts adduced by the employer.
52. In *Madarassy v Nomura International PLC* 2007 ICR 867 CA, the Court of Appeal stated:

“The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal “could conclude” that, on a balance of probabilities, the Respondent had committed an unlawful act of discrimination”.
53. Ms Patterson referred the Tribunal to the case of *R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors* [2010] IRLR 136, SC in which Lord Phillips emphasised that in deciding what were the ‘grounds’ for discrimination, a Court or Tribunal is simply required to identify the factual criteria applied as the basis for the alleged discrimination. Where an action is not inherently discriminatory the Tribunal will need to consider the mental processes, conscious or subconscious, for the treatment.
54. Ms Patterson referred the Tribunal to the fact that mere unreasonable treatment combined with possession of a protected characteristic is not sufficient by itself to raise even the possibility of an adverse inference so as to shift the burden of proof (*Glasgow City Council v Zafar* [1998] ICR 120, HL, 124AE per Lord Browne-Wilkinson; *Bahl v The Law Society* [2004] IRLR 799, CA, para 101 per Peter Gibson LJ; *Adeshina v St George’s University Hospitals NHS Foundation Trust & others* [2017] EWCA Civ 257, paras 36-37 per Underhill LJ).
55. With regard to victimisation, the Claimant would need to establish that he did a protected act and that there followed a detriment and that he suffered a detriment because of the protected act; however, in accordance with *Madarassy*, something more would be required to indicate a prima facie case of discrimination to shift the burden of proof.
56. In *Scott v London Borough of Hillingdon* 2001 EWCA Civ 2005 CA, the Court of Appeal said knowledge of a protected act was a pre-condition of a finding of victimisation.
57. With regard to harassment claims, In *R (Equal Opportunities Commission) v Secretary of State for Trade & Industry* [2007] ICR 1234 HC, it was accepted on behalf of the Secretary of State that the ‘related to’ wording (in the Sex Discrimination Act 1975) did not require a ‘causative’ nexus between the protected characteristic and the conduct under consideration: an ‘associative’ connection was sufficient. Burton J did not doubt or question the concession. The EHRC Code of Practice on Employment (2011), which does not claim to be an authoritative statement of the law (see para 1.13), deals with the ‘related to’ link at paras 7.9 to 7.11. It states that the words bear a broad meaning and that the

conduct under consideration need not be 'because of' the protected characteristic.

58. In relation to the statutory definition, first the Claimant must show that the conduct was unwanted. Some claims will fail on the Tribunal's finding that he or she was a willing participant in the activity complained of. Moreover, it seems to us self-evident and necessarily implicit that any behaviour on which a claim rests must be (a) of a sort to which a reasonable objection can be raised and (b) voluntary, or at the very least such that the Respondent can properly and lawfully bring it to an end.
59. Secondly, the requirement for the Tribunal to take account of all the circumstances of the case and in particular whether it is reasonable for the conduct to have the stated effect (subsection (4)(b) and (c)) connotes an objective approach, albeit entailing one subjective factor, the perception of the complainant (s26(4)(a)). Here the Tribunal is equipped with the means of weighing all relevant considerations to achieve a just solution.
60. Furthermore, even if in fact the disclosure was unwanted, and the Claimant was upset by it, the Claimant must show that the effect amounted to a violation of dignity, created an intimidating, hostile, degrading, humiliating or offensive environment.
61. Central to the objective test is the question of gravity. In determining whether the conduct complained of rose to the level of violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment we must be careful. To quote from the judgment of Elias LJ in *Land Registry v Grant* [2011] ICR 1390 CA (para 47):

*"Furthermore, even if in fact the disclosure was unwanted, and the Claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The Claimant was no doubt upset ... but that is far from attracting the epithets required to constitute harassment. In my view, to describe this incident as the Tribunal did as subjecting the Claimant to a 'humiliating environment' ... is a distortion of language which brings discrimination law into disrepute."*
62. In determining whether actionable harassment has been made out, it may be necessary for the Tribunal to ascertain whether the conduct under challenge was intended to cause offence (ibid, para 13). More generally, the context in which the conduct occurred is likely to be crucial (ibid, para 43).
63. We have in mind also the guidance given by the Court of Appeal in *Reverend Canon Pemberton v Right Reverend Inwood*, former acting Bishop of Southwell and Nottingham [2018] EWCA Civ 564; [2018] ICR 1291:

*“In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the Claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the Claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.” (Per Lord Justice Underhill).*

64. When considering whether conduct relates to race, we bear in mind that that question will normally require consideration of the “mental processes of the putative harasser” (GMB v Henderson [2016] EWCA Civ 1049) and a “more intense focus on the context of the offending words or behaviour” (Bakkali v Greater Manchester Buses (South) Ltd UKEAT/0176/17; [2018] ICR 1481).

### **Rationale for primary findings**

65. In arriving at our primary findings, we have had careful regard to all the evidence put before us. We have considered the coherence, consistency, and general plausibility of the witness evidence that we heard and have read. We have also attached particular importance to contemporary documents and the way that the initial complaints and claims were made by Mr Cyrus. We find that all witnesses were sincere and did their best to give us a true and unvarnished account of the facts.
66. On certain points, we have been unable to accept evidence given by Mr Cyrus. We think that on occasions his recall was less than perfect, and we have given greater credence to his written account of events nearer the time. It may be that Mr Cyrus’ strength of feeling as to how he feels he was treated has in some instances precluded a balanced perception/ recollection of events.
67. Mr Cyrus stated in his view there was a “collusion” between Mr Mander and Mr Ramloll in the evidence they gave for the purposes of the grievance procedure and when providing evidence to the Tribunal. Despite Mr Cyrus’s concerns, we are satisfied that there is nothing in the evidence to suggest this and there are points of difference in Mr Mander and Mr Ramloll’s accounts of events.

### **Findings of fact**

68. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them, and taking into account the Tribunal’s assessment of the witness evidence.
69. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary,

and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence.

70. Mr David Mander (Associated Director of Property Operations) and Mr Cyrus had previously worked together in around 2013/14, prior to engagement with the Respondent Trust. It is not in dispute that Mr Mander and Mr Cyrus described their previous working relationship as very good, bordering on friendship and that they retained each other's contact details.
71. Mr Mander has worked at the Respondent Trust since 2 January 2019, as an Associate Director of Property Operations, and was responsible for the soft and hard facilities management services across the buildings the Trust used to deliver their services.
72. On 14 February 2021, Mr Cyrus sent Mr Mander a text message (page 65) asking him if he had any vacancies where he worked. Upon Mr Mander's request, Mr Cyrus sent Mr Mander his CV on the same day and thereafter there were various text messages and emails. Mr Mander asked Mr Cyrus whether he would consider a year contract on 15 February 2021. In an email dated 20 February 2021, Mr Mander set out details of a potential project to deliver and lead all the work to allow the Respondent Trust to retender the soft facilities management services contract and stated that the scope of work would run for around 15 months.
73. The remaining emails are not relevant to the issues which the Tribunal need to determine save that the Tribunal find that they show that Mr Mander facilitated Mr Cyrus to secure a role at the Respondent Trust.
74. During the discussions and before Mr Cyrus accepted the job, it is not in dispute that he expressed concerns about reporting directly to Mr Mander. Mr Mander arranged a meeting by MS Teams on 8 March 2021 for Mr Cyrus to talk with Mr Ramloll about his concerns. Mr Ramloll was the Head of Facilities Management at the Respondent Trust and responsible for the soft facilities management contract and was someone that Mr Mander also managed. Mr Ramloll told Mr Cyrus that Mr Mander had a direct management style and had high standards as the outcome of what Mr Mander's team achieved impacted on the care and wellbeing of patients.
75. Mr Cyrus was made an offer of employment by the Respondent Trust as a "Bank Property Project manager" on 17 March 2021 conditional on a DBS/CRB check, occupational health check and right to work check. Mr Cyrus was offered employment as a Bank worker at Band 8a and the terms of this employment were explained in the letter of 17 March 2021 (page 151). The relevant extracts are as follows:  
*"Bank workers are required to complete a monthly timesheet which will need to be authorised by your Team Leader so that payment can be made to you for hours worked. Completed and authorised timesheets must be received by payroll*

*by the 5th of the following month for payment to be made on the 26th of that month.....*

*The Trust does not guarantee that regular, or even any, work will be offered to you and, conversely, there is no requirement for you to accept work offered. Your appointment as a Bank worker should not be construed as being of a continuous nature but rather as existing on a day-to-day basis. If you do not carry out any duties in a period of six months, you will be removed from the Bank register..... Whilst working on the bank you are subject to the Trust's policies and procedures and to the local policies and procedures of the service."*

76. Mr Cyrus does not dispute that prior to his appointment at the Respondent Trust he had any experience of and therefore reason to believe that Mr Mander exhibited any racist behaviours.
77. Mr Cyrus commenced work at the Respondent Trust on Tuesday 6 April 2021. Prior to commencing work, he received an email from Mr Mander on 1 April 2021 setting out work for him to commence over the first couple of weeks. This included asking Mr Cyrus to arrange one to one meetings with ward managers / matrons to capture their views on the quality of soft services, to prepare a Microsoft Form to capture the comments from Hubs about certain soft services, summarise the comments from each area (working aged adults, older adults, all inpatients and Hubs) and to set up meetings with Mr Ramloll and Mr Mander to talk through the feedback received from the information capturing sessions.
78. Mr Cyrus also received further emails from Mr Mander dated 6, 7, 14 April 2021 clarifying what work he needed to do and should prioritise.
79. Mr Mander sent a further email dated 13 April 2021 asking Mr Cyrus to prepare a progress report and future plan by 22 April 2021 but on 19 April 2021, Mr Mander requested that by 22 April 2021, Mr Cyrus had interviewed everyone that he had detailed, captured their feedback and summarised their feedback against the Divisional breakdown in a document/s.
80. Mr Mander became increasingly frustrated with Mr Cyrus and his progress. He sent Mr Cyrus an email dated 8 April 2021 stating that they,  
*"have a daily meeting in place and this is the opportunity to update on progress – there is no need for updates outside these meetings, unless it's urgent or impactful"*
81. On 13 April 2021, Mr Mander wrote to Mr Cyrus,  
*"I am sure you don't have Annabel  
You told me that Nick didn't want to do, and he had fed this back to you  
Are you sure that the other names are correct?"*
82. On 14 April 2021, Mr Mander wrote to Mr Cyrus, we set out extracts below:-  
*"Why are you waiting until Friday to chase them? This makes no sense. If you chase them today, you can hopefully get some time in their diary before we next*

*week – I need to have these meetings completed soonest, so we can collate the feedback*

*Leroy*

*Again I question “next few days” – it will take two minutes to send them an email chasing them – and then two minutes to call each of them later today. I am sure you are not back to back for seven and half hours today and can’t find the time? If you feel you can’t find the time today, send me the correct list and I will do this”*

83. Mr Mander sent a further email dated 19 April 2021 asking Mr Cyrus for a copy of the template he had used for individual feedback capture, so he could offer feedback. Mr Cyrus sent Mr Mander the email he had used (page 210-211) and Mr Mander stated that this needed to be in a word document.

### **Meetings**

84. Frequent meetings took place between Mr Mander and Mr Cyrus to discuss his progress and to provide feedback. It is not in dispute that further work was required on the document after each meeting and Mr Cyrus arranged to make further changes to the document after each discussion.
85. We do not detail all of the meeting dates here and instead make findings of fact on the meeting dates on which the List of Issues refers.

### **Meeting 9 April 2021 (allegation 2.1.3)**

86. On 9 April 2021, there is a dispute about what was said. The Tribunal find that Mr Cyrus was seated in a room with a light sensor that switched off if there is no motion in the room. Mr Mander opened the door to the room, and it was dark. Mr Mander smiled and told Mr Cyrus, “I nearly didn’t see you”. This is discussed below.

### **Meeting on 21 April 2021**

87. On 21 April 2021, Mr Mander met with Mr Cyrus to go through the document he had created so far from the feedback he had received. At the meeting, Mr Mander told Mr Cyrus how the document should be formatted and what needed to be corrected.
88. Mr Mander was going on annual leave on 26 April to 30 April 2021 inclusive and therefore arranged a further meeting on 22 April 2021 with Mr Cyrus and Mr Ramloll (page 220) to go through what further work needed to be done whilst he was away. Prior to this meeting, Mr Mander emailed Mr Cyrus and Mr Ramloll the specification document that Mr Cyrus was working on, with his comments written on (pages 223 to 343).

### **Meeting on 22 April 2021 (allegation 2.1.1. and 2.1.4)**

89. On 22 April 2021, Mr Mander met with Mr Cyrus and Mr Ramloll. There is a dispute of fact of what was said at this meeting. The Tribunal do not find that Mr Mander said, "I have 2 black managers that I manage in the same room" (this is discussed below).
90. There is a dispute of fact as to whether Mr Mander called Mr Cyrus a liar at this meeting in response to missing paperwork. The Tribunal find that there was a conversation about missing paperwork during which Mr Mander said to Mr Cyrus, "If you haven't done it, you can tell me you haven't done it." This is discussed below.
91. Mr Cyrus wrote to Mr Mander on 23 April 2021 confirming that he would get the outstanding work completed from their meeting the previous day and asking whether he should carry out site visits for the following week also. Mr Mander responded to Mr Cyrus stating that the priority was to, "get the paperwork in order and handed to Yogesh by the time you meet next" and that he should also have time to do site visits and updates next week.

### **Meetings on 27 and 29 April 2021**

92. Mr Ramloll met with Mr Cyrus on 27 April 2021 and Mr Ramloll told Mr Cyrus how the documentation should be adjusted and amended.
93. Mr Cyrus wrote to Mr Ramloll on 28 April 2021 confirming that, he had,  
  
*"spent the entire day adjusting each sheet to represent what you requested yesterday. I do have to add three more interviews completed over the last few days, which I will do tonight, if not first thing tomorrow. I compared your notes to mine; hopefully, there are no more errors. Although I have changed the master feedback sheets for the older adults, I have yet to add the columns for food which, of course, I will do. The page numbers are on each document. I need to start the contract work as I would like to be ahead of myself before David's return on Monday. If you do spot anything, can we discuss it tomorrow as I have a massive headache? "*
94. Mr Ramloll met with Mr Cyrus on 29 April 2021 via Microsoft Teams at which time they shared screens. Mr Ramloll identified further adjustments / amendments that needed to be made to the documentation and discussed this with Mr Cyrus. There is a dispute of fact as to what was said by Mr Cyrus and Mr Ramloll at this meeting, however there is no dispute that the conversation ended abruptly when Mr Ramloll ended the meeting.

### **30 April 2021**

95. On 30 April 2021, Mr Ramloll asked Mr Cyrus to send him all the updated documents following their meeting the previous day and Mr Cyrus sent these later that morning.
96. Later that day, Mr Ramloll then spent 2.5 hours formatting and adjusting these documents without amending the content. Mr Ramloll emailed Mr Cyrus on 30

April 2021 at 19:11 sending the documents he had amended and confirming that he had formatted these documents and that he had noted one comment was missing (Dev) from the summary sheet and infection cleaning columns were not populated on the summary sheet.

97. Mr Cyrus then sent Mr Mander an email on 30 April 2021 at 21:17 stating, *“On 2 occasions this week (in your absence), I was made to feel uncomfortable, the conduct towards me was unacceptable. he had been made to feel uncomfortable. I take full accountability for not possessing the entire experience of Microsoft Word, so I consumed 10 hours directing myself on the product over the last two days (not during work time...)..... I will see you on Monday morning unless you tell me otherwise”*
98. Mr Cyrus carried out an advanced 10-hour course from YouTube on Word. Mr Cyrus was unsure whether Mr Mander wanted him to attend work on the Bank Holiday which was the Monday.

### **Meeting on 3 May 2021, Bank Holiday (Allegation 2.1.2)**

99. This was Mr Mander’s first day back in the office after his week of annual leave. A meeting was arranged between Mr Cyrus, Mr Mander and Mr Ramloll to discuss the document that Mr Cyrus had updated. Before Mr Ramloll joined the meeting, Mr Mander spoke briefly to Mr Cyrus about the email he had sent on 30 April 2021. Mr Mander confirmed he had received the email and that he would investigate what had happened and they could speak further at their next meeting.
100. When Mr Ramloll arrived at the meeting, there was a discussion about Mr Mander’s holiday and his skin pigmentation. There is a factual dispute as to what was said by Mr Mander during this discussion. The Tribunal find that Mr Mander was wearing shorts to this meeting and that he stated that he found it hard to tan as his skin burns and that when he was younger, he had a dark mark on his face, but this later turned into freckles. This is discussed further below.
101. Mr Ramloll printed his amended version of the document for Mr Mander to review. There were still substantial amendments that Mr Mander considered were required to the document which included formatting and amending the content and the meeting lasted approximately 3 hours so that Mr Mander could go through the amendments required. The plan was for Mr Cyrus to make the amendments to the document as Mr Mander had suggested and meet again to discuss the updated document on 4 May 2021.
102. Mr Cyrus left the meeting and then worked in an adjacent office to update and amend the document as discussed at the meeting. After a short period, Mr Cyrus asked Mr Mander for help as he had minimised his screen and could not change this back.
103. Mr Mander and Mr Ramloll went for a coffee/ refreshment and Mr Mander discussed the email he had received from Mr Cyrus on 30 April 2021. Mr Ramloll informed Mr Mander that he had ended the meeting abruptly with Mr Cyrus on



29 April 2021 as in his view Mr Cyrus was finding it difficult to receive feedback on his work.

**4 May 2021**

104. Mr Mander spoke briefly to Victoria Bishop, Deputy Director of HR, and asked a general question of what his options were if he had a bank worker who was under-performing. Ms Bishop told him that he was not obliged to continue the working relationship, if they were a bank worker. This conversation took place before Mr Mander met Mr Cyrus that day.
105. Mr Cyrus gave Mr Mander the updated document he had worked on the previous day after their meeting, but Mr Mander considered that this did not include all the amendments / updates they had discussed and the changes that he had made resulted in the document being less inaccurate.
106. Mr Mander told Mr Cyrus that he wanted to meet him to discuss the email of 30 April 2021 and the content of his latest document.
107. There is a dispute of fact of the discussions that took place on 4 May 2021 between Mr Cyrus and Mr Mander. This is discussed below.
108. At their meeting, Mr Mander discussed the email of 30 April 2021 with Mr Cyrus. Mr Cyrus told Mr Mander that he felt that Mr Ramloll had been rude to him on two occasions. The Tribunal do not find that Mr Cyrus said that he would make an official complaint about Mr Ramloll. Mr Mander told Mr Cyrus that he had spoken to Mr Ramloll and that he could understand why Mr Ramloll was feeling frustrated with Mr Cyrus' work as he had invested time with Mr Cyrus and the document/s were still not correct. Mr Ramloll was also keen to get the documents in the required state before Mr Mander returned from leave.
109. Mr Mander then went through the document and started setting out the further amendments that were required. These were numerous. Mr Mander explained to Mr Cyrus that the document was unsuitable to be presented to the Executive team in its current format and that he was frustrated that this was the case. Mr Cyrus was also frustrated that further amendments were required and shocked that Mr Mander had told him his work was not good enough. The Tribunal do not find that Mr Cyrus told Mr Mander, "I don't think I can do this job".
110. The Tribunal do not find that Mr Cyrus raised any issues about Mr Mander's alleged discriminatory conduct towards him at this meeting.
111. Mr Mander told Mr Cyrus that in the circumstances he thought it would best that Mr Cyrus should stop the work he was doing, and he could leave the Trust right away.
112. Mr Mander stated that he would arrange for Mr Cyrus to be paid until the end of May 2021. Mr Mander suggested that Mr Cyrus stay in the room whilst he arranged for the team to have coffee to avoid any embarrassment to Mr Cyrus. He also asked Mr Cyrus to leave his laptop and mobile phone in his locker.

## Dismissal

113. After his dismissal on 4 May 2021, Mr Cyrus emailed Mr Mander stating, *“Further to our conversation today, can you please confirm that SABP will pay me until the end of this (May) month, as you suggested today? Also, for clarification, today would have been my fifth week, not six, as you told me. I also believe my dismissal today was irregular and against the values and policies of SABP; I am seriously thinking about taking legal action against SABP (page 365)”*
114. Mr Mander acknowledged Mr Cyrus’ email on 5 May 2021 confirming that he would pay him until the end of May 2021 and stating, *“I am sorry the outcome of yesterday’s meeting goes against our Trust’s values. During our meeting I fully explained the issues and reason and you agreed with these. Again, I thank you for the contribution that you have made”*
115. Mr Cyrus responded on 5 May 2021 stating, *“Firstly, you have been disingenuous with regards to saying that I agreed with your reasons. I was somewhat offended by your response concerning my formal complaint. While you did mention that the behaviour of Yogesh crossed a thin line, you said that you had appreciated the fact that he wanted to get it right for your return from leave. Thus, accepting his unwanted behaviour towards me. Instead of investigating the incident, which can only be described as bullying & harassment, you decided to interview your team members concerning my performance. You mentioned yesterday that Kylie had spent time showing me how to formulate a word document; you are correct; she did, but it took less than ten minutes. You said that you were frustrated that it took six weeks for one document, this is entirely incorrect as yesterday would have been only five weeks since I joined; it had taken four weeks to interview everyone. I outlined to you at my interview, and on the first day I started, I would ask questions to clarify my knowledge of a task that you may ask. You said that was fine. You’ve now punished me for executing a formal complaint against Yogesh, somewhat unscrupulous and falls short of the Trust Policies; I feel racially discriminated against and bullied by you both. Please provide the email details of your line manager as I would now like to raise another formal complaint.”*

## Grievance

116. Mr Cyrus wrote to Mr Mander’s line manager, Ms Susie Gray, on 5 May 2021 raising a formal grievance, the relevant extract of the email is as follows: - *“After raising a grievance (following an incident) with David Mander, he informed me that my work was not suitable and that Yogesh acted in his (David’s) best interest. David has made several remarks about my skin colour, which I find offensive. In his leadership of SABP LGBT, I would have expected better. I conclude that both individuals bullied and harassed me while in the employment of SABP. I also maintain firmly that David Mander has racially discriminated against me based on my skin colour. I would like this thoroughly investigated.*

*I tried to resolve this informally on Tuesday, May 4th, but instead, I was given notice and told my services was not needed anymore. I would now like to raise a formal grievance against both Yogesh and David Mander.*

*I will be more than happy to discuss this further with you or an investigating officer. I do, however, want this investigated. I feel that my dismissal and treatment based on my skin colour and the excuse that my performance fell below the required level is illegal and immoral.” (page 368)*

117. Ms Gray acknowledged the Mr Cyrus' email on 6 May 2021 stating that she would investigate the points raised and consult HR on the appropriate procedure to follow.
118. Ms Angela Borst, HR Business Partner, formally acknowledged Mr Cyrus' grievance on 6 May 2021 confirming that the Respondent Trust would respond under the Trust's Grievance Policy within 28 days. The Respondent Trust's Grievance Policy is at page 456-495 of the bundle.
119. On 13 May 2021 there was a meeting between Mr Cyrus and Ms Borst to ensure that the Respondent Trust had all the information to consider Mr Cyrus' grievance as he indicated that he had additional things to share. Ms Borst stated that she would then be in a position to decide on the next steps and the most appropriate people to be involved.
120. A note of this meeting is at page 389 – 392 of the bundle. Ms Mitchell was present to take the note. The note states that it was not an ab verbatim note. Ms Patterson took Mr Cyrus to various parts of this document, and he disputed the note was correct in several places. Mr Cyrus accepted that the document does not refer to the claim set out at allegation 2.1.3, in which he alleges Mr Mander entered a room and said, “smile so I can see your teeth as it is rather dark in here and I cannot see you.”
121. After the meeting, Mr Cyrus wrote to Ms Gray on 13 May 2021 raising further issues stating,  
*“I am sorry, but I forgot to mention that when David Yogesh and I met on the bank holiday Monday when Yogesh arrived, I said good morning to him he ignored me. The only time he acknowledged that I was in the room is when David asked who has the paperwork, to which he turned to me and said did you get my email on Friday, I responded, I have only just seen it, to which he said I did send it relatively late on Friday. When I mentioned to David on Tuesday that Yogesh had put the phone down on me the previous Thursday after saying to him, I didn't appreciate his tone. David responded by saying that he and Yogesh were very similar in that their birthday was in the same month and shared the same birth sign.  
I took from this to mean that David implied that the behaviour was acceptable. He also mentioned that he had gotten Yogesh version of events (over the weekend), which were very similar to mine. Illustrating that David and Yogesh had discussed my performance over the weekend following the email sent to David from me stating I had a horrid week. On Monday, Yogesh was aware that David had decided to get rid of me, hence why Yogesh initially refused to talk.*

*He didn't for the entire period I was in the building; David walked into the room I was in to say goodbye. Yogesh did not. Is that behaviour acceptable to the Trust? David intentions were to find something wrong with the document to justify getting rid of me hence the invite to Head Office on Tuesday and suggesting that the Exec Team would not accept the document's format.*

*The above is also relevant to the investigation. Can I also ask that I am paid the full entitlement for the bank holiday."*

122. Ms Borst wrote to Mr Cyrus to update him about his grievance on 26 May 2021. She confirmed that the Respondent Trust had appointed Mr Rutah, Lead Clinical Engagement and Transformation, CMO Office, as an alternative manager to investigate the grievance in place of Ms Gray and that the Respondent Trust would provide a response to the grievance by 8 June 2021. On the same day, Ms Borst sent Mr Cyrus the typed notes of their meeting on 13 May 2021.
123. The Respondent Trust arranged to pay Mr Cyrus for the bank holiday he worked after ascertaining the number of hours he worked.
124. Mr Cyrus commenced early conciliation on 24 May 2021.
125. On 27 May 2021, Mr Cyrus wrote to Ms Borst stating,  
*"I forgot to mention another crucial incident that occurred during my second meeting with David Mander where I sat in an office next door to Susie Gray office. The room has a light sensor which switches off when there's no motion. David came into the room for a planned meeting. The room was dark David smiled and said I nearly didn't see you. I responded by saying it is dark in here I was once again taken back. This is a true account. You will find the date in the calendar for reference."*
126. For the purposes of the grievance, Mr Rutah asked Ms Borst to send a blank document setting out the points raised by Mr Cyrus for Mr Mander and Mr Ramloll to provide their response. An email was sent by Ms Borst to Mr Mander and Mr Ramloll on 1 June 2021 with this blank document stating, "Please do not converse with others on the attached; we are sending this to you in confidence".
127. Mr Mander sent his statement for the purposes of the grievance to Ms Borst and Mr Rutah on 2 June 2021. The statements from Mr Mander are dated 1 June 2021 (pages 405-411), 2 June 2021 (page 414) and there is an undated document (page 428) and from Mr Ramloll are dated 2 June 2021 (pages 415-419).

### **Outcome of grievance**

128. An outcome of grievance letter was sent to Mr Cyrus from Mr Rutah on 8 June 2021 which did not uphold any of the grievances that Mr Cyrus put forward. The relevant extract of this letter for the purposes of these proceedings is labelled, "Racist comments"  
*"Within your grievance you stated that on a number of occasions, David Mander, Associate Director of Property Operations made racist comments which were directed at yourself, and at times, included Yogesh Ramloll, Head of Facilities*

Management. In your email dated 05 May 2021 (subject: Formal Grievance) you state: "I ... maintain firmly that David Mander has racially discriminated against me based on my skin colour".

The instances you shared in subsequent correspondence/meetings included:

1. A meeting on the 22nd April 2021 with yourself and Yogesh where David made a comment along the lines of "I've never had two black [or brown] guys in the same room together".
2. A meeting on the 03rd May 2021 with yourself and Yogesh where David made a comment again along the lines of "I've never had two black [or brown] guys in the same room together".
3. At the meeting on 03rd May 2021, David made you feel uncomfortable telling you a story about having a brown mark down his face when he was a child.
4. At the same meeting, David also made a comment along the lines of "I can't even get a tan and get as brown as you two" in reference to him wearing shorts.
5. During a previous meeting, you were sitting in an office where the lights had gone out as they were motion sensor lights. When David came into the room for a planned meeting with you he said, "I nearly didn't see you". You responded by saying "it is dark in here".

Following investigatory work which included statements from David Mander and Yogesh Ramloll on each of the points you raised for racism towards you, we were unable to find evidence to suggest that David Mander had made any racist comments towards you.

Both David and Yogesh were clear and consistent that David did not make the comments as alleged at points 1 and 2 above.

David does confirm that he made a comment about his own skin in that he said that he did not used to have freckles but used to have a brown mark on the side of his face. Similarly, there appears to have been a conversation about whether or not David would get a suntan following his holiday and a comment made in relation to light sensors not working and the darkness of a meeting room.

As ever, in circumstances where the relevant evidence is oral evidence from witnesses, it is important to consider the cogency of that evidence and also whether or not one version of events is supported by another witness. I have no reason to doubt the cogency of the evidence from David and Yogesh and also a number of points they made, in separate meetings, supported one another. Therefore, on balance, particularly given David and Yogesh are clear and consistent that there were no comments made which had racial connotations as alleged, I have concluded that David has not discriminated against you on the basis of race (including skin colour).

I therefore do not uphold your grievance on the points outlined in point 2.0.

- 3.0 Bully and Harassment Behaviours towards you from David Mander and Yogesh Ramloll, you outlined the following:
  1. Being called a liar
  2. DM not being upfront with expectations/formats
  3. Aggressive tone from Yogesh
  4. Being made to feel like an idiot

Following investigatory work which included statements from David Mander and Yogesh Ramloll on each of the points you raised, for Bullying and Harassment towards you, we were unable to find evidence to suggest that David Mander or Yogesh Ramloll showed any behaviour of Bullying or Harassment towards you.

*Again, I have reached this view because the evidence from David and Yogesh supported one another and I have no reason to doubt the cogency of their evidence. I therefore do not uphold your grievance on the points outlined in point 3.0.”*

## **Conclusion and Findings**

129. The following conclusions and analysis are based on the findings which have been reached above by the Tribunal and the applicable law. Those findings will not in every conclusion below be cross-referenced unless the Tribunal considered it necessary to do so for emphasis or otherwise. We set out our responses to the List of Issues as follows: -

### **1 Direct discrimination on the grounds of race (s.13 Equality Act 2010)**

**In the first instance the Tribunal had to determine if the Claimant had been subject to direct discrimination by the Respondent on grounds of the Claimant's race.**

**1.1 Has the Respondent treated the Claimant less favourably than it treated or would treat others?**

**1.1.1 The Claimant relies on his dismissal by David Mander on 4 May 2021 as the less favourable treatment relied upon.**

**1.2 If there has been less favourable treatment, was the reason for such treatment the protected characteristic of race?**

**1.3 In respect of the allegations of discrimination on the grounds of the Claimant's race, the comparator relied on by the Claimant is:**

**1.3.1 The Claimant relies on an actual comparator, namely a white female colleague who also worked as a bank worker at the same time as the Claimant and also reported directly to Mr Mander.**

130. As set out in the List of Issues, the Tribunal reminded itself that with a claim for direct race discrimination, the Claimant must show that he was treated less favourably than a real or hypothetical comparator. The less favourable treatment must be because of his race. Mr Cyrus identified himself as a black man.

131. The comparator relied on by Mr Cyrus was a white female colleague named KK whom he believes was a bank worker at the time and reported directly to Mr Mander. The Respondent Trust disputes she was a valid comparator as her circumstances were not the same as his, or even similar. The Respondent submits that she was on a lower band rate of pay, she carried out a very different role to Mr Cyrus and was on a fixed term contract.

132. Where no 'like-for-like' comparator is shown, the authorities remind us that it is often best, rather than grappling with the concept of the hypothetical comparator, simply to ask the question why the Claimant was treated as he was: what was the Respondent's conscious or subconscious reason for the treatment?

133. Addressing that question, we refer to what Mr Cyrus says his case is. Mr Cyrus accepted that he was not dismissed from his job by Mr Mander overtly because of his race as he accepted that Mr Mander had assisted in securing him the

position in the first place and therefore, he was not dismissed by Mr Mander because of this.

134. Mr Cyrus stated that his case was that he was subject to direct race discrimination contrary to section 13 of the Equality Act 2010 in that he was dismissed after he told Mr Mander on 4 May 2021 that he (Mr Mander) had carried out an act/s of discriminatory conduct towards him because of his race and that as a result Mr Mander dismissed him.
135. Mr Cyrus' case is that termination of his bank contract in these circumstances amounted to less favourable treatment of him due to his race.
136. The Tribunal has to consider the conscious or subconscious mental processes which led the Respondent to take a particular course of action (in this instance dismissal) in respect of Mr Cyrus, and to consider whether the protected characteristic of race, played a part in the treatment.
137. There is a dispute of fact between Mr Cyrus and Respondent Trust as to whether Mr Cyrus informed Mr Mander that he had behaved in a discriminatory manner towards him because of his race at their meeting on 4 May 2021.
138. Mr Mander's evidence is that there was no discussion about his conduct or that Mr Cyrus had perceived his previous conduct as discriminatory and the first that he was aware that Mr Cyrus was alleging that his treatment was discriminatory was in an email dated 5 May 2021 in which he stated, "*I feel racially discriminated against and bullied by you both*" but in which no further particulars were given.
139. If this is correct and Mr Mander was unaware of any alleged discrimination claims being made against him up to the time that he dismissed Mr Cyrus then he cannot have treated him less favourably by dismissing him because of his race as Mr Cyrus alleges.
140. Mr Cyrus' evidence was clear, and he repeated several times during the hearing that he did not consider that Mr Ramloll's behaviour towards him, and for which he complained to Mr Mander in his email of 30 April 2021 was because of his race. The Tribunal therefore do not need to consider the discussion that Mr Cyrus had with Mr Mander on 4 May 2021 about Mr Ramloll as they are not relevant to the issue of direct discrimination. The Tribunal must direct themselves to what discussion took place about Mr Mander's own discriminatory conduct on 4 May 2021.
141. The Tribunal clarified with Mr Cyrus what discussions he says took place between himself and Mr Mander on 4 May 2021. Mr Cyrus told the Tribunal that he discussed with Mr Mander the difficulties that he had when meeting Mr Ramloll on two occasions whilst he was away on holiday. He described at the first meeting Mr Ramloll changed a lot of the document he was working on and even made changes that were not in line with what Mr Mander had previously requested. Mr Ramloll told Mr Cyrus that he should not have interviewed one individual and their comments should be removed.

142. At the second meeting, Mr Ramloll told him that the amended document was still not to his standards and that Mr Cyrus then told Mr Ramloll that he did not like his tone. Mr Ramloll told Mr Cyrus that he was ending the call because he had had a busy day and before he had a chance to respond, Mr Ramloll ended the call.
143. Mr Cyrus told Mr Mander that at their joint meeting on 3 May 2021, Mr Ramloll had not said hello or acknowledged him in any way.
144. Mr Cyrus stated that he told Mr Mander that ‘behaviour breeds behaviour’ and that because Mr Mander had called Mr Cyrus a liar in front of Mr Ramloll he believed he could treat Mr Cyrus in any way he wished. Mr Cyrus said that he told Mr Mander that he had said to him and Mr Ramloll that he had two black managers in a room.
145. Mr Cyrus stated that at this point in the meeting, Mr Mander stopped him from saying anything else and did not acknowledge what he had said but instead went back to talking about Mr Ramloll. Mr Mander told him that Mr Ramloll sometimes crosses a thin line because he wanted to protect Mr Mander and get the work done, he had asked him to do.
146. Mr Cyrus said he was surprised at this and then Mr Mander told him that he did not think he could do this job and that he was prepared to pay him until the end of May 2021.
147. The Tribunal clarified with Mr Cyrus whether he used the words discrimination during their discussion and he confirmed he did not.
148. As set out above (paragraphs 141-147), Mr Cyrus provided a detailed account of what he said happened on 4 May 2021. However, parts of his oral evidence were contrary to the witness statement that he provided to the Tribunal dated 10 November 2022 (5 days before he gave evidence).
149. At paragraphs 68 -71 of his statement, Mr Cyrus stated that,  
“68. I mentioned the three incidents, one where he said smile so I can see you, and the other where he said he had two brown/black people in the same room working for him.  
69. David said he was surprised I took offence to what he said as he was only joking and meant no harm.  
70. I then went on to say that I wanted to make an official complaint against Yogesh, and I also liked David to be mindful of what he says and when and in front of whom.  
71. David did not look happy at this stage; he said he felt my work was unsuitable.”
150. The Tribunal clarified with Mr Cyrus whether paragraphs 68 and 69 of his statement were correct and Mr Cyrus stated that these were correct.
151. In these circumstances, the Tribunal therefore do not find that Mr Cyrus’ evidence was consistent on the discussion that took place with Mr Mander on 4 May 2021



and that to the contrary the oral and written evidence My Cyrus had given the Tribunal were in direct conflict.

152. Mr Mander could not have ignored Mr Cyrus when he told him that he did not like that he called him a black manager as well as telling him that he was only joking and meant no harm. Further Mr Cyrus is inconsistent about whether he told Mr Mander about three alleged incidents or one. These are key details and would be central to Mr Mander's knowledge at the time he dismissed Mr Cyrus.
153. Further, having reviewed the documentation in the bundle, the Tribunal do not consider that this supports Mr Cyrus' version of events. Mr Cyrus' email of 5 May 2021 (set out above at paragraph 115) and the note of the meeting he had with Ms Borst on 13 May 2021 in which he was given an opportunity to discuss and log his complaints with HR for the purposes of the grievance procedure do not refer to Mr Cyrus telling Mr Mander about his previous discriminatory conduct on 4 May 2021.
154. The Tribunal accept that Mr Cyrus did not agree that the notes written on 13 May 2021 were wholly accurate as they were not an ab verbatim account of what was said that day, but the Tribunal find that the notes would have been sufficiently detailed to note at the very least the issues that were discussed. The Tribunal note that Mr Cyrus has not claimed that the note of 13 May 2021 was missing key points that were discussed including that he told Ms Borst that he discussed Mr Mander's discriminatory conduct with him just prior to him being dismissed.
155. Mr Cyrus' ET1 form is also silent on any reference that Mr Cyrus told Mr Mander about his previous discriminatory conduct on 4 May 2021 and instead to the contrary states, "*Mr Mander accepted verbally that Yogesh had bullied and harassed me, but I was dismissed because I dared to complain.*"
156. Mr Mander's evidence is clear that Mr Cyrus did not tell him that he had discriminated against him at any time before he dismissed him. The statement that he prepared for the grievance procedure is consistent with this, although we note that he was not asked what specific discussions took place on 4 May 2021 in relation to discriminatory conduct as Mr Cyrus had not raised this an issue at the time.
157. Mr Mander's evidence is also that he told Mr Cyrus that he was dismissed because of his perception of his poor performance and inability to do the job. Mr Mander was clearly getting increasingly frustrated with Mr Cyrus as evidenced by his email responses to Mr Cyrus in (set out at paragraphs 80-82 above) and he accepts that he had a brief discussion with Victoria Bishop, Deputy Director of HR, and asked a general question of what his options were if he had a bank worker who was under-performing.
158. This discussion took place on 4 May 2021, prior to meeting Mr Cyrus and even if Mr Cyrus's version of events were accepted by the Tribunal, this discussion took place prior to him having any knowledge that Mr Cyrus was making allegations of discrimination on the basis of race against Mr Mander.

159. The Tribunal are persuaded by Mr Mander's evidence and the reasons he gives for dismissing Mr Cyrus in his statement dated 2 June 2021 in which he states Mr Cyrus was unable to deliver on the required level of work or deliver against the required timelines and that he was unable to listen to the feedback given and make the required changes. This is also consistent with Mr Cyrus' account of what Mr Mander said to him on 4 May 2021 as in Mr Cyrus' email of 5 May 2021, he states to Mr Mander, *"You said that you were frustrated that it took six weeks for one document, this is entirely incorrect as yesterday would have been only five weeks since I joined;"*
160. The Tribunal however do not find that Mr Cyrus advised Mr Mander in the meeting on 4 May 2021, that he couldn't do the job and that therefore this did not play a part in Mr Mander's decision to dismiss Mr Cyrus on 4 May 2021.
161. In relation to direct discrimination based on race, the burden of proof rests initially on the employee to prove, on the balance of probabilities, facts from which the Tribunal could decide, in the absence of any other explanation, that the employer did contravene that provision. To do so the employee must show more than merely that he was subjected to detrimental treatment by the employer and that the relevant protected characteristic applied. There must be something more. If the employee can establish this, the burden of proof shifts to the employer to show that on the balance of probabilities it did not contravene that provision. If the employer is unable to do so, the Tribunal must hold that the provision was contravened, and discrimination did occur.
162. Having heard the written and oral evidence of both parties and having reviewed the documents put before us, the Tribunal have made a finding of fact, on the balance of probabilities, that Mr Cyrus did not inform Mr Mander at their meeting on 4 May 2021 of any discriminatory act/s that he believed Mr Mander had carried out towards him. Mr Cyrus' case for direct race discrimination therefore fails as he has not been able to discharge the burden of proof to prove, on the balance of probabilities, facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent Trust did contravene section 13 Equality Act 2010 in relation to direct race discrimination.
163. Accordingly, the Tribunal is satisfied that Mr Cyrus has not made out a prima facie case of less favourable treatment based on his race and that the burden of proof had not shifted to the Respondent Trust. In any event, the Respondent Trust through Mr Mander did provide the Tribunal with a satisfactory explanation of why Mr Cyrus was dismissed, and the Tribunal find that Mr Cyrus was dismissed in relation to Mr Mander's perceived poor performance of Mr Cyrus and not because of his race.

## **2 Harassment (s.26 Equality Act 2010)**

### **2.1 Did the Respondent act as follows:**

- 2.1.1 On 22 April 2021, the Claimant met with Mr Mander, the day before Mr Mander went on annual leave and at this meeting Mr Mander said, "I have two black managers in the same room as me that I manage".**

164. Despite accepting that the List of Issues (at pages 48 and 49) was correct at the outset of the hearing which stated,
- 2.1.1 In the Claimant's first meeting (since his engagement by the Respondent) with Mr Mander, the day before Mr Mander went on annual leave, Mr Mander said "I have two black men together."
  - 2.1.2 On 3 May 2021, at a meeting held with Mr Mander at which Yogesh Ramloll was present, following Mr Mander's return from annual leave at one of the Respondent's locations, David Mander said "Two brown people in the same room as me that I manage".
165. Mr Cyrus sought to amend the List of Issues during his cross examination by Ms Patterson by deleting allegation 2.1.2 and amending allegation 2.1.1 as follows:
- 2.1.1 On 22 April 2021, the Claimant met with Mr Mander, the day before Mr Mander went on annual leave and at this meeting Mr Mander said, "I have two black managers in the same room as me that I manage".
166. The Tribunal noted that the amendments sought to the List of Issues is significant as this not only changes the form of words which Mr Cyrus alleges Mr Mander said to him but also the number of occasions, he is alleging Mr Mander said something discriminatory towards him.
167. The use of word "brown" or "black" is also of significance and it is the Tribunal's view that this is not something that would be used interchangeably. The Tribunal would expect whether the word brown or black was used to stick in a person's mind if it was said to them and they took offence to this.
168. During cross examination, Mr Cyrus was clear that Mr Mander used the word "managers", but this word is in neither of the original allegations 2.1.1 or 2.1.2 nor in his witness statement of 10 November 2022 in which he stated at paragraph 45, *"When Yogesh came into the meeting room, David said I have two black men together reporting to me, which is very unusual. He was jolly when he commented."*
169. The Tribunal found that the evidence Mr Cyrus gave about this alleged act of unwanted conduct was unreliable and not consistent. The Tribunal would expect him to recall the exact wording or thereabouts of what was said to him if not the exact date of the meeting at which this occurred and certainly to be able to recollect whether this was said to him on one occasion or two.
170. The Tribunal do not accept Mr Cyrus' explanation for changing his evidence at the hearing and amending the List of Issues which he stated was because the Respondent Trust had failed to disclose a copy of his work diary to him.
171. Firstly, Mr Cyrus' calendar would only have assisted in him clarifying the date that the meeting he alleges such words were said to him by Mr Mander and not the form of words or number of incidents.
172. Secondly, Mr Cyrus' work calendar is in the bundle at page 432 and Mr Cyrus did not seek to amend the List of Issues at any time, since these were disclosed and

specifically not at the outset of the hearing when the Tribunal asked him to confirm if the List was correct.

173. Mr Cyrus could not adequately answer Ms Patterson's questions how he confused two incidents when there was only one incident and how the description of what was said to him by Mr Mander had changed.
174. The Tribunal note that Mr Cyrus' evidence on this allegation has changed over time. The ET1 stated:  
*"I was discriminated against; my line manager David Mander referred to my skin colour on the first occasion I had a face-to-face meeting with him and his deputy. His deputy happens to be someone of colour or has an ethnic background. He said, and I quote I have two black men together; this is very unusual. David Mander then made a further remark about the colour of my skin during the next meeting, which was held on the 3rd May 2021, where he said, and I quote, " Two brown people in the same room as me that I manage. "*
175. The Tribunal consider the words used by Mr Cyrus himself in the ET1 are of relevance where he says "I quote" under each allegation he makes indicating that he is stating ab verbatim what was said to him by Mr Mander. This form of words is not consistent with Mr Cyrus's oral evidence at the hearing and his current and amended allegation at 2.1.1.
176. Mr Cyrus also referred in his meeting with Ms Borst on 13 May 2021 that at meetings on 2 occasions Mr Mander said, *"never had two black/brown guys in the same room together"*. The note of the meeting on 13 May 2021 also records, *"It was upsetting to LC as it was the second time this comment had been made"* and the Tribunal note the way in which the incidents were therefore described to Ms Borst by Mr Cyrus meant the fact that the incident had occurred on two occasions was relevant to how Mr Cyrus felt. This is not the evidence he gave under cross examination in which he stated comments were made by Mr Mander at only one meeting.
177. Mr Mander denies that he would have used any of the different suggested wording alleged by Mr Cyrus as this is simply not something he would say. He confirmed that he would have no reason to say that he has two black managers in the room as he did not consider this to be a novel situation as this was not the first time, he had been in a room with two people of colour.
178. It is Mr Cyrus' evidence that Mr Ramloll was at the meeting when Mr Mander allegedly said the words that he found upsetting and discriminatory.
179. Mr Ramloll was clear in his written and oral evidence that he does not recall any such comments being made by Mr Mander. The Tribunal were persuaded by Mr Ramloll's explanation of why if Mr Mander had used the form of words as Mr Cyrus suggests, namely "2 black managers or 2 black men" that Mr Ramloll would have recalled this and that he would have corrected Mr Mander stating that he did not refer to himself as black and would have told Mr Mander that such a comment was not appropriate.

180. For the reasons set out above, the Tribunal have made a finding of fact that on 22 April 2021, Mr Mander did not say to Mr Cyrus, "I have two black managers in the same room that I manage."

181. Mr Cyrus's claim for harassment on this allegation therefore fails.

**2.1.2 On 3 May 2021, Mr Mander described that he had had freckles and one day he woke up to find that the freckles had grown into one thin line across his face which made him half black.**

182. By way of background, it is not in dispute by the parties that on 3 May 2021, Mr Mander had just returned from annual leave and at the meeting on 3 May 2021, Mr Mander, Mr Ramloll and Mr Cyrus discussed his holiday and there was a discussion about Mr Mander's skin pigmentation. What is in dispute is what Mr Mander said at this meeting.

183. Mr Cyrus describes this incident in his meeting with Ms Borst on 13 May 2021 and states that Mr Mander told Mr Cyrus and Mr Ramloll, "*about when he was a child, he had a brown mark down is face, like a scar, but then it turned into freckles.*"

184. In the relevant part of the ET1, Mr Cyrus alleges that Mr Mander said, "*as a little boy he (Mr Mander) had freckles and one day he woke up to find that the freckles had grown into one thin line across his face which made him half black.*"

185. In Mr Cyrus's witness statement dated 10 November 2022, he states that when Mr Mander was talking about his holiday, "*he said that when he was younger, he had freckles, and one morning when he woke, half his face was brown/black. He said he had two colours on his face. He laughed.*"

186. Mr Ramloll's evidence is that in the context of conversation discussing Mr Mander's skin pigmentation which was started by Mr Cyrus commenting on Mr Mander's legs looking white as he was wearing shorts, Mr Mander said he had a mark on his face when he was younger but later it turned into freckles. Mr Ramloll could not be certain and states that Mr Mander may have described this as a "dark mark" but he did not consider that there were any racist connotations to this comment. Mr Ramloll is certain that Mr Mander did not say he had a line down his face or that he used the term half black.

187. Mr Mander's evidence is also that he recalls he was wearing shorts at the meeting and Mr Cyrus said his legs were white and that in the context of that discussion, he said, "*that when I was young, I had no freckles, but I had a pigmentation stripe and joked that then one morning I didn't have a stripe but had lots of freckles. I said that my freckles had spread.*"

187. The Tribunal are not persuaded by Mr Cyrus' evidence on this point as we note that the way that Mr Cyrus has described the incident has evolved over time and in particular the use of the words "half black" which arguably is a more offensive term with racial connotations was not used in Mr Cyrus' initial description of

events with Ms Borst. The Tribunal would expect Mr Cyrus to recall these words as being offensive and therefore this to form part of his grievance procedure.

188. Furthermore, Mr Cyrus is inconsistent as to whether Mr Mander used the term “half black” or “half of his face was brown / black” and once again the Tribunal would not expect the terms brown and black to be used interchangeably and for Mr Cyrus not to recall this detail clearly.

189. The Tribunal find that the description of Mr Cyrus’ events to Ms Borst on 13 May 2021 and the incident as described by Mr Ramloll are not dissimilar save that Mr Cyrus describes this as a brown mark and Mr Ramloll believes the words dark mark may have been used.

190. For these reasons, the Tribunal make a finding of fact that, at the meeting on 3 May 2021, there was a discussion about Mr Mander’s holiday and his skin pigmentation and during this discussion Mr Mander said that when he was younger, he had a dark mark on his face, but this later turned into freckles.

**2.1.3 At the only other meeting held with the Claimant after his induction (the first meeting with Mr Mander after his appointment and prior to 4 May 2021) in a meeting in Leatherhead, Mr Mander entered the room and said “smile so I can see your teeth as it is rather dark in here and I cannot see you.”**

191. Ms Patterson put to Mr Cyrus that he did not raise this allegation of Mr Mander’s conduct at the meeting he had with Ms Borst on 13 May 2021. Mr Cyrus stated that the note of the meeting on 13 May 2021 was not an ab verbatim note, but he appeared to accept that this was correct. This ties in with his own email of 27 May 2021 in which he first raises the issue about this meeting. He states in this email (page 397),

*“I forgot to mention another crucial incident that occurred during my second meeting with David Mander where I sat in an office next door to Susie Gray office. The room has a light sensor which switches off when there's no motion. David came into the room for a planned meeting. The room was dark David smiled and said I nearly didn't see you. I responded by saying it is dark in here I was once again taken back. This is a true account. You will find the date in the calendar for reference.”*

192. However, in the ET1 the allegation made by Mr Cyrus had changed to: -

“On the third occasion, during a meeting in Leatherhead. I was working on my own in a small office that had a motion sensor if you were; still, the light came off as Mr Mander entered the room he said, smile so I can see your teeth as it is rather dark in here and I cannot see you.”

193. In Mr Cyrus’ witness statement (Paragraph 34) he states,

*“On 9 April 2021..... When David came into the office, he said smile so I can see your teeth; it is so dark inside I couldn't see you. He was referring to my*

*skin colour. David laughed. I was somewhat embarrassed that I did not raise an issue at the time as I was three days. I also needed the position as well. “*

194. The Tribunal find that contrary to the position set out in Mr Cyrus' witness statement even when he had an opportunity to raise his concerns about this incident at a meeting with Ms Borst, he failed to do so. The Tribunal are persuaded by the Respondent's submissions that out of all the allegations made by Mr Cyrus this is one of the most overtly racist and one to which he may take the most offence and yet Mr Cyrus did not recall this at the very meeting which he attended to discuss Mr Mander (and Mr Ramloll's) conduct.
195. Further the Tribunal note that Mr Cyrus' email of 27 May 2021 was sent 3 days after he started the early conciliation process (which commenced on 24 May 2021) and in any event the incident described in the email of 27 May 2021 is very different to the incident that is presented in the ET1 as in the former description Mr Mander did not ask Mr Cyrus to smile, he simply stated that he did not see Mr Cyrus and Mr Cyrus accepted that the room was dark.
196. Mr Mander denies that he used the words as alleged in the ET1 form. He stated that he recalls he was walking past Mr Cyrus in the corridor and Mr Cyrus was about to enter the room with the faulty lighting and he told him not to sit in there as no one would know he was in there and other people may walk in on him.
197. In cross examination, Mr Mander was very clear about the position of the room and the positioning of the sensors in that room that had caused difficulties for other staff members using the room as the lights went off when they stayed still in the room. It was not in dispute between the parties that there was such a room where the lights went off if there was no movement in the room.
198. Based on the two very differing accounts provided by Mr Cyrus, the Tribunal have made a finding of fact accepting Mr Cyrus' earlier account as this was nearest to the time that this occurred, and the Tribunal note that it is not significantly different to the account Mr Mander gave.
199. The Tribunal have therefore made a finding of fact that on 9 April 2021, Mr Cyrus was seated in a room with a light sensor that switched off if there is no motion in the room. Mr Mander opened the door to the room, and it was dark. Mr Mander smiled and told Mr Cyrus, "I nearly didn't see you".

**2.1.4 At the same meeting as that described at 2.1.1 above, Mr Mander called the Claimant a liar.**

200. In his meeting with Ms Borst, Mr Cyrus stated that in the context of a statement that was missing from the documents at the meeting on 22 April 2021, Mr Mander said to him in front of Mr Ramloll, "*Don't lie to me, don't ever lie to me*".
201. In the ET1, Mr Cyrus stated, "*On another occasion, Mr Mander bullied and harassed me in front of his deputy; he called me a liar and had only worked for the Trust for a couple of weeks.*"

202. In his witness statement, Mr Cyrus states in response to a missing document, *“David said you are a liar I was shocked by the statement.”*
203. Mr Mander’s evidence is that he does not recall calling Mr Cyrus a liar on 22 April 2021. He concedes that he may have thought he was not telling the truth but that he would not use the word liar. He also stated that he would not have said this because of the colour of someone’s skin.
204. Mr Ramloll was present at the meeting on 22 April 2021 and he states that he cannot recall Mr Mander calling Mr Cyrus a liar, however he does remember, *“there was a point where we were going through the document and Leroy had said he’d done something and David thought he hadn’t and said something along the lines of “If you haven’t done it, you can tell me you haven’t done it.”*
205. The Tribunal are persuaded by Mr Ramloll’s evidence which was consistent with the evidence he gave for the purposes of the grievance procedure and found his oral evidence to be compelling on this issue.
206. The Tribunal place significant weight on the fact that in Mr Cyrus’ initial complaint to the Respondent and in his discussion with Ms Borst he did not recall Mr Cyrus using the word, “liar” at all and certainly not as emphatically as he states in his ET1 and witness statement.
207. For the reasons set out above, the Tribunal make a finding of fact that on 22 April 2021, that there was a conversation about missing paperwork during which Mr Mander said to Mr Cyrus, “If you haven’t done it, you can tell me you haven’t done it.”

- 2.2 If the Respondent did any or all of those things, did such action or inaction amount to unwanted conduct related to the Claimant's race?**
- 2.3 If so, did the conduct have the purpose or effect of violating the Claimant’s dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, having regard to all the circumstances and whether it is reasonable for it to have that effect?**

**Dealing with each allegation in turn:-**

**Allegation 2.1.1**

208. As set out above, the Tribunal have made findings of fact that Mr Mander did not say the form of words as alleged at 2.1.1.

209. Mr Cyrus’s claim for harassment on this allegation therefore fails.

**Allegation 2.1.2**

210. In relation to this allegation, the Tribunal made a finding of fact that, at the meeting on 3 May 2021, there was a discussion about Mr Mander’s holiday and his skin pigmentation and during this discussion Mr Mander said that when he was younger, he had a dark mark on his face, but this later turned into freckles.

**Allegation 2.1.3**



211. In relation to this allegation, the Tribunal made a finding of fact on 9 April 2021, Mr Cyrus was seated in a room with a light sensor that switched off if there is no motion in the room. Mr Mander opened the door to the room, and it was dark. Mr Mander smiled and told Mr Cyrus, "I nearly didn't see you".
212. Dealing with allegations 2.1.2 and 2.1.3 together, the Tribunal did not hear from the parties on their submissions as to whether the comments above at 2.1.2 and 2.1.3 as found by the Tribunal were unwanted conduct related to the Claimant's race as the parties did not know what the Tribunal finding would be. The Respondent accepted that the harassment claims as pleaded by Mr Cyrus would amount to unwanted conduct related to the Claimant's race on the basis that the comments would be considered overt acts of discrimination.
213. The Tribunal do not find that Mr Mander's comments on 9 April 2021 and 3 May 2021 as found by the Tribunal at allegations 2.1.2 and 2.1.3 above, amounted to unwanted conduct related to the Claimant's race as he did not make any comments directly relating to the Claimant's skin colour as initially alleged, namely using the words half black and asking him to smile as it is dark.
214. If and to the extent that Mr Cyrus would state that he finds the words used by Mr Mander as found by the Tribunal were culturally offensive, that reaction by itself cannot create the necessary linkage and Mr Cyrus must show that it was reasonable for the conduct to have that effect.
215. The Tribunal find that the comments they have found that were made by Mr Mander are benign and factual comments and not of a sort to which a reasonable objection can be raised objectively taking into account all the circumstances of the case including the context in which they are raised.
216. The Tribunal consider in both instances the context that such comments were made are also an important consideration. On 3 May 2021, the discussion was prompted by Mr Cyrus referring to Mr Mander's skin colour and therefore was not an "out of the blue" comment. This also applies to the comment made on 9 April 2021 by Mr Mander which was simply a factual comment stating that he did not see Mr Cyrus as the room was dark. It is not in dispute that the room was dark.
215. Furthermore, the Tribunal do not consider the acts on which the harassment claims rest based on their findings of fact about what was said by Mr Mander on 22 April 2021 and 3 May 2021 are capable of satisfying the statutory test for harassment, as the Tribunal find that the comments were not sufficiently serious and they did not have the purpose or effect of violating Mr Cyrus' dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for Mr Cyrus.
216. The Tribunal find that there was no treatment capable of amounting to harassment. Mr Cyrus's claims for harassment on these allegations therefore fails.

#### **Allegation 2.1.4**

217. In relation to this allegation, the Tribunal made a finding of fact that on 22 April 2021, that there was a conversation about missing paperwork during which Mr Mander said to Mr Cyrus, “If you haven’t done it, you can tell me you haven’t done it.”
218. Mr Cyrus was asked by the Tribunal to set out in his view how Mr Mander calling him a liar was related to his race. Mr Cyrus was unsure of his answer. He stated that he did not consider that he had been called a liar due to his race on that day but after that he reflected on all that had happened, and he now believes that it was. When pressed further on this issue by the Tribunal, he was unable to provide the Tribunal with a cogent reason why he thought this save that he stated it was Mr Mander’s behaviour towards him.
219. The Tribunal have not found that Mr Mander called Mr Cyrus a liar and have found the wording used was much less confrontational and was a statement asking Mr Cyrus to confirm what he had done and that it was acceptable to say if he had not done the work.
220. There were no facts from which the Tribunal could conclude that such a comment on 22 April 2021 was an act of harassment, namely unwanted conduct related to his race. Mr Cyrus’s claim for harassment on this allegation therefore fails.

### **3 Victimization (s.27 Equality Act 2010)**

#### **3.1 Did the Claimant perform a protected act? The Claimant alleges:**

**3.1.1 On 4 May 2021, at a meeting with Mr Mander, the Claimant complained to Mr Mander that the unwanted conduct referred to in his email of 30 April 2021 were acts of discrimination.**

**(Mr Cyrus seeks to amend his ET1 and for this issue to read, On 4 May 2021, at a meeting with Mr Mander, the Claimant complained to Mr Mander that the unwanted conduct set out in allegation 2.1.1 above were acts of discrimination.)**

**3.2 Insofar as the protected act relied on constitutes allegations made by the Claimant, is the Claimant prevented from relying on those allegations because they were false and not made in good faith?**

**3.3 Has the Respondent subjected the Claimant to a detriment because he had done a protected act? The Claimant relies on the following alleged detriments:**

**3.3.1 The Claimant alleges that he was dismissed.**

221. The Tribunal then went on to consider Mr Cyrus’ claim of victimisation. The Respondent Trust argued that Mr Cyrus cannot rely on the protected act as set out in the List of Issues of telling Mr Mander on 4 May 2021 about the unwanted conduct set out in his email of 30 April 2021 as this relates to the conduct of Mr Ramloll and Mr Cyrus has conceded in the hearing that his conduct was not related to race.
222. The Tribunal discussed this with Mr Cyrus, and he accepted that this was correct. Mr Cyrus explained that he believed he had stated that the protected act was

that on 4 May 2021 he told Mr Mander about his (Mr Mander's) discriminatory conduct. Mr Cyrus accepted that this was not included in his ET1. However, he made an application to amend his claim on victimisation to amend the protected act on which he relies.

223. As set out and discussed above, the Tribunal do not make a finding of fact that Mr Cyrus informed Mr Mander of any discriminatory conduct on 4 May 2021 and therefore the protected act on which Mr Cyrus now seeks to rely did not take place. As a result, Mr Cyrus' claim for victimisation fails as the Tribunal find that no protected act has taken place.
224. The Tribunal do not need therefore to consider whether Mr Cyrus suffered a detriment (namely being dismissed) as a result of the protected act relied upon.
225. The Tribunal therefore do not need to consider Mr Cyrus' application to amend his victimisation claim. However, the Tribunal note that they would not be minded to agree to amending his ET1 at the very late stage that the application was made, namely at the final hearing and after the Claimant and Respondent witnesses had given evidence.
226. Mr Cyrus also failed to provide the Tribunal with an adequate reason why the application was made so late save as to state that he believed that the relevant protected act had been included in his ET1. Further he could not explain why the List of Issues which he had agreed was not correctly pleaded on victimisation.

### **Outcome and Postscript**

227. For the reasons given, The Tribunal, unanimously, dismisses all of Mr Cyrus' claims set out in the List of Issues.
228. We would not wish to leave this case without saying that we have not had to resolve any issues relating to an Unfair Dismissal claim as the Tribunal does not have jurisdiction to consider this since Mr Cyrus only worked for the Respondent Trust from 6 April 2021 to 4 May 2021.
229. The Tribunal note that a significant proportion of Mr Cyrus' cross examination of the Respondent Trust's witnesses was based on the challenges he faced when doing the job and he raised issues with the lack of support given to him and being given a goal that he says would have been difficult to achieve in the timescale he was given.
230. The Tribunal have some sympathy for Mr Cyrus, who after taking a career break to care for his mother, started a new job with a new organisation which meant that there were things that he did not know that others who have worked at the organisation for some time may not appreciate.
231. We found that there was a clear gap in Mr Mander's expectation of what Mr Cyrus could achieve within the short timescale he was employed by the Respondent Trust and what Mr Cyrus was able to do with little / no technical support, through no fault of his own, and the changing nature and scope of the task that he was asked to complete by Mr Mander.

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Employment Judge Sekhon  
Date: 25 November 2022

Sent to the parties on  
Date: 13 December 2022

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