EMPLOYMENT TRIBUNALS

Claimant: Mr M Hasan

Respondent: IFM Bolton Limited

Heard at: Manchester

On: 30, 31 January, 1, 2, 6 February (in person) and 7 February 2023 (in chambers, CVP)

Before: Employment Judge KM Ross,
Ms C Bowman,
Ms A Berkley-Hill

Representation

Claimant: in person
Respondent: Mr C Breen, Counsel

JUDGMENT

1. The claimant's claim that he was unfairly dismissed under section 95 and section 98 Employment Rights Act 1996 fails.

2. The claimant's claims that he suffered direct discrimination under section 13 Equality Act 2010 because of his race and/or his religion and belief as listed in the allegations at paragraph 5 (1)-(8) of the Case Management Order of Employment Judge Leach(p37) dated 14 June 2021 and listed in this judgement below, fail.

3. The claimant's claim that he suffered an unlawful deduction from wages under section 13 Employment Rights Act 1996 when his salary band was reduced in February 2020 up to and including his dismissal, fails.

REASONS

1. The claimant commenced employment with the respondent in November 2017. A number of capability issues arose with the claimant's work and the capability management process was followed. The claimant was offered a downgraded post with support and training which he refused. It was made

clear to the claimant if he was unwilling to be downgraded, the alternative was dismissal.

2. He was downgraded from January 2020 at the conclusion of the capability process. He went absent on sick leave and never returned to work. He appealed against the outcome of the capability process and the downgrading. His appeal was unsuccessful. He chose dismissal as an alternative to the downgraded post when his appeal failed in August 2020. He appealed against dismissal but he was unsuccessful.

3. He brought a claim to this Tribunal for unfair dismissal. At the Case Management hearing with Employment Judge Leach he identified complaints of direct discrimination because of race and/or religion and belief. The claimant was permitted to amend his claim and eight allegations of discrimination are listed at page 37 of the agreed bundle.

4. The claimant is a practising Muslim and of Bangladeshi national origin.

5. The claimant is a litigant in person, speaking English as a second language. He requested an interpreter for the final hearing. HMCTS arranged for an interpreter to attend. The claimant explained he did not need the interpreter to interpret every word. Instead he asked that the interpreter be used when he was unclear as to the meaning of what was being said. We proceeded on that basis.

6. The claimant also identified that he would like regular breaks to pray. The Tribunal accommodated the claimant's request and also arranged for a private conference room to be made available to him so he could pray in privacy.

7. There were some procedural difficulties in the case. The respondent's legal representative was instructed late in the course of proceedings, coming on record on 10 January 2023. The claimant had already sent his documents to the Tribunal and his witness statement before they came record.(On 22 December 2022)

8. Once the respondent's solicitor came on the record, they provided a joint file of documents which they believed contained all the documents the claimant wished to have included. Unfortunately the claimant's witness statement referred to page numbers in his original file of documents sent to the court before the respondent's representative came on record. The claimant said he had not had time to update his statement with the new page references to the joint bundle.

9. The claimant was asked at the outset of the hearing whether all the documents he had sent to the Tribunal were enclosed in the joint bundle. The claimant asked for some additional documents to be included which were missing and they were copied for the tribunal by the clerk and added. The Tribunal checked with the claimant and he said that all documents were now included in the joint bundle.

10. The Tribunal and the respondent spent a considerable time during the course of the hearing identifying the documents the claimant wished to refer to in his statement and in cross examination, in the joint bundle. The Tribunal assisted the claimant by copying further documents referred to in the claimant's statement, during the hearing.

11. The claimant requested to adduce new documents partway through the hearing but this was not permitted. The claimant also sent in a further submissions document after the in chambers meeting had concluded and a decision had been made. The Tribunal wrote to the claimant explaining the Panel could not take that further submission into account.

12. At the outset of the hearing we agreed a timetable for the hearing, with the consent of the parties, which we followed.

13. The issues in the case were clearly identified by Employment Judge Leach at the Case management hearing on 10 June 2021 and are listed below in this Judgment.

14. We heard from the claimant. For the respondent, we heard from Mr Moran who conducted the capability process which led to the claimant being downgraded, from Ms Wallace who conducted the appeal against the capability process and the decision to downgrade the claimant and from Ms Stanton against whom the claimant also made allegations of discrimination. We did not hear from the officer who heard the appeal against dismissal, Mr Webster as he was no longer working for the respondent. However we had statement from him.

15. At the conclusion of the evidence in the case we had a verbal submission from Mr Breen and the claimant provided a written submission and also spoke to us about it.

Facts

16. We find the following facts. The claimant was employed by the respondent as an Electrical Biomedical Engineering technician, Band 6 (also referred to as Grade F) in the respondent's Electrical Biomedical Engineering department from November 2017

17. The Department is responsible for servicing, calibrating and repairing medical equipment. It was critical the work was done accurately as the instruments were used in hospital for neonatal care and life-support.

18. The claimant applied with his CV (p60-5) and by application form. (p85-95). The respondent believed based on his details CV and application form that the claimant was a highly experienced and competent engineer and had worked at this level in a variety of institutions.p20. His academic qualifications were both undergraduate and postgraduate degree level. However within a few months, concerns were raised and by 7 March 2018 the respondent had started the informal capability procedure. The respondent's procedure is at p145-6.

19. The claimant was placed on the 1st stage of the informal procedure at a meeting on 7 March 2018. See page 364-6. His duties were restricted. We find the claimant did not object.

20. On 8 March 2018 the claimant agreed improvement was needed.p398.

21. The claimant was asked to provide a list of equipment he was confident to work on, and a list of areas where he needed training. We find that also the claimant provided former list but never identified provided a list to the respondent in respect of the latter list.

22. At the claimant's appraisal on 12 March 2018 it was identified he was "yet to develop the full range of skills required for the role".p387.

23. A further meeting was held on 16 March 2018 page 398. Concerns were identified and the claimant agreed improvement was needed.

24. A further meeting was arranged for 21 May 2018 but postponed for Ramadan.p410. It was rearranged for 28 June 2018. Unfortunately due to the claimant's sickness absence the meeting was postponed to 1 August 2018. The claimant was notified it would be informal meeting.p414. Further concerns were raised with the claimant and his union representative at that meeting.p416-7. A suggestion was made that the claimant should voluntarily reduce his grade to band 4 equivalent and receive comprehensive training to support his career progression through the pay scales. The claimant rejected the proposal stating he was competent and only needed support on 1 or 2 pieces of equipment. He remained on restricted duties.p416-7. He was warned this contract could be terminated if the support put in place failed to improve his performance.

25. Further concern was raised on the 15 August 2018.p418-9. The meeting listed for 27 September 2018 was postponed due to lack of trade union representative availability. A further meeting took place on 9 October 2018. The claimant was asked again to identify any further training, having failed to do so.p422-3. The claimant was also asked to put information he had provided into a summary report with the assistance of his trade union rep.

26. The claimant was absent on sick leave 16 October 2018-17 January 2019.

27. By letter 7 January 2019 the claimant was asked again for the summary report and to engage with the respondent in the capability process.

28. A clarification of the claimant's restricted duties was issued on 22 March 2019.p428. On 23 April 19 the claimant received a verbal warning in relation to an oxygen flow meter. He did not appeal. There were a number of incidents and concerns expressed during 2019. Page 367-8. The claimant remained on restricted duties. In July 2019 Mr Moran took over line management responsibility for the claimant. In November 2019 Mr Murphy who had been conducting the capability process, retired. On 19 December

2019 the claimant was invited to a formal capability meeting on 7 January 2019.p439.

29. At that meeting where the claimant was again represented by his trade union, a performance improvement plan "PIP" was agreed p 440-2. It was also agreed that the claimant would be instructed on 5 devices and then be expected to carry out a shadow test of the same devices following test procedures and service manuals. It was agreed the devices would be:

    T34 syringe driver, Braun Infusomat (Infusion Pump), Braun Perfuser(Syringe Pump), Inomax System and Neopuff.

30. We find the claimant was familiar with all these devices except Inomax. We find full details of what occurred at the meeting on 7 January set out in a detailed letter at page 618-21.

31. Clarification was also given of the claimant's restricted duties and Mr Moran confirmed he would meet the claimant every day to ensure he was confident in the tasks he was asked to undertake.p445.

32. On 7 January 2020 Mr Moran instructed the engineers to carry out the tests with the claimant. There were 3 different individuals.

33. We find on 8 January 2020 the Inomax test was conducted. The relevant documents are at p 446,447,451. The feedback document is at page 463-4. The feedback of the test was not positive.

34. By letter dated 10 January 2020 the claimant was invited to a meeting on 28 January 2020 to consider the outcome of the tests- page 465.

35. On 13 January 2020 the claimant underwent the Braun Perfusor test. The documents are at p466,467 and 473.

36. On 14 January the claimant underwent the Braun Infusomat test. The documents are at page 483,473. The feedback at page 473 is for both tests. The feedback is reasonably positive but the claimant states he would like training in calibration. p483.

37. On 16 January 2020 the claimant underwent T34 test. The outcome report which was not favourable is at 659. The other documents are at pages 647, 660, 624, 625.

38. The claimant sent a detailed email complaining about this test page 649 to which Mr Moran replied on 17 January 2020. Mr Moran also raised his concerns about the claimant's attitude to the test with HR. Page 647.

39. On 17 January 2020 there was a problem with the claimant and equipment as recorded by Mr Moran at p651. The claimant agreed in cross examination this incident occurred.

40. On 20 January 2020 the claimant underwent the Neopuff test. The feedback is at p 656. It was not positive. The claimant complained about this test- page 449- stating had not been included in the list of equipment on which he was to be tested but agreed cross examination that it had been agreed he should be tested on that equipment. The documents are at p653-5.

41. On 20 January 2020 Mr Moran had concerns about the claimant's absence from the Department. P652,657.He spoke to the claimant and considered his timesheet.p1171. He also asked for a list of prayer time which the claimant provided p658.

42. On 23 January there was an email exchange with the claimant's union rep when Mr Moran explained he'd been unable to locate the claimant on 22nd of January. 660-1. It was suggested by the trade union representative that the reason the claimant was away from the department was that the claimant had come to see him. Mr Moran stated he had no objection to the claimant seeing his union representative as long as he knew where he was.

43. On 28 January 2020 the claimant attended the formal capability meeting in the presence of his trade union representative to review his performance. At that meeting the claimant was informed that he had failed to meet the standard required at band 6 and he was therefore being downgraded with one month's notice to band 4.

44. The Tribunal finds, relying on the evidence of Mr Moran that the tests were straightforward and the claimant should have been able to perform them easily and calibrate the equipment where necessary.

45. It was confirmed that during that meeting to the claimant that although he would be downgraded, he would be provided with training and support by identifying appropriate courses and training and if it could be demonstrated that the claimant had a higher level of capability, progression options could be discussed and considered. The claimant was given one month's notice of the reduction in grade. The terms were confirmed by letter dated 10 February 2020 page 664-7.

46. On 29 January 2020 the claimant went absent on sick leave. He objected to the downgrade and appealed against it. He never returned to work.

47. He presented an appeal against the downgrade which was heard by Ms Wallace on 28th July and 12 August 2020 pages 689-734. The appeal was unsuccessful. See p735-6 for the outcome letter. The claimant had been informed if he did not accept the downgrade he would be dismissed. The claimant was given another opportunity to accept the downgrade at the conclusion of the appeal but he rejected it and chose dismissal.

48. The claimant made a further appeal against the decision to dismiss him.p736a. That appeal was heard on 17 November 2020. It was also unsuccessful and the claimant was notified by letter dated 20 November 2020 p737.

Law

49. The relevant law for the unfair dismissal case is at section 95 and 98 Employment Rights Act 1996. We also had regard to the case of Alidair v Taylor 1978 ICR 445

50. So far as the claimant's claims for discrimination are concerned the relevant law is found at section 13 Equality Act 2010. The burden of proof provisions at section 136 Equality Act 2010 are also relevant. We remind ourselves that the established legal authorities demonstrate there is a two- stage process in a direct discrimination case. These authorities include Wong v Igen 3 All ER 812 , Madarassy v Nomura International 2007 IRLR 246 and Efobi v Royal Mail Group Ltd 2019 2 All ER 917. The Tribunal reminded itself that a difference in treatment and a difference in protected characteristic are not sufficient to shift the burden of proof there must be "something more". See Mummery LJ in Madarassy v Nomura International 2007.

51. We also reminded ourselves that it is necessary to explore the alleged discriminator's mental processes. We had regard to Lord Nicholls guidance that bias may be unconscious. See Nagarajan v London Regional Transport 1999 ICR 877.

52. Finally in relation to the claimant's claim for unlawful deduction from wages the relevant law is at s 13 Employment Rights Act 1996.

The Issues-liability

Unfair Dismissal

53. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to the claimant's capability.

54. If so, was the dismissal fair or unfair in accordance with section 98(4) ERA, and in particular did the respondent in all respects act within the so-called band of reasonable responses?

Discrimination

55. The claimant relies on the protected characteristic of race and religion or belief. The claimant is of Bangladeshi national origins and a practicing Muslim.

Direct Discrimination – section 13 Equality Act 2010 ("EqA") (Protected characteristics race and/or religion or belief)

56. Did the respondent subject the claimant to the following treatment?

    (1) When taking time away from work, in order to pray (in accordance with the requirements of the claimant's religion), was the claimant told by his manager, Mr Moran, that he was taking too much time and

was he asked by Mr Moran why he was taking so much time even though Mr Moran knew full well the purpose of the claimant's time away from carrying out his work and the length of time that his prayers required? The claimant alleges these comments were made by Mr Moran between September 2019 and 29 January 2020.

(2) On or about 16 January 2020 did Mr Moran threaten the claimant with further action under the respondent's capability procedure if he did not carry out work immediately on a device called T34, even though Mr Moran knew (and the claimant informed him) that the claimant was required to take time away from carrying out his work duties to take part in prayers?

(3) Did the respondent require the claimant to undertake work on a device called Inomax even though it did not provide circumstances or documentations which were appropriate for the work to be carried out? This alleged event occurred on 8 January 2020.

(4) Was the claimant shouted at by Karen Stanton (another employee of the respondent) because he refused to sign the respondent's goods acceptance notebook acknowledging receipt of items being delivered? This alleged event took place on 3 June 2019.

(5) Did Karen Stanton shout at the claimant (in front of another employee) that he should stop working on a piece of equipment called a VS-900 monitor, given that he had no authority to work on such a monitor even though the claimant did have written permission to work on the VS-900 monitors? This alleged event took place on 29 April 2019.

(6) Did the respondent move the claimant from one salary band to a lower salary band in January 2020 (without the claimant's agreement) and pay him at that lower salary band until the date of his dismissal in August 2020?

(7) Did the respondent contact Keele University questioning the validity of the claimant's qualifications? This incident took place prior to the termination of the claimant's employment.

(8) Did the respondent contact the NHS North West Fraud Prevention Team in relation to the claimant? This incident took place following the claimant's termination from employment.

57. Was the treatment listed above (or any of them) "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others (comparators) in not materially different circumstances? The claimant relies on a hypothetical comparator.

58. If so, was this because of the claimant's race and/or religion or belief?

Unauthorised deduction from wages

59. Did the respondent make an unauthorised deduction from wages (contrary to section 13 Employment Rights Act 1996 by changing the claimant's salary band in or about January 2020 up to and including the date of dismissal?

60. If so, how much was deducted?

Unfair dismissal

61. We turned to the claimant's claim for unfair dismissal and the first issue. We find the reason relied on by the respondent was capability which is a potentially fair reason under section 95 Employment Rights Act 1996.

62. We reminded ourselves that the long established test set down in Alidair Ltd v Taylor 1978 ICR 445 CA is: does the employer honestly believe the employee is incompetent or unsuitable for the job and are the grounds for that belief reasonable. As we reminded the parties in this case, it is not our task to consider whether we consider the claimant was capable of doing his job. Neither is the legal test for the respondent to prove the claimant is incapable of performing his job.

63. We find that the decision to dismiss the claimant was taken by Ms Wallace. She heard the claimant's appeal against Mr Moran's decision to downgrade the claimant to a grade 4. She upheld Mr Moran's decision and although she offered the claimant the opportunity once again to continue in his role but at a lower grade with support and training, he refused that offer and so the alternative was dismissal.

64. We are satisfied that the respondent can show that they honestly believed the claimant was not capable of carrying out his role.

65. We find the respondent became concerned about the claimant's ability to carry out his role and standard of his work quite soon after his employment began. We find he was placed on restricted duties in March 2018, following the meeting with his manager Mr Murphy. Page 365. There is no evidence that the claimant ever challenged the restriction on his duties. We find throughout the process which followed the respondent tried to be supportive and offered the claimant training . We find the claimant never clearly identified further training he needed.

66. We find Mr Murphy held regular meetings with the claimant to discuss his concerns about the claimant's performance.

67. The claimant had been recruited to work as a grade F ,(equivalent to a Band 6) specialist EBME technician and was responsible for the maintenance repair and calibration of medical equipment used in the treatment of patients. It included equipment for the respondent's neonatal and maternity unit. His application page 85 to 95 and CV page 60 to 65 suggested he was experienced in work this type and at this level.

68. We find even after the claimant was placed on restricted duties issues still arose. The claimant remained in the capability procedure.

69. On 23rd of April 2019 the claimant was issued with a verbal warning by Anu Kumar in relation to a near miss incident with regard to an oxygen flowmeter.p429 for acting outside the scope of his role. We accept the evidence of Karen Stanton that she reported this incident. We find Ms Stanton to be clear and articulate witness. She explained this incident involved the claimant taking an air flow meter not an oxygen meter to the ward, when a request had been placed for an oxygen flowmeter. She explained that if this equipment provided by the claimant had been inadvertently used by the staff in the unit it could cause cardiac arrest and serious consequences because the patient would not be supplied with the level of oxygen needed. Although at the tribunal the claimant tried to suggest that he was not at fault for that incident, he accepted a verbal warning for it at the time and did not appeal against it.

70. The incident was discussed at the appeal hearing with Ms Wallace page 702. The claimant did not show any insight into the seriousness of the mistake.

71. At Tribunal the claimant referred to document 837 which is the report request. We accept the evidence of Ms Stanton that the incident occurred as she described and as set out in the email at p419. We are not satisfied the entire comment written by the claimant at the bottom of that page was contemporaneous because it is not consistent with the evidence given to the appeal by the claimant, Ms Stanton's evidence or the email issuing verbal warning from Anu Kumar.

72. There were a number of other incidents and the claimant remained within the capability process and on restricted duties. Mr Murphy retired in November 2019. Mr Moran had taken over responsibility for the claimant in July 2019 and took over the capability process once Mr Murphy retired.

73. We find that Mr Moran issued the claimant with a formal notification under the capability procedure. He made it clear that as a business the respondent could not sustain a situation where the claimant was employed at grade F (band six) but was continuing to work on restricted duties at a lower level, Page 618-621. We find this had been the case for almost 2 years.

74. We find the claimant was supported by his trade Union representative throughout the capability procedure.

75. We find that by agreement with the claimant and his trade union representative an agreed improvement plan would assess the claimant's ability in relation to his level of competence. See page 620. We find the claimant underwent those tests but they were not satisfactory see page 665.

76. The respondent prepared a performance improvement plan "PIP" with the consent of the claimant and his representative page 442-3.

77. We find that when considering whether Ms Wallace had an honest belief in the fact that the claimant was not capable of carrying out the role of a band six technician in this employment, she had regard to the detailed capability report prepared by Mr Moran see page 668-679 with appendices at page numbers as recorded at page 669.

78. We find the claimant's CV suggested that he was familiar and capable with servicing equipment required for this role. His CV stated he worked on the T34 syringe pumps and infuser pumps. The Braun infuser was an infusion pump. Of the tests the claimant carried out in January 2020 , he agreed that only the Inomax was new to him. The evidence before the respondent when the claimant was recruited was that he was a highly skilled competent engineer at grade 6 but the concerns expressed about his performance and his inability to perform the tests once employed suggested otherwise.

79. We find that there was detailed evidence before Ms Wallace that the claimant was not capable of working at a band six level. We find based on the information provided in the capability report , including the tests the claimant completed in January 2020, the feedback at p 464,473,656,659-660, together with the claimant's evidence at the detailed appeal hearing meant that she had a reasonable belief that the claimant was not capable of working at that level safely.

80. We turn to the next issue which is to consider whether the dismissal was fair or unfair within the meaning of section 98(4) Employment Rights Act 1996.

81. We turn to consider the issue of training supervision and encouragement. We find that for two years prior to being downgraded to a band four the respondent had held regular meetings with the claimant and the documents show that Mr Murphy repeatedly asked the claimant if there was any additional training he required. The claimant never clearly indicated any further training he required.

82. Even at Tribunal the claimant's evidence was contradictory in the issue of training. On the one hand he stated on occasions that he was highly skilled and experienced working at band six level as stated in his CV and that he needed no training. On other occasions in his evidence he criticised the respondent for failing to provide him with further training.

83. We turn to consider the issue of alternative employment. The respondent, despite finding that the claimant was not capable of working at band six, did not decide to dismiss the claimant. Instead the respondent downgraded the claimant to band four but offered support and training with a view to the claimant improving and progressing. We find the respondent did not require a band 4 technician so this was an additional post which the respondent was willing to carry to keep the claimant in employment with them.

84. The claimant never took up this offer an opportunity. He went absent on sick leave immediately after he was downgraded to band four and never returned to work. He was again offered the band four (also described as

Grade D) position at the appeal hearing on 12 August 2020 and given time to discuss this with his trade union representative. However he rejected that proposal and chose to accept the alternative which was dismissal.

85. We turn to consider the procedure adopted by the respondent. We find the respondent adopted a fair procedure. The claimant was placed initially into the informal capability procedure with regular meetings and restricted duties. He then was placed in the formal procedure with a performance improvement plan and agreed tests to perform to further assess his ability. He met Mr Moran with his trade union representative regularly.

86. He had an opportunity to appeal against the decision to downgrade him to grade 4 (Band D) , an opportunity to consider again taking the lower grade post instead of being dismissed and attended a further appeal against dismissal. We find the appeal against downgrade which culminated in the claimant's dismissal was a lengthy and detailed hearing taking place over two days on 28 July and 12 August 2020 where the claimant was permitted to give detailed evidence and provide information. He was represented by his trade union at the meeting. See minutes page 689 to 2734.

87. We find the respondent made available a medical expert on both days of the hearings on 28 July 2020 and 12 August 2020. However the claimant did not request the expert to be present or ask any questions to be put to the expert at any time. We entirely accept the evidence of Ms Wallace on this point. The claimant was adamant in cross examination that the expert was not available.

88. Although Mr Moran did not take minutes of the meetings he held with the claimant in January 2020 he provided a very detailed summary letters of those meetings which set out what had occurred. See page 618 for a detailed account of the meeting 7 January 2020, email of 8 January 2020 at page 445 recording a summary of the discussion and further clarification at page 445. See page 664 to 6674 detailed outcome letter of meeting on 28 January 2020.

89. Finally we turned to consider whether dismissal was within the band of reasonable responses of a reasonable employer of this size and undertaking. We reminded ourselves that the respondent did not immediately move to dismiss the claimant instead giving him the opportunity to work at a lower level, band four which he rejected.

90. We find Ms Wallace to be a clear careful and conscientious witness.

91. We reminded ourselves that the claimant's role was responsible for servicing and maintaining and repairing specialist medical equipment. The claimant when giving evidence suggested that because there had been no reports of patient harm there was no problem with his work. He also suggested that some equipment was not "critical".

92. We find,relying on the evidence of Mr Moran, Ms Wallace and Ms Stanton that all the equipment serviced maintained and repaired by a band 6

technician is critical. As was explained at Tribunal even a blood pressure monitor which is not serviced or repaired properly is potentially lethal when it is being used in a maternity or neonatal unit or critical care unit because recording an incorrect reading could lead to the wrong diagnosis or treatment being given.

93. We find that Ms Wallace was not satisfied the claimant had demonstrated any insight into his lack of ability. She found he referred to the many complaints (p706) which he admitted he had received as "silly mistakes".p703

94. The claimant's lack of insight and understanding was also reflected at the appeal hearing when he stated: "I have received lots of complaints but I have evidence. All complaints are administrative not technical."

95. Given the patient risk factor in this line of work, and the claimant's lack of insight into his inability to work at the level required we find the respondent has shown that dismissal was within the band of reasonable responses of a reasonable employer of this size and undertaking.

Discrimination

96. We considered the first issue.

97. Did the respondent subject the claimant to the following treatment?

Allegation 1. *When taking time away from work, in order to pray (in accordance with the requirements of the claimant's religion), was the claimant told by his manager, Mr Moran, that he was taking too much time and was he asked by Mr Moran why he was taking so much time even though Mr Moran knew full well the purpose of the claimant's time away from carrying out his work and the length of time that his prayers required? The claimant alleges these comments were made by Mr Moran between September 2019 and 29 January 2020.*

98. We find that Mr Moran, as the claimant's line manager, had a legitimate and genuine concerns as to the claimant's whereabouts at times. We rely on his evidence that on a number of occasions the claimant disappeared out of the Department without letting Mr Moran know where he had gone. We find this was not consistent with how other engineers operated. We find it is a health and safety risk not to know where a team member is as well as being impracticable and unmanageable from service delivery viewpoint.

99. We had regard to the contemporaneous email evidence at pages 652,655 and 657.

100. We find one of those concerns arose on 20 January 2020 which was the day in accordance with the agreed performance improvement plan that the claimant was to be instructed on the Neopuff device by an engineer, followed by a shadow test. We find the engineer had been waiting in the

Department to start the test and despite paging the claimant three times Mr Moran had difficulty in locating him. The claimant had left the Department between 9am and 10.10am.

101. We find that Mr Moran was aware that the claimant was permitted to leave the Department to pray. The claimant confirmed in evidence Mr Moran had never objected to him leaving the Department to pray.

102. We find on 20 January 2020 the claimant told Mr Moran when he asked the claimant where he had been that he had been "just looking for equipment".p652. We find he did not tell Mr Moran that he had been praying.

103. We find in this conversation Mr Moran, knowing the claimant had an agreement with the respondent that he could be away from the department to pray, asked the claimant for a list of his prayer times so he would be aware of where he was at those times. We find the claimant provided the information see page 658.

104. We find Mr Moran also had concerns about the claimant's working hours generally.

105. We find that on 22 January 2020 Mr Moran had again been unable to locate the claimant and had raised a concern with him about that. We find his trade union representative raised the matter with Mr Moran on the claimant's behalf stating the claimant thought Mr Moran believed the he (the claimant)had come to the trade union representative's office yesterday morning and the claimant felt upset about that. His representative stated " Let me assure that members have a right to see their workplace reps as long as management are made aware."

106. We find that Mr Moran was concerned that the claimant was away from his workplace and did not know where he was on some occasions. We find this is confirmed by the contemporaneous email evidence and also raised by Mr Moran's letter to the claimant on 10 February 2020 page 664. "There was a high concern regarding you leaving the Department without first informing management for authorisation to do so".

107. We find that when Mr Moran questioned the claimant about his whereabouts 20 January the claimant did not say that he was away from the workplace because he was praying. We find that there was a discussion around prayer times but only to clarify when they were. The claimant agreed in cross examination at tribunal that he did tell Mr Moran that he had an agreement with Mr Murphy that he could incorporate two of his prayer sessions into one 45 minute lunch break for timesheet purposes. See page 657.

108. The claimant did not produce any evidence of any other conversations about his time away from the Department other than on 20th and 22 January 2020.

109. We must ask ourselves whether the claimant can adduce facts which could suggest that the reason Mr Moran asked the claimant about his whereabouts was because of his race or religion.

110. We remind ourselves that a difference in protected characteristic and detrimental treatment i.e. being asked about his whereabouts is not sufficient to shift the burden of proof. There must be "something more".

111. We find that Mr Moran knew the claimant was entitled to have breaks to pray and the claimant confirmed Mr Moran had never stopped him praying.

112. We had regard to the fact that the claimant was not the only member of the team who required time to pray. See page 747.

113. We are not satisfied that the claimant has adduced any facts to show the burden of proof has shifted.

114. However in case we are wrong about that we turn to consider whether the respondent can show there was a non-discriminatory explanation for the treatment of asking the claimant about where he was.

115. We find that there was. We find the only reason Mr Moran was asking the claimant about his whereabouts was because he needed to know, as his manager, for both service needs and obvious health and safety issues(where the team was in the event of a fire) of the claimant's whereabouts.

116. We also rely on the contemporaneous evidence that in relation to the conversation on 22nd of January the claimant did not say he was praying, he said he was visiting his trade union representative. This is evidenced by the email from his trade union representative.

117. We are satisfied that the claimant did not say to Mr Moran the reason he was away from the department was because he was praying in the conversation on 20 January either. On that occasion we find that Mr Moran was concerned about the claimant's whereabouts because the engineer was waiting for him to start one of the agreed tests under the performance capability programme.

118. We find the claimant did not complain to Mr Moran, Ms Wallace or to Mr Webster who heard the appeal against dismissal that he was suffering from race or religious discrimination.

119. We are not satisfied that the claimant has shown that the reason he was away from the workplace at the time concerns were raised was because he was at prayers. He did not say that at the time.

120. In any event we are satisfied that the respondent has shown that Mr Moran had a non-discriminatory explanation for the treatment. He asked the claimant about his whereabouts because as his manager he was entitled to

know where the claimant was when he was out of the Department during the working day. Accordingly this allegation fails.

121. We turn to the next allegation:

> *On or about 16 January 2020 did Mr Moran threaten the claimant with further action under the respondent's capability procedure if he did not carry out work immediately on a device called T34, even though Mr Moran knew (and the claimant informed him) that the claimant was required to take time away from carrying out his work duties to take part in prayers?*

122. We find 16 January 2020 was the date agreed for the claimant to perform the test on device T 34. See page 647, 659 and 649. We find the claimant did say he did not want to start the test. There is no contemporaneous evidence that the claimant said that was due to prayers. The claimant's email at 649 which is very detailed and was sent at 1755hours on that day does not refer to prayers. We rely on the report of the engineer who conducted the test which shows that the claimant was permitted breaks to go to pray. See page 659.

123. We also rely on the contemporaneous email of 16 January 2020 sent by Mr Moran to HR at 1510 hours. The email explains that the claimant was scheduled to carry out the shadowed test on the T 34 that afternoon, but the claimant had come into Mr Moran's office stating he" did not want to carry out the test this afternoon and needed more time". We find the claimant did not say to Mr Moran that the reason he needed more time was prayers.

124. We find the claimant never referred to needing more time to pray until the case management hearing before Judge Leach. He did not allege this at the appeal hearing before Ms Wallace despite this allegation being discuss- page 714.

125. We find that on 16 January 2020 the claimant was procrastinating and objecting to completing the test. Mr Moran stated in his contemporaneous email p647 "I reminded him he had already had a morning's instruction with the opportunity to take notes and access to a service procedure to work through. I also reminded him that refusal to do what we had agreed at the meeting and what I had asked him to do, could be construed as a disciplinary matter." Mr Moran recorded the claimant "made several more requests to not carry out the tests today (essentially almost to the point of arguing with me)."

126. The claimant agreed in cross examination he did not want to do the test that afternoon. In any event there is no dispute that the claimant started the test that afternoon, did not complete it and was permitted to complete the test the following day.

127. We must ask ourselves whether the claimant can adduce facts which could suggest that he was treated less favourably than a hypothetical comparator because of his race or religion.

128. We find the claimant is unable to adduce facts to shift the burden of proof. The claimant agrees he did not want to carry out the test that afternoon and there is no dispute Mr Moran said the claimant previously agreed he would carry out the test in accordance with capability procedure and "PIP" and that a refusal to do so could be a disciplinary matter. There is no dispute Mr Moran also said that the claimant could complete the test the following day, which is what happened. There is no dispute either that the claimant was permitted to pray that afternoon.

129. However if we are wrong about this and the burden of proof has shifted we are satisfied the respondent has shown a non-discriminatory explanation for informing the claimant he needed to commence the test as agreed that afternoon. We find the reason Mr Moran told the claimant he needed to carry out the test that afternoon was that it had been agreed as part of the capability procedure. We also find that Mr Moran informed the claimant he could continue with the test following day . We find that the claimant was permitted breaks to pray.

130. Therefore this allegation fails.

131. We turn to allegation three:

> *Did the respondent require the claimant to undertake work on a device called Inomax even though it did not provide circumstances or documentations which were appropriate for the work to be carried out? This alleged event occurred on 8 January 2020*

132. We find this allegation is factually incorrect. There is no dispute that the respondent required the claimant to carry out a test on the Inomax device on 8 January 2020. It was part of the agreed improvement plan. See pages 620 and 445. The documentation relevant to the test are at pages 446,451 and 447. Mr Moran's note of the test is at page 463. We rely on Mr Moran's evidence that the service manual and test procedure were available. We rely on his evidence that engineer Mr Loughman carried out the instruction and the claimant attended. An apprentice was also in attendance. The claimant was permitted to spend an hour alone with the equipment and the test procedure to become more familiar with it. The claimant was then asked to carry out the procedure unsupervised with the engineer observing.

133. The claimant's performance was poor. See p665 and 66.

134. The Tribunal finds that the claimant was provided with the service manual and an opportunity to be instructed before carrying out the test. Accordingly the Tribunal finds the allegation is factually incorrect.

135. However even if we are wrong about that the claimant has not adduced any evidence to suggest that the reason the respondent did not provide adequate circumstances or documentation was because of his race or religion.

136. Even if we are wrong about that and the burden of proof has shifted we are satisfied that the respondent carried out this test in the way it would have done for anyone of any race or religion who had provided a CV and an application form which suggested the familiar able to work with the equipment of this type. Therefore this allegation fails.

137. We turn to consider allegation 4:

> *Was the claimant shouted at by Karen Stanton (another employee of the respondent) because he refused to sign the respondent's goods acceptance notebook acknowledging receipt of items being delivered? This alleged event took place on 3 June 2019*.

138. We find Ms Stanton to be a direct honest and clear witness who made concessions where necessary. Ms Stanton is now a medical engineering manager, Band 8b but when she started with the respondent in April 2018 she was a specialist EBME technician, Band 6, the same role as the claimant.

139. We find on the 3 June 2019 there was an incident when the claimant declined to sign the goods acceptance sheet acknowledging receipt of an item being delivered to the Department. We find the department regularly received deliveries of goods from central stores and the internal process was that when the goods were delivered the person delivering them asked a member of the Department to sign a form acknowledging receipt. We find deliveries were regular, at least once a day and sometimes more.

140. We find that it was usually the person standing closest to the delivery who signed the form. We find it was a simple administrative task essentially the same as signing parcel for a neighbour. We find the task was simply to sign for the delivery and there was no requirement for the member of staff to process or otherwise deal with the parcel.

141. We find on that day the claimant was closest to the person delivering the goods and was asked by him to sign the form to acknowledge receipt. We find the claimant declined to do so and asked Ms Stanton if she would sign the form instead. We find Ms Stanton was surprised by the request but got up from her desk and went to sign the form. We find she asked the claimant why he couldn't sign the form. We find she was puzzled because the claimant had never asked her to do this in his place previously and she thought it was strange because no one in the Department had ever asked her to sign the receipt form, instead of signing themselves.

142. We find the claimant told Ms Stanton it was because it was outside the scope of his work. We rely on the evidence of Ms Stanton to reach this finding. We also rely on the evidence given by the claimant to the appeal hearing at page 707. The claimant said" I refused to sign for deliveries and asked Karen or Ian to sign. Karen did but after asked me why I wouldn't sign for them". The claimant did not suggest at the appeal hearing that Karen

Stanton shouted at him and neither did he suggest that she had discriminated against him on grounds of religion or belief.

143. The claimant said in his statement to this Tribunal that Karen Stanton had shouted at him page 139.

144. The Tribunal prefers the evidence of Ms Stanton to that of the claimant. The claimant was sometimes a contradictory and inconsistent witness. For example he suggested both that the respondent had failed to train him but also that they had not identified any training he required because he was competent to work at band 6.

145. In reaching this decision the Tribunal has also taken into account that closer in time to when the events took place, at the appeal hearing in 2020, when his memory is likely to be more reliable, the claimant did not suggest Ms Stanton had shouted at him.

146. The Tribunal therefore finds this allegation is factually incorrect and it fails at that point

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147. The Tribunal turns to consider the allegation 5:

> *Did Karen Stanton shout at the claimant (in front of another employee) that he should stop working on a piece of equipment called a VS-900 monitor, given that he had no authority to work on such a monitor even though the claimant did have written permission to work on the VS-900 monitors? This alleged event took place on 29 April 2019.*

148. The Tribunal finds this allegation is factually incorrect. There is a direct conflict of evidence. The claimant stated in his witness statement at paragraph 137 that Karen Stanton "suddenly shouted" to him "for stopping servicing blood pressure monitor(maker :Mindry & Module:VS -900". The claimant states he had permission from his manager to work on the monitor. Ms Stanton says she did not shout at the claimant on 29 April 2019 that he had no authority to work on a VS-900 monitor and is at a loss to understand where this allegation has come from. She stated that at that stage she was not a manager and had no responsibility for the claimant, that she had been copied into an email with an attachment which set out the scope of work the claimant was able to do at that time, p429, and therefore she was aware that the claimant was able to work on the VS 900 and had no reason to challenge him. She also relies on the work log system which suggests p742-746 that the claimant was not working on the Mindray VS900 during that period.

149. The claimant never referred to this incident during his hearings with the respondent.

150. The claimant agreed in cross examination that there was no evidence in the work log that he worked on the VS 900. He did not have any clear

explanation as to why he had not raised this issue prior to raising it with Employment Judge Leach at the case management hearing.

151. The Tribunal prefers the evidence of Ms Stanton to the evidence of the claimant and finds the remark was not made. The Tribunal relies on the fact that there is no evidence that the claimant was working on this equipment at that time, that the claimant never mentioned the incident until the case management hearing before Employment Judge Leach on 14 June 2021 and the fact that Ms Stanton whom we find to be a clear and cogent witness has no recollection whatsoever of the remark and is sure she did not make it and that there is no documentary evidence of the claimant working on that device at that time.

152. Therefore this allegation fails because we find the remark was not made.

153. We consider allegation 6:

> *Did the respondent move the claimant from one salary band to a lower salary band in January 2020 (without the claimant's agreement) and pay him at that lower salary band until the date of his dismissal in August 2020?*

154. The claimant agreed that there was a typographical error in this allegation and it should refer to February 2020 rather than January 2020 There is no dispute that the outcome of the capability process was that the claimant was downgraded to band 4. He was informed of the outcome at the meeting on 28 January 2020 and given one months' notice of the decision. See letter of confirmation page 664-7.

155. We find that the respondent had followed their capability procedure and a legitimate outcome of that procedure was to downgrade the claimant. See p155,153.We find that downgrading means that the claimant would be working at a lower level for a lower rate of pay.

156. We find that protection of pay and conditions of service is not appropriate where an employee is downgraded as a result of the capability process. See the respondent's policy at page 153.

157. We must consider whether the claimant has adduced facts which could suggest that the reason for the treatment -i.e. downgrading him against his wishes,was his race and/or religion. We reminded ourselves that a difference in treatment and having a protected characteristic is not sufficient to shift the burden of proof. There must be "something more". The Tribunal is not satisfied the claimant has adduced any evidence to suggest facts which could suggest the real reason he was downgraded was his race or his religion.

158. The claimant did not adduce any evidence which could suggest this other than mere assertion. During cross examination the claimant was asked when he had raised any concerns about discrimination during the capability or appeal process. He insisted that it was simply self-evident he was raising

matters of discrimination. The Tribunal finds it was not self-evident from the information provided by the claimant to the respondent before he presented his employment tribunal claim and ticked the box for discrimination.

159. The Tribunal finds the evidence suggests that the respondent was supportive of the fact the claimant was a practising Muslim. For example, the respondent adjourned capability meetings because they had been arranged during a period when Ramadan took place.p410. The claimant stated Mr Murphy agreed and permitted him breaks to pray. Mr Murphy was the same manager who was taking the claimant through the capability procedure before he retired and Mr Moran took over.

160. However in case we are wrong about our finding that the claimant has failed to adduce any facts to suggest the reason for the treatment was discriminatory, we have gone on to consider whether the respondent can show there was a non-discriminatory explanation for the treatment.

161. We find they can. The respondent had clear evidence that the claimant, despite his very detailed CV and application form suggesting he was experienced and highly competent grade 6 engineer, was not capable of working at band 6 level. The respondent had all the information included in the capability report. In particular the respondent had the results of the tests completed by the claimant in January 2020. The respondent was entitled to draw the conclusion from those test results that the claimant had not performed adequately in what were described as very basic tests for a band 6 technician. The respondent was entitled to conclude as it did at page p665-6 that the claimant had not demonstrated the technical ability to carry out the role.

162. The respondent has therefore shown a non-discriminatory explanation for the treatment – ie reasonable grounds for their belief that he was not competent to work safely at band 6 and this allegation fails.

163. We now consider the last allegations: 7 and 8. We have considered them together.

164. Allegation 7:

> *Did the respondent contact Keele University questioning the validity of the claimant's qualifications? This incident took place prior to the termination of the claimant's employment*.

165. Allegation 8:

> *Did the respondent contact the NHS North West Fraud Prevention Team in relation to the claimant? This incident took place following the claimant's termination from employment*.

166. We rely on our findings of fact that the claimant submitted an extensive CV(page 60 to 65) which suggested he was a very experienced. At the outset of his CV the summary states "highly skilled medical equipment

engineer experienced in theatre settings and educated to Masters level." He then sets out in great detail that he is capable of repairing calibrating and maintaining patient monitors, ventilators, defibrillators, syringe pumps infusion pumps, oxygen saturation monitors, suction pumps and patient beds. See page 60. He also submitted a very detailed application to the respondent page 85-95.

167. It therefore came as a surprise to Mr Murphy and Mr Moran that the claimant was struggling with basic tasks. The email evidence suggests that a concern was also raised by the claimant's representative.p113,114,115,

168. There is no dispute that the respondent contacted Keele University to check the validity of his educational certificate , namely his degree. The request to make the check was dated 3 January 2020 and confirmation that the Keele degree was legitimate was received by April 2020.

169. We find the original request to check the claimant's educational qualifications was made by the respondent's HR department to the fraud specialist manager at Bolton HNS Trust on 3 Jan 2020.P1132.

170. Therefore allegation 7 is factually correct. Allegation 8 is correct except that the date is incorrect because the referral was made prior to the termination of the claimant's employment.

171. The Tribunal finds there is no evidence to shift the burden of proof in relation to allegations 7 and 8. The claimant has done no more than to assert discrimination. Accordingly the allegation fails at this stage.

172. However in case we are wrong about that we turned to consider whether the respondent can show a non-discriminatory explanation for the treatment. We find they can. The claimant presented as a skilled medical engineer but very quickly the respondent discovered he was struggling with basic tasks. He admitted himself there were numerous complaints about him. These complaints were made by different individuals.

173. He worked on restricted duties from March 2018 but remaining at the Band 6 rate of pay until he was downgraded at the end of January 2020, with one month's notice, to band 4. We find the respondent had discovered a surprising mismatch between the claimant's stated qualifications and experience listed in his CV and application form and the reality of his abilities in practice

174. It was therefore entirely appropriate for the respondent to seek confirmation of the legitimacy of his educational certificates including his degree and to make that enquiry via the appropriate individual namely the fraud specialist manager.

175. Therefore this allegation also fails.

Unlawful deductions from wages claim.

176. The question for the Tribunal is whether the claimant received less and the sums payable under the terms of his contract from February 2020 when he was downgraded until his dismissal in August 2020.

177. The claimant suggests the respondent was not entitled to reduce his salary band, because he did not consent to the downgrade and because he did not consider he should be downgraded.

178. The Tribunal finds the claimant's claim is misconceived. The respondent's policy makes it clear that a possible outcome of the capability procedure is to downgrade the employee. The claimant's contract of employment refers the claimant to the respondent's policies. The Tribunal relies on its findings of fact that the respondent followed a fair capability procedure and found that the claimant was not capable of working at band 6. The respondent was entitled to make that finding and was entitled to downgrade the claimant to band 4. The claimant's consent to downgrade him was not required.

179. The respondent gave him adequate notice (1 month) of change of contractual terms. From a contractual position, under the terms of his contract he was entitled to 1 weeks' notice for each year of service on termination of contract. His band 6 contract was effectively terminated with 1 months' notice (more than his entitlement of 2 weeks for 2 years complete service given his start date in November 2017 and the downgrade in January 2020) and he was on a band 4 contract from that date. He remained on that downgraded contract, absent on sick leave, until his appeal against the downgrade failed and his employment ended.

180. As a matter of good will the respondent sought the claimant's consent by offering the claimant the opportunity to remain with them at the lower grade but the claimant rejected that option.

181. The claimant can not show that he received less than the sums properly payable under his contract because the respondent was entitled to downgrade him. Therefore this allegation also fails.

Employment Judge Ross

1 March 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

1 March 2023

FOR THE TRIBUNAL OFFICE