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EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Mr C Fernandes	**AND**	Interserve (Facilities Management) Ltd

Heard at: London Central **On**: 7 - 9 January 2019

Before: Employment Judge Brown
Members: Mrs H Craik
Mr D Carter

Representation
For the Claimant: In person
For the Respondent: Mr N Smith, Counsel

JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. **The Respondent did not subject the Claimant to harassment because of race or disability.**
2. **The Respondent did not subject the Claimant to race or disability direct discrimination.**
3. **The Respondent did not victimise the Claimant.**
4. **The Respondent did not fail to make reasonable adjustments.**
5. **The Respondent did not make unlawful deductions from the Claimant's wages.**
6. **The Respondent did not fail to give the Claimant a statement of terms and conditions.**

REASONS

Preliminary

1. The Claimant, a Food Service Assistant, brings complaints of race and disability harassment, direct race and disability discrimination, victimisation, failures to make reasonable adjustments, unlawful deductions from wages and a failure to provide an updated statement of terms and conditions, against the Respondent, his employer.

2. The Claimant relies on his diabetes, on a wrist injury and on anxiety and depression in his disability discrimination claims. The Respondent concedes that the Claimant was a disabled person at all material times by reason of diabetes and a wrist injury. It does not concede that the Claimant was a disabled person at all material times by reason of anxiety and depression.

3. The Claimant confirmed, at the outset of the Final Hearing, that he contends that he became disabled by reason of anxiety and depression after 10 January 2018, following two occasions on 3 January and 10 January 2018 when he alleges he was subjected to race and disability harassment.

4. The Claimant relies on being of Indian origin in his race discrimination claim; he contends that he was the only employee of Indian origin in the relevant work place.

5. The parties had agreed a comprehensive list of issues arising in the claim and response at a Preliminary Hearing on 11 October 2018. The issues were:

Disability

1.1. Does the claimant have a physical or mental impairment, namely

1.1.1. diabetes,
1.1.2. wrist injury [or
1.1.3. anxiety and depression]?

1.2. If so, do any of the impairments have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?

1.3. If so, is that effect long term? In particular, when did it start and:

1.3.1. has the impairment lasted for at least 12 months?
1.3.2. is or was the impairment likely to last at least 12 months or the rest of the claimant's life, if less than 12 months?

1.4. Are any measures being taken to treat or correct the impairment? But for those measures would the impairment be likely to have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?

Section 26: Harassment on grounds of race and harassment on grounds of disability

1.5. Did the respondent engage in unwanted conduct as follows:

   1.5.1. on 3 January 2018 the claimant's line manager reprimanding him unjustifiably and not reprimanding others at fault,
   1.5.2. on 10 January 2018 the claimant's line manager being rude and aggressive to him
   1.5.3. failing to give the claimant support throughout the grievance and appeal process.

1.6. Was the conduct related to the claimant's protected characteristic(s)?

1.7. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

1.8. If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

1.9. In considering whether the conduct had that effect, the Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Section 13: Direct discrimination on grounds of race and direct discrimination on grounds of disability

1.10. Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act:

   1.10.1. paying the claimant less than equivalent colleagues
   1.10.2. failing to pay the increase rate of pay promised in 2014
   1.10.3. denying the claimant the opportunity to renew his Food Hygiene certificate after it expired in 2011
   1.10.4. failing to provide personal protective equipment in the form of a sweater for outside deliveries in the winter months
   1.10.5. failing to uphold his grievance in 2018
   1.10.6. failing to investigate his grievance adequately in 2018
   1.10.7. objecting to his grounds of appeal against the grievance
   1.10.8. failing to uphold his grievance appeal
   1.10.9. any of the treatment in 3.5 above not found to have been harassment.

1.11. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on hypothetical comparators.

1.12. If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic(s)?

1.13. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Section 19: Indirect discrimination on grounds of and indirect discrimination on grounds of disability.

1.14. [The claimant is to confirm whether he pursues an indirect discrimination claims and, if so, what the claims are.]

Section 27: Victimisation

1.15. The claimant is to confirm whether he pursues a victimisation claim and, if so, what the protected act relied upon is which will need to be an allegation made by him of unlawful discrimination.

1.16. If there was a protected act, has the respondent carried out any of the treatment set out in paragraphs 3.5 and 3.10 above because the claimant had done a protected act?

Reasonable adjustments: section 20 and section 21

1.17. Did the respondent apply the following provision, criteria and/or practice ('the provision') generally, namely:

1.17.1. requiring employees to work to a pattern of work which did not always allow for meal breaks to be taken when the claimant needed a break due to his diabetes
1.17.2. requiring employees to make outside deliveries without providing personal protective equipment (jumpers)
1.17.3. requiring employees to lift heavy items.

1.18. Did the application of any such provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that:

1.18.1. he required meal breaks at certain times due to his diabetes;
1.18.2. he required warm clothing in cold weather due to his diabetes
1.18.3. he found it difficult to carry heavy items due to his wrist injury.

1.19. Did the respondent take such steps as were reasonable to avoid the disadvantage?

1.20. Did the respondent not know, or could the respondent not be reasonably expected to know that the claimant had a disability or was likely to be placed at the disadvantage set out above?

Time/limitation issues

1.21. The claim form was presented on 26 May 2018 and ACAS were notified about early conciliation on 31 March 2018. Accordingly, any act or omission which took place before 1 January 2018 is potentially out of time, so that the tribunal may not have jurisdiction.

1.22. Does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

1.23. Was any complaint presented within such other period as the employment Tribunal considers just and equitable?

Unlawful Deduction from wages

1.24. Has there been an unlawful deduction from the claimant's wages in relation to the issue at 3.10.2 above?

Failure to provide a statement of terms and conditions of employment

1.25. Has there been failure to provide the claimant with an updated statement of the terms and conditions of employment?

6. The Claimant had served further and better particulars of his indirect discrimination claim, Bundle page 44. In those particulars, however, he reiterated elements of his direct race discrimination claim and the Tribunal concluded that no separate indirect discrimination claim was pursued.

7. The Claimant told the Employment Tribunal that the harassment issue, "Failing to give the Claimant support throughout the grievance and grievance appeal process," simply meant not upholding the grievance and grievance appeal. He told the Tribunal this at the outset of the Final Hearing and repeated it during the Hearing.

8. At the start of the Final Hearing, the Respondent told the Tribunal that the Claimant had served only a brief 10 paragraph witness statement, which dealt with few of the allegations in his claim. The Respondent said that it had served all its witness statements, in full, on the Claimant. The Claimant brought a disability impact statement to Final Hearing, which he had not previously served, but on which he wished to rely. The Respondent read the disability impact statement and confirmed that it did not object to it.

9. To put the parties on an equal footing and to be fair to both parties, the parties agreed that the list of issues in the case, the Claimant's 10 paragraph

witness statement, his disability impact statement brought to the Final Hearing and the Claimant's grievance dated 24 January 2018, at Bundle page 250, should all be taken as his evidence in chief. These documents covered all the allegations on which the Claimant relied, and did not take the Respondent by surprise. The Claimant also provided the Tribunal and Respondent with a list of documents which the Claimant wished the Tribunal to read before making its decision. The Tribunal read all those documents.

10. The Claimant said, in evidence, that the protected act on which he relied in his victimisation claim was a 2016 grievance against his manager, Miss MacFoy. It was one of the documents which the Claimant asked the Tribunal to read, page 193a. The Claimant confirmed, in evidence, that he did not say, in that grievance, that Miss MacFoy had discriminated against him.

11. There was a bundle of documents and a supplementary bundle of documents, which included the Claimant's medical records.

12. The Respondent produced a document showing rates of pay of the Claimant and other members of staff. The Claimant did not accept the accuracy of the document and was given the opportunity to cross examine the Respondent's witnesses on it, albeit he put no positive case to the witnesses regarding the document.

13. The Tribunal timetabled the hearing. It heard evidence from the Claimant. For the Respondent, it heard evidence from: Georgina MacFoy, Catering Contract Manager and the Claimant's Line Manager; Tamsin Grey, Performance Manager and Grievance Officer; and Mike Lee, Account Director and Grievance Appeal Manager.

Findings of Fact

14. At the times material to this claim, the Claimant was employed, first as a Porter and then as a Food Service Assistant. The Claimant is employed by the Respondent. His continuous employment started in July 2008. The Claimant was originally employed by a company called Bouygues Energies and Services FM Limited. He TUPE transferred to the Respondent on 1 October 2016.

15. The Respondent provides facilities management services and, in particular, catering services, to clients. At all material times, the Claimant was employed at 70 Whitehall, which is a Cabinet Office Building. The Respondent provides catering services there, including a canteen and coffee shop, for the Cabinet Office. It also provides teas and coffees to other Cabinet Office Buildings, including Admiralty House and 10 Victoria Street.

16. The Claimant's Manager since December 2014 has been Georgina MacFoy. She is of black African ethnic origin. The Respondent employs an ethnically diverse workforce on its Cabinet Office catering contract. Miss MacFoy has 15 direct reports. Of these employees, 3 are of white British ethnic origin, one is of Brazilian Portuguese, one of Middle Eastern, one of Brazilian, two of black African, three of black Afro Caribbean, one of Portuguese, two of North

African and one is of Indian ethnic origin (the Claimant). The Respondent also uses agency workers on its catering contract. Permanent members of staff are SC security cleared to go to different Cabinet Office Buildings; agency staff are not, and therefore need to be accompanied when they go to other client buildings.

17. When the Respondent took over the Cabinet Office catering contract, it introduced a number of changes. It introduced an online holiday request system. The Claimant did not have access to a smartphone-type hand-held device and the Respondent also operated a paper holiday booking system to accommodate this. In the 70 Whitehall canteen, customers were no longer served, but were required to serve themselves from a buffet. The Claimant had previously cooked eggs for customers, but his duties changed to replenishing stocks of food, from which the customers served themselves. Two of the Claimant's colleagues: Jimmy Girard, a Food Services Assistant; and Brahim, a Supervisor, were primarily responsible for undertaking deliveries of teas and coffees and food to other Cabinet Office locations. When they were not at work, the Claimant would provide cover for them and would undertake deliveries. The Claimant estimated that he did this around 20 times in 3 months; that is, about 6 to 7 times a month. The Tribunal accepted that he did carry out deliveries with about this regularity, but also found that carrying out deliveries was not the Claimant's principal day to day responsibility.

Anxiety and Depression

18. The Claimant told the Tribunal that he started to suffer with anxiety and depression in January 2018. On 15 January 2018, his GP signed him off work for two weeks with work related stress, Bundle page 246. On 29 January 2018, his GP signed him off work again for three weeks with work related stress, page 263. On 14 February 2018 his GP signed him off work with work related stress, depression and anxiety for one month, page 326. On 9 March 2018, his GP signed him off work with work related stress, depression and anxiety for 4 weeks page 331. The Claimant was also seen by Helen Greenwood, a Psychiatric Liaison Nurse, at the Northwick Park Hospital Mental Health Centre on 12 January 2018, Supplementary Bundle page 221. In her summary of consultation, Ms Greenwood said that the Claimant was suffering from poor sleep, reduced appetite, low mood and suicidal thoughts triggered by work. She said that he had no history of mental illness or previous diagnosis and that the Claimant believed that he would be fine if his work circumstances were addressed. The treatment recommended by Miss Greenwood was that the Claimant should be managed by his GP with some time off work and, perhaps, short term sleeping tablets and anti-depressants, if his mood remained low.

19. The Claimant remained signed off sick by his GP with anxiety and depression thereafter. On 30 July 2018, Main Bundle page 445, his GP signed him off work for 6 weeks until 9 September 2018.

20. The Claimant has remained off work since that time.

21. The Claimant has not provided any medical evidence from his GP that he was advised by his GP, at any time during 2018, that he was likely to continue to suffer from anxiety and depression until January 2019 and / or that he was likely to be unable to return to work for the whole of 2018 - albeit the Tribunal acknowledges that the Claimant has now been signed off for the whole of 2018 and remains signed off work.

22. The Tribunal considered that the Claimant did have a mental impairment, that is anxiety and depression, which arose, at the latest, in February 2018, when he was signed off specifically mentioning anxiety and depression. He was signed off with "work stress" in January 2018. Given that the Claimant was signed off work, the Tribunal found that his anxiety and depression condition had a substantial adverse effect on his ability to carry out normal day to day activities. Carrying out work and going to work are normal day to day activities.

23. There was no Occupational Health report advising on the Claimant's condition during 2018, or his likely future condition. The Tribunal has found, later in this Judgment, that the Claimant has not cooperated with attempts to refer him to Occupational Health.

24. The Tribunal has concluded that there was no evidence by August 2018, whether from the Claimant's GP or from Occupational Health, that medical opinion considered that the Claimant was likely to continue to suffer from anxiety and depression, and/or be off work, for 12 months or more from the date of onset of his condition. There was no evidence of medical prognosis during 2018. The Claimant's GP continued to sign the Claimant off work for short periods.

25. Therefore, the Tribunal has found that, at the times material for this claim - until August 2018 - the Claimant was not likely to suffer from a mental impairment which had a substantial adverse effect on his ability to carry out normal day to day activities for 12 months or more. Accordingly, he did not come within the definition of disability in *s6 Equality Act 2010* in relation to his anxiety and depression.

The Claimant's Allegations

26. The Claimant contended that he was paid less than equivalent colleagues in his workplace. In evidence to the Tribunal, he confirmed that the colleagues with whom he compared himself were: Jimmy Girard, of black African ethnic origin; Djofrely Pinto Ferreira, of Brazilian Portuguese origin (and who the Claimant said was of black ethnicity) and Shirley Forde, of black Afro Caribbean origin. He said that Brahim Mouni, of Algerian national origin and North African ethnic origin, was a supervisor and was paid more than the Claimant.

27. The Claimant told the Tribunal that Jimmy Girard came from another work place, a secure unit, where he was paid £9 per hour and that the Claimant therefore believed that Jimmy continued to be paid more than the Claimant. The Claimant said Jimmy and Djofrely did the same job as the Claimant but were paid more than he was.

28. The Respondent produced a print out from its payroll system for the Claimant, Mr Girard, Mr Pinto Ferreira and Miss Forde for December 2017. It showed that the Claimant and Mr Girard were each paid £8.38 per hour. Miss Ford was paid £8.40 per hour and Mr Pento Ferreira £7.50 per hour.

29. Miss MacFoy gave evidence about the print out and the employees' pay rates. She told the Tribunal that Miss Forde had retired, but had come back to work for the Respondent. She said that Miss Forde's pay rate was wrongly entered onto the payroll system and that she should have been paid £8.38 per hour. Miss MacFoy also said that Mr Pinto Ferreira should also have been paid £8.38 per hour and that this has been corrected. Miss MacFoy told the Tribunal that Food Service Assistants and Kitchen Porters at 70 Whitehall were all on the same basic wage, which ought to be £8.38 per hour.

30. The Claimant did not accept the document but did not challenge its contents in cross examination.

31. While Miss MacFoy told the Tribunal that the hourly pay rates on the print out were erroneous, the Tribunal found that, given that the document came from the Respondent's payroll, it was likely to show the rates of pay actually paid to the relevant individuals at the time.

32. However, Miss MacFoy also explained that the Cabinet Office contract does not pay the London Living Wage. The client is the Cabinet Office and it does not fund the London Living Wage. Ms Forde said that other Government Departments do fund the London Living Wage, so that, for example, employees working on contracts in Building 5 and 22 Whitehall do receive the London Living Wage, which is higher than the £8.38 per hour paid to Food Service Assistants and Porters under the Cabinet Office contract.

33. In evidence, the Claimant said he did not know exactly how much other people were paid, because they did not tell him. He did accept that people were paid at higher rates in different locations; for example, he believed that Jimmy was paid £9 per hour when working in a different location, doing higher security work.

34. The Tribunal accepted Miss MacFoy's evidence about the difference in pay between different locations. She had detailed knowledge about the pay rates for individual employees and the different Government buildings. It accepted Miss MacFoy's evidence that the Claimant was paid the standard rate for a Food Service Assistant, as was Mr Girard, at £8.38 per hour. It accepted Miss MacFoy's evidence that Mr Pinto Ferreira's hourly pay ought to have been £8.38 and that Miss Forde's pay should also have been £8.38 per hour, because that was the standard rate under the Cabinet Office contract. The Tribunal found that the Claimant was not paid the London Living Wage and nor were other Food Service Assistants at 70 Whitehall, because the Cabinet Office did not fund the London Living Wage under the Respondent's catering contract there.

35. The Claimant contended that the Respondent had failed to pay him a pay increase promised in 2014. He said that the HR representative at his

predecessor employer had told him that he would receive a pay increase, but that the HR representative did not say when, or what the increase would be. Miss MacFoy told the Tribunal that the Claimant had not raised this with her. The Tribunal found that there was no specific promise made to the Claimant that he would be paid any specific rate of pay at any particular time. It found that the Claimant was paid the standard rate for an Food Service Assistant at 70 Whitehall, which was £8.38.

36. The Claimant had a food hygiene certificate which expired in 2011, Bundle page 272. He contended that the Respondent had denied him the opportunity to renew his food hygiene certificate after it had expired. He told the Tribunal, however, that he did not know about any other employees and whether they had food hygiene certificates.

37. Miss MacFoy told the Tribunal that she was aware, from 2014, that the Claimant did not have food hygiene certificate. However, because the contract for the predecessor employer was coming to an end, it had been difficult to arrange training, in that the training provider would be changing. She said that the predecessor employer managed this situation by providing supervision to the Claimant and other staff through its chefs. When the Respondent took over the Cabinet Office catering contract, all staff needed new training. On 3 and 4 October 2016, Brian Wiltshire, Manager, gave an introduction to food hygiene talk, which was a Level One qualification, to all employees on the contract. She said that this was the qualification which was required and that the Claimant attended the talk. She said that the Respondent then rolled out online training for employees.

38. The Tribunal accepted Miss MacFoy's evidence. She had detailed knowledge of the training arrangements made by the Respondent and also by the predecessor employer. She also knew the training status of other employees, which the Claimant did not. The Tribunal found that all employees needed refresher training in food hygiene and all were given Level One training on 3 and 4 October 2016, including the Claimant. Online training was then rolled out. The Tribunal concluded that there was no evidence that other employees were given training when the Claimant was not.

39. The Claimant contended that the Respondent failed to provide him with outdoor protective clothing, in the form of a jumper or fleece, to keep him warm when undertaking deliveries. He said that other employees were given jumpers or fleeces. The Claimant told the Tribunal - and the Tribunal accepted - that the Respondent's written instructions to employees included an instruction that employees were required to wear Interserve branded uniform and, if they did not, they would be disciplined. The Tribunal noted that this provision was set out at Bundle page 59l.

40. The Claimant contended that he was required to wear warm clothing in cold weather because of his diabetes.

41. Miss MacFoy conceded that the Respondent had given fleeces to other employees and not to the Claimant at the beginning of the contract. She also

conceded that the Claimant had afterwards asked for a fleece, but had not been provided with one. She told the Tribunal that only a limited number of fleeces had been provided to her contract by the Respondent, at the start of the contract, and that she had given those to the employees with primary responsibility to make deliveries; Jimmy and Brahim. She told the Tribunal that the Claimant's main responsibility was food service in the canteen and that he undertook deliveries much less frequently. Miss MacFoy also told the Tribunal that Jimmy and Brahim wore their own coats and jumpers when going outside for deliveries and had never been disciplined; and nor had she ever told the Claimant that he would be disciplined for wearing his own coat and jumper outside.

42. The Tribunal accepted that a person with diabetes like the Claimant might have less good circulation and might require extra clothing to keep warm.

43. The Claimant did not contradict the Respondent's assertion that Jimmy and Brahim's primary responsibility was to make deliveries, while deliveries were carried out less frequently by the Claimant. He made deliveries about 6 to 7 times a month. The Claimant gave no evidence that he had ever been warned by Miss MacFoy, or anybody else, that he should not wear his own coat and jumper.

44. The Tribunal found that the Respondent did require that some employees, including the Claimant, to make deliveries without providing them with jumpers or fleeces. However, it found that this did not put the Claimant or others with diabetes at a substantial disadvantage because they were, in fact, permitted to wear their own jumpers and coats. They would therefore not have been cold, nor would they have required additional clothing on top of their own outdoor garments.

45. Furthermore, the Claimant was not in the same position as others who carried out deliveries as their main job junction. There was a material difference in circumstances between the Claimant and his comparators, Jimmy and Brahim. The reason that they were provided with fleeces at the start of the contract was because their main job responsibility was undertaking deliveries.

46. Nevertheless, the Employment Tribunal comments that it was understandable for the Claimant to feel that he should be provided with a fleece, because the Respondent's written instruction required employees to wear Interserve uniform. The Claimant took such instructions seriously; his appraisals specifically mention that he was very well turned out, Bundle pages 165 and 276. He clearly was a contentious employee in this regard. It was reasonable for him to want to comply with the written instructions, even if there was an informal policy of allowing employees to wear their own coats.

47. The Claimant contended that the Respondent required employees to work a pattern of work which did not always allow for meal breaks to be taken when the Claimant needed a break due to his diabetes. The Claimant told the Tribunal that Miss MacFoy had told him that he could not take a break until after breakfast service was cleared and that this could take until 11:45am. He also said that he did not always get a lunch break at 12:30 and sometimes he had to go to the

office at lunchtime to ask for his break. On his evidence, however, he was always then given his breaks.

48. Miss MacFoy told the Tribunal that the Claimant did get a mid-morning break, either during the breakfast service, or when it finished at 10:30am. She said he also got a lunchbreak, usually at 12:30pm, when the chefs sent the Claimant on his break. She said that cover would be provided for breaks.

49. On 26 November 2013 the Claimant had attended an Occupational Health meeting. In the report arising out of it, the Occupational Health doctor, Doctor O'Brien, advised that the Claimant had diabetes and that, in terms of adjustments, the Claimant required regular meal breaks, page 101.

50. The Claimant attended a Capability Stage One Review Outcome meeting on 2 October 2015. A letter was prepared by Miss MacFoy after this meeting. The Claimant disputed the contents of the letter and said that he had never received it. However, the Tribunal noted that the Claimant also disputed the notes of meetings he had not even attended, for example between Miss MacFoy and Miss Grey on 29 March 2018, page 347. The Tribunal also noted that the Claimant repeatedly said in evidence that the Respondent's notes and letters were fabricated. The Tribunal found that there was no good reason for the Claimant's assertions in this regard. The Tribunal found that Claimant's allegations, that the Respondent's employees, Miss MacFoy, Miss Grey and Mr Lee, all lied and fabricated notes and letters, were indiscriminate and careless.

51. The Tribunal accepted that the letter of 8 October 2015, Bundle page 141, was written at the time and accurately reflected the contents of the meeting held on 2 October 2015. The letter said that, in the meeting, the Claimant had reported that he was managing his diabetes and that regular meal breaks were contributing to his wellbeing. The Claimant did not contradict the letter at the time. The Tribunal therefore found that, in 2015, the Claimant was having regular meal breaks and that he told Miss MacFoy that he was benefitting from them.

52. Further, the Tribunal found that the Claimant failed to cooperate with the Respondent regarding Occupational Health referrals thereafter; he failed to consent to being referred to Occupational Health over a long period of time. Julie Herman, Manager, provided an Occupational Health referral form to the Claimant at a meeting on 16 December 2015 and asked for his consent for the referral, page 175. He did not provide that consent. On 29 April 2016 Miss MacFoy wrote to the Claimant following a meeting also on 29 April 2016. She enclosed a further Occupational Health referral consent form which asked for advice on the Claimant's medical situation and which reasonable adjustments might be required. The Claimant did not provide the consent. On 6 May 2016 he wrote to Miss MacFoy, saying that he had provided consent in the past and should only have to do so once. He said that he would consult his union representative. On 17 May 2016 Miss MacFoy asked the Claimant to meet her to discuss Occupational Health referral along with the Claimant's union representative page 184. The Tribunal accepted Miss MacFoy's evidence that the Claimant did not meet with her in order to discuss this along with his union representative. There is no evidence in the bundle of documents, which ran to over 600 pages and

contained numerous items of correspondence from the Claimant, that the Claimant sought a meeting about Occupational Health with his union representative and Miss MacFoy.

53. Miss MacFoy told the Tribunal that she drafted a further Occupational Health referral form and discussed it with the Claimant at a meeting in work on 8 November 2017 page 239. She said that the Claimant told her, after the meeting that his GP had advised him not to consent. The Claimant denied that Miss MacFoy had discussed this Occupational Health referral with him on 8 November 2017. Ho told the Tribunal that the Respondent only sent the referral form to him when he went off sick in January 2018. Miss MacFoy told the Tribunal that a copy of the referral form had also been sent to the Claimant at this time.

54. The Tribunal noted that, in the supplementary bundle of documents which the Claimant asked the Tribunal to read, at page 203 his November 2017 GP records show that the Claimant attended his GP and showed the GP a referral form for Occupational Health. The Tribunal therefore accepted Miss MacFoy's evidence about her drafting a referral form and discussing it with the Claimant in November 2017. This appears to have been the form that he later discussed with his GP the same month.

55. The Tribunal concluded that the Claimant had shown a pattern of noncooperation with Occupational Health and that it was very likely that the Respondent was continuing to seek Occupational Health referral in 2017, and thereafter, but that the Claimant failed to engage.

56. On the Claimant's evidence, he did get breaks in the morning and at lunch every day. Even the Claimant did not say that there was a day when he missed a mid-morning break or a lunch break.

57. The 2013 Occupational Health advice said that the Claimant needed regular breaks. Given that the Claimant did get mid-morning and lunch breaks everyday - albeit at not exactly the same time each day - the Tribunal found that the Claimant did enjoy regular breaks. The Respondent allowed meal breaks to be taken when the Claimant needed them, which was regularly.

58. In so far as the Claimant contended that he ought to have been provided with breaks at particular times, there was no medical or OH evidence before the Tribunal that the Claimant required breaks to be taken at specific, fixed times every day. The Claimant did not co-operate with the Respondent's attempts to refer him to OH and actively prevented the Respondent from obtaining up to date advice regarding his disabilities and any adjustments he required. The Respondent complied with the advice that it was given in November 2013.

59. Accordingly, the Tribunal did not find that the Claimant was at any substantial disadvantage if he was not provided with breaks at specific, fixed times.

60. The Tribunal acknowledged that the Claimant may have felt unhappy that he had to ask for breaks, on occasion, in order for breaks to happen. Nevertheless, the Claimant did have regular daily breaks.

61. The Claimant contended that the Respondent required him to lift heavy items. In the Occupational Health report dated 26 November 2013 at page 101, the Occupational Health doctor advised that the Claimant could not carry out tasks requiring rotation of his dominant left forearm and that he could not lift more than 12kgs. The Claimant told the Tribunal that he had to lift heavy items during work, but his evidence was very vague on when, where, and in what circumstances he was required to lift heavy items at all. Miss MacFoy's evidence was that the Claimant was never required to lift heavy items and that she herself instructed colleagues that the Claimant was not required to lift heavy items. Miss MacFoy also told the Tribunal that the Claimant was provided with a trolley to carry heavy items. The Tribunal found the Claimant's evidence about being required to lift heavy items was so vague as not to be credible. The Tribunal rejected the Claimant's evidence.

62. The Claimant contended that, on 3 January 2018, Miss MacFoy accused him of not filling up a milk jug when a customer requested it. The Claimant told the Tribunal that it was not the Claimant's job to fill up the jug and that Miss MacFoy was rude towards him when she spoke. He said that another employee, who was working on the till, should have filled up the jug and that Miss MacFoy instead picked on the Claimant. The Claimant said that he had bacon in his hand at the time and was busy.

63. Miss MacFoy told the Tribunal that the other employee was busy serving customers on the till at the relevant and that the Claimant should have filled the milk jug, because it was a reasonable request. In evidence, the Claimant appeared to accept that, at the time the customer asked for the jug to be filled, the other employee was busy with customers at the till.

64. The Tribunal found that the milk jug in question was empty and that the other employee was busy at the till, serving customers, at the time when the customer asked for the milk jug to be filled. While the Tribunal accepted that the Claimant had a plate of bacon in his hand, it found that he could have put this down and attended promptly to the customer's request. It concluded that it was reasonable for Miss MacFoy to expect the Claimant to fill the jug. It was part of the Claimant's duties to replenish food supplies and it was reasonable for Miss MacFoy to question him as to why he did not, when the other employee was busy at the till. The Tribunal found that Miss MacFoy acted reasonably in the way that she approached this matter.

65. On 10 January 2018 the Claimant was working in the canteen on the food service area when Miss MacFoy asked him to undertake a delivery to another building. The Claimant told the Tribunal that Miss MacFoy was rude to him when she did so and that he had asked her whether she wanted him to do front of house or delivery and that Miss MacFoy had simply stared at him in response.

66. Miss MacFoy told the Tribunal that the other employees who were working that day were agency employees who did not have security clearance and could

not undertake deliveries on their own; and that, therefore, it was reasonable for her to keep the two agency employees on front of house in the canteen and ask the Claimant to do the delivery. She said that the Claimant had questioned her decision, rather than carrying out her simple, reasonable instruction.

67. The Claimant agreed in evidence that he did query the instruction and that Miss MacFoy's request was a reasonable one. The Tribunal found that the Claimant objected to Miss MacFoy's reasonable request.

68. Miss MacFoy told the Tribunal that the Claimant shouted and she asked him to come to the office; she said that the Claimant eventually agreed to do the delivery after he calmed down.

69. The Claimant told the Tribunal that, while in the office, Miss MacFoy threatened to send the Claimant home. He conceded in evidence that he was "emotional" on the way to the office.

70. Given that the Claimant was taking exception to a reasonable request, the Tribunal concluded that it was more likely that the Claimant reacted intemperately, than Miss MacFoy. It found that Miss MacFoy may well have said that she would send the Claimant home, but that she did so because the Claimant was disobeying instructions and shouting.

71. The Claimant went off work, sick, and submitted a grievance on 24 January 2018, page 250. In the grievance, he said that he had a witness to the events of 10 January 2018, Lucia Zidekova, who was in the office when Miss MacFoy shouted at the Claimant page 253. He complained that Miss MacFoy had shouted at the Claimant on 10 January and had threatened to send her home. He said that Miss MacFoy had harassed him and subjected him to race discrimination and that he had become anxious and depressed as a result.

72. On 2 February 2018, Steve Cross, the Respondent's Operations Manager, asked Tamsin Grey, Performance Manager for a different contract, to investigate the Claimant's grievance, page 328. On 5 March 2018, Miss Grey wrote to the Claimant, acknowledging his grievance and asking to meet him on 13 March.

73. The grievance hearing eventually took place on 22 March 2018. The Claimant attended the meeting. Nicholle Brandt, Contract Administrator was the note taker, page 342.

74. The Claimant contended that the Respondent failed to interview his witness Lucia Zidekova and that the Respondent discriminated against him and victimised him in doing so. He acknowledged that Miss Zidekova had left the Respondent's employment by the time of the grievance hearing, but said that the Respondent had had ample time to interview her because she had given one month's notice before she left at the beginning of March 2018.

75. Miss Grey told the Tribunal that she understood it to be the Respondent's standard practice that a grievance investigator would meet the person bringing the grievance before interviewing any other witnesses. She also said that she

was not aware that Miss Zidekova had left the business. She explained that Nicholle Brandt, the note taker, was a Contract Administrator responsible for the administration of leavers, movers and new employees and that, when Miss Zidekova's name was mentioned in the grievance hearing, Miss Brandt had told the meeting that Miss Zidekova had left the Respondent's employment.

76. The Claimant told the grievance meeting that Miss MacFoy had wanted to send him home and that she only wanted to employ black people, page 345. He said that he was paid less than other employees and that Jimmy and Brahim were given jumpers but he was not.

77. Miss Grey interviewed Miss MacFoy on 29 March 2018, page 347. She asked her about each of the Claimant's allegations. Miss MacFoy told Miss Grey that she had given the Claimant a reasonable instruction on the day of 10 January and that he had argued and shouted. She said that, on 3 January, the Claimant should have stopped what he was doing to get milk. She said that the Claimant was on exactly the same wage as Jimmy Girard, Djofrely Pinto Ferreira and Shirley Forde. She explained that other staff in other buildings were on London living wages. Miss MacFoy said that fleeces had been issued at the start of the Respondent's contract, but said that she would order a fleece for the Claimant. Miss MacFoy said that she had employed 3 employees, none of whom were black.

78. Miss Grey did not interview other witnesses and she did not independently verify pay records. Miss Grey told the Tribunal that she spoke to Stewart Cross to see whether Miss Zidekova had been interviewed before she left, but discovered that she had not been.

79. The Tribunal found that Miss Zidekova had left the Respondent's employment and that the first Miss Grey had known about this was during the grievance hearing. It accepted Miss Grey's evidence that she did not have the opportunity to interview Miss Zidekova because of this.

80. Miss Grey told the Tribunal that she accepted Miss MacFoy's evidence and did not probe further by interviewing other witnesses because she did not see any reason to disbelieve Miss Grey.

81. Miss Grey sent a grievance outcome to the Claimant on 11 April 2018. She did not uphold his grievance, but accepted Miss MacFoy's version of events. In the outcome letter, Miss Grey told the Claimant that she had asked Miss MacFoy to order a fleece for the Claimant.

82. The Tribunal accepted Miss Grey's evidence that she believed Miss MacFoy's version of events and did not see the need to investigate further. The Tribunal found that Miss MacFoy had given Miss Grey a credible explanation for each of the matters which the Claimant had alleged against her. While the Employment Tribunal comments that Miss Grey might have checked pay slips, or pay rates, it did not find that there was any evidence that Miss Grey would have made further investigations if the Claimant had been non-Indian, or had not been disabled, or had not submitted a grievance in 2016. Indeed, Miss Grey told the

Tribunal that she was not aware of the Claimant's 2016 grievance and the Tribunal accepted her evidence on this; there was no reason to believe that she would have known about it.

83. The Claimant appealed the grievance outcome on 16 April 2018, page 356. On 27 April 2018 the Respondent's HR Operations Department wrote back to the Claimant, saying that the matters raised in his letter had already been responded to in the grievance outcome. It asked that the Claimant provide the factual circumstances relied on and the appeal outcome he sought, page 363. The Claimant asked for more time to do this, page 366. The Respondent agreed and the Claimant provided more detailed grounds of appeal on 6 May 2018, page 368.

84. The Claimant contended that the Respondent discriminated against him and victimised him when it objected to his first grounds of appeal. Mr Lee, the appeal officer, gave evidence to the Tribunal and said that he was not aware of the Claimant's 2016 grievance. He also told the Tribunal that he could not find, in the Claimant's original appeal letter, any new evidence, or new witnesses, or specific information which contradicted the earlier grievance outcome. Mr Lee said that he would normally look for new evidence, or new arguments, in an appeal.

85. The Claimant was off work, sick, when he appealed. Mr Lee invited him to an Appeal Hearing by letter of 13 June 2018, page 400. The grievance appeal was held on 18 June 2018, when the Claimant attended with his union representative. The Claimant was late to the meeting because he could not find the building and his union representative did not meet him at Westminster Tube, despite this having been previously agreed between them.

86. Mr Lee went through the Claimant's appeal with him during the appeal meeting. He then wrote to Miss MacFoy on 21 June 2018, asking questions arising out of the grievance appeal, page 437a.

87. On 9 July 2018 Mr Lee sent a grievance outcome letter to the Claimant, page 441. In it, he said that the Claimant had been offered the right to be accompanied, but the Claimant had declined.

88. Mr Lee upheld the original grievance outcome of Miss Grey. He rejected the Claimant's complaints about Miss MacFoy on 3 and 10 January. Mr Lee decided that employees could wear coats when outside to keep warm. He told the Claimant that the Claimant was on the same pay as Mr Pinto Ferreira and that 70 Whitehall did not pay the London living wage. Mr Lee said that Miss MacFoy used agency workers as well as the existing staff and that, in fact, the staff structure had remained the same for some years. He said that there was no evidence of black people being recruited in preference to other ethnic groups.

89. Mr Lee sent a corrected appeal outcome letter to the Claimant page 448, which said that the Claimant had been accompanied by Andrew Corass, Trade Union Representative.

90. The Claimant contended, at the Employment Tribunal, that Mr Lee had deliberately lied in the original grievance appeal outcome letter, when he said that the Claimant had declined the right to representation. In evidence, Mr Lee explained that he had provided the “free text” for the original appeal outcome letter and that Human Resources had added “standard” parts to the letter; so that the part regarding the Claimant declining he right to be accompanied was included as a standard paragraph in error and Mr Lee corrected this error on returning from holiday. The Tribunal accepted Mr Lee’s evidence about this; it accorded with normal practice that a Hearing Manager would make a decision on the substantive appeal and HR would draft the formal, standard parts of an outcome letter.

91. Mr Lee was not significantly challenged in his evidence by the Claimant in cross examination. The Tribunal concluded that there was no evidence that Mr Lee would have conducted an appeal differently, or would have come to a different outcome in respect of someone who was not Indian, or who was not disabled, or who had not put in a grievance in 2016.

Relevant Law

92. By *s39(2)(b)(c)&(d) EqA 2010*, an employer must not discriminate against an employee in the way the employer affords the employee access for, or by not affording the employee access for, receiving any benefit, facility or service, or by dismissing him, or subjecting him to any other detriment.

93. The shifting burden of proof applies to claims under the *Equality Act 2010, s136 EqA 2010*. In approaching the evidence in a discrimination case and in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in *Igen v Wong* [2005] ICR 931 at para 76 and Annex to the judgement.

Direct Discrimination

94. Direct discrimination is defined in *s13(1) EqA 2010:* “(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

95. In case of direct discrimination, on the comparison made between the employee and others, “there must be no material difference relating to each case,” *s23 Eq A 2010*.

96. Disability and race are each a protected characteristic, *s4 EqA 2010*. By *s9 EqA 2010*, race includes colour; nationality; ethnic or national origins.

Disability

97. By s6 Equality Act 2010, a person (P) has a disability if P has a physical or mental impairment, and the impairment has a substantial and long term adverse effect on P’s ability to carry out normal day to day activities.

98. Normal day to day activities encompass activities both at home and activities relevant to participation in work, *Chacon Navas v Eurest Colectividades SA* [2006] IRLR 706; *Paterson v Metropolitan Police Commissioner* [2007] IRLR 763.

99. Where an impairment ceases to have an effect but that effect is likely to recur, it is to be treated as continuing, Sch 1 para 2, EqA 2010. "Likely" means, "could well happen".

100. In assessing the likelihood of an effect lasting 12 months, account should be taken of the circumstances at the time of the alleged discrimination. Anything occurring after that time is not relevant in assessing likelihood, Guidance on Matters to be taken into Account in Determining Questions Relating to the Definition of Disability (2011), para C4, and *Richmond Adult Community College v McDougall* [2008] ICR 431, CA.

Victimisation

101. By *27 Eq A 2010*,

" (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 A
(*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."
(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

Causation

102. The test for causation in direct discrimination cases is a narrow one. In *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, Lord Nicholls said that the ET must determine why the alleged discriminator acted as he did. What, consciously or unconsciously, was his reason? Para [29]. Lord Scott said that the real reason, the core reason, for the treatment must be identified. Para [77]. See also *Chief Constable of Greater Manchester Police v Bailey* [2017] EWCA Civ 425 paragraph [12].

103. If the Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it had a significant influence, per Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572, 576.

"Significant" means more than trivial, *Igen v Wong, Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437, EAT.

104. In *Madarassy v Nomura International Plc* [2007] IRLR 246 Lord Justice Mummery said that, in discrimination cases, the burden of proof does not shift from the Claimant to the Respondent where the Claimant proved only the bare facts of a difference in status and a difference in treatment. He said that a difference in protected 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 the balance of probabilities a Respondent had committed an unlawful act of discrimination, paragraph [56] of the Judgment.

Harassment

105. By *s40(1)(a) EqA 2010* an employer (A) must not, in relation to employment by A harass a person (B) who is an employee of A's. Harassment is defined in s26 EqA 2010.

106. *s26 Eq A* provides
"(1) A person (A) harasses another (B) if—
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
….
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect."

107. In *Richmond Pharmacology Ltd v Dhaliwal* [2009] IRLR 336 the EAT said that, in determining whether any "unwanted conduct" had the proscribed effect, a Tribunal applies both a subjective and an objective test. The Tribunal must first consider if the employee has actually felt, or perceived, his dignity to have been violated or an adverse environment to have been created. If this has been established, the Tribunal should go on to consider if it was reasonable for the employee to have perceived this. In approaching this issue, it is important to have regard to all the relevant circumstances, including the context of the conduct. A relevant question may be whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence: the same remark may have a different weight if evidently innocently intended, than if evidently intended to hurt (paragraph [15]).

108. The EAT also commented that "Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. Whilst it is very important that employers and

tribunals are sensitive to the hurt that can be caused by offensive comments or conduct (which are related to protected characteristics),.. it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase", paragraph [22].

109. In *Land Registry v Grant* [2011] IRLR 748 at [47] Elias LJ said that words of the statutory definition of harassment, ".. are an important control to prevent trivial acts causing minor upsets being caught by the definition of harassment." In *GMBU v Henderson* [2015] 451 at [99], Simler J said, "..although isolated acts may be regarded as harassment, they must reach a degree of seriousness before doing so." The shifting burden of proof applies to claims under the Equality Act 2010, s136 EqA 2010.

Reasonable Adjustments

110. By *s39(5) EqA 2010* a duty to make adjustments applies to an employer. By *s21 EqA* a person who fails to comply with a duty on him to make adjustments in respect of a disabled person discriminates against the disabled person.

111. *s20(3) EqA 2010* provides that there is a requirement on an employer, where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter, in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

112. *Para 20, Sch 8 EqA 2010* provides that an employer is not under a duty to make adjustments if the employer does not know and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at the substantial disadvantage.

113. The comparator for the purposes of s20 is identified by reference to the disadvantage caused by the relevant arrangements, *Smith v Churchills Stairlifts plc* [2005] EWCA Civ 1220, [2006] IRLR 41, ".. it is apparent from each of the speeches in Archibald that the proper comparator is readily identified by reference to the disadvantage caused by the arrangements, " per Maurice Kay LJ at para 41. In other words, the comparator is a person who was not placed at a substantial disadvantage by the arrangements.

Reasonableness of Adjustments

114. The test of 'reasonableness', imports an objective standard. Per Maurice Kay LJ in *Smith v Churchills Stairlifts plc* [2005] EWCA 1220, [2006] ICR 524, *Collins v Royal National Theatre Board Ltd* 2004 EWCA Civ 144, 2004 IRLR 395 per Sedley LJ para 20.

Discussion and Decision

115. The Tribunal has considered all the facts when coming to its conclusions, although, for clarity, it has dealt with each allegation individually. Applying all the facts to the relevant law, the Tribunal has decided as follows:

Alleged Harassment on the Grounds of Race and Disability – 3 and 10 January 2018

116. The Claimant contended that Miss MacFoy subjected him to harassment on the grounds of race and disability on 3 January 2018 by reprimanding him unjustifiably. The Tribunal has found that Miss MacFoy told the Claimant that he ought to have filled the milk jug, which was within his job description, and that this was a reasonable request. On the facts, the Tribunal found that Miss MacFoy did not reprimand the Claimant unjustifiably. The other employee was busy and should have not have been reprimanded. The facts alleged by the Claimant were not correct. The Claimant was not subjected to the unwanted conduct which he alleged.

117. The Claimant also contended that the Claimant's Line Manager was rude and aggressive to him on 10 January 2018 and that this conduct amounted to race and disability harassment. On, the Tribunal's findings of fact, the Claimant's Line Manager gave him a reasonable instruction, but the Claimant reacted negatively, questioning her instruction and, eventually, shouting. It was not Miss MacFoy who reacted in this way. The Tribunal has concluded that Miss MacFoy was not rude or aggressive towards the Claimant and that the Claimant was not subjected to the unwanted conduct he alleged in this harassment complaint.

Alleged Harassment – Failing to give the Claimant support during the grievance and grievance appeal

118. The Claimant clarified, at the outset of the Final Hearing, that this allegation related to the grievance and grievance appeal officers not finding in his favour. It is correct that the grievance and grievance appeal officers did not find in the Claimant's favour; however, the Tribunal found that those outcomes were based on the facts which the appeal managers had honestly found. The Tribunal found that there was no link between the grievance and appeal outcomes and the Claimant's race or disability. Furthermore, the Tribunal concluded that the managers' findings of fact and outcomes, based on facts honestly found by them, could not amount to conduct which violated dignity, or created a prohibited environment. It would not be reasonable for their outcomes to have had the prohibited effect and, in the circumstances of the case, the outcomes would not lead to the prohibited environment being created, whatever the Claimant's view of the matter.

Direct Race and Disability Discrimination

119. The Claimant was disabled at the relevant times by reason of his diabetes and wrist injury, but not by reason of depression and anxiety, as the Tribunal has found.

Allegation – Paid Less than Equivalent Colleagues

120. The Claimant contended that he was paid less than equivalent employees and that this amounted to discrimination. On the evidence with regards to pay,

the Respondent's own printout showed that Shirley Forde was paid 2p more per hour than the Claimant, Jimmy Girard and Mr Pinto Ferreira (who was paid £7.50 per hour). Therefore, Miss Forde was paid 2p more than the Claimant, who was of Indian origin, than Mr Pinto Ferreira, who was of Portuguese Brazilian and perhaps of black ethnic origin, and than Mr Girard, who was of black African ethnic origin.

121. Given that Ms Forde was paid 2p more per hour than all her equivalent colleagues, there was no evidence that the Claimant was paid less than Miss Forde because he was Indian. Others, who were not Indian, but were black, were also paid less than Miss Forde. There was also no evidence also that he was paid less because he was disabled; other people were also paid less than Miss Forde - and they were not disabled. The Tribunal found that the burden of proof did not shift the Respondent to show that race or disability was not the reason for the small disparity in pay between Miss Forde and the Claimant.

122. The Tribunal rejected the Claimant's allegation that he was paid less than Mr Girard or Mr Pinto Ferreira. His evidence in this regard was mere assertion. Even if Mr Girard had been paid more than the Claimant, the Claimant said that Mr Girard was paid more because he had come from a location where he was doing different work, for which the pay was higher. This was nothing to do with Mr Girard's race, or the Claimant's race, and did not give rise to a prima facie case of discrimination on the basis of which the burden of proof would shift to the Respondent.

Failure to Increase the Claimant's Pay

123. The Claimant contended that failure to increase his pay was race and disability discrimination against him. On the Claimant's evidence, there was no promise of a particular pay rate, or a time when he would get the pay increase. There was no evidence that a comparator, who was not Indian, or who was not disabled, would have been given a pay rise, in circumstances where there was only a vague promise of a pay rise, with no details or date. There was no less favourable treatment of the Claimant than a comparator.

Denying the Claimant an Opportunity to Renew his Food Hygiene Certificate

124. On the evidence, the Tribunal found that all employees needed their food hygiene certificates and training updated and, therefore, that all were treated in the same way as the Claimant. There was no less favourable treatment of the Claimant compared to other employees.

Failing to provide the Claimant with a Jumper – (Also Alleged to be a Failure to Make a Reasonable Adjustment)

125. The Tribunal found that the reason the Claimant was not given a jumper at the outset of the contract, when Jimmy and Brahim were given jumpers, was that undertaking deliveries did not constitute the Claimant's main job duty, but did constitute Jimmy and Brahim's main responsibilities. Furthermore, the Claimant

was not given a jumper, later, because none were available later. The reason he was not given a jumper was nothing to do with his race or his disability.

126. The Claimant also contended that the failure to provide the Claimant with the fleece amounted to a failure to make a reasonable adjustment. While the Respondent did not provide him with a fleece, the Tribunal has found that this did not put the Claimant at a substantial disadvantage, because he was able to wear his own coat or jumper. No duty to make an adjustment, by giving him a fleece, arose.

<u>Failing to Uphold the Claimant's Grievance and /or to Investigate it Properly (Also Alleged to be Victimisation)</u>

127. The Claimant contended that failing to uphold his grievance, and to investigate his grievance properly, amounted to race and disability discrimination and/or to victimisation.

128. The Tribunal read the Claimant's 2016 grievance and found that the Claimant did not make any *Equality Act 2010* allegations against Miss MacFoy; the Claimant himself admitted this in evidence. The 2016 grievance did not amount to a protected act.

129. The Tribunal found that Miss Grey made her findings on the evidence available to her. It accepted Miss Grey's evidence that she honestly believed Miss MacFoy's explanations and did not see that corroboration was necessary, because she had no reason to disbelieve what she had been told. There was no evidence that Miss Grey would have come to a different conclusion, or conducted a different investigation, in the case of somebody who was not Indian, or not disabled, or had not submitted a 2016 grievance. Therefore, there was no less favourable treatment of the Claimant compared to a non-Indian or disabled comparator and there was no detriment to the Claimant.

<u>Objecting to the Claimant's Grounds of Appeal (Also Alleged to be Victimisation)</u>

130. The Claimant contended that objecting to the Claimant's grounds of appeal amounted to discrimination and/or victimisation. The Tribunal accepted Mr Lee's evidence that he considered that the Claimant had not provided new evidence or new witnesses, which Mr Lee considered was normally required to bring an appeal. That being the case, the Tribunal concluded that Mr Lee did not treat the Claimant less favourably than he would have treated another comparator who had submitted the same appeal grounds. He treated the Claimant in the same way as he treated all appellants, by requiring him to provide new evidence, or new details of his complaints, in his grievance appeal. Given that this was his normal practice, he did not subject the Claimant to a detriment – the Claimant was not disadvantaged in the workplace, he was treated according to normal workplace practices.

<u>Failing to Uphold the Grievance Appeal (Also Alleged to be Victimisation)</u>

131. The Claimant contended that failing to uphold the Claimant's appeal amounted to discrimination or victimisation. The Tribunal accepted Mr Lee's evidence and he made his findings on the evidence available to him. It concluded that there was no evidence he would have come to a different decision in the case of somebody who was not Indian, or not disabled, or who had not put in a grievance.

132. Furthermore, the Tribunal makes clear that it accepted Mr Lee's evidence about the mistaken assertion, in the original grievance appeal outcome letter, that the Claimant was not represented at the grievance appeal hearing. The Tribunal finds specifically that Mr Lee did not lie. The passage was a standard HR paragraph which was included in error. There was no evidence of discrimination in that simple mistake, nor of any improper motive.

133. With regard to the victimisation claim, the Tribunal makes clear that the Tribunal has accepted the Respondent's non-discriminatory explanations for the alleged acts in this case. Victimisation was no part of the reason it acted as it did.

Failure to Make Reasonable Adjustments

134. The Tribunal found that the Respondent did allow the Claimant to have meal breaks, when he needed them. He had regular meal breaks, even if he sometimes had to ask for them. Accordingly, the PCP for which the Claimant contended was not established.

135. The Tribunal also found that the Claimant was not required to lift heavy items and, therefore, again, the PCP the Claimant contended for was not applied.

Unlawful Deductions from Wages

136. The Tribunal concluded that the Respondent had not made any unlawful deductions from the Claimant's wages. There never was a concluded offer of higher pay and, therefore, the Respondent did not make any deductions when it failed to pay him more than his contracted rate.

Failure to give the Claimant Updated Terms and Conditions

137. The Claimant's terms and conditions were in the Tribunal bundle. The Claimant signed a TUPE Employee handbook given to him, page 59n, which included pages to which the Claimant specifically referred the Tribunal, page 59l.

138. He also signed for receipt of his terms and conditions on transfer, at page 219 - again, this was a document to which the Claimant asked the Tribunal to pay attention. The Claimant was provided with these terms and conditions on the Transfer and, accordingly, the Tribunal concluded that the Respondent did not fail to give him updated terms and conditions following the transfer. Accordingly, there was no breach of *s.38 Employment Act 2002*.

139. For these reasons, the Claimant's claims fail.

____

Employment Judge Brown

Dated:. 29 January 2019

Judgment and Reasons sent to the parties on:

31 January 2019

………..

For the Tribunal Office