Case No: 2204513/2018

.

EMPLOYMENT TRIBUNALS

Claimant: **Mr. P. Eghan**

Respondent: **Interserve Security (First) Ltd**

Heard at: London Central **On:** 13,15-17, 20-22 May 2019

Before: Employment Judge Goodman
Mr D. Carter
Mr T. Robinson

Representation
Claimant: in person
Respondent: Mr A. Roberts, counsel

JUDGMENT

1. The claim of race harassment does not succeed.

2. The claim of race discrimination does not succeed.

3. The claim of detriment for making protected public interest disclosures does not succeed.

4. The victimisation claim does not succeed.

REASONS

1. The claimant is employed by the respondent as a close protection officer at the BBC, though currently he is absent through sickness. He has brought claims of detriment for making protected disclosures, race discrimination, harassment related to race, and victimisation.

2. The issues in the claims were clarified at a preliminary hearing on 18

September 2018 at which the claimant was represented by Mr C. Johnstone of One Assist Legal Services.

3. Three groups of protected disclosures were identified, the earliest being 1 September 2016, the latest in January 2018. They concerned breach of the legal obligation to provide a safe working environment, and that the health and safety of staff, clients and the public was put at risk through not preparing risk assessments. The detriments alleged to have resulted were (1) a failure to give due process to the grievances and complaints in his disclosures (2) refusal of overtime in December 2016 to February 2017, and (3) failing to heed his further concerns about workplace practice (in the alternative, said also to be race discrimination).

4. The harassment claim was about the conduct of another close protection officer, Paul Ellis, namely: (1) refusal to cooperate in handover from June 2017, (2) a telephone call on 3 July 2017, and (3) refusal to cooperate with a handover arrangement put in place in September 2017. Paul Ellis is white, and the claimant is black.

5. The race discrimination claim concerned the refusal to allocate him overtime, the named comparator being Marcella Hawraluk, who is white.

6. The victimisation claim relied on four alleged protected acts between 25 February 2017 and 6 April 2018. The respondent disputes that the first three are protected by the Equality Act as they mention no protected characteristic. The claimant says that as a result of these his complaints were not given due process, and were handled in a biased way.

7. The respondent asserts that claims of detriment before 16 January 2018 are time barred. This requires the tribunal to consider whether there was conduct extending over a period in the claims of discrimination, harassment and victimisation, and if not, whether it is just and equitable to hear them. In the protected disclosure (whistleblowing) claims, the tribunal must consider whether the detriments were part of series of similar acts, and, if out of time, whether it was not reasonably practicable to present the claims in time.

8. The timetable of directions for hearing preparation slipped, in part because of the ill health of the claimant's legal adviser, who shortly before the hearing suffered a stroke. A week before the hearing the respondent sought a postponement, but the claimant elected to continue with this hearing, so there could be finality in his claims. The witness statements were then to have been exchanged mid-week before the hearing start, but for reasons not known to the tribunal the respondent was unable to exchange until the day before. In consequence the start was postponed to day three, at the request of counsel for the respondent, who had not had time to prepare.

Evidence

9. To decide the claims the tribunal heard live evidence from:

Paul Eghan, the claimant. He had prepared a 49 page witness statement of 405 paragraphs, which despite the length, was often allusive rather than

informative, but it was cross referenced to the documents bundles which told a fuller story, though requiring some effort to grasp it.

Paul Shri, security officer employed by the respondent, who supplied information to the respondent for the grievance appeal.

Ian Arslanian Scott, close protection officer employed by the respondent, who supplied information to the respondent for the grievance appeal.

John Duggan, the same

Paul Angelidi, the same

Norman Washington Spence, the same

Jeffrey Wallace, the claimant's union representative, though no longer employed by the respondent. He appeared unwell and had difficulty answering questions.

Mark Murphy, the respondent's Account Director for the BBC contract. He heard the appeal in late 2017 against the outcome on earlier grievances

Terry Havard, Employee Relations and Development Manager for the respondent's BBC account.

Jonny Kempster, the respondent's Security Manager, managing 130 employees on the BBC site, who in June concluded the claimant's first grievance about overtime allocation.

10. There were documents bundles of over 1,200 pages. We also listened to a recorded conversation between the claimant and duty service manager Gaspar Greyling, which had been transcribed for the bundle.

Conduct of the Hearing

11. The case had been listed, to hear liability issues only, over 11 days. This generous allocation no doubt had regard to the number of the claimant's witnesses, but in the event was unnecessary, as their evidence was taken quite shortly. Instead we had a reading day on the first day, no hearing the next day, then two and a half days of claimant's evidence, and one and a half days of respondent's evidence, delaying submissions to the next day as each side wished to make a written submission. Next day the tribunal read written submissions from each party and heard additional oral submissions before reserving judgment. A contingent remedy hearing was listed for 4 October.

12. The claimant had had some legal advice in preparing the claim, but was on his own in the hearing, a difficult task for a non-lawyer with a complex claim. He was both courteous and admirably organised and methodical in his questions and control of the documents. Like many liitgants in person he sometimes added to his evidence when asking questions and making his submission. The tribunal have been alive to this and have tried to see his case as a whole, while checking the respondent has been able to

address these points. At times the claimant was referred back to the agreed issues, to focus his questions, and was also on occasions prompted by the tribunal to ask witnesses about parts of his case he had overlooked.

Relevant Law

13. We set out the relevant law here so as to be able to make some of the relevant decisions within the factual narrative.

Protected Disclosures

14. Section 43B of the Employment Rights Act 1996 says a qualifying disclosure means "any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to go one or more of the following…". This includes that a person is failing to comply with any legal obligation to which he is subject, or that the health and safety of any individual is being endangered, or that information tending to show one of these has been deliberately concealed.

15. It has to be more than a mere allegation, and must disclose information – **Cavendish Munro Professional Risk Management Ltd v Geduld (2010) IRLR 38.**

16. As to the technicalities of the wrongdoing, the claimant is not held to strict legal language, but it must be clear enough, in context, what he means. He need not be right, but his belief in the wrongdoing alleged must be reasonable - **Babula v Waltham Forest College (2007) EWCA Civ 174**.

17. The words "in the public interest" were inserted in 2013 to reverse **Parkinson v Sodexho**, to the effect that a worker could claim whistleblower protection even though the matter raised was purely personal, and concerned only his own contract. In **Chesterton Global Ltd v Nurmohammed (2017) EWCA Civ 979**, a case about whether a complaint about the claimant's position was in the public interest if a number others were also affected, and which concerned an allegation of deliberate misstatement of profit figures which had the effect of reducing office managers' commission payments, the Court of Appeal held that the tribunal must ask (a) whether the worker believed, at the time he was making it, that the disclosure was in the public interest, and (b) if so, whether that belief was reasonable. Where the disclosure related to the employee's own contract, there might still be features of the case that made it reasonable to regard disclosure being in the public interest as well. The number of those involved was not of itself determinative. There may be more than one reasonable view on whether a disclosure was in the public interest. The reasons why the worker believed the disclosure was in the public interest need not have been articulated at the time, provided the subjective belief was objectively reasonable, though if the worker could not explain, it might be doubted if he in fact believed the disclosure was in the public interest.

18. By section 47B, "a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done

on the ground that the worker has made a protected disclosure." It must be the worker's disclosure.

Protected Acts (Victimisation)

19. Under the Equality Act 2010, workers are protected not just from discrimination and harassment because of a protected characteristic, but also from detriment if they complain of discrimination against themselves or others, or assist in complaints procedures. Section 27 prohibits victimisation by A of B because –

    (a) B does a protected act, or
    (b) A believes that B has done or may do a protected act.

20. The acts protected that are relevant in this case are, section 27(2):

    (d) making an allegation (whether or not express) that A or another person has contravened this Act.

21. In contrast to protected disclosures, the protected act can be a bare allegation, and need not assert information. It is not protected if false and made in bad faith (section 27(3).

Discrimination

22. Section 13 of the Equality Act provides that a person discriminates against another if "he treats" (an actual comparator) "or would treat" (a hypothetical comparator) that person less favourably than another on grounds of the protected characteristic (here, race). Section 23 provides that comparators must be material – that is, the circumstances are not materially different.

23. Section 136, on the shifting burden of proof, is important, because discrimination may not be admitted by the Respondent, indeed the Respondent may not even recognise that is what he is doing. The section requires that if there are facts from which the court could decide, in the absence of any other explanation, that a person A contravened the provision concerned, the Court must hold that the contravention occurred, but that does not apply if A shows that A did not contravene the provision. That sums up the earlier case law in **Igen v Wong** and **Barton v Investec** to the effect that the Claimant must first establish facts from which we could conclude by the facts themselves, or by inference from those facts, that discrimination occurred, and if shown, the tribunal then looks to the Respondent to explain why discrimination was not the reason for its actions. That approach has been confirmed in **Ayodele v CityLink (2017) EWCA Civ 1913.**

24. There is no need to prove positively the protected characteristic was the reason for treatment, as tribunals can draw inferences in the absence of explanation – **Network Rail Infrastructure Ltd v Griffiths-Henry (2006) IRLR 88 -** but Tribunals are reminded in **Madarrassy v Nomura International Ltd 2007 ICR 867**, that the bare facts of the difference in protected characteristic and less favourable treatment is not "without more, sufficient material from which a tribunal could conclude, on balance of probabilities that the respondent committed an act of unlawful

discrimination". There must be "something more".

25. **Nagarajan v London Regional Transport 2000 1AC501** is authority to the effect that if there is more than one reason for a Respondent's action, if racial grounds or protected acts had a significant influence on the outcome, discrimination is made out. **Aylott v Stockton on Tees Brough Council** holds that the main question is why the Claimant was subjected to less favourable treatment than others; it is good practice to check this by using a hypothetical comparator.

26. **Shamoon v Royal Ulster Constabulary (2003) ICR 337** discusses how, particularly in cases of hypothetical comparators, tribunal may usefully proceed first to examine the respondent's explanation to find out the "reason why" it acted as it did. **Glasgow City Council v Zafar 1998 ICR 120**, and **Efobji v Royal Mail Ltd 2017 IRLR 956**, reminded tribunals that the respondent's explanation must be "adequate", but that may not be the same thing as "reasonable and sensible".

Harassment

27. Section 26(1) of the Equality Act 2010 provides

> 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

The emphasis in (a) is added. In this case we had little difficulty finding the conduct complained of was harassment; the more difficult decision was whether it was related to race.

28. Section 26(4) provides:

> 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.

These are factors to be considered when deciding whether the conduct was harassment. Whether the conduct related to a protected characteristic is not limited to these factors, and we must rely on the burden of proof.

Causation

29. The Tribunal is required to make a careful evaluation of the respondent's reason or reasons for subjecting the claimant to detriment. This applies to all claims where we have to examine a reason for an action or a failure to act. This is in essence a finding of fact, and inferences to be drawn from facts, as a reason is a set of facts and beliefs known to the respondent -

Abernethy v Mott, Hay and Anderson 1974 ICR 323 CA, and **Kuzel v Roche Products Ltd (2008) IRLR 530, CA.** The real reason may not be the label attached to it by the employer, nor the reason advanced by ether party. It is for the Tribunal to make a finding – **Blackbay Ventures Ltd v Gahir (2014) ICR 747.**

30. In finding the reason, we have to decide whether any protected act (for the victimisation claim) or protected disclosure (whistleblowing claim), or any difference in race (for the race discrimination claim) was the reason why the respondent acted as it did. In doing this we must be careful to avoid "but for" causation: see for example the discussion in **Chief Constable of Manchester v Bailey (2017) EWCA Civ 425** (a victimisation claim). However, it is not necessary to show that the employer acted through conscious motivation – just that, in a victimisation claim, a protected act (and in a sex discrimination claim, the difference in sex) was the reason for the dismissal – **Nagarajan v London Regional Transport (1999) ITLR 574.**

Time limits

31. Both Acts have a time limit of three months from the act complained of, but the Acts apply them differently.

32. For the discrimination, harassment and victimisation claims, the Equality Act 2010 states at section 123:

> "(1) proceedings on a complaint… may not be brought after the end of –
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable…
>
> (3) (a) conduct extending over a period is to be treated as done at the end of the period;
> (b) failure to do something is to be treated as occurring when the person in question decided it".

33. There is much case law on what is "conduct extending over a period". To connect separate events, there may be an underlying rule or principle which has been applied. **Hendricks v Metropolitan Police Commissioner** supports the view that this may be "an underlying discriminatory state of affairs". The question was whether there was an 'act extending over a period', as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed. The Claimant must have an arguable case that the incidents are linked, and not just a bare assertion that there is a continuing act – **Ma v Merck Sharp & Dome Ltd (2008) EWCA Civ 1426.**

34. In order to constitute a continuing act, if there is a series of incidents, the incidents complained of must be unlawful; if they are not, they cannot be relied on to keep time running, which may result in the claim being time-barred **Oxfordshire County Council v Meade UKEAT/0410/14.** It is also

important to distinguish between the continuance of the discriminatory act itself (e.g. the schemes and practices in the above cases), and the continuance of the *consequences* of a discriminatory act, for it is only in the former case that the act will be treated as extending over a period - **Barclays Bank plc v Kapur [1989] IRLR 387.**

35. If a claim is out of time, and a tribunal is considering extending time because just and equitable, it must take account of the factors listed in **Keeble v British Coal Corporation**, so, the length of delay, the reason for any delay, the effect of delay on the cogency of the evidence, whether anything was concealed from the claimant, and then consider whether it is still possible to have a fair trial. It must nevertheless bear in mind that time limits are there for a reason and generally enforced – **Robertson v Bexley Community Centre (2003) EWCA Civ 576**. In **Afolabi v Southwark Borough Council (2003) ICR 800**, an extension was allowed after a delay of 9 years because the evidence to support his claim had only recently come to light – the claimant then started the claim within three months of finding the evidence – but it was stated to be wholly exceptional.

36. So much for claims under the Equality Act. The regime is a little different for the protected disclosure claims, where section 48 of the Employment Rights Act 1996 states:

> (3) An employment tribunal shall not consider a complaint under this section unless it is presented—
>
> (a)before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or
>
> (b)within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
>
> (4)For the purposes of subsection (3)—
>
> (a)where an act extends over a period, the "date of the act" means the last day of that period, and
>
> (b)a deliberate failure to act shall be treated as done when it was decided on.

It is clear from case law on these and other claims (such as unfair dismissal) subject to the reasonably practicable test, that it is about what was practically possible, so much tougher than the broader test of what is just and equitable

Findings of Fact

37. The Respondents is a subsidiary of a large service company. It provides manned guarding services, and employs 410 security officers, of which 100 or so are on the BBC contract, reporting to four duty security managers (DSMs), in turn reporting to a close protection manager. There are a number of BBC sites within the contract, but principally W1.

38. The respondent carries out ethnic monitoring. In the light of this it was surprising that Mr Havard, the witness from the HR Department, was unable to give evidence about the ethnic composition of its workforce in London, stating only that it was very diverse. He ventured that about half the staff on the BBC contract are white and half other groups, while across London it is more like 60:40. Since 2015 the HR department has seen 9 complaints of discrimination in the London area, of which "1 or 2" were at the BBC, and they "mainly" concerned race. According to the claimant, from 2017 there were 12 Close Protection officers (CPOs), of whom 4 were black. We know that particular managers concerned in this case (Greyling, Kempster, Havard, Murphy) are white. There was no mention of any other managers not being white, and in the absence of evidence we assume they are.

39. The claimant was employed as a CPO by Wilson Jones from 31July 2012, and transferred to the respondent under TUPE in April 2014. He has spent 24 years in security. There is every indication that he was a conscientious and efficient officer, there was no criticism of his conduct, and he has never been subject to discipline.

40. The role of the CPO is to provide protection for VIPs, which may include meeting and greeting, escorting them in public areas, operation planning, incident response, conflict management, crowd control and marshalling. Some VIPs come with their own security personnel, and then there must be liaison. The BBC premises have public areas, in particular the piazza at W1, where fans and protesters gather to see and be seen by politicians and popular celebrities visiting the BBC for radio and television programmes. The combination of openness to the public, with the site being a venue for political protest, and with the risk of potentially malicious attacks by individuals and being a target of organised terrorists, means that there are particularly acute security problems, and much relies on the judgement and experience of individual staff.

41. CPOs work in four teams of two, expanded at BBC request, after an incursion into the newsroom in 2017, to teams of three, plus a DSM for each shift. Each team works four 12 hour day shifts, then four days off, then four night shifts, then another four days off. There are other security personnel employed by the respondent on site to provide backup for CPOs.

42. There is a need for additional cover for employee sickness, annual leave, and unplanned leave, if someone is unexpectedly absent. These gaps are offered to full time CPOs as overtime, any remaining gaps are filled by the CPOs employed on zero hour contracts.. The allocation of overtime lies at the root of this case.

43. Historically, the respondent had a number of systems for allocating overtime, and it was not clear to us whether the principle for allocation was first come first served, or to even out the shifts given to each individual. Allocation was often contentious, and DSMs, tired of conflict, tended to leave CPOs to allocate planned overtime among themselves, week by week and month by month. A list of shifts in the period coming up would be circulated, and staff would then indicate which they wanted to work. A decision was made on any clashes (and as will be seen, made that

decision was the problem), and the final roster was then entered on the management software Timegate. There was some evidence that managers would delegate entering the rota on the system to CPO's.

44. The claimant, and some other CPOs, did not always want a lot of overtime, because they had private clients. For example, the claimant has a regular contract to provide close protection to an MEP. An added complication for the claimant was that he lived in Newark, Nottinghamshire, and needed to plan his cover to fit with my desires, especially in school holidays. As a result he did not seek overtime regularly.

45. At the back of this case lies long-running friction between the claimant and another CPO called Paul Ellis, who is white. In 2017 the claimant referred to this conflict having run through, as he put it, "five turbulent years", so it went right back to the start of employment. In answer to a question from tribunal, the claimant said that he did not think over those 5 years that the friction between himself and Paul Ellis was related to the difference in race.

46. All the CPO's were questioned in autumn 2017 about relations with Paul Ellis, as part of the respondents investigation of the claimant's appeal against a grievance finding, and some of them gave evidence to the tribunal as well. A number of CPO's perceived Mr. Ellis as "superior", and said "he wanted to be worshipped". He "always tried to tell us what to do". Some thought that he was favoured by management and got away with things. These comments were made by black (Spence, Nelson) and white (Angelidi, Duggan) CPOs. None of them mentioned race as the reason for any objectionable behaviour. There were also some, both black and white, who said they had never noticed any problem. The claimant, when asked by the tribunal, said Paul Ellis was jealous of the MEP private client, and until the beginning of 2017 he did not consider Paul Ellis was unpleasant because the claimant (or anyone else) was black.

The 2016-17 Protected disclosures

47. In 2016 the claimant became concerned at the lack of risk assessment for CPOs in relation to visitors. On a number of occasions he complained that CPOs were not warned that well-known people were coming in, or told some of them were subject to particular threats, and he reported a number of incidents as they happened, and also reported assaults or suspicious behaviour. His concern may have been triggered when in mid- 2016 the security cluster manager, Andreas Engelbrecht, drew CPOs' attention to the heightened risk to the BBC in the light of the Charlie Hebdo attacks in Paris (January 2015) Jo Cox's murder (June 2016), and threats to Ed Miliband, and Salman Rushdie. There were also flash protests when senior figures visited the BBC. CPOs were expected to carry out "dynamic risk assessments", that is, think on the hoof. The substance of the claimant's complaints was that there should be more warning of high-risk targets.

48. The first protected disclosure alleged is in an email on 1 September 2017 from the claimant to his DSM complaining that early arrivals for the Today programme that morning had included the Polish ambassador, ex-minister and Strictly star Ed Balls, minister Jeremy Hunt, and then the Polish Prime Minister, all without warning.

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49. We consider whether this is protected under the Employment Right Act. It is a disclosure of information, not a bare allegation. It relates to the health and safety of staff, members of the public, and the VIPs. It can be, and probably was, read in the context of ongoing concern whether CPOs were able to make adequate dynamic risk assessments when they had no warning of who was coming in. It related to a sufficiently wide group to be in the public interest, and it might be said that the avoidance of a serious attack at a national institution like the BBC promoting freedom of expression is itself a matter of public interest. This disclosure qualifies for protection.

50. The next protected disclosure alleged is an email on 4 September 2016. The claimant reports how he challenged a cyclist who was filming the BBC from a nearby church. The claimant chased him away and was subject to abuse. We did not think this email qualified for protection. It is not clear that the claimant was raising the risk assessment issue, or doing anything other than flagging up a particular security incident of interest to his colleagues.

51. The third in this group is an email of 18 September 2016 when the claimant reports he had escorted a nervous Vanessa Feltz into the building, and only later learned from a Sunday newspaper that she had recently been subject to threats of beheading. He should have been told. He said that the serious threat "should be passed on to our team to reflect the level of risk". Clearly this is information, not belief or bare allegation. It discloses reasonable belief of threat to health or safety, by not providing information relevant to risk assessment. For reasons already stated, health and safety at the BBC is a matter of public interest. This qualifies for protection.

52. On 12 October 2016 the claimant was attacked (grasped by the throat) by an autograph hunter, Ben W, on the occasion of a visit by film star Tom Hanks. On 25 January 2017, the same Ben W was involved in an incident with the claimant, and subjected to the claimant to racist abuse, which he reported to the police and his employer. The police did not proceed with the prosecution for want of adequate identification evidence.

53. Soon after, the claimant and his colleague Paul Angelidi decided to escalate concerns about health and safety to the Health and Safety Executive (HSE). Paul Angelidi submitted an online report. The HSE asked for more information, which was supplied, and the HSE then wrote to the respondent about it. We do not have the correspondence, or any of the respondent's internal material, other than an undated draft response. We then see the HSE reply to Mr Angelidi dated 6 March 2017, as disclosed by the claimant. Judging by the questions and replies, the substance of the report covered crowd control, assaults by members of the public, having to lift heavy barriers, and lack of personal protective equipment.

54. Does it qualify for protection? It does, except that the claimant did not make the disclosure, as it came in the name of his colleague. He assisted in the drafting, though to what extent is not known. Under the Act, this has to be his disclosure. A factual issue that is relevant for us is whether the respondent knew the claimant was involved in drafting it. The respondent denies that it did; none of the witnesses they called seem to have been involved in this, so the denial is bare. The fact that the HSE replied to Mr

Angelidi, not to the claimant, indicates that if any worker's name was disclosed to the respondent, it was not the claimant's. Mention of the autograph hunter's two assaults on the claimant (who was not named to the HSE) might give a clue, but any employee, or their trade union representative, could have filed this report to HSE. Even if it had been the claimant's disclosure, we could not see how the respondent could have known the claimant was involved with this. They could only have known if the CPOs concerned had told others what they were doing, and word had leaked, but we have no evidence from either side that this happened. As a result, even if it qualified for protection, it cannot be shown to have caused unfavourable treatment.

55. The next protected disclosure is the claimant's email dated 25 January 2017 about an unannounced visit by Gina Miller, who had received death threats for her post 2016 referendum application for judicial review on decisions to leave the EU. The claimant said: "she was high risk and we were not told of her visit". For the reasons that we the found the email about Vanessa Feltz was protected, we find that this one was too.

56. The respondent complains that some of these emails have had additions made to them by the claimant when pasting them into a word document for disclosure. In our finding, the relevant material is original, though the headings may have been added; in any case it is open to respondent to disclose the emails they were sent, if concerned that the claimant has mithis, and they have not done so.

Overtime Dispute - December/January

57. Round about Christmas 2016 the claimant applied for some overtime shifts, but did not get any. He complained to DSM Ty Penson who told him there were some dates, but when the claimant got home and called in with his availability he was told the dates had already been allocated On an unknown date in January 2017 he went to see DSM Gasper Grayling to complain about it. He was told that he had not replied; the claimant asserted he had, and went on to say that others had been given overtime even when they had not said they were available (relying on the act that emails were "reply all"). Mr Grayling retorted £well then they're lucky.. it's the luck of the draw". The claimant became heated and accused him of favouritism. He was told to stop, Mr Grayling did not like the tome=ne in which he said favouritism, "you're accusing me of something now". The claimant said he would make a grievance,

> "okay, no problem. It seems that me and Clarice seem to be the only ones that don't get shifts here and it seems to be the same and every time so can't not think that".

Mr Grayling responded:

> "you've just accused me of racism".

This was challenged, and Mr Grayling said:

> "because you said you and Clarice don't get overtime. The reply to the

email said he is not available".

An argument followed on who had first raised race as an issue.

58. The claimant recorded the conversation. Clarice (Nelson) and the claimant are both black. According to the claimant the fact that Mr Greyling spoke of racism indicated the unfair allocation was related to race, which he had not thought before. We were however interested that the claimant recorded the conversation, and included Clarice Nelson, when there is nothing in the documents or from Mr Nelson to indicate in fact he had a grievance about overtime; perhaps the claimant did wonder if race was the reason, and set out to see if he could get some evidence.

59. On 24 February 2017 Mr Grayling sent out another request for overtime. The claimant asked for 2 shifts and Marcella Hawraluk (white) asked for 3. She got 3, the claimant got 1. The claimant complained that in the period December to February he had been allocated no shifts, while Marcella Hawraluk had 27, (though we note from checking the documents – we did not have all the relelvant weeks - that the claimant declined shifts on 12-15 February because it was half term).

60. On 25 February the claimant filed a grievance about the allocation of overtime with Andreas Engelbrecht. He had only requested overtime on 3 occasions over the last 3 years. It was "a biased and favouritism system which I feel discriminates myself every time I apply for overtime allocation". One team member got all the allocation without question, perhaps 80%, and yet he had been told it was the luck of the draw. He was removing himself from the overtime option until the matter was formally investigated, and he got "an answer to why this blatant discrimination is being kept up year in year out". We note that although he included the "luck of the draw" remark, he did not say Mr Greyling had asked if he was calling him a racist; we have no evidence either from the claimant that he conveyed this (racism) to Mr Engelbrecht verbally.

61. The complaint was never analysed properly, and we do not seem to have all the emails about availability, so we do not know if the claimant was right about not getting overtime even when he said he was available, but we can see from the email that on 24 February Ms Hawraluk had got one shift, the claimant one, Norman Spence two and Clarice Nelson one. Both Mr Spence and Mr Nelson are black.

62. Terry Havard, as HR manager, was asked to advise on the grievance. He asked the managers who would be looking into it, and added in his email to them:

> "also, the term 'discrimination' is often used in an incorrect context and if he feels discriminated against he needs to explain specifically why. Unfair process and discrimination are two very different things".

63. It is a valid point that it was not clear from the claimant's grievance, when he spoke of discrimination, whether he meant race discrimination, or just general unfairness. Knowing that he was black and the managers were white, it would have been wise to ask him, but it does not appear that anyone did. We do not know if Mr Greyling mentioned his conversation to

his colleagues.

64. The claimant gave more information on request, but just then Gasper Grayling then had to stop work when his partner died suddenly; the claimant volunteered to withdraw his grievance, so as not to add to his stress, but Terry Havard asked the managers to continue the investigation:

> "if there is an issue with overtime allocation then let's sort it before it escalates at another time. Overtime is always a contentious matter but surely there has to be a method which makes it fair and concise to all."

65. Gasper Greyling was off work for 2 months, which put the investigation on hold. That takes us to the end of April, but it does not seem that the matter was picked up even then. On 12 April the claimant told his DSM that he was not available for overtime while his grievance was being investigated, a way of pointing out that he was still waiting.

66. Then on 15 May 2017 he asked Andreas Engelbrecht about progress on the grievance, and followed up with an email on 17 May: "I made it very clear that due to the biased and discriminatory behaviour which I feel constitutes discrimination at work, I am disappointed and stressed out that Marcella alongside Paul Ellis are distributing and being allowed to continue distributing amongst themselves overtime". Managers should do it, not staff. He wanted an accurate number of overtime allegations per team member from 1 November to the end of June, and "as I'm taking this matter very serious as under the equality act 2010 discrimination in the workplace is I feel more evident now that emails and documents are being deleted". He also referred to allocation being done by a WhatsApp group set up by Marcella Hawraluk.

67. The claimant says he mentioned the Equality Act here because he had discussed what to do about the grievance delay with his union representative and now knew from him that there was an Equality Act.

68. An unknown manager commented on this an hour later: "FYI. Let's have a chat about this as I see the waggons circling" (i.e, this is building up for a fight). The identity of the manager is unknown because this email was sent in redacted form to the claimant by the respondent in response to a data subject access request; the respondent has not followed up by disclosure of an unredacted email in these proceedings to show who sent it.

69. Andreas Engelbrecht sent an email to the COPOs on 17 May, which reads as a follow up to a discussion with the team on allocation. He sets out guidelines for allocation overtime, but leaves it to the team to make the decisions:

> "as discussed I expect the overtime to be distributed fairly and evenly and that I also consider the EPO team as a whole is capable and mature enough be able to allocate shifts by yourselves in a way that is transparent and open to all."

February 2017 Grievance - First Protected Act

70. The 25 February 2017 grievance is the first of four protected acts in the

victimisation claim. The respondent argued that it is not protected because 'discrimination' could mean anything, and was not a reference to a breach of the Equality Act. Discussing this, we note that Mr Havard had recognized at the time that discrimination was usually a reference to the Equality Act, because he said that it *could* be used "incorrectly" to mean unfair process. For this reason, we conclude that the respondent did understand that discrimination in the legal sense was alleged, even if the protected characteristic was not spelled out. If they did suspect, but were unsure, they could have asked him. As the claimant does not seem to have stated at this point that Mr Grayling spoke of racism, they could not have picked that up, but by May, when the claimant complained that his grievance was still outstanding, he did refer specifically to the Equality Act. Certainly anything they did or did not do after that date must be examined to see whether it is detriment, because the claimant had specifically alleged a breach of the Equality Act, which from 17 May they knew must have been what he meant on 25 February.

71. We also asked ourselves why the claimant did not state specifically that the discrimination was about his being black. We know from experience that when a woman, say, or black or gay person, speaks of discrimination, they take it for granted that it refers to the protected characteristic of sex, or sexual orientation or colour, which they take to be obvious; depending on surrounding circumstances it may or may not be obvious to the people addressed. An example of this is Mr Greyling assuming the claimant was suggesting race was behind the favouritism he alleged. We also observe that accusing someone of racism is serious. It is possible the claimant did not think it "nice" to use the term. There is room for doubt, as is later apparent, whether he thought race was the reason for overtime decisions, or whether he only picked it up when Mr Greyling mentioned it.

72. In early March there was an incursion by pranksters into the BBC newsroom. The BBC asked the respondent to increase the number of CEOs on shift from 2 to 3. The respondent drafted a plan to appoint team leaders for these three person shifts, and selected "temporary team leaders" for each shift, without advertising the posts or having a competition. One of these temporary team leaders was Paul Ellis, and the news got round. Further, Mr Ellis seems actually to have assumed a team leader role. As later became clear, the claimant objected to his participation, as he saw it, in writing standard operating procedure, allocating overtime, and passing on management instructions. According to the respondent, this team leader post was never more than a plan, because the client did not sign off on it until the autumn, and Mr Ellis had no official role. Nevertheless, the background hostility between them increased. It has not been explained by the respondent why named individuals were given the temporary roles.

73. The WhatsApp group was set up by Marcella Hawraluk to share information among the team. It rapidly became used for overtime availability in addition to email. From the claimant's point of view this stoked the unfairness, because she was a close friend of Paul Ellis and perceived to be in his camp, as well as getting a lot of overtime.

74. A new manager started at the beginning of May, Johnny Kempster. He met the team, including claimant, on 14 June on general operational

matters, and again on 19 June, when the claimant said that he had an ongoing problem on overtime, and with Paul Ellis, who he said humiliated and belittled him. He said there was an outstanding grievance. He followed this up by forwarding to Johnny Kempster strings of emails going back to the grievance in February 2017.

75. On 20 June Johnny Kempster emailed the claimant proposing mediation to improve the working relationship with Paul Ellis, and then confirming that he understood the problem with overtime was that management needed to monitor it to ensure fairness. He asked :"Would that "close out your grievance? – If I have misunderstood again please let me know. I would be grateful if you could confirm if I have understood your grievance and desired outcome". The claimant responded that he was happy to keep the new system if it was monitored by management. "Absolutely correct in your understanding regarding the overtime allocation grievance resolution". As for mediation, he was not hopeful, but he would if the other side genuinely wanted it.

76. Mr Kempster then emailed his managers asking them to check the overtime when doing their shift cycle reviews, to see that allocations within the month remained even, to avoid staff being overtired. The claimant thanked him for addressing this so promptly. Mr Kempster then told HR that that he had dealt with the grievance by adding the additional review as a "control method", and the grievance was now closed.

77. He had not deal with dealt with the other complaints about Paul Ellis, nor picked up on the reference to the Equality Act. In his defence, he points out that he only took up the grievance when the claimant raised it in another context, that as a result he thought it was about overtime, and that he had been told by the claimant he had dealt with it. It seems however he was still due to see the claimant on 3 July.

78. In the meantime, Paul Ellis said to Mr Kempster: "under no circumstances would mediation be needed".

79. We do not know why Andreas Engelbrecht did not act on the grievance once Gasper Grayling returned to work.

80. We have no evidence that Mr Kempster knew anything about the claimant's complaints on health and safety issues. All management witnesses said health and safety was covered by a specialist department, and on site by a Mr McCann.

81. Meanwhile, disputes about overtime allocation on the WhatsApp group continued. On 28 June the claimant emailed:

> "the greed of overtime allocation is overwhelming. Due to people having little words with management on the sly people have empowered themselves and gotten away with helping themselves so far to long. I don't trust anyone to handle the overtime allocation as no one is being held accountable when grievances are brought up".

Reading this, Paul Ellis complained to Johnny Kempster about "constant snipping from people like (the claimant)". Meanwhile, other CPOs agreed

the system was a mess and was not working. The tribunal comments that Mr Kempster's control measure would require a month to take effect (depending on the shift review took place).

Harassment Events

82. The claimant's harassment claim in these proceedings concerns Paul Ellis's behavior. The first of the three episodes alleged in this claim occurred on 18 June. Paul Ellis was due to relieve the claimant, but was late on shift. He then seems to have not stopped to hear the claimant's handover report. There was a row, and the radio fell to the ground. Subsequently Mr Ellis apologised, which the claimant accepted in relation to this incident, but said he expected better behavior.

83. The second episode occurred late on 3 July. Paul Ellis, who was on shift, sent a text to the claimant, who was at home in bed, about a change to his August overtime allocation, which was being cut from 3 shifts to 2. Perceived unfairness in overtime allocation was now of course a flashpoint in their relationship. Mr Ellis knew this. Asked why he did this, he said it was for "transparency". When the claimant responded to the text, Paul Ellis telephoned him. There was a short confrontational call, then the claimant rang back. The conversation included with a dispute about why Paul Ellis was allocating shifts, to which Mr Ellis said Mr Kempster had agreed it. It became so heated that the claimant's son woke up, and after it ended the claimant's wife advised him to write it all down because he was so upset. Mr Ellis meanwhile had started to write down at his end what the claimant was saying, which included that he had called Paul Ellis a racist and a bigot.

84. When later asked about this, in February 2018, the clamant denied calling him a racist or a bigot.

The July 2017 Grievance - Second Protected act

85. Next day, 4 July, the claimant went sick with stress and filed a formal grievance about Paul Ellis. He said it was "workplace bullying and workplace harassment under the equality act 2010". He said he had been speaking to Johnny Kempster to resolve it, he was supposed to see him the day before, but this had not happened, he had now received verbal abuse and intimidation over the phone. He would like this dealt with in a timely manner, "not the 5 months taken with my last grievance which this all stemmed from". It was accompanied by the claimant's detailed contemporary note of the conversation. He clarified that his it was not just about Paul Ellis, but with the manager's handling of the dispute.

86. This is the second protected act in the victimisation claim. Clearly the reference to the Equality Act qualifies it for protection, unless made in bad faith.

87. Daniel Vickers was asked to manage the grievance. He met the claimant on 24 July 2017. The claimant was accompanied by his trade union representative, Jeff Wallace, who is also black. The claimant had prepared a list of points to discuss, including Paul Ellis allocating the overtime, Jonny Kempster's proposed supervision by management not happening, the

WhatsApp group, and an allegation that entries on the computer were being changed without authority - “sabotage”. After debate, the grievance was to proceed as a formal grievance, in contrast to the informal stage at which the Engelbrecht grievance had or had not proceeded. The notes show there was no mention by anyone of race as a reason for unfair overtime, or for Paul Ellis’s behaviour. It is however clear that the claimant was very angry. On 2 August the claimant wrote at length amplifying his grievance. On 14 August another manager gave Dan Vickers information about the June handover dispute.

88. On 16 August Daniel Vickers sent a written outcome, stating that the grievance was not being upheld. He had not found evidence of malicious rumours. The overtime difficulty had been resolved by Mr Kempster on 21 June. There was no team leader, because the customer not agreed the contract variation the respondent had proposed. Mr Ellis was not writing operating procedures. The claimant had received an apology for 18 June. Mr Kempster had told CPOs not to use WhatsApp to allocate overtime. The many photographs the claimant had sent of the computer system did not demonstrate sabotage, and any changes could be explained by people not saving changes on closing. A complaint that Mr Ellis had assaulted a member of the public on 9 May was not upheld.

89. Mr Vickers has since left the company and we do not know why he makes no mention of the breach of the equality act, not even to enquire what it was. On the other hand, neither the claimant nor his trade union representative said anything at the meeting about race that could explain the reference to the Equality Act, nor did the claimant mention it in his detailed written follow up.

90. Neither risk assessment, nor any other health and safety issue, featured in the complaint as amplified, or in the discussion.

The Grievance Appeal

91. On 21 August 2017 the claimant submitted a 13 page appeal against the grievance outcome. By way of summary, he said it was “bullying harassment and threatening behaviour”, with malicious rumours, disparate treatment and the WhatsApp group being used unfairly. He asked for clarity about job titles, as he had not been told why there had been no selection process for the team leader roles; overtime calls were done deliberately to discriminate; Mr Kempster had concluded the grievance, and he had not had an explanation of the delay in handling this February grievance. Paul Ellis and Marcella Hawraluk had not been disciplined in respect of a number of earlier episodes when they should have been. Mr Vickers had not had a meeting with him, and had been unsympathetic about him being away from work with stress.

92. The claimant had been off sick with stress from 4 July and did not return to work until 18 September. We can see in the bundle that he had a hospital appointment for a scan on his neck in August, and in the light of the fact that he had a tumour removed from his neck in January 2019, it may be that there were some physical causes of the symptoms attributed at the time to stress.

93. Terry Havard advised Mark Murphy, who was to handle the appeal, that it was not a rehearing and he should simply address points made by the claimant.

94. Mark Murphy met the claimant on 7 September 2017 to clarify what the grievance was about. At this stage it does not seem he had read the documents about the earlier processes. There are 7 pages of notes of the discussion, in which the claimant went over the facts of which he complained. As at that stage Mr Murphy had not read the documents, the claimant did most of the talking. The claimant put his case in a nutshell when he said:

> "from my perspective, I have been ignored. I just wanted someone to have taken it serious on day one. One person has caused this culture and I've never seen anything like it. There has been nothing from management to control it. Johnny himself hasn't me seriously. Andreas passed it around…. Okay, have been taken seriously now. I wanted Dan to take it serious at the grievance point."

He did not mention race.

95. Mr Murphy asked Dan Vickers for his papers, and sent them to the claimant. He also prepared a list of questions and interviewed all the other CPOs, noting their answers. The claimant replied to Mr Murphy about Dan Vickers's investigation, but still made no reference to race, discrimination or the equality act.

More Harassment Conduct

96. In view of the evident conflict with Paul Ellis, Mr Murphy issued an instruction on 12 September 2017 that when the claimant started back to work on 18 September, the claimant was to start his shift 5 minutes late, and Paul Ellis was to leave 5 minutes early. Handover was to be done through the DSM. This was to continue until the grievance appeal had been resolved.

97. This staggered handover not happen. On the 18, 26, 27 and 28 September, and on 7 October, Mr Ellis arrived early, by about 30 minutes on each occasion. After an 18 September clash with the claimant, he would phone the duty manager to say he was coming in, and the duty manager would then tell the claimant to leave his shift earlier than expected. Nevertheless, on 7 October they overlapped again. These episodes are the third part of the claim of racial harassment by Mr Ellis.

98. On 8 October the claimant complained to Mr Murphy about this provocation, and on 13 October Mr Ellis was suspended on working at New Broadcasting House because the handover arrangement had been breached. He was not to return until the grievance outcome was resolved. In the event, he was suspended for 10 weeks.

99. The Claimant took legal advice in October.

100. On 8 November 2017 the Murphy interviewed Mr Ellis as part of investigating the claimant's appeal. On past conflict, Mr Ellis referred to the

two having had what he called “healthy discussion”. He had once told the claimant and Mr Angelidi, when they were complaining about protective equipment, to keep their opinions to themselves. On 18 June (the radio incident) he had arrived late for handover due to traffic; the claimant had shouted at him to “go home to his big fancy house and car”. He did not think mediation would solve things. He did tell Mr Murphy that on 3 July the claimant had called him a “racist, bigot and troublemaker”. He also reported some gossip, that the previous day he had heard the claimant had told a manager that he would be making a claim against the respondent for a great deal of money, and that he was setting up to get Paul Ellis sacked. He also told Mr Murphy that in the past, the claimant have been arrested by the police and Mr Ellis have given some advice about how to handle it. He had been released without charge.

101. Mr Murphy asked about the report that the claimant was setting up a claim against the respondent. Mr Kempster emailed him on 15 November stating that on Tuesday 7 March 2017 he had spoken to the claimant who had said that he had a solicitor and either Paul Ellis should be dismissed or the claimant should get a payoff, mentioning £40,000.

102. It is worth exploring this: at start of his evidence to the tribunal Mr Kempster amended his evidence in chief, saying that he must have meant 7 May, because he did not start work for the respondent until 1 May. However, the tribunal thinks this too is an error. Mr Ellis told Mark Murphy on 8 November that he had heard it the previous day. The 7 November was a Tuesday (as was 7 March). The 7 May was not a Tuesday. Further, in the email Mr Kempster says he was asked about progress of his grievance and as he was not due to be interviewed about it until the following day. There is no evidence that anybody was investigating the claimant’s grievance in May 2017, or that Mr Kempster was due to be interviewed next day. We conclude that when in his email he wrote March, he meant not May, but November.

103. Mr Murphy did not ask the claimant whether he had called Paul Ellis a racist, or whether he thought Paul Ellis was a racist. He spoke to Paul Ellis again on 1 December to deal with some points raised by the claimant. Mr Murphy said that he would be returning to site, that thereafter the DSM should not delegate management responsibility to team members, and interaction between the claimant and Paul Ellis should be avoided. Mr Ellis replied that he faced a “stream of allegations” from the claimant, including a historic allegation (‘sandwichgate’) that he taken hospitality food when he should not.

104. Finally, Mr Engelbrecht gave Mr Murphy some information about overtime allocation in February 2017.

105. The claimant was told that he would be getting a response on 15 December 2017 and then “would like to have a meeting”. He got the written response on 15 December 2017, but there was no meeting.

106. The outcome letter covers 17 pages and takes the claimant’s 45 points (as analysed by Mr Murphy) one by one. Overall, he identified that there was a “clash of personality” with Mr Ellis, and said: “I can see that on occasions Paul Ellis may have come across as assertive, but I would

simply put this down to clash in personality and his long career in the police force". Of the 3 July telephone call, it was the claimant who had become abusive. Other members of the team did not support the view that Mr Ellis was "aggressive or authoritarian". He acknowledged that the overtime system had led to individual disputes, and for that reason a new system was being introduced. Jonny Kempster had sorted the overtime grievance, and the claimant had confirmed that at the time. Mr Vickers had left, and he could not follow that up. Any delay in handling his grievance was not because of collusion by management. Staff should have sorted out the overtime difficulties for themselves. Paul Ellis had not been disciplined for alleged failures in the past because none of them led to a client complaint. He then listed a number of general concerns. He should not bear historic grudges, but should raise complaints within 3 months if he wanted them addressed. He was to improve relations with Paul Ellis. He was to avoid hearsay. There was no disparity in treatment if Paul Ellis was not disciplined, because the claimant himself had never been disciplined for anything. On the allegation that the claimant wanted a cash settlement, he told the claimant that the his grievance was "possibly disingenuous, with the aim to be purely litigious for financial gain".

107. The tribunal notes that Mr Murphy recognised that there had been weak management, especially of the overtime problem, but he did not say so to the claimant.

Paul Ellis's Grievance about the Claimant

108. Next, on 16 January 2018, Paul Ellis filed a grievance about the claimant, saying that the claimant had wanted him sacked. He complained of verbal abuse on 18 June, and 3 July, including being called a racist, and referred to his discussion with Mr Murphy about this. The claimant had rehashed a number of earlier allegations, none of them proved. This was intimidation and harassment such as he had not met with in the army and the police.

109. Chris Jenkins was assigned to investigate, and had a meeting on 5 February 2018, when Mr Ellis added that the claimant used his computer for personal matters, and that but for the suspension Mr Ellis would have applied for a CPO manager post.

110. Chris Jenkins also summoned the claimant to see him about this complaint on 12 February, in Manchester. The claimant was upset about the way that Mr Kempster handed him a letter about this, and had then walked away when the claimant had questions about it. The claimant asked for a day off immediately before so he could prepare, but was refused, and he then went sick with stress. At the meeting, the claimant denied having called Paul Ellis a racist, but said "they could all go choke on their greed". He said Paul Ellis was trying to run the team. He also explained his settlement remark, and the legal advice he had about it. He had told Mr Kempster that he had been advised about resigning and claiming constructive dismissal, but he loved his job and did not want to leave. The figure of £40,000 was a calculation of the overtime lost because he was not applying for it while the grievance was under investigation, and the investigation had unreasonably been delayed.

111. He followed up by sending a detailed written response and emails.

112. On 23 February 2018 Chris Jenkins wrote to Paul Ellis with the outcome. He did not uphold his grievance. There had been no decision to discipline Paul Ellis, or to have the claimant disciplined. The claimant had been entitled to take legal advice about his position. He repeated the offer of mediation, and in the meantime restated that Paul Ellis was to keep to the staggered handover arrangement; it was only to be varied on the express instructions of management.

February 2018 Grievance - Further Protected Disclosures

113. Also on 23 February 2018 the claimant lodged a further grievance, stating this concerned health and safety and lack of duty of care:

> " which began with incidents and concerns raised starting from 16 October 2016 to present. I feel the management not taking the safety and welfare of myself seriously".

This included:

> "risk assessments, CCTV, health and safety, welfare, assaults, actions of employees, SOP documentation, TL roles, investigations, bullying and harassment".

He had tried to resolve it before, by raising concerns through statements, incident reports, emails, informal and thought consists of October 2016. He had welcomed mediation but other the other party had refused.

114. This is the last of the protected disclosures in the whistleblowing claim. Does it qualify for protection? In our view, it does not contain information, but rather allegations. The 16 October 2016 email is not in the bundle, and we do not know what it said; the reference to risk assessments (without anything about them) comes after a 13 month silence on the point. There is nothing to say what any breach of legal duty or threat to health and safety was, and that could only be have been gleaned by referring back to much older material, over a year old, which the claimant did not supply. This is bare allegation. Further, risk assessments, health and safety, and so on, but without any detail, are included in the same list as his grievances about overtime and Paul Ellis, which suggests that this grievance was about his own dissatisfactions, not a matter of public interest. In addition, on the risk assessment points, there is so little detail, and they relate to communications so old, which he had not pursued for so long, that we could not conclude that the claimant had a reasonable belief that he was making this disclosure in the public interest, rather than as a further complaint about his own dissatisfaction.

115. There is in the list of issues a reference to an earlier protected disclosure, in January 2018, to DSMs Darren Gray and Ty Penson, following up on earlier matters. There are no emails. There is no evidence from the claimant on either of these, only some dates in his further particulars. In our finding he has not proved there was such a disclosure, nor what information was disclosed, and there is insufficient evidence to be

able to decide whether, if made, they qualified for protection.

Handling of the February Grievance

116. In response to the 23 February grievance, a more senior manager, Tom Ward, replied on 27 February 2018 saying that he had discussed this with Mark Murphy. All these matters had been covered in the appeal, he said, and he was not going to investigate again.

117. We comment that he did not note that risk assessment and health and safety had not been covered by Mark Murphy, but as the claimant gave so little detail, and had tacked them to a list of matters that had already been raised, it was not surprising his managers saw this as a revival of grievances that had already been explored.

118. On 8 March 2018 Chris Jenkins wrote to the claimant telling him that Paul Ellis's grievance had not been upheld. The grievance process had been exhausted. He was not to "circumnavigate the process", by trying to revive them; that could be harassment.

119. The claimant was still off work with stress, following the 11 February meeting in Manchester. He told his DSM he would be returning to work in April but in the event he did not; on 16 April he went to ACAS for early conciliation. On 1 May he told his manager he was unlikely to return until legal proceedings had concluded, but on 2 May 2018 he was hospitalised with a perforated colon. The claim was presented to the Employment Tribunal on 9 May.

The April Grievances

120. On 6 April the claimant lodged two more grievances. One was about the "vexatious grievance" of Paul Ellis. He complained of racism, continual harassment, and intimidation. The other was about his managers and HR "causing me stress and anxiety", naming those involved in the previous grievances: Engelbrecht, Vickers, Murphy, Kempster and Havard.

121. John Minnis was appointed to handle these. On 18 April he told the claimant that the allegation of racism would be investigated, but all the others had already been dealt with, the grievance process was exhausted, and they would not be investigated again.

122. The claimant continues to be unfit for work, and there has as yet been no meeting on the racism grievance, although we can see that some attempts were made in the autumn of 2018. In January 2019 the claimant had an operation to remove a tumour from his neck.

Submissions

123. The respondent argues generally that the claimant, with a number of complaints about work, in particular risk assessments and overtime, was, with advice, trying to shoehorn generalised complaints into the frame of causes of action he could pursue while still employed, that is, race discrimination and whistleblowing detriment. It is argued that the fact that most of his witness statement was about the respondent's health and

safety shortcomings, and not about individuals deliberately mishandling his grievance, showed that he did not himself see it that way.

124. In the whistleblowing claim it is argued the protected disclosures are not protected. In the victimisation claim it is argued that the protected acts do not make clear that a breach of the Equality Act is meant, as there is no reference to race. In both claims it is argued that any treatment alleged as unfavourable was not done because the claimant had made a protected disclosure or protected act. In all the Equality Act claims it is denied the claimant has established facts from which we could conclude that discrimination (or harassment or victimisation) had occurred.

125. The claimant argues that many of his concerns about health and safety were true and real, with many examples. As to harassment, Paul Ellis clearly knew (and intended) that his approaches were unwelcome and intimidating. It is argued they were related to race as: "the clear and profound difference in which myself a black employee was dealt with as opposed to my white colleagues was clear demonstration of race discrimination". In the hearing he made plain that he considered white employees who had brought grievances, such as Paul Ellis and Paul Angelidi, had them heard faster and more thoroughly than his. This supported the case on discrimination and vicitmisation.

126. On race as the reason, we were referred to Gaspar Greyling's mention of race:

> "the deliberate allocation of disproportionate overtime to my white colleague combined with me being labelled as a racist for highlighting the disparities and daring to call to race discrimination was met with what I believe to be direct discrimination (race). Gasper Greyling…was complicit in direct discrimination (race)."

Discussion – Harassment Claim

127. Judged by section 26, Paul Ellis's conduct on 18 June, 3 July and in the later part of September 2017 (staggered handover) amounted to harassment. There was no good reason for the contact about overtime, and he must have known it was provocative. He could easily have got someone else to do it. It is also hard to see why he should work round the clear instruction for staggered handover.

128. What is hard to see is how it is related to race. Until January 2017, the claimant said, he had not considered that anything in the long conflict between him and Paul Ellis was about race. He only concluded race had something to do with it when Mr Greyling mentioned it. Reading the transcript of that conversation, it (racism) is something Mr Grayling took, rightly or wrongly, from what the claimant said – he picked up on the request for a reason why the claimant and Mr Nelson got (it is said) less overtime. This might contribute to a finding that when allocating overtime Mr Greyling was influenced by racial difference, but says nothing about Mr Ellis. The claimant and Mr Ellis had worked together for over 5 years. There is no evidence in all that time that Mr Ellis said or did anything that could relate to the claimant (or anyone else) being black. If he had, the claimant might be expected to say so in these proceedings. Nor have any

of his CPO colleagues, black or white, including his trade union representative, mentioned race as a reason for the conflict between them, or that Mr Ellis had said or done anything that might indicate racial difference influenced his actions. He seems to have been experienced as difficult by white colleagues too. There is material indicating he considered himself superior to other CPOs because he had been in the army and the police. The claimant had a number of meetings with managers about his grievance about Paul Ellis when he could have said there was racial element, but he did not. It is of note that when asked whether on 3 July he had called Paul Ellis a racist, he denied it, even though this gave him an obvious way in to say, "well, actually he is", and then elaborate. He did not then, and has not now, and we conclude that while he may believe in his heart of hearts that race underlies the difficult relationship, he knows there is nothing to show that this is the case. We have found no facts from which we could conclude, or draw inferences from which we could conclude, that the harassment related to race.

129. Finally, in the claim form the claimant said of Paul Ellis's January 2018 grievance that: "he used my race as weapon to bring a vexatious grievance". The case management summary of the issues added these words:

> "the claimant believes Mr Ellis's actions were related to race because the claimant had raised a grievance about Mr Ellis and Mr Ellis ascribed this to racial motivation on the part of the claimant, thereafter raising a grievance himself about the claimant".

This seems to argue that because the claimant had lodged a grievance about Mr Ellis, Mr Ellis harassed the claimant on his counter grievance, and that related to race because Mr Ellis complained the claimant had called him a racist. However, the claimant, in our finding, probably did call Mr. Ellis a racist, in the course of the very heated phone call on 3 July, with the claimant associating Mr. Ellis with the overtime dispute, in which months earlier Mr Greyling had first used the word. It was a legitimate thing for Mr. Ellis to complain about, in the context of his complaint that the claimant was raking up some very old matters, and (the reported conversation with Mr Kempster) trying to get him dismissed. It does not make his grievance an act of harassment. Nor does it show that the earlier conduct (18 June, making the 3 July telephone call), was race harassment.

130. The harassment claim does not succeed.

Race Discrimination – Discussion

131. This claim is about Marcella Hawraluk, who is white, being allocated substantially more overtime than other CPOs including the claimant.

132. First, it is not clear that there was disparate treatment. She was allocated a lot of shifts because she made herself available for many, and the claimant did not. We do know she got 2 or 3 more shifts on a particular date, but we have no evidence of black CPOs complaining they did not get enough overtime, and there is some evidence at this this time that black CPOs got as many or more shifts as white CPOs. We do not know if the claimant was late responding to calls from overtime. We do know he very

rarely asked for overtime. It is of course always possible there was some personal malice, or a feeling that as he rarely asked for overtime he could not complain (this reflects what Ms Hawraluk said when interviewed by Mr Murphy). What we do know is that the facts, and inferences from them, do not suggest race had anything to do with it. The only fact is that the claimant is black and she is white, and bare difference without something more is not enough. We do not have "something more". There were 9 CPOs at the time, leaving 7 other than the claimant and the comparator, of whom three were black. The claimant is only complaining of 2-3 shifts. The comparison with Ms Hawraluk having 27 shifts is not material because on the evidence available he did not volunteer for more than 3 shifts in the period. Black CPOs did not mention any unfairness in their allocation, making race an unlikely reason why the claimant did not get the shifts he had asked for. Mr Grayling's remark does not show that managers considered race when allocating overtime. It was a challenge to what he thought the claimant was suggesting when he said there was favouritism.

133. The claimant has not proved facts from which we could make inferences that race was the reason for not getting the shifts he wanted.

Protected Disclosure Detriment

134. The claimant says he was (1) denied overtime in December 2016 and January 2017 (2) not afforded due process in his grievances and (3) in particular, the race discrimination claim in his grievances was ignored because he had made protected disclosures.

135. In this and in the victimisation claim, we have identified the faults as delay handling the February 2016 grievance, not dealing with points he made, in particular, discrimination, and (in 2018) refusing to consider them at all.

136. We could not see any evidence from which we could conclude there was a material influence on the overtime allocation decisions of the claimant's demands for better risk assessments, or more information about visitors at particular risk. The allocation was sorted out by the team or by the DSM. It was an imperfect system, acknowledged by everyone to be contentious, and there had been unhappiness about allocation going back before any protected disclosures by the claimant. The claimant did not ask for much, and the claim may only concern 2-3 shifts. We do not even know if it is right that he did not request it in time. It seems unlikely that he would be punished, in this or in any other way, for complaining about unexpected visitors. It was an operational matter; the respondent may not have wanted to demand more from programme makers because they wanted the contract, but we have no evidence that managers ever expressed resentment about the claimant's reports. At most we have mention that Mr Ellis told the claimant and Mr Engelbrecht not to complain about lack of PPE, but Mr Ellis was not a manager to whom disclosures were made.

137. It seemed all the more unlikely that any deficiencies in the grievance handling related to protected disclosures. The most obvious reason for delay handling the February 2017 grievance was that Mr Grayling was on extended leave of absence, and it was not picked up when he returned to

work. Of the later grievance handling, neither Dan Vickers nor Mark Murphy had received complaints about risk assessment or knew of the HSE reporting, nor were they mentioned in the grievance meetings or written material by the claimant . As for the 2018 grievance, even if was protected (we found it was not), the respondent's perception was that this was part and parcel of a grievance in which procedure was exhausted, not that he was drawing their attention to breaches of legal obligation or want of safety.

Victimisation

138. The claim is that because he had done the protected acts, the respondent failed to afford him any due process in the complaints he made, and that they were dealt with in a completely biased manner.

139. The first complaint was to Mr Greyling in January 2017. He told the claimant to lodge a grievance of he thought there was favouritism. Arguably this was the informal stage of the grievance process, which broke down because the claimant was angry and Mr Greyling dismissive or defensive. It preceded any protected act. The first written grievance is in February 2017, handled by Mr Engelbrecht. We know it was delayed by Mr Greyling's prolonged absence. It is not explained why Mr Engelbrecht did not follow it up in three weeks after Mr Greyling returned or reply to the May letter chasing progress. Can we infer it was because the claimant had alleged discrimination, either in February or May? We entertain a suspicion, because there is so little information, and he was not called to give an explanation. It was not clear that the facts required explanation: the steer from Mr Havard could be taken as telling managers this was no about unlawful discrimination. As for the 15 May email, we know Mr Engelbrecht moved swiftly on the overtime issue, in effect telling the team to sort it out sensibly. He may have overlooked that the claimant may have been saying more than that it was unfair, and that it was discriminatory on grounds of race, but as the claimant never mentioned race, it is understandable that he thought he had dealt with the problem identified. It was probably an inadequate response, because it is not clear whether he agreed there had been unfairness in overtime allocation, but he acted as if there had been some unfairness and spoke to the team, even if he left the system as it was, and did not adopt the claimant's solution of getting managers to allocate, not team members. It is hard to say that any defects in the response were because the claimant had said there was a breach of the Equality Act.

140. Next is the action taken by Mr Kempster on the grievance. He was not assigned the task of responding to the grievance, but assumed it when the claimant raised it with him direct. He too thought it was just about overtime, he took the point that managers should check to see if there was unfairness, he devised a system, (again probably inadequate in practice because it did not tell managers to watch for unfair allocation among staff but told them it was to see staff did not get tired), asked the claimant if that dealt with it, and was told it did. It is entirely understandable that he then said the grievance was closed. He failed to read through all the emails he had been sent, which would have shown him discrimination might be an issue, so it is difficult to find that the protected act was the reason for any

omission. He did appreciate there was a difficult relationship with Mr Ellis, as he explored whether mediation was a solution. His actions show a willingness to resolve the grievance, even in fact he did not achieve it, and we could not find this was victimisation.

141. Next is Dan Vickers's investigation. He dealt with it promptly. He did not uphold the claimant on any point, but gave grounds for his conclusion, showing he had considered them after investigation. He missed the point about the Equality Act. This was probably because he reacted to the claimant's account, rather than probing further, but as the claimant gave a great deal of additional information, in writing and at a meeting, without mentioning race as a factor, even when accompanied by his trade union representative, it is likely that this was the reason for missing it, not because the claimant had alleged breach of the Act without saying more.

142. We move to Mr Murphy's handling of the grievance appeal. This did take time, but it was undoubtedly thorough. He recognised the problem of abdication of management role in the overtime allocation. He noted every point made by the claimant – and race was not one of them - and investigated and answered them. His exasperation was fed by the reported and misdated remark about a legal claim, but based mainly on the historic aspects of some of the complaints about Paul Ellis, and the insistence he should be disciplined for events long gone. We could not find the appeal handling was a detriment, let alone that it was because of a protected act.

143. Mr Ward was swift to turn down the February 2018 grievance. He did not investigate them, but was advised the ground had already been covered. We have already noted that tis was not strictly true of the health and safety isues, but as they were not described it is understandable they were taken as makeweights, if the point was noted at all. Whatever the reason, Mr Ward's decision was not because the claimant had mentioned a breach of the Equality Act in earlier letters, which he had probably not read, or had this mentioned to him by Mr Murphy, who seems to have been unaware that the claimant believed there had been *race* discrimination.

144. Finally, there is the grievance handled by Mr Minnis. The tribunal agrees that he was right to identify that this further grievance covered old ground on most issues. As for the racism issue identified as requiring investigation, this has stalled because the claimant has been out of the workplace. The lack of a meeting, the next stage, is not because the claimant has alleged a breach of the Equality act or even because he has brought these proceedings.

145. The claimant has argued that other grievances were handled more quickly and responsively; it is a particular argument about delay in the handling of his grievance. Despite the respondent's complaint that he did not identify these, we recognise that he has stated that Paul Ellis's grievance got preferential handling, and that of Paul Angelidi. Paul Ellis's complaint was resolved in five weeks. In our view this reflects these features (1) the matter had already been investigate din part in the claimant's grievance appeal (2) no one was absent, unlike the hold up of the claimant's grievance because Mr Greyling was absent (3) as the lay members in particular observe, HR departments usually recognise the

damage done to working relationships, which can extend beyond the immediate parties to the wider team, when there is grievance and counter grievance, and would recognise the problem must be grasped, given that in effect this was a continuation of a grievance started in July the previous year. The explanation for speedier resolution lies here, meaning it is not useful comparative material when considering whether the handling of the claimant's grievance was an act of victimisation. As for the outcome, Mr Ellis got a dusty answer.

146. The grievance of Mr Angelidi identified in the claimant's witness statement is from 2014, when he accused Mr Ellis of taking a sandwich, a potential disciplinary matter, though we do not have the circumstances. Four months later, according to the claimant, Mr Ellis was interviewed about this by telephone. The claimant contrasts this with being called to Manchester in February 2018 to answer Paul Ellis's complaint. Our conclusion is that theft of a sandwich is on the face of it less serious than an allegation of wanting someone sacked and an accusation of racism. The latter could not be dealt with in a telephone call.

147. The witness statement also mentions that in My 2p016 the claimant was interviewed about Paul Angelidi's actions with security for Lord Hall. It is not clear from reading the documents referenced what the complaint was about. Paul Angelidi was told it was not to go further, but eh claimant was told nothing more. It is not possible from the evidence supplied why the claimant should have, of he was participating as a witness. It is in any case about potential disciplinary action, rather than a grievance. There is also a general complaint that when black officers reported racial assaults they were not investigated when an assault on Marcella Hawraluk was investigated. We had nothing more than the incident reports, and no account of what did or did not happen next, so have no useful evidence on whether this shows victimisation.

148. We concluded that we could not find from comparison of grievance handling that the claimant was victimised in the handling of his grievances.

Time Points

149. As we did not uphold any claim on its merits it is not strictly necessary to rule on the time points. On the face of it, complaints about overtime allocation, whether as discrimination, whistleblowing detriment, or victimisation, ended on 15 December 2017 when he got the outcome letter, and so are out of time. Complaints about grievance handling generally are potentially in time, but we have not found anything in the handling that shows that the 6 April grievance handling was part of a series of similar incidents, required for survival of the earlier whistleblowing detriment claims. It was turned down because procedure was exhausted on 15 December. For race harassment, if we had concluded race was the reason, there could have been conduct extended over a period to the date of Paul Ellis's grievance on 16 January 2018, the claimant having gone to ACAS on 16 April, to make the earlier acts in time. On victimisation, we would probably have concluded that as the February grievance was turned down after a conversation with Mark Murphy, if we had, but for the time point, found Mark Murphy turned down the appeal because of a protected act, the two did form part of conduct extended over a period, so making

complaints about earlier handling in time, but we did not.

Conclusion

150. We have therefore concluded that none of the claims succeed. We want to add that there is no reason to find that the claimant's genuine sense of anger and disadvantage in the way overtime was allocated, or his reports handled, was manufactured or insincere, but it may have been misguided as to the cause. There was a difficult relationship with Mr Ellis, and the overtime allocations were confused and possibly open to abuse, and his managers were slow to address this. He has not however established that there was race harassment, race discrimination, or detriment because he made protected disclosures or alleged breach of the Equality Act.

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Employment Judge Goodman

Date 31 May 2019

JUDGMENT SENT TO THE PARTIES ON

5 June 2019

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FOR THE TRIBUNAL OFFICE