EMPLOYMENT TRIBUNALS

Claimant:	Mr A Chaudhry		
Respondent:	Cerberus Security and Monitoring Services Ltd		
HELD AT:	Leeds	**ON:**	9 to 12 September 2019. 24 September 2019 and 4 October 2019 (in chambers).
BEFORE:	Employment Judge D N Jones		
Members:	Ms J Lancaster Mrs L Hill		

REPRESENTATION:

Claimant: In person

Respondent: Mr R Clement, of Counsel

JUDGMENT

1. The complaints of victimisation and harassment in claim number 1810827/2018 are not well founded and are dismissed.

2. The complaints of victimisation, direct race and/or religious discrimination and harassment in claim number 1800009/2019 are not well founded and are dismissed.

REASONS

Introduction

1. Mr Chaudhry is employed by Cerberus Security and Monitoring Services Limited (Cerberus) as a security officer. He commenced employment on 24 March 2007 and remains working for Cerberus. The current proceedings comprise of two claims brought on 22 October 2018 and 4 January 2019.
2. Mr Chaudhry had brought two earlier claims, which included discrimination complaints. Both were settled. Compromise agreements were made through the

auspices of ACAS and COT3 documents recorded them on 21 June 2013 and 30 April 2018[1].

3. The first claim with which we are dealing is one of victimisation and harassment. Mr Chaudhry says that because he brought the earlier discrimination proceedings he was subjected to a number of detriments in respect of not having been offered any work on 11 May 2018, being offered only 20 hours rather than what he believes his entitlement to have been of 48 hours per week, from 1 June 2018, not being offered any opportunities for work whilst he was off sick, being pressured in a grievance procedure to accept what the grievance officer was saying and being told by the managing director, during the grievance hearing, to go back to find himself another employer as Cerberus had no work for him. Alternatively, he argues that the conduct of the meeting of 12 July 2018 amounted to harassment.

4. The second claim is for one of victimisation, harassment and direct race discrimination or religious discrimination. The claimant is of Pakistani origin. He is Muslim. The protected acts are the earlier sets of proceedings and the first claim with which we are dealing. The alleged detriments, unwanted conduct and/or less favourable treatment are not being issued with the appropriate personal protective equipment, not having action taken to ensure that the claimant's means of access to and exit from the site at which he was working facilitated his timely arrival and departure, not offering him sufficient work from 3 December 2018 and attempting to force him to resign on 5 December 2018.

Evidence

5. The Tribunal heard evidence from Mr Chaudhry. The respondent called Mr Mark Earl, patrol net manager and health and safety officer, Mr Brendon Stott, screening and recruitment manager, Ms Ruth Train, business development manager and Mr Stephen Hardcastle, managing director. The respondent had served a witness statement from Ms Nicola Anderson, its head of sales. She had considered a grievance brought by the claimant relating to the above concerns in the first claim on appeal. However, as no complaint was made of her handling of the case, her evidence related principally to the opinion she had formed as the grievance appeal officer and as such was not strictly relevant. In the event she was not called by Mr Clement to give evidence.

6. A short video of part of the grievance meeting was shown to the Tribunal. It had no audio.

7. Mr Clement sought to rely upon findings of a disciplinary panel of the Association of Chartered Certified Accountants in respect of an examination Mr Chaudhry sat. The Tribunal ruled that this evidence was not relevant to the issues in the case. It was about credibility alone and was not of assistance.

8. On the second day of the hearing the respondent sought permission to add a document which was a copy of the assignment instructions from the client JMC Contracting, for the site at which Mr Chaudhry worked from 8 November 2018. This was a document which was relevant to the issues and should have been disclosed in accordance with the Tribunal's earlier orders. It was produced after the Tribunal had asked questions about what personal protective equipment would have been required at the site. We considered that there was prejudice to Mr

[1] In the hearing Mr Chaudhry stated he had signed the cot3 on 1 May 2018, but in his grievance and in all other documents in the bundle the reference is to 30 April 2018. In the event, nothing turns on which of the two it was.

Chaudhry in having this document presented so late and the issue had been and could be dealt with in cross examination. We did not allow its admission. We did allow late submission of documents from Mr Chaudhry, including copy contracts of employment, on the first day of the hearing and a compilation of hours worked and pay received, which the respondent presented on the third day. This did not cause any particular prejudice.

The issues

9. At the commencement of the hearing it was agreed the following were the issues:

The first claim

(Victimisation)

9.1 Was Mr Chaudhry subject to the following detriments:

9.1.1 Not being offered/allocated any hours of work between 11 and 31 May 2018?

9.1.2 Not being offered more than 20 hours per week on and from 1 June 2018?

9.1.3 Not responding, or ignoring, Mr Chaudhry's request for availability for work whilst off sick?

9.1.4 Being pressured to agree with the grievance officer's point of view during the grievance hearing by Mr Stott and Ms Train?

9.1.5 Being told by Mr Hardcastle in the grievance meeting to go back and find himself another job as Cerberus had no work for him?

9.1.6 A delay of 5 days in sending out the grievance outcome?

9.1.7 The rejection of the grievance?

9.2 If so, was it because he had committed the protected acts of having brought earlier discrimination proceeding?

Harassment

9.3 Did Mr Stott, Ms Train and Mr Hardcastle behave as alleged in paragraphs 9.1.4 and 9.1.5 above?

9.4 If so, was any such conduct unwanted?

9.5 If so, did it relate to the protected characteristics of religion and/or race?

9.6 If so, did it have the purpose or effect of violating Mr Chaudhry's dignity or create a hostile, intimidating, degrading, humiliating or offensive environment for Mr Chaudhry?

The second set of proceedings (Direct race/religious discrimination, harassment and victimisation

Victimisation

9.7 Was Mr Chaudhry subjected to the following detriments:

9.7.1 Not being issued with the appropriate personal protection of equipment?

9.7.2 Not having action taken to sort out his means of access to and exit from site premises because of a faulty remote control between 7 November 2018 and 3 December 2018?

9.7.3 Not having been offered work, or sufficient work, from 3 December 2018?

9.7.4 Being subject to an attempt to force him to sign a letter of resignation on 5 December 2018?

9.8 If so were any such detriments because the claimant had done protected acts, namely brought two earlier sets of proceedings and the first claim before this Tribunal?

Direct discrimination

9.9 Further or in the alternative did the detriments amount to less favourable treatment of the claimant than Cerberus treated or would have treated others because of his protected characteristics of race and/or religion?

Harassment

9.10 Did the events in paragraphs 9.7.1 to 9.7.4 occur as alleged?

9.11 If so, were they conduct which was unwanted?

9.12 If so, did any relate to the protected characteristics of religion and/or race?

9.13 If so, did any have the purpose or effect of violating Mr Chaudhry's dignity or create a hostile, intimidating, degrading, humiliating or offensive environment for him?

Time limits.

9.14 Was the complaint of 11 May 2018 presented more than three months and any material early conciliation period prior to the presentation of the claim (the primary time limit)?

9.15 If so did it constitute part of conduct extending over a period, the last part of which fell within the primary time limit?

9.16 Alternatively, is it just and equitable to consider that claim?

Background facts

10. Mr Chaudhry is allocated work at a variety of sites of the clients of Cerberus.

11. Between 9 January 2017 and 22 April 2018 Mr Chaudhry worked at a site in Normanton of the client Onwards Holdings. On 23 April 2018 that site was taken over by the Leman Container Base (Leman). Mr Chaudhry remained there. Another security officer, Mr Hudson, was removed from the site by Cerberus on 24 April 2018. Mr Hudson had been the security officer working days at the site in Normanton. Leman had no requirement for a day guard.

12. On 25 April 2018 Leman gave notice that they no longer required a night guard from 4 May 2018. Cerberus moved Mr Chaudhry from that site to work at JMC Contracting in Bradford. On 9 May 2018 JMC Contracting gave notice to Cerberus that they no longer required any security guards from 10 May 2018.

13. Mr Chaudhry was informed that his placement at JMC Contracting would end on 11 May 2018 by email from the operations support manager dated 10 May 2018. Mr Chaudhry responded and asked where his next work would be. Mr Earl replied, by email, to inform him that there would be no work until a posting became available on 1 June 2018 at Search Labs. That would be for 20 hours per week. Mr

Chaudhry replied and stated that he felt he was being punished. Mr Earl was concerned about this comment and referred it to Mr Stott.

14. On 14 May 2018 Mr Stott sent Mr Chaudhry an email to reassure him. He explained that he was not being punished and set out the circumstances which had led to there being no work in 13 paragraphs of 'facts'. They recorded the sequence of events which had led to a number of sites being cancelled.

15. On 15 May 2018 Mr Chaudhry reported sick. He submitted a fit to work note (sick note) for depression and neck and low back pain. It was for two weeks. A further sick note was issued for a fortnight on 1 June 2018 and subsequent sick notes were issued until 11 October 2018, the last being for four weeks, expiring on 7 November 2018.

16. On 12 June 2018 Mr Chaudhry sent an email to Mr Stott to query work availability as his sick note came to an end on 15 June 2018. Mr Stott replied and stated there was no work at present. Mr Chaudhry responded and stated that he was not convinced that there was no work and sought an explanation. Mr Stott replied setting out the sites where work was available and to whom it had been allocated.

17. On 17 June 2018 Mr Chaudhry raised a grievance. He set out, in 20 paragraphs, the details of his complaint. He believed that following the settlement of his claim, on 30 April 2018, his employers had not met their obligations to allocate him hours of work. He said Mr Hudson had been moved on 24 April to another site whilst he remained at Normanton and then, he believed, Mr Rahim Khan had replaced Mr Hudson. Mr Chaudhry said his employers had failed to comply with the terms of the settlement of his previous claim and his contractual entitlement.

18. On 12 July 2018 Mr Chaudhry attended at the premises of Cerberus for a grievance meeting with Mr Stott. Ms Train was in attendance to take notes. After about one and a half hours of discussion Mr Stott left the meeting because he believed it could progress no further as, in his view, Mr Chaudhry was refusing to accept indisputable facts. These were about site closures and other employees who were affected by them. These were shown to Mr Chaudhry on the 'Timegate system', a computer programme used by Cerebrus. Mr Stott went to see Mr Hardcastle, explained what had happened and why he had left the meeting. Mr Hardcastle then went to the meeting room to see Mr Chaudhry to discuss his concerns. That conversation did not resolve matters and there is a dispute about what was said, which we address in our analysis below.

19. On 16 July 2018 Mr Stott wrote to the claimant, summarising the commencement of the grievance meeting. The letter incorporated the notes of the meeting which had been taken by Ms Train. In his evidence Mr Chaudhry disputed that these minutes were accurate. He was unable to identify which parts of the notes he disagreed with, suggesting they were all "artificial". In cross-examination of Mr Hardcastle, however, Mr Chaudhry relied on parts of the note in support of his case. Having heard from Ms Train, we were satisfied that these were accurate notes of the discussion which took place. Part of the record in respect of the conversation with Mr Hardcastle supported, to some degree, what Mr Chaudhry was alleging, namely that he could seek to work elsewhere. We did not accept the notes had been fabricated, as alleged.

20. On 19 and 20 July 2018, Mr Stott was ill and took sick leave. Mr Chaudhry did not accept that Mr Stott had been ill on these two days. He said that the document produced as evidence of Mr Stott's absence was fabricated. The internal sick record and an HMRC statutory sick pay document both referred to this absence.

We accept that Mr Stott had been ill. On 23 July 2018 Mr Stott emailed Mr Chaudhry and told him he had been off work with gastroenteritis.

21. On 19 July 2018 Mr Chaudhry sent an email to Mr Stott to complain that he had not received an outcome of the grievance. The policy of the respondent was that any grievance outcome would be received within five days of the hearing, but if it was not possible to respond within that time there would be a written explanation for the delay and the employee would be told when a response could be expected. On 20 July 2018 Mr Chaudhry submitted an appeal concerning this delay.

22. On 23 July 2018 Mr Stott replied to Mr Chaudhry and informed him that the reason he had not had a reply was because he had been off sick with gastroenteritis.

23. The outcome to the grievance was sent separately, on the same day. It was not upheld. In a letter which ran to one and a half pages Mr Stott wrote that he had informed Mr Chaudhry that there had been no work available to allocate to him, he had shown him other workers' logs to establish that point but Mr Chaudhry had disagreed with them. On 29 July 2018 Mr Chaudhry submitted an appeal to the grievance outcome.

24. On 15 August 2018 Mr Stott wrote to Mr Chaudhry to ask whether there was a further sick note because the earlier one had expired. Mr Chaudhry had submitted his sick note to another administrator. In his reply he said, "*my doctor has subject it to your conduct relating to the provision of work and directed me to go back to* ***work*** *at any time* ***before*** *it* ***expires and I do*** *not need to* ***go back*** *to my doctor first" [claimant's original emphasis].* The sick note which had been submitted ran from 11 August 2018 to 10 October 2018.

25. On 11 October 2018 Mr Chaudhry sent an email to Mr Stott and Mr Earl to inform them that his sick note ended on 20 October 2018 and he asked to be advised about work. Mr Stott replied to say that he would respond to this when he had the opportunity and he was aware that the sick note had expired on 20 October 2018.

26. Mr Chaudhry replied on 12 October 2018 and stated that his sick note had in fact ended on 10 October and that he had mistakenly referred to the 20th. He asked to be advised about work. Mr Stott did not reply to this. By 11 October 2018 Mr Chaudhry had submitted another sick note which lasted until 7 November 2018.

27. On 16 October 2018 Ms Anderson held a meeting to consider Mr Chaudhry's appeal against the grievance outcome.

28. On 22 October 2018 Mr Chaudhry presented the first of these two claims to the Tribunal.

29. On 30 October 2018 Ms Anderson wrote to Mr Chaudhry. She dismissed the appeal. She stated that there had not been work available upon the expiration of the contract with the client Leman and that Mr Chaudhry had been offered the next available shift with another client on 1 June, for 20 hours. She stated that Mr Hudson had been removed from the Onward site because there was no longer a requirement for a day guard. She stated that the contract of employment was one of flexible hours to meet the needs of the business. She stated that he had not been offered further work because he was off sick. In respect of his complaint that Mr Stott had behaved inappropriately she said that she had reviewed the CCTV footage and the note taken by Ms Train. She did not consider that Mr Stott had behaved 'immorally or fraudulently', as Mr Chaudhry had alleged. She also rejected the complaint that Ms Train had inappropriately intervened during the meeting to put pressure upon him. In respect of a complaint about Mr Hardcastle

entering the room, she stated she had not seen him acting aggressively or inappropriately on the CCTV footage and that he could have terminated the meeting and asked for an another. She noted that the pair had shaken hands at the end.

30. On 7 November 2018 Mr Stott sent an email to Mr Chaudhry to inform him that he had just been requested to provide a security officer at JMC Contracting in Leeds. The start was to be on 8 November 2018, Thursdays 16.30 to 7.30, Fridays 16.30 to 7.00, Saturday 19.00 to 7.00 and on Sunday 19.00 to 7.30, being 52.75 hours working time after deduction of breaks.

31. On 8 November 2018 Mr Chaudhry attended at his employer's premises because the personal protective equipment he had previously used, which was his own, had been stolen from his car. He was provided with a hard hat (which had been previously used) and a visibility jacket.

32. Mr Chaudhry attended the site but had problems entering and leaving. This was because there was a delay in responding to him at the gatehouse where there was a barrier which had to be lifted upon request via the intercom.

33. Mr Chaudhry contacted Mr Earl to explain that he was having a problem on the first or second day of his appointment to the site. Mr Earl suggested that Mr Chaudhry speak to Mr Ali Zaman, as he had worked on the site previously and he thought he might be able to give him some advice. Mr Zaman spoke to Mr Chaudhry and said that he had also faced the same problem. Mr Earl said he would speak to the site manager to see if he could obtain a fob for Mr Chaudhry to operate the entry barrier himself. Mr Earl duly spoke to the site manager but this was not possible. Site passes and fobs were not issued to anyone other than Yorkshire Water employees, the owners of the site. JMC Constructive operatives who were conducting work on behalf of Yorkshire Water, and who had engaged Cerberus and Mr Chaudhry, were, themselves, not allowed to have their own passes/fobs.

34. On 27 November 2018 Mr Chaudhry emailed Mr Earl to draw attention to the fact that he had had a discussion with him on 8 November about problems with entry and exit. He asked if he had sorted it out. In response Mr Earl stated that they could not obtain passes and so he had to press the button on the intercom, inform them who he worked for and that the gate would be opened remotely.

35. On 3 December 2018 Cerberus were informed by their client at the site that they wanted the security guard to be replaced. This was because of an incident on 2 December 2018 when Mr Chaudhry had driven out of the entry barrier of the site instead of waiting for the exit barrier to be raised. According to the operator of the barriers she had been busy speaking to a van driver who was waiting to enter the premises. Mr Chaudhry had not waited but had driven out of the entry barrier, in reverse, when it was closing. This was a breach of safety policies. In response to the request Ms Swarbrick, of Cerberus, stated she would wish to check the driver's version of events first before removing him. Mr Earl and Mr Stott discussed this matter with Mr Chaudhry. He stated that the barrier was faulty. It was decided to remove him from this site and his last shift there was on 4 December 2018. Mr Chaudhry was asked to attend the offices of Cerberus on 5 December 2018. This was to inform Mr Chaudhry of the decision to remove him from that site and to arrange an alternative assignment.

36. At the meeting Mr Stott gave Mr Chaudhry a pre-prepared letter, having firstly read it out. It set out the circumstances in which the appointment to the Yorkshire Water

site had been terminated. It also stated that he would be appointed to another site, of Rosehill Polymers, on a temporary basis. This was to be for 24 hours per week.

37. Mr Chaudhry said there were two letters produced during this meeting. He said the first was one on which he saw the word 'resignation'. He said he had been asked to sign it. He said that when he refused and asked for it to be sent by email, Mr Stott printed off another letter which was the one which was in our papers and we have summarised above, in paragraph 36. Mr Chaudhry said he took this away with him and never signed it. Mr Stott agreed that he had asked Mr Chaudhry to sign this letter but denied there was any resignation letter. A copy of the letter was sent by recorded delivery, but returned as not collected on 9 December. It was emailed on 6 and 10 December 2018.

38. We are satisfied that the account of Mr Stott is correct. He had prepared this letter in the light of the history of the difficulties which had arisen with Mr Chaudhry. This was to ensure that there could have been little dispute about the circumstances in which the assignment at Yorkshire Water had terminated. Given that Mr Chaudhry was immediately offered an alternative placement we think it implausible that he would have been asked to sign a letter of resignation at the time. Mr Chaudhry was unable to give any details of the letter which he said he had been forced to sign other than he saw the word resignation on it.

The law

39. By section 39(1) of the Equality Act 2010 (EqA) an employer must not discriminate against a person by subjecting him to a detriment.

40. In **Ministry of Defence v Jeremiah [1980] QB 87**, the Court of Appeal held that a detriment would exist if a reasonable worker would or might take the view that the treatment was in all the circumstances to his disadvantage. In **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337** the House of Lords held that an unjustified sense of grievance would not amount to a detriment.

41. Direct discrimination is defined in section 13 of the EqA:

> "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourable than A treats or would treat others."

42. By section 9 of the EqA, race is a protected characteristic and is defined as including colour, nationality, ethnic or national origins. By section 10 of the EqA religion is a protected characteristic.

43. By section 23 of the EqA:

> "On a comparison of cases for the purpose of section 13… there must be no material difference between the circumstances relating to each case".

44. Under section 27 of the EqA:

> "(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 this Act (c) doing any other thing for the purposes of or in connection with this Act (d) making an allegation (whether or not express) that A or another person has contravened this Act."

45. By Section 26(1) of the EqA 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.

46. By section 26(3), 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.

47. Section 136 of the EqA provides:

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

48. A number of authorities relating to the predecessor of section 136 of the Equality Act 2010, approved the guidelines in the case of **Barton v Investec Henderson [2003] ICR 1205**:

"*It is for the claimant to prove on the balance of probabilities facts from which the Employment Tribunal could conclude in the absence of an adequate explanation that the respondent has committed an act of discrimination. If the claimant does not prove such facts the claim will fail. In deciding whether the claimant has proved such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers will be prepared to admit such discrimination even to themselves. In many cases the discrimination will not be intentional but merely based on the assumption that he or she would not have fitted in. The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. The Tribunal does not have to reach a definitive determination that such facts would lead to it concluding there was discrimination but that it could. In considering what inferences or conclusions can be drawn from the primary facts the Tribunal must assume that there is no adequate explanation for those facts… When the claimant has proved facts from which the inferences could be drawn, that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent. It is then for the respondent to prove that he did not commit, or as the case may be is not to be treated as having committed that act. To discharge that burden it is necessary for the respondent to prove on the balance of probabilities that his treatment was in no sense whatsoever on the*

protected ground. The respondent must not only provide an explanation for the facts proved by the claimant from which the inferences could be drawn, but that explanation must be adequate to prove on the balance of probabilities that the protected characteristic was no part of the reason for the treatment. Since the respondent would generally be in possession of the facts necessary to provide an explanation the Tribunal would normally expect cogent evidence to discharge that burden. In particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire, procedure and/or any Code."

49. In **Madarassy v Nomura International plc [2007] ICR 867**, the Court of Appeal held that a difference in status, namely that of the protected characteristic alone, was not of itself sufficient to discharge the burden of proof in a direct discrimination case. The same principle applies to claims of victimisation: "*It is trite law that the burden of proof is not shifted simply by showing that the claimant has suffered a detriment and that he has a protected characteristic or has done a protected act*", per Underhill LJ, **Bailey v Greater Manchester Police [2017] EWCA Civ 425,** para 29.

50. In **Laing v Manchester City Council and another [2006] ICR 1519**, the President of the Employment Appeal Tribunal said that if a tribunal was satisfied on the evidence that the respondent had provided a reason which, on a balance of probabilities, had eliminated any discriminatory cause, it was not necessary for the tribunal to trouble about whether the burden of proof had shifted in the first instance. This approach has been approved by the Supreme Court, in a case in which Lord Hope expressed the opinion that in most cases the tribunal is unlikely to need to trouble itself with the shifting burden, **Hewage v Grampian Health Board [2012] ICR 1054**: "*As Underhill J pointed out in Martin v Devonshires Solicitors (para 39), it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other*."

51. In **Glasgow City Council v Zafar** the House of Lords held that because an employer acted unreasonably did not mean that it had acted discriminatorily. If the employer treated those with and without the protected characteristic equally unreasonably there would be no discrimination. In **Nagajaran v London Transport** the House of Lords held that the essential question was why the employer had acted in a particular way and that the reason may be a subconscious one. Lord Nicholls pointed out that most people will not admit to acting in a discriminatory way and are often unaware they are doing so.

52. The decision of the Court of Appeal in **Ayodele v Citylink,** approved the previous authorities, albeit under similar but differently worded provisions in the Discrimination Acts, and confirmed they remained relevant to the approach to the burden of proof under section 136.

Analysis and conclusions

53. The findings and conclusions of the tribunal are agreed by all three of its members and are unanimous.

The first claim

Not offering work from 11 May to 31 May 2018 and work from 1 June 2018 of only 20 hours.

54. Mr Chaudhry was not offered any work between 11 May 2018 and 31 May 2018 and from 1 June 2018 he was offered work at a site for only 20 hours per week. The first issue is whether these were detriments.

55. Mr Chaudhry believed that he was entitled to 48 hours work per week. Indeed, over a long period of time he had been provided with work in excess of 48 hours. The tribunal was presented with four copies of contractual terms and conditions.

56. The respondent had included in the bundle an unsigned statement of terms which had Mr Chaudhry's name on the front sheet but included an incorrect date for the commencement of his employment of 1999. That document had not been signed by either party. Under the subheading 'hours of work', hours would be variable each week, flexible as required by the needs of the business, in accordance with the published rota, working between Monday and Sunday.

57. Mr Chaudhry produced a copy dated July 2010 which was signed by neither party. Those written particulars stated the normal hours of work were as defined by his roster but that he would be required to work those hours that were reasonably to be expected to fill the duties of the post. Another copy of terms produced by Mr Chaudhry was dated 29 January 2009. These included the correct start date of 24 March 2007 and had been signed on behalf of Cerberus. Mr Chaudhry had not signed it. At paragraph 7 .1, hours of work were to vary in accordance with contract assignments and subject to the Working Time Regulations. Paragraph 7.3, in red type, stated that the average working week was limited to a maximum of 48 hours over a seven-day period averaged over 17 weeks. This was stated to be in compliance with the WTR which came into effect on 1 October 1998. Mr Chaudhry cited this passage in reliance on his contention that he was entitled to a minimum of 48 hours. This was a misreading of paragraph 7.3, which concerned itself with a maximum number of hours. Under this contract, as with that provided by the respondent, the hours were variable and flexible. Another version was produced by Mr Chaudhry but that concerned another named employee.

58. Mr Chaudhry relied upon the fact that he had not signed any of these written particulars, notwithstanding he was seeking to rely on paragraph 7.3 in one version he had produced. Whilst it is good practice for the parties to sign written particulars, it does not follow that they do not embody the agreement between the parties if unsigned. It was not suggested that that there was any implied term of the contract by custom and practice or otherwise.

59. We are satisfied that the three copies of contracts with Mr Chaudhry's name upon did embody the terms and conditions of his employment. It is likely that each of these contractual terms had been produced at different times by Cerberus to reflect updates in the employment relationship. What is common to each is the reference to an undefined number of hours whether by reference to a roster, variation or flexibility. We find there was an agreement for Mr Chaudhry to work variable and flexible hours. The contract did not guarantee work in any particular period.

60. By reference to his contractual entitlement, therefore, there would be no detriment if Mr Chaudhry did not receive an offer of any work or work of less than 48 hours. But that is only the starting point. It would be a detriment for an employee who was engaged under a zero hours contract without good reason to be awarded an unequal allocation of hours by comparison to his colleagues. If that were for discriminatory reasons or because of a protected act it would be unlawful.

61. The documentation produced supported the case advanced by Cerberus that there had been a termination of a number of contracts to provide security services from a number of their clients. At the time Mr Chaudhry complained that he was being punished, six separate sites were terminated. These can be seen in separate notices of contract closures in the bundle of documents. They include the cessation of the contract of Onward Holdings which was cancelled on 20 April 2018. Notification of this was given on 6 April 2018. Leman took over that site and gave notice of cancellation on 25 April 2018 for 4 May 2018. JMC Contracting gave notice of termination of the Bradford site on 9 May 2018 for 10 May 2018.

62. Mr Chaudhry said that these documents had been fabricated by Cerberus and he pointed to the fact there were no external documents. There were no written instructions from the clients to Cerberus notifying them of the respective terminations. Mr Chaudhry argued that managers of Cerberus had falsely created six separate internal notices of contract closure for the purpose of defeating his complaint. He said that had been to conceal the true situation, namely that work was available which was not being offered.

63. Mr Stott and Mr Earl provided consistent and convincing explanations about the sequence of events which had led to the movement of staff from one site to another and why no hours could be offered in mid-May to Mr Chaudhry. Both Mr Hudson and Mr Khan were also removed from the Normanton site. Mr Hudson was moved at an earlier date, in April 2018, because there was no longer a requirement for daytime security guards. Mr Chaudhry and Mr Khan, who had worked night shifts, went to work at the same site in Bradford to join Mr Hudson after contract with the Normanton site was cancelled on 4 May 2018. All three were then moved from the Bradford site of JMC Construction on 11 May 2018. There could be no reason for Cerberus to move Mr Hudson in this way, as suggested by Mr Chaudhry, to frustrate his opportunities for work. This undermines Mr Chaudhry's suggestion that the notice of contract closure from Onward Holdings was falsified, because all three security officers were equally adversely affected. Mr Hudson was moved three times within three weeks because of closures of sites at short notice.

64. Mr Khan was allocated work at Avant Homes in Menston. Mr Earl could not offer Mr Chaudhry that work because he had been banned from the site one and a half years previously. Mr Chaudhry did not challenge Mr Earl about this. Mr Hudson initially moved to work at Avant Homes in Apperley Bridge, on 24 April 2018 when Onward Holdings no longer required a day security officer. Avant Homes' site closed on 30 April, when Mr Hudson was moved to JMC Contracting to work with Mr Chaudhry. When that site closed down on 11 May 2018 he was moved to JCT 600 in Bradford on mobile patrol duties. This involved driving a vehicle across the site. Although in cross examination Mr Chaudhry claimed he had worked at the JCT 600 site, we accepted Mr Earl's explanation that Mr Chaudhry was not qualified or experienced to work as a mobile guard. That is why the letter Mr Stott sent on 12 June 2018 referred only to manned guards.

65. Mr Stott had given a detailed explanation to Mr Chaudhry about the absence of works hours, in writing, on 14 May 2018. He pointed out the closure of the site

affected other security guards. He also wrote to Mr Chaudhry on 12 June 2018 setting out the nine sites which were being fully manned at that time. Mr Chaudhry refused to believe that he was being told the truth. Having considered what Mr Stott said in evidence and the detail in these two letters, we accept that there was no work available to offer Mr Chaudhry on 11 May 2018. That is because he could not move to Menston, because he had been banned from that site and he could not do mobile patrol duties. At that time there were no other sites available.

66. The next available work was from 1 June 2018, of 20 hours. That arose because a guard (A) who had been working at Search Holdings was due to go for an operation, freeing up work for this period. Mr Chaudhry claimed that this guard was also working at Rosehill Polymers for 20 or 24 hours and therefore, if he was to be off work, he should have been offered those additional hours at that other site as well.

67. Mr Chaudhry relied upon a document produced by the respondent for these proceedings which set out the nationality of the members of the workforce. That included the sites at which some of those employees worked, but not all. The difficulty with this argument was that the document did not relate to the period in June 2018. It must have been produced, at the earliest, in December 2018 for the purpose of this case. It included the names of some staff who were new and not employed by Cerberus in May and June 2018. That document suggested that guard A was working at Rosehill Polymers site, but that would have been from, at the earliest, December 2018. There was no reliable evidence to suggest that guard A had been working there in June 2018 so as to free up additional hours to the 20 Mr Chaudhry had been offered by Mr Earl. Mr Earl had said in evidence that was not the case. It is evidence we accept.

68. We are therefore satisfied there were no appropriate and available sites to which Mr Chaudhry could have been allocated work in the latter part of May or more hours than 20 per week from 1 June 2018. It follows, from this finding, that we are satisfied that the decision to offer no work, or less than 48 hours, during this period had nothing to do with the fact that Mr Chaudhry had brought discrimination proceedings which had been settled. We can understand why he was initially suspicious about the sudden cessation of work, after he had been employed for more than 48 hours for many months and that situation changed within days of the settlement of his second claim. Nevertheless, Mr Stott took proper efforts to reassure him by providing more information about the individual placements of other employees and the commercial decisions taken by other clients which had led to this situation. We accepted that explanation.

<u>Not offering hours of work when Mr Chaudhry was on sick leave</u>

69. Mr Chaudhry was certified as unfit to work because of sickness from 11 May 2018 until 7 November 2018. This complaint concerns a number of requests he had made in emails to return to work during that period.

70. On 12 June 2018 he emailed Mr Stott and asked for a schedule of work from when his sicknote finished, on 15 June 2018. Mr Stott replied and said there was no work at present. Mr Chaudhry replied to say he was not convinced and asked for an explanation. Mr Stott sent a letter in which he detailed all seven sites then being worked by Cerberus including the names of the guards working. He also stated that there were two sites which were subcontracted because they were located too far away.

71. Although Mr Chaudhry disputed the contents of Mr Stott's letter, about the lack of any work at that time as well as his evidence on oath, we were satisfied it did reflect the situation as of that time. In short, we find there was no work available when Mr Chaudhry made his request on 12 June 2018. He was therefore not subjected to a detriment. Nor was the decision not to offer work anything to do with his having brought discrimination proceedings previously. It was because there was no work to offer.

72. The next request for work was made by Mr Chaudhry in an email of 16 July 2018. He referred to his earlier sicknote having expired on 15 July 2018 and asked for his work schedule. Mr Stott replied on 16 July 2018 and informed Mr Chaudhry that there was no work available. None of the evidence before the tribunal suggested or implied that there had been work at that time. Moreover, a sicknote had been issued on 11 July for a period of a month to 10 August 2018. This would have precluded any work. The doctor had not made any suggestion for adjustments, even had any been available. The failure to offer Mr Chaudhry work at that time was therefore nothing to do with the fact he had brought previous discrimination proceedings but all to do with the fact that there was no work available.

73. On 15 August 2018 Mr Chaudhry sent an email in response to a query of Mr Stott to state that his sicknote of 10 August 2018 had expired. Mr Chaudhry suggested that if he could work before the expiration of his sicknote he would not need to obtain another from his doctor. In his evidence he said that this email made it plain that his illness was work-related, but it is fair to say that the wording is a little unclear. By this time a further sick note covering the two-month period from 11 August 2018 to 10 October 2018 had been provided. Because of the timing of the previous emails, the opportunity to offer work before renewal of the sicknote had been overtaken by the submission of a two-month sicknote. In other words, at the time of Mr Chaudhry's request for work he was certified as unfit for a period of two months. The reason he was not offered work at this time was because his doctor had certified him as unfit. The fit to work note was not qualified, either in suggesting that some adjustments could be made or that work would be therapeutic and assist Mr Chaudhry's recovery, as he suggests. Any employer would have to take the fit to work note at face value. Not to do so could be criticised as rejecting medical opinion and placing improper pressure on the employee to return to work. We therefore find that the failure to offer Mr Chaudhry work at this time was nothing to do with his having brought previous discrimination proceedings but solely because he was certified as unfit by his doctor.

74. On 11 October 2018 Mr Chaudhry asked to be advised about work and that his sicknote was due to end on 20 October 2018. Mr Stott replied, to say that he would get back to the claimant, but Mr Chaudhry then pointed out that he had made an error and his sicknote had expired on 10 October 2018. A further sicknote for a month had been issued in the same form as the early ones. Again, the failure to offer the claimant work during this time was because he had been certified unfit by his general practitioner. It had nothing to do with the fact he had brought earlier proceedings.

<u>Being pressured to agree with the grievance officer</u>

75. It is not disputed that Mr Stott left the meeting. This was because he was frustrated that Mr Chaudhry would not accept the information on the Timegate spreadsheet, which demonstrated no work was available and other employees had also been affected by the closure of sites.

76. In her evidence, Ms Train said that she intervened, notwithstanding she was there only to take a note. She tried to explain to Mr Chaudhry how the Timegate programme recorded the relevant details, so it would be factually correct. This was at a time when Mr Chaudhry was challenging its accuracy. We accepted her evidence. Mr Chaudhry had become frustrated and talked over Mr Stott; he felt passionately that he had been badly treated. This led to a confrontational situation. Mr Stott was equally adamant to impress upon Mr Chaudhry the validity of the information on Timegate computer display. In an attempt to assist Ms Train intervened and, in a calmer tone, tried to explain why the information on the computer display was correct.

77. Prior to Mr Stott's departure matters had become heated. Mr Chaudhry had asked for his opinion to be recorded, that the information presented was incorrect. Ms Train's note reflects his repeated challenges to it, such as about the diary of other workers or their placements. She did not refuse to write down Mr Chaudhry's point of view, as he alleges.

78. In his claim form, Mr Chaudhry complains that Mr Stott conducted himself unreasonably, aggressively and insisted on Mr Chaudhry agreeing with his point of view. Mr Stott had asked Mr Chaudhry to accept the validity of the working records and Mr Chaudhry had rejected that, emphatically. This culminated in Mr Stott standing up and leaving the meeting. We accept that could be construed as unreasonable and bordering on the aggressive. It is unusual for a grievance officer's exasperation to result in him leaving the room. As the person in authority, we would have expected Mr Stott to have called the meeting to an end if it had become heated and unmanageable. Leaving the room in this way was likely to exacerbate Mr Chaudhry's sense of grievance.

79. For these reasons the conduct constituted a detriment for the victimisation claim and unwanted conduct for the purpose of the harassment claim.

80. The reason Mr Stott reacted in this way was because of Mr Chaudhry's inflexible insistence that the information presented on the computer screen was all incorrect. This bare rejection of the validity of the records was not credible. They did not accord with Mr Chaudhry's perception of how he had been treated and so he disbelieved them. This reflected a position adopted by Mr Chaudhry in this case. The contemporaneous records concerning Mr Stott's ill health and the cancellation records for sites supported the respondent. Mr Chaudhry's response to that difficulty was to say they were fabricated. There was an unattractive proposition on the evidence before us and we rejected it.

81. In the context of the grievance meeting, that stance left no room for any further constructive discussion. The detrimental treatment and unwanted conduct had nothing to do with the earlier proceedings Mr Chaudhry had brought nor relate to his race or religion. Mr Stott would have reacted in the same way regardless of the fact that Mr Chaudhry had brought earlier discrimination claims which had settled. There was no evidence the conduct was related to the claimant's ethnicity or faith, either by way of the nature of the conduct itself or by way of inference from our other findings of facts, the surrounding circumstances or how the managers of the respondent conducted themselves with others. The victimisation and harassment claim therefore fail.

82. Ms Train's intervention to suggest the computer records were factual and accurate was not a detriment or unwanted conduct. She was trying to assist. Furthermore, her intervention was nothing to do with the fact Mr Chaudhry had brought previous

proceedings and nor did they relate to his race or religion. Her intervention was solely to move matters forward, by drawing to Mr Chaudhry's attention the fact that the way in which the records were compiled meant it was very difficult to suggest, realistically, they were not correct.

Being told to go back to join another company

83. Mr Hardcastle joined the meeting after having spoken to Mr Stott. The note of the meeting of Ms Train provided the most reliable evidence of what had been said.

84. Mr Hardcastle firstly asked Mr Chaudhry why he was here again. He then said, probably rhetorically, if the company could not give him work and had proven it what did Mr Chaudhry want him to do.

85. We agree with Mr Chaudhry that in asking why they were here again, Mr Hardcastle had in mind the earlier litigation. That had included similar complaints.

86. Whilst we accept that the issue of working elsewhere was discussed and that Mr Hardcastle had said he had no work for the claimant, this was not expressed in the way alleged, "*Go back and join another company as [I have] no more work for [you]*". Mr Hardcastle disputed he had said this and we find the discussion was as set out in the note. The context in which these points arose are significant.

87. The note records that following reference to Mr Chaudhry's health and sickness absence there was some discussion about the refusal of Mr Chaudhry to accept that the company had no work. Mr Chaudhry said that he was struggling financially. Mr Hardcastle replied, "*the problem is we do not have any guarding work*". Mr Chaudhry again said that he was struggling financially and he needed hours. Mr Hardcastle said, "*if we do not have work, what else are you doing to find alternative work*?". Mr Chaudhry said that he was struggling and depressed. Mr Hardcastle talked about no work being available as demonstrated on the electronic systems.

88. We do not find this conversation constituted a detriment or unwanted conduct. The reference to attempts which might have been made by Mr Chaudhry to explore opportunities to work elsewhere were not made unhelpfully or disparagingly. Mr Chaudhry was not precluded from working elsewhere under the terms of his contract with Cerberus. Mr Hardcastle made this enquiry in response to the financial problems Mr Chaudhry had spoken of, in the absence of shifts of work from Cerberus. In fact, Mr Chaudhry had applied for other work as a security officer to other companies whilst he was off sick, on 21 May 2018 and 6 June 2018, albeit Mr Chaudhry did not tell Mr Hardcastle of that in response to the question.

89. Although Mr Hardcastle had obliquely referred to the earlier litigation, the protected acts, at the beginning of the discussion the reference to work for any other company was totally unconnected and unrelated to that.

90. There was no evidence the conduct related to the claimant's race or religion, either in the nature of what Mr Hardcastle had said, or by way of inference from our other findings of facts or how he had treated others who did not share the protected characteristics.

91. For these reasons the claims of victimisation and harassment are not established.

The delay of 5 days in sending out the grievance outcome

92. Under the written policy, the grievance outcome should have been sent by 19 July 2018, that is five working days after the hearing on 12 July 2018. That did not occur because of an unforeseen absence through sickness of Mr Stott.

93. We have rejected the allegation of Mr Chaudhry that this illness was fabricated, intentionally to avoid complying with the written grievance procedure, in paragraph 20 above.

94. The delay was wholly attributable to the illness of the grievance officer, Mr Stott. It had nothing to do with the fact that Mr Chaudhry had previously brought discrimination proceedings.

The outcome of the grievance

95. Mr Chaudhry's grievance was rejected because there was no substance to it. There was no work available for him and he was not being singled out or punished. The outcome was not influenced in any way, nor attributable to the fact he had brought earlier discrimination proceedings.

The second claim

Not been issued with the appropriate personal protection equipment

96. In his evidence Mr Earl stated that there was no requirement for safety boots on this site. In his evidence, Mr Chaudhry said that his main duties were to keep a record of the vehicles which entered and left the site and to patrol the area to ensure that no equipment was stolen. He worked night shifts. Because it was a construction site, he said that safety boots were required.

97. Mr Chaudhry also complained that he could not wear the high vis safety jacket over a winter coat.

98. Mr Earl said that Cerberus would provide personal protective equipment as required by the contractor and the only requirements were for nonslip shoes and a high vis vest.

99. No complaint was raised by Mr Chaudhry about the lack of proper personal protective equipment at the time. He had complained about the difficulty in entering and leaving the premises on the first day on site, but had made no complaint about the PPE provided. Nor did he refer to it in his email to Mr Earl of 27 November 2018. The first time this was raised was at the meeting on 5 December 2018, when Mr Chaudhry was informed that he was to be removed from that site.

100. We are satisfied Mr Chaudhry was provided with the appropriate PPE for the particular duty at this site. Even though a construction site, working at night did not bring him into contact with heavy plant or equipment and therefore the contractor had not specified additional PPE. Mr Chaudhry has not established that he was subjected to any detriment. The complaint of victimisation and direct discrimination are not made out.

101. Not issuing safety boots and a winter high visibility jacket was not unwanted conduct. If it had been a significant concern Mr Chaudhry would have raised the matter with Mr Earl when complaining about difficulties entering and leaving the premises. In addition there is no evidence at all that this related to race or religion. The harassment claim is not well founded.

Not taking action to sort out his means of access and departure from site premises because of a faulty remote control between 7 November 2018 and 3 December 2018

102. There is no evidence that the remote control was faulty. That was not a complaint Mr Chaudhry made in his email to Mr Earl of 27 November 2018. It was a problem which arose because the operators of the barrier who worked remotely from it did not respond in a timely fashion to the intercom requesting access or exit.

103. Mr Earl took steps to try to address Mr Chaudhry's complaint. His suggestion that Mr Chaudhry should speak to Mr Zaman, his predecessor at the site, was a sensible one. Similarly, his request for a fob to be issued to Mr Chaudhry was appropriate, see our findings at paragraphs 33 and 34. Mr Earl responded to the email of 27 November 2018, to explain that he had not been able to obtain a pass and that it was necessary to use the intercom. Mr Earl believed that the information that the site manager had refused to issue fobs had been conveyed to Mr Chaudhry by the control office with whom he had hourly contact during his shift or the site manager. That was not an unreasonable assumption. Mr Chaudhry's email of 27 November 2018 was the first indication to him that the message about the refusal to issue fobs had not been passed back to Mr Chaudhry. He replied to the email within the hour.

104. This allegations of victimisation and direct discrimination do not succeed because there was no failure to take the action complained of and so no detriment. The removal of Mr Chaudhry from site was a consequence of his reckless behaviour in reversing out of the entrance barrier. We reject his allegation at paragraph 10 of the claim form and paragraph 37 of his statement that Mr Earl had encouraged him carefully to enter or exit by the barrier which happened to be open at the time regardless of whether it was appropriate. The advice of Mr Earl was contained in his email, to await the response to the intercom.

105. There was no unwanted conduct for the purpose of the harassment complaint.

<u>Not offering Mr Chaudhry work, or sufficient work, from 3 December 2018</u>

106. As soon as the client had refused to have the claimant work at the Yorkshire Water site, Mr Stott found alternative work for Mr Chaudhry. The only work available at that time was for 24 hours. Mr Chaudhry could not identify any other work which was available in excess of that, other than by removing hours from other security officers who were already in post. That would not be expected in circumstances in which Mr Chaudhry's removal from site was brought about by his failure to adhere to safe practices. It would be unfair to the other security officers.

107. Mr Chaudhry was not detrimentally treated when offered 24 hours work from 3 December 2018. Mr Chaudhry's sense of grievance in respect of this complaint is partly based upon his misunderstanding about his contractual rights, see paragraph 54 above. Furthermore, and in any event, that decision was not attributable to his having brought previous proceedings or to his race or religion. It arose because he had been excluded from one site and there was no extra work available at that time. There is no comparator to whom he could point who had been treated more favourably in the same or similar circumstances.

108. This decision was unwanted conduct, in the sense that Mr Chaudhry wanted to work more than 48 hours, but there was no evidence it related to his race or religion either with regard to the nature of the conduct itself, the circumstances in which it arose or the way in which others who did not share the protected characteristics were treated.

<u>Attempting to trick Mr Chaudhry into signing a letter of resignation on 5 December 2018</u>

109. The account of Mr Choudhry that there was a resignation letter and attempt to make him sign it has not been accepted, see paragraphs 36 to 38 above. The letter he was asked to sign was the one explaining the reason for his removal from the previous site and offer of work at Rosehill Polymers.

110. No detriment or unwanted conduct has been established.

Time Limits

111. It is not necessary to address these issues as the claims have not succeeded.

Employment Judge D N Jones

Date: 17 October 2019