EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr E Constantinescu		Amazon (UK) Services Limited

Heard at: London Central **On**: 25, 26, 27 September 2019

Before: Employment Judge Stout
Mr I McLaughlin
Mr P Secher

Representations
For the Claimant: In person
For the Respondent: Ms Ahmad (Counsel)

By a judgment sent to the parties on 7 October 2019, the unanimous judgment of the Tribunal is that the Respondent did not:

(1) Directly discriminate against the Claimant contrary to ss 13 and 39(2)(c)/(d) of the Equality Act 2010; or

(2) Victimise the Claimant contrary to ss 27 and 39(2)(c)/(d) of the Equality Act 2010.

Those claims are accordingly dismissed.

The Respondent has failed to pay to the Claimant 8.195 hours holiday pay to which he was entitled under his contract of employment.

The holiday pay claim is accordingly allowed and the Respondent is to pay the Claimant the agreed sum of £103.67 by way of damages for breach of contract.

On 4 October 2019, the Respondent requested that written reasons of the decision be provided in accordance with Rule 62(3).

REASONS

1. This is a claim arising from the Claimant's employment with the Respondent, and its termination with immediate effect on 24 October 2018. The Claimant, who is of Romanian nationality and ethnic origin, brings claims of direct discrimination under ss 13 and 39 of the Equality Act 2010 ("EqA 2010"), of victimisation under ss 27 and 39 of that Act and for holiday pay. A claim of unfair dismissal originally included in his claim form was dismissed by judgment of 24 April 2019 because he did not have the requisite two years' service to bring such a claim.

The issues

2. The issues on liability to be determined were recorded at the preliminary hearing and are as follows:

Section 13: direct discrimination (race)

(1) The claimant says that he was accused of breach of health and safety which is potentially gross misconduct, while his line manager Mr Gorrian was accused by the claimant of bullying the claimant (calling him an idiot), such bullying also being potentially gross misconduct. The claimant says he was suspended and thereafter summarily dismissed. By contrast a grievance against Mr Gorrian was investigated and rejected because the respondent found that Mr Gorrian had been joking when he called claimant an idiot. No sanction was applied to Mr Gorrian.

(2) It is common ground that the respondent subjected the claimant to the following treatment, namely suspending and then dismissing him.

(3) As the respondent treat the claimant as alleged less favourably than it treated or would have treated the comparator Mr Gorrian and not materially different circumstances?

(4) If so, has the claimant proved primary facts in which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic of race (ethnicity)?

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

Section 27: victimisation

(6) Has the claimant carried out a protected act? The claimant relies upon telephone conversation with Global HR on 7 May 2018.

(7) If there was a protected act, has the respondent carried out any of the treatment identified below because the claimant had done a protected act:

a. One sending the claimant to clean up site LCY1 from 11 June to 2018 for three weeks;
b. Mr Gorrian and interfering in the claimant's Fastenal (asset management system) project;
c. Mr Gorrian shouting at the claimant in a chat room.

Unpaid annual leave – Working Time Regulations

(8) What was the claimant's leave year?
(9) How much of the leave year had elapsed at the effective date of termination?
(10) In consequence, how much leave had been agreed for the year under regulation 13 and 30?
(11) How much paid leave for the claimant taken in the year?
(12) How many days remain unpaid?
(13) What is the relevant net daily rate of pay?
(14) How much pay is outstanding to be paid to the claimant?

3. In addition, the Tribunal identified at the start of the hearing that the Claimant's claim form also included a claim that his suspension and subsequent dismissal from employment constituted unlawful victimisation and the Tribunal has accordingly considered that claim in addition to the issues that were identified at the preliminary hearing.

The Evidence and Hearing

4. The Tribunal heard evidence from the Claimant himself. For the Respondent, the Tribunal heard evidence from Mr Ken Gorrian (IT Manager, who was the Claimant's line manager), Mr Ukwu Ukwu (Operations Manager), Mr David Breen (Operations Manager) and Mr Kevin Davis (Senior Operations Manager). Mr Ukwu gave evidence by video link from the United States, his employment having transferred there recently. At the instigation of the Tribunal, in the light of paragraph 32.3.1 of the White Book and Paragraph 4 of Practice Direction 32 to the Civil Procedure Rules, the Respondent's solicitors had ascertained from the Foreign and Commonwealth Office that there was no legal restriction on a person giving voluntary video evidence to the Tribunal from the state of Arizona.

5. We explained to the parties at the outset that we would only read the pages in the bundle to which we were referred. We did so. We also admitted into evidence some additional documents from the Respondent, comprising a CCTV request form and HR services contact records with the Claimant, and some photographs of some of the equipment in the Respondent's

warehouse. We also watched a video of the CCTV evidence that was relied on by the Respondent in dismissing the Claimant.

6. We explained our reasons for various case management decisions carefully as we went along and also made clear our commitment to ensure that the Claimant was not legally disadvantaged because he was a litigant in person. We regularly visited the issues and explained the law when discussing the relevance of the evidence.

The facts relevant to the discrimination and victimisation claims

7. Having considered all the evidence, we find the following facts on a balance of probabilities. Not all the matters that we were told about are recorded in our findings of fact. That is because we have limited them to points that are relevant to the legal issues.

Background

8. The Respondent is a UK subsidiary of the global online commerce business known as Amazon, which sells a range of goods and services.

9. The Claimant commenced employment with the Respondent on 20 February 2017 as an IT Technician (Tier 3). His line manager at all times material to this claim was Mr Gorrian.

10. The Claimant alleged in his witness statement that in April 2017 Mr Gorrian told him that he could not stand him. This was denied by Mr Gorrian in his witness statement. However, we did not hear oral evidence on this point and as it was not one of the matters that was the subject of one of the Claimant's legal claims in these proceedings, we make no finding of fact on this point. In any event, even if this was said, the Tribunal finds that there is no evidence to suggest this was anything to do with the Claimant's nationality or ethnic origin. Mr Gorrian's evidence (not challenged by the Claimant) was that at the outset they had a good working relationship and that the Claimant's work was of a good standard and that he would go 'above and beyond' what was expected of him.

Chime chats

11. The events of direct relevance to these proceedings commence on 1 May 2018. On this date an exchange took place on Chime (the Respondent's electronic chatroom) between the Claimant and Mr Gorrian and various other employees, including Mr Adrian Haslett, regarding a 'trouble ticket' or 'tt' that had been raised concerning a broken screen. This 'tt' had been encrypted on the instructions of Mr Gorrian because he was concerned about identifying publicly the person who may have broken the screen. The

Claimant considered it to be funny that so many technicians or engineers were involved in dealing with this ticket, and that Mr Gorrian had thought it necessary to encrypt the ticket. He teased Mr Gorrian about this on Chime, using emoticons to indicate that he was joking. Mr Gorrian responded *"I told him to encrypt it" "end of"* and *"Just be tactful if you want to start calling people out"*. The Claimant then replied at some length saying that he was joking and apologising and again including emoticons to reinforce these points.

12. The Claimant contended that this exchange amounted to Mr Gorrian "shouting" at him on Chime. The Tribunal does not find that this exchange can properly be described as "shouting". We can see that there is a measure of irritation on the part of Mr Gorrian, but the Claimant himself acknowledged that he was 'calling him out', so this is understandable. The Tribunal notes that this exchange shows that the Claimant and his colleagues did engage in jokey conversations on Chime, and that the Claimant (like others) uses emoticons to indicate when something is not intended seriously.

13. The following day, 2 May 2018, in the course of another group chat on Chime, the Claimant told Mr Gorrian that he had given 10 radios to "OB" (Outbound), to which Mr Gorrian responded *"you're an idiot"*, followed immediately by a colon (which the Tribunal understands to have been an incomplete attempt to enter an emoticon) and then a smiley face emoticon. This is the comment about which the Claimant subsequently raised a grievance. The Tribunal finds that, as with the Claimant's comments the previous day, the emoticon used by Mr Gorrian was intended to indicate that the comment was not to be taken seriously. He also followed this up almost immediately with an apology, accepting that he probably did tell the Claimant to give the radios to OB [Outbound], i.e. that he was in the wrong. He did not on Chime directly apologise for using the word "idiot", but Mr Gorrian's evidence in his witness statement, and to Mr Ukwu in the grievance investigation meeting (on 5 June 2018), and to the Tribunal orally, was that he and the Claimant subsequently discussed it in the IT room and that he apologised to the Claimant in person then. The Claimant did not accept that Mr Gorrian had ever apologised and it is apparent from the documents that he has consistently maintained that Mr Gorrian did not apologise for this comment. The Tribunal does not need to resolve this dispute in order to determine the case, but even if Mr Gorrian did not apologise subsequently, there is no doubt that Mr Gorrian gave the Claimant an immediate, and public, apology on Chime, accepting he was probably in the wrong.

<u>The Claimant's grievance</u>

14. The Tribunal finds that the Claimant at the time and to this day took genuine offence at Mr Gorrian's use of the word idiot because he considered it to be a slur on his mental capacity. However, the Tribunal finds that this is not

what was intended by Mr Gorrian and is not how such a comment, especially with an emoticon attached, would generally be understood.

15. On 7 May 2018 the Claimant raised a grievance against Mr Gorrian by calling the Respondent's HR Services line. The Claimant originally alleged that it was in this telephone call that he did his 'protected act' that he relies on for his victimisation claim, i.e. that he made an allegation or complaint that Mr Gorrian was discriminating against him on grounds of national origin/ethnicity in this call. We have the transcript of this call, which the Claimant accepts to be accurate. It does not contain any allegation of discrimination. It is a complaint about the use of the word "idiot", but it does not even describe it as bullying and does not suggest (in any terms at all) that Mr Gorrian made the comment because the Claimant is Romanian.

16. In evidence to the Tribunal, the Claimant in the alternative suggested that he did his 'protected act' in a phonecall to HR on 28 May 2018, but the Respondent has in the course of the hearing now produced records of all the Claimant's contacts with HR from April 2018 to the end of his employment and there is no written record of a complaint of discrimination (in any terms) having been made. In the face of that documentary evidence, the Claimant accepted at the hearing that he could not prove that he had made any such complaint and the Tribunal finds that he did not make any such complaint or allegation in any phonecall to HR.

17. The Claimant's grievance was then progressed through the Respondent's usual processes. Mr Ukwu Ukwu (referred to generally as "Jonah") was appointed to hear the grievance. The Claimant met with Mr Ukwu on 29 May 2018. We have notes of that meeting, which the Claimant indicated he agreed to be broadly accurate. Again, they contain no record of the Claimant having complained that Mr Gorrian had in making the *"idiot"* comment been treating him less favourably because of his national/ethnic origin. Indeed, the Claimant in that meeting suggested that part of his aim in bringing the grievance was to improve Mr Gorrian's working relationship with other members of the team, not just him. Mr Ukwu confirmed in evidence to the Tribunal that he had not understood the Claimant to be complaining of discrimination.

18. Mr Ukwu subsequently interviewed Mr Gorrian over the phone and then produced an investigation report. His conclusion was that there was no case to answer as there did not appear to be a pattern of instances that Mr Gorrian worked unprofessionally with the Claimant and the IT team. He found there were reasonable explanations as to what occurred with each incident brought up by the Claimant, except for the occasion when Mr Gorrian referred to him as an idiot. Mr Ukwu considered that that was an inappropriate term to use and that it was a poor decision by Mr Gorrian for which he had shown contrition and a willingness to take feedback and adjust his communication style with his direct reports. He therefore considered it appropriate to conclude the investigation and take no further disciplinary action. He did however recommend some development training regarding people management/soft skills with Mr Gorrian.

19. Mr Ukwu was then away for a period, so the grievance outcome was delivered to the Claimant on 4 July 2018 by Mr Breen. Mr Breen explained that he had reviewed Mr Ukwu's notes and conclusions and agreed with them. He said that he would not have delivered the outcome in those terms had he not agreed with Mr Ukwu.

20. The Claimant appealed the outcome of the grievance on 17 July 2018, contending that Mr Gorrian should face disciplinary consequences for the comment. That appeal was not progressed as it appears to have been overtaken by the events that led to the Claimant's dismissal, to which we will return.

LCY1 and the Fastenal project

21. While the grievance was still under investigation, the Claimant contends that Mr Gorrian began to treat him differently because he had brought that grievance. He complained about two particular matters, about which the Tribunal finds as follows.

22. First, he complained that he was sent for three weeks beginning on 11 June 2018 to clean another IT office (Amazon LCY1). The Claimant considered this work to be demeaning. However, the Tribunal finds that it was not intended as such by Mr Gorrian, and was not a task assigned to the Claimant because he had raised a grievance. An email from Mr Gorrian to Stuart Evans of 3 June 2018 about designating the Claimant to this task states that it was *"to give him 'a chance to shine as well as a way to improve the whole site, with him being responsible for creating a handover document with Karl to share with the team"*. Mr Gorrian's evidence to the Tribunal was that he was aware the Claimant had been disappointed at not getting a promotion he had applied for earlier in the year and he had been looking for ways to compensate him for that. The Tribunal accepts that this email should be taken at face value and that this was the reason for the Claimant being assigned this work. The Claimant found that he did not like the work in the end, but there is nothing obviously demeaning about what he was asked to do. The list of tasks that he was to carry out (p 98) appears on its face to be reasonable tasks to ask him to perform.

23. Secondly, the Claimant complained that Mr Gorrian interfered with a project he was working on, the Fastenal project which was about storage of radios in cabinets which would be issued and retrieved from technicians. Mr Gorrian explained in his witness statement that he brought that project to an end as he did not consider it was working. The cabinets were not reliable and kit was being lost. Again, the Tribunal finds that Mr Gorrian's reasons here were the reason for stopping the project, and that it had nothing to do with the Claimant having raised a grievance.

Suspension and dismissal

24. On 31 July 2018 it was reported to Mr Gorrian by another manager that Mr Adrian Haslett (who is a white British employee also Tier 3 like the Claimant) was in the fulfilment centre not wearing appropriate personal protective equipment (PPE) and with a contractor standing on pallets. The manager showed Mr Gorrian pictures on her phone of what was happening and Mr Gorrian went to investigate immediately and spoke to Mr Haslett that day. He initiated a GenSuite in respect of that incident, which is the Respondent's standard procedure where there is a health and safety breach. He subsequently investigated further by requesting the next day (1 August 2018) to view CCTV footage. He viewed it on 3 August 2018 in the office with the loss prevention specialist Mr Singh. On viewing the footage (which the Tribunal has also seen), Mr Gorrian saw that in fact the Claimant was the first of the group to stand on the stack of 10 pallets. He stood on there briefly, before getting down and then standing by (with Mr Haslett) while a contractor stood on the pallets for some considerable time.

25. Mr Gorrian then commenced disciplinary investigations in respect of both Mr Haslett and the Claimant, and on 3 August 2018 telephoned the Claimant at home to notify him that he was being suspended. On the same day, the Claimant was sent a letter notifying him of his suspension for *"a serious breach of health and safety rules, working unsafely or behaving in a way that puts your own or another person's health and safety at serious risk"*.

26. The Claimant suggested that Mr Gorrian should not have commenced a disciplinary investigation, but should have turned a blind eye to him standing on the pallets. He argued that Mr Gorrian would not have done this if he had not raised the prior grievance against him and/or if he were not Romanian. However, the Respondents' witnesses (Mr Gorrian, Mr Breen and Mr Davis) all gave evidence to the effect that Mr Gorrian really had no alternative but to refer the Claimant to a disciplinary process because if he had not done so, he could himself have been subject to disciplinary proceedings for ignoring a serious health and safety breach. The Tribunal finds as a fact that Mr Gorrian referred the Claimant to disciplinary proceedings because he had apparently committed a serious health and safety breach. The Tribunal further finds that he could not fairly have done otherwise given that he had decided to refer Mr Haslett to disciplinary proceedings.

27. Mr Gorrian conducted a disciplinary investigation meeting with the Claimant on 6 August 2018, the outcome of which was that the Claimant's case was referred for disciplinary proceedings. Mr Gorrian reached the same decision in relation to Mr Haslett. On 26 September 2019 the Claimant was invited to a disciplinary hearing on 2 October 2018, but this was postponed at the Claimant's request, ultimately taking place on 8 October 2018. That hearing was chaired by Mr Breen. Both at the investigation meeting and at the disciplinary hearing (and again in his evidence to the Tribunal) the Claimant accepted that he was (as he put to the Tribunal) 'guilty'. The Claimant has

at times and again in the Tribunal sought to point out that there is no specific policy (or none that he was aware of) dealing with standing on multiple pallets. However, the Tribunal finds that he was aware of the risks, that he had had training in working at height and, whatever the terms of the specific policies, he understood that standing on 10 pallets was against company policy and not safe. There was also no dispute that suitable equipment such as a ladder or MEWP was available to the Claimant. The second aspect of the incident of concern to the Respondent was that the Claimant (and Mr Haslett) had not taken appropriate care for the safety of the contractors in permitting the contractor to stand on the 10 pallets for some time. The Claimant disputes that he was responsible for the safety of contractors that he was escorting in the building, but the Respondent's witnesses all maintain that it is part of the responsibility of any Amazon employee escorting third parties around the building.

28. On 24 October 2018 the Claimant was informed at a disciplinary outcome meeting chaired by Mr Breen that the decision had been taken to terminate his employment for a serious breach of health and safety rules, which is 'gross misconduct' under the Respondent's disciplinary policy. This was confirmed in a letter (mis-dated 20 October 2018).

29. Mr Haslett was also dismissed for the same reasons on 22 October 2018. The decision to dismiss Mr Haslett was taken by Mr Ukwu. Mr Breen told the Tribunal that he did not discuss the Claimant's case with Mr Ukwu. Accordingly the Tribunal understands that the decisions to dismiss both employees were taken independently.

30. The Claimant subsequently appealed against his dismissal on 26 October 2018 and his appeal was heard by Mr Davis on 2 November 2018. Mr Davis also heard Mr Haslett's appeal (although Mr Haslett did not attend his appeal hearing). Mr Davis dismissed both appeals.

31. The Claimant contended that in relation to his dismissal he was treated less favourably than Mr Gorrian, in that Mr Gorrian called him an *"idiot"* but was not subject to disciplinary proceedings, whereas he was dismissed. Mr Breen and Mr Davis both gave evidence to the Tribunal that they considered Mr Gorrian's circumstances to be completely different to those of the Claimant, in that the Claimant had committed a serious health and safety breach, which is gross misconduct under the Respondent's disciplinary policy, whereas Mr Gorrian had merely used inappropriate language (which he accepted and for which he was contrite) which did not amount to bullying or harassment or otherwise constitute gross misconduct under the Respondent's disciplinary policy. The Tribunal agrees with the Respondent's witnesses that these are material differences between the Claimant's case and that of Mr Gorrian.

Conclusions on the discrimination and victimisation claims

Direct discrimination

The law

32. Under ss 13(1) and 39(2)(c)/(d) EqA 2010, we must determine whether the Respondent discriminated against the Claimant by treating him less favourably than it treats or would treat others because of a protected characteristic. The protected characteristic relied on by the Claimant is his nationality or ethnic origin, which is Romanian. The Claimant also relies on an actual comparator (Mr Gorrian) who he says would have been treated more favourably in materially the same circumstances (s 23(1) EqA 2010), but if we consider that Mr Gorrian's circumstances are not materially the same, we must (given that the Claimant is unrepresented) also consider how a hypothetical comparator would have been treated (*Balamoody v UK Central Council for Nursing, Midwifery and Health Visiting* [2001] EWCA Civ 2097, [2002] IRLR 288).

33. The fact that someone is treated unreasonably does not mean that they have been discriminated against, they must have been treated less favourably (Glasgow City Council v Zafar [1998] ICR 120).

34. The Tribunal must determine "what, consciously or unconsciously, was the reason" for the treatment (*Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] ICR 1065). Discrimination must be a significant factor in the reason for the treatment, although not necessarily the sole, or intended reason (*Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437, [2007] ICR 459). If a decision-maker's reason for treating an employee is not influenced by a protected characteristic, but the decision-maker relies on the views or actions of an employee which are tainted by discrimination, it does not follow (without more) that the decision-maker discriminated against the Claimant: *CLFIS (UK) Ltd v Reynolds* [2015] EWCA Civ 439, [2015] ICR 1010 and *Gallop v Newport City Council* (No. 2) [2016] IRLR 395). What matters is what was in the mind of the individual taking the decision.

35. In relation to all these matters, the burden of proof is on the Claimant initially under s 136(1) EqA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. This requires more than that there is a difference in treatment and a difference in protected characteristic (*Madarassy v Nomura International plc* [2007] EWCA Civ 33, [2007] ICR 867). The burden then passes to the Respondent under s 136(3) to show that the treatment was not discriminatory: *Wong v Igen Ltd* [2005] EWCA Civ 142, [2005] ICR 931.

Our conclusions

36. In this case, the Claimant contends that his suspension and/or dismissal constituted direct discrimination. We find that the Claimant has not discharged the initial burden of proof on him. There is no evidence before the Tribunal from which we could conclude that the fact the Claimant is

Romanian played any part either in Mr Gorrian's reasons for suspending the Claimant or in Mr Breen's reasons for dismissing the Claimant or in Mr Davis's reasons for not upholding his appeal against dismissal. At all stages the Respondent's witnesses acted because the Claimant had been recorded on CCTV committing what the Respondent regarded as a serious health and safety breach in standing on a stack of 10 pallets and then standing by while a contractor did the same. That the treatment of the Claimant had nothing whatsoever to do with him being Romanian is demonstrated by the fact that Mr Haslett (who is not Romanian) was treated in exactly the same way for much the same offence (albeit, arguably, Mr Haslett's was less serious as he did not himself stand on the pallets). For the reasons we have already given, we find that the Claimant's chosen comparator, Mr Gorrian, is not a proper comparator for the Claimant because his circumstances were materially different.

Victimisation

The law

37. Under ss 27(1) and s 39(2)(c)/(d) EqA 2010 and s 39(2)(c)/(d), the Tribunal must determine whether the Respondent has treated the Claimant unfavourably because he did, or the Respondent believed he had done, or may do, a protected act. A protected act includes (so far as relevant in this case) making an allegation (whether or not express) that the Respondent or another person has contravened the EqA 2010 (s 27(2)). In deciding whether the reason for the treatment was the protected act, we apply the same approach as for the claim of direct discrimination.

Our conclusions

38. In this case, on the facts as we have found them to be, the Claimant did not prior to bringing his claim to this Tribunal make an allegation to the Respondent (in any terms whatsoever) that the Respondent had done anything that might amount to a breach of the EqA 2010. As such, his victimisation claim must fail in all respects.

39. In any event, so far as concerns the reasons for the Claimant's suspension and dismissal, the Tribunal finds that the reason for this was because the Claimant had committed a serious health and safety breach and had nothing whatsoever to do with him having brought a grievance against Mr Gorrian.

40. Further, the Tribunal finds in relation to the three other detriments that the Claimant alleged he suffered as a result of bringing his grievance:

    a. The 'shouting' in the Chime chat room occurred on 1 May 2018, before he made his grievance and so could not have been because of it;

b. The reason he was allocated to deal with LCY1 was because Mr Gorrian considered it would be responsible work for him which would give him a chance to shine, not because of his grievance; and,
c. The interference with the Fastenal project was because Mr Gorrian, for sound management reasons, considered the project was not working, not because the Claimant had brought a grievance.

Holiday pay

41. The Claimant had from the outset complained that he had not been paid his full holiday entitlement on termination of employment. In his Schedule of Loss (served late on 2 September 2019) he had put his loss at 91.22 hours. The Tribunal directed the Respondent at the start of the hearing to prepare a Counter-Schedule of Loss setting out its case on loss, including as to holiday pay. The Respondent produced this Counter-Schedule at Closing Submissions and it was accordingly only at this point that it was possible for the Claimant and the Tribunal to understand precisely how the Respondent had calculated the 35.78 hours holiday pay that it had paid the Claimant upon termination of employment. The Tribunal gave both parties an opportunity at that point to say what they wanted about holiday pay and, in particular, to address the Tribunal as to whether the Claimant's holiday taken had been correctly recorded and as to whether he had had an opportunity to take his holiday entitlement for the holiday year ending on 30 September 2018 given that he had been suspended since 3 August 2018. The Tribunal's findings of fact in relation to the holiday pay issue are as follows.

42. The Claimant was entitled under clause 7 of his contract to 176 hours (22 days based on an 8-hour day) of holiday per year. The holiday year ran from 1 October to 30 September. In addition he was entitled to Christmas Day, New Year's Day and a further 48 hours (6 days) each year in lieu of the remaining public holidays. In total, therefore, the Claimant was entitled to 30 days or 240 hours holiday per year.

43. The Claimant's contract provided that unused holiday cannot be carried forward into the next holiday year save in exceptional circumstances and only with prior written authorisation and in any event a maximum of 40 hours can be carried over, which must be used by 31 December in that year or forfeited (with no compensation). The contract provides that accrued but untaken holiday will be compensated for on termination of employment.

44. An email from Mr Gorrian to the Claimant of 24 September 2018 indicates that at that point the Claimant had a total of 57 hours leave remaining, plus carry over of 35 hours and emergency leave of 35 hours. The email informs the Claimant that as of 1 October 2018 the balances will reset, but that the Claimant can carry over 40 hours to the following year.

45. The Claimant was dismissed on 24 October 2018. It is not in dispute that he would have worked for 130 hours between 1 and 24 October 2018 had he not been suspended and accordingly (as holiday accrues at a rate of 4.3 hours for every 40 hours worked), he would have accrued 13.975 hours holiday during that period. In addition, he had 40 hours carry-over, bringing his total accrued but untaken holiday as at 24 October 2018 to 53.975 hours.

46. However, the Claimant was asked to attend a disciplinary meeting on 2 October 2018, which he could not attend and it appears that this was therefore deducted from his annual leave allowance (as being 10 hours, the Claimant's normal working day). The Claimant does not dispute that this is correct and permissible. This would have reduced his accrued but untaken holiday as at 24 October 2018 to 43.975 hours. In addition, the Claimant is also recorded on the Respondent's system as having taken "UK Emergency Holiday" on 3 October 2018. However, there is no evidence before the Tribunal to support this record or deduction. The Claimant was suspended at that point and not required to attend work. The Claimant denies having requested any Emergency Holiday. The Tribunal therefore finds that the Claimant did not in fact take any holiday on 3 October 2018 and that, under his contract, there was therefore an accrued outstanding holiday entitlement of 43.975 hours as at 24 October 2018. The Claimant was only paid in lieu of 35.78 hours and is accordingly entitled to an additional 8.195 hours pay as a matter of contract and/or as part of his ordinary wages (from which the Respondent is prohibited by s 13 ERA 1996 to make unlawful deductions).

47. It was, as the Tribunal understood it, also part of the Claimant's case (at least as set out in his Schedule of Loss) that he should have been permitted to carry forward at the end of the leave year on 30 September 2018 more of his accrued but untaken holiday. It is not entirely clear to the Tribunal precisely what this amount was, but according to the figures in Mr Gorrian's email of 24 September 2018 it was a total of 127 hours (including carry over and emergency leave). Of those hours, the Claimant was in fact only permitted to carry forward 40 hours. The Claimant complains that he had had to cancel holiday he had previously booked from 2 to 19 September 2018 because of the suspension, and that he could not take his remaining leave in the period between 24 and 30 September (as Mr Gorrian had suggested in his email to him of 24 September) because he was suspended. The Respondent in its letter to the Claimant of 3 August 2018 informing him that he was suspended had, however, made clear that if he wished to take annual leave during suspension he should have requested it in the ordinary way. The Claimant in evidence to the Tribunal accepted that he could have done this, but said that he did not wish to as it would have delayed the disciplinary process still further. The Claimant also accepted that there had been no impediment to him taking holiday prior to his suspension, but that he had not taken all his holiday as he was busy at work.

48. The Tribunal finds that the Claimant had no contractual right to carry forward any more entitlement than the 40 hours that he was permitted to

carry over. However, the Tribunal has also considered whether any additional carry-over was required by the *Working Time Regulations 1998* (WTR 1998) or the *Working Time Directive 2003/88/EC* (WTD), with which the WTR 1998 must be compatibly interpreted (insofar at least as concerns the mandatory annual leave entitlement under art 7 of the WTD, which is 20 days). On the face of both the WTD (art 7(2)) and the WTR 1998 (art 13(9)(b)) there is no entitlement to carry over annual leave from one year to the next, or to receive a payment in lieu save where the employment is terminated. However, in some cases where an employee is unable to take their leave in the leave year in question, the CJEU has held that they must be permitted to carry this forward. This includes where the employee is sick (eg *HMRC v Stringer and Schultz-Hoff v Deutsche Rentenversicherung Bund:* C-502/06 [2009] IRC 932) and where the employee is absent on parental or maternity leave (*Zentralbetriebsrat der Landeskrankenhauser Tirols v Land Tirol:* C-486/08 [2010] IRLR 631 and *Gomez (Merino) v Continental Industrias del Caucho SA:* C-324/01 [2004] ECR I-2605, [2005] ICR 1040). It is also the case where the employer (wrongly considering the individual not to be a 'worker' and therefore to have no entitlement to holiday) does not permit the individual to take paid holiday at all. In the latter case, the CJEU has held in *King v Sash Window Workshop Ltd* C-214/16 [2018] IRLR 142 that on termination of employment the individual is entitled to compensation for all the leave accrued but untaken for all years of employment. In *Kreuziger v Land Berlin* C-691/16 [2019] CMLR 34 the CJEU held that the key question in considering whether there is a right to carry over unused holiday entitlement under the WTD is whether *"the worker who has lost the right to paid annual leave has actually had the opportunity to exercise the right conferred on him by the directive"* (para 42).

49. None of these authorities deal with the situation where an employee is suspended from work, but the Tribunal recognises that a suspension from work may in practice mean that an individual does not have an opportunity to take holiday, just as is the case with employees who are sick or on maternity or parental leave. The Tribunal has therefore considered whether in the circumstances of this case the Claimant had an opportunity to take his holiday entitlement in the 2017-18 leave year. The Tribunal finds as a fact that he did. This is both because he could have taken holiday prior to being suspended, and because even when suspended the Respondent specifically informed him that he could still request holiday in the normal way. The Tribunal finds that was a genuine opportunity offered by the Respondent, albeit one that the Claimant did not wish to take up because he did not wish to prolong the disciplinary process.

Overall conclusion

50. The unanimous judgment of the Tribunal is that the Respondent did not:

a. Directly discriminate against the Claimant contrary to ss 13 and 39(2)(c)/(d) of the Equality Act 2010; or
b. Victimise the Claimant contrary to ss 27 and 39(2)(c)/(d) of the Equality Act 2010.

51. Those claims are accordingly dismissed.

52. The Respondent has failed to pay to the Claimant 8.195 hours holiday pay to which he was entitled under his contract of employment.

53. The holiday pay claim is accordingly allowed. The parties were able to agree at the hearing that the amount to be paid to the Claimant as damages is £103.67 and accordingly that order is made by consent.

Application for reconsideration

54. Immediately following our giving judgment in this matter, Counsel for the Respondent made an application under Rule 70 for the Tribunal to reconsider its decision that the Claimant is entitled to 8.195 hours holiday pay. This was made on the basis of new evidence in the form of an email dated 26 September 2018 from Gintare Mikeliuniene to Mr Gorrian. Ms Ahmad relies on this to show that the Claimant had booked holiday on both 2 and 3 October 2018 and that accordingly the Respondent was right to deduct 20 hours from his holiday pay for those two days.

55. On such an application, Rule 70(1) requires first that an Employment Judge consider whether there is a reasonable prospect of the original decision being varied or revoked and an application is only to be reconsidered at a hearing (with members: see Rule 70(3)) under Rule 70(2) if the Employment Judge does not refuse it under Rule 70(1) and considers a hearing is necessary in the interests of justice. In this case, since the application was made at the hearing, we simply proceeded to consider the application as a full panel.

56. On such an application, we must consider whether it is in the interests of justice for us to reconsider our decision. As the application is made on the basis of new evidence, we must also first consider whether the *Ladd v Marshall* criteria are satisfied, namely whether the evidence could have been obtained with reasonable diligence for use at the hearing; whether it is relevant and would probably have had an important influence on the hearing; and whether it is apparently credible.

57. We find that the *Ladd v Marshall* criteria are not satisfied and that it is not in any event in the interests of justice for us to reconsider our decision.

58. As to the first limb of the *Ladd v Marshall* test, while we can understand why this particular email was not produced for use at the hearing (and thus it could be said that the first limb of the *Ladd v Marshall* test is satisfied), that is only because the Respondent failed to engage with the Claimant's

Schedule of Loss (served on 2 September 2019, over three weeks before this hearing commenced) at any point before the start of the hearing, and only then did so at the direction of the Tribunal. As a result, it was not until closing submissions that it was apparent that the Respondent disputed all elements of the Claimant's calculation of holiday pay, including not only the amount of holiday paid, but also the amount accrued and the amount taken. It is thus the Respondent's conduct which has led to this situation arising and we take this into account when considering the interests of justice.

59. As to the second and third limbs of the *Ladd v Marshall* test, while the email is on its face 'credible', it does not actually change the Tribunal's view that the Respondent should not have deducted 10 hours holiday pay from the Claimant for 3 October. The Claimant was at that point suspended. He was not required to come into work. Although the email from HR suggests that he agreed to taking 3 October as holiday, that is disputed by the Claimant and the Respondent has not produced Ms Mikeliuniene as a witness. It appears to the Tribunal that the decision to list 3 October as holiday was at Ms Mikeliuniene's instigation, rather than something the Claimant agreed to. In any event, while an employee is suspended they are not required to come into work. Although the Respondent here did stipulate that if an employee wishes to take holiday while suspended they must book it in the usual way, the reality is that in the absence of a requirement to come into work the Claimant neither needed to attend work nor to book holiday. The Tribunal considers that it is only if an employee is required to come into work and is not available that it is permissible for that to be interpreted as a request for holiday. There is no evidence to suggest that the Respondent was in any position to re-arrange the meeting to 3 October. It in fact rearranged the meeting to 8 October and sent the Claimant a letter on 3 October setting that new date.

60. In those circumstances, we find that the new evidence on which the Respondent relies would not have made any difference to the Tribunal's decision. In any event, we do not consider that it is in the interests of justice to permit this reconsideration when the reason that the nature of the dispute on holiday pay was not clarified until closing submissions was because of the Respondent's failure to engage with the Claimant's schedule of loss at any point between 2 September and the start of the hearing on 25 September 2019.

61. The application is refused.

Employment Judge Stout

Date: 17/10/2019

REASONS SENT TO THE PARTIES ON

22/10/2019

FOR THE TRIBUNAL OFFICE