EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Okoro	**v**	Action for Children

Heard at: Bury St Edmunds **On:** 2, 3, 4 and 5 September 2019

Before: Employment Judge Tynan

Members: Mrs C A Smith and Ms L Daniels

Appearances
For the Claimant: In person
For the Respondent: Mr Mellis, Counsel

RESERVED JUDGMENT

1. The Claimant's complaints that he was directly discriminated against and victimised by the Respondent contrary to sections 13 and 27 of the Equality Act 2010 are not well founded and are dismissed.

2. The Claimant's complaint under section 23 of the Employment Rights Act 1996 is well-founded and the Tribunal orders the Respondent to pay to the Claimant the sum of £1,002.23 in respect of the unlawful deductions made from his pay in contravention of section 13 of the Employment Rights Act 1996.

3. The Tribunal has no jurisdiction to make an award to the Claimant pursuant to section 38 of the Employment Act 2002.

RESERVED REASONS

1. The Claimant is from Nigeria and describes himself as black African. Having gone through Acas Early Conciliation between 27 February 2018 and 9

March 2018, he presented a complaint of race discrimination to the Employment Tribunals against the Respondent on 13 March 2018.

2. There was a Preliminary Hearing before Employment Judge Foxwell on 22 February 2019 to identify the claims and issues, when it was identified that the Claimant's complaints were of direct race discrimination and victimisation, together with claims for unpaid wages and in respect of the Respondent's alleged failure to provide the Claimant with written particulars of employment. The latter complaint can only be pursued if the Claimant was an employee, as opposed to a worker, as the obligation in section 1 of the Employment Rights Act 1996 to provide a written statement of employment particulars applies to 'employees', as defined in the 1996 Act.

3. The agreed claims and issues were recorded at paragraphs 10 and 11 of the Case Management Summary following the hearing. In accordance with and pursuant to Employment Judge Foxwell's Order, the Claimant wrote to the Tribunal on 9 March 2019 stating that the issues had been incorrectly recorded in one respect, namely at paragraph 10(i) of the Case Management Summary. He did not express any other concerns as to the accuracy of the Case Management Summary. That is significant because in both his witness statement and evidence to the Tribunal the Claimant broadened the scope of his complaints against the Respondent, notwithstanding there was no application by him to amend his Claim. Whilst the Tribunal was content to consider the entirety of his evidence, the hearing proceeded, and we have approached our discussions and Judgment, on the basis that the complaints and issues remain as identified by Employment Judge Foxwell at the Preliminary Hearing on 22 February 2019, subject to the correction notified by the Claimant to the Tribunal on 9 March 2019.

4. The Claimant gave evidence in support of his claim. He submitted a 15-page witness statement and additionally submitted witness statements by two former colleagues, Chima Madu and Bukola Obameso on his behalf. Mr Madu attended Tribunal and gave evidence on the second day of the hearing. The Claimant informed the Tribunal that Ms Obameso was unable to attend Tribunal as a result of her childcare commitments. We have read Ms Obameso's statement but ultimately have attached limited weight to it. Ms Obameso alleges in her statement that the working environment at the Respondent was unfair to ethnic minority workers. However, her statement does not provide any further specific details in that regard. Her statement largely concerns the Claimant's plans to travel to Nigeria in 2017, a matter which we have been able to determine on the Claimant's evidence and with reference to the documents contained in the two hearing bundles.

5. For the Respondent we heard evidence from the following individuals:

    5.1 Robert Wyatt, Operational Director of Children Services at the Respondent. As a result of staff shortages and following an unfavourable Ofsted inspection in 2017, Mr Wyatt was brought in to manage the Haviland Way service at which the Claimant was employed. Subsequently, in February and March 2018, Mr Wyatt

was in contact with the Claimant regarding his grievance, albeit, as we set out below, the grievance did not proceed.

5.2 Penny Olivo a Children's Service Manager at the Respondent. Mrs Olivo's involvement was limited to February and March 2018 when she was appointed as the designated investigating manager following certain complaints made against the Claimant.

5.3 Francis Laffen, a People Partner at the Respondent. Her witness statement, which is dated 28 August 2019, was submitted just a few days before the Final Hearing. Mrs Laffen undertook an analysis of data from the Respondent's internal HR database and personnel records and from this she prepared a spreadsheet detailing the grade, pay and racial/ethnic origin of those individuals who worked in the service.

6. Certain individuals referred to in the course of this Judgment have left the Respondent's employment and accordingly did not give evidence. The Respondent has had to rely upon contemporary evidence to defend various of the complaints.

7. The Case Management Order made at the Preliminary Hearing on 22 February 2019 provided that the parties' written statements must be served on or before 7 June 2019. The Order was in a standard form that no additional witness evidence would be allowed at the Final Hearing without the Tribunal's permission. There was no prior notice to the Tribunal that the Respondent would be seeking to adduce additional witness evidence and the Tribunal is critical of the Respondent for springing this evidence upon the Claimant at the very last moment. We were minded not to admit it. However, the Claimant informed the Tribunal that he would not in fact object to Mrs Laffen's statement and evidence being adduced. He is to be commended for his magnanimity, since Mrs Laffen's oral testimony in particular, of which he had no prior notice, has assisted the Respondent in these proceedings.

8. Regrettably, there were two bundles of documents rather than a single agreed bundle. We do not propose to go into detail as to why this was, except that aspects of the conduct of the proceedings seem to have reinforced the Claimant's mistrust of the Respondent, with the result that he insisted upon bringing his own bundle of documents to the hearing. In the event we were largely able to work by reference to the Respondent's bundle. Save where indicated, the page references in this Judgment are to the numbered documents in the Respondent's bundle of documents (which for convenience we shall refer to as the hearing bundle).

Findings of Fact

9. The Respondent is a National Children's Charity.

10. The Claimant began working for the Respondent as an agency worker on 13 January 2016. He worked as a Support Worker working nights. From July 2017, he was engaged directly by the Respondent (we refer to this as 'direct engagement'). He last worked for the Respondent on 26 January 2018.

11. The Claimant worked at Haviland Way in Cambridge, a residential and respite home for children and young people.

12. The Claimant holds a BTEC Level 3 Extended Diploma in Health and Social Care (Health Sciences). We note from page 33 of the hearing bundle that the Claimant was awarded his Diploma in July 2013 with Triple Grade Distinction.

13. The Claimant was initially supplied to the Respondent by CBSbutler Limited. An email from a recruitment consultant at that company at page 36 of the hearing bundle confirms that the Claimant was engaged on a 12-week contract *"with the view to go on to a Permanent Contract after that time"*. The Tribunal was given to understand that the Respondent recruits many of its workers in this way. However, for reasons which remain unclear, the Claimant was not directly engaged by the Respondent until 3 July 2017, namely some 18 months later. Whilst the Claimant complains about this delay in his witness statement and draws some comparison with other workers who he says transitioned to direct engagement within the standard 12-week period, he has not raised the matter as a formal complaint that he was directly discriminated against. In any event, there is insufficient information and evidence available to the Tribunal to reach an informed view as to how the Claimant was treated relative to others, or what their circumstances and protected characteristics were. The numerous documented extensions to the Claimant's placement are however consistent with the evidence we saw and heard regarding organisational 'challenges' at the Respondent.

14. The email at page 36 of the hearing bundle confirms that the Claimant's appointment was as a Support Worker Level 2, notwithstanding he was personally qualified at Level 3. In other words, the Claimant decided to take a job for which he was over-qualified. The Claimant is evidently industrious and hard-working, and no doubt he hoped (and indeed expected) to progress. When he was placed at the Respondent, he was paid at the rate of £9 per hour. The terms of his assignment are confirmed at page 39 of the hearing bundle in a 'Draft form of Proposal for an Assignment'. This identifies the role as 'Support Worker 2'. The assignment proposal was signed and dated by the Claimant on 19 January 2016 as confirmation of his acceptance of it.

15. On 7 March 2016, CBSbutler Limited emailed the Claimant an application form to complete with a view to transitioning him to a direct engagement with the Respondent. The completed application form is at pages 44 – 51 of the hearing bundle. The documented post title was Support Worker,

albeit without identifying the level or grade. The form was completed to include details of the Claimant's Diploma.

16. Whilst the completed March 2016 application form did not state the level or grade of Support Worker, we agree with the Respondent that the Claimant's role was to be unchanged and that he would simply transition from being an agency worker to being directly engaged by the Respondent. We consider it unlikely that the Claimant would have been promoted to a Support Worker Level 3 after just 12 weeks with the Respondent, certainly at least without this being documented in some way. The completed application form does not identify that the transition to direct engagement would be at a higher level/grade with increased pay. Nor does it identify that the Claimant's work arrangements would change. For the reasons we set out below, we find that the intention was that he would continue to be a casual worker as opposed to a permanent member of the Respondent's employed staff.

17. As regards the Support Worker Level 3 role, we accept Mrs Laffen's evidence that the job title of 'Support Practitioner' at the Respondent is used interchangeably with Support Worker Level 3.

18. As noted already, there were various extensions to the Claimant's assignment and these extensions are evidenced at pages 52, 56, 57, 58, 59, 91 of the hearing bundle. Each time the Claimant's assignment was extended, CBSbutler Limited confirmed that all other terms remained as per the initial arrangement. In other words, the Claimant's job role, level and hourly rate of pay all remained unchanged.

<u>The meeting with Mr Innes on 9 November 2016</u>

19. The Claimant's evidence at Tribunal was that in March 2016 he began discussing his job role with John Innes, who was then the Registered Manager at Haviland Way. However, there is no reference to any such discussion in the Claimant's witness statement. We find that he became confused about the matter at Tribunal and that there was no such discussion in March 2016.

20. Instead, on 9 November 2016 Mr Innes approached the Claimant and Mr Madu in the staff room area and gave both of them a permanent application pack to complete. The Claimant may have wondered why Mr Innes was inviting him to complete a further application form in November 2016 given that he had completed and submitted an application form in March that year at the request of his agency.

21. We accept the Claimant's and Mr Madu's evidence that they discussed their pay with Mr Innes on 9 November 2016, with specific reference to the pay bands operated by the Respondent for Support Worker Level 2 and Support Worker Level 3/Support Practitioner staff. Both felt they were being underpaid. Mr Innes was apparently unaware of the Claimant's Level 3 qualification and so the Claimant showed him a copy of his Diploma Certificate on his iPad. We further accept the Claimant's evidence that,

during this discussion, Mr Innes agreed that the Claimant should be paid £20,000 per annum once he transitioned to the Respondent. Given his qualifications, the Claimant evidently felt he should be paid at the rate for a Support Practitioner (or Support Worker Level 3). However, this overlooked that he was a Support Worker Level 2 and would be continuing in this role. It is not the Claimant's case in these proceedings that he was denied appointment or promotion to a Support Practitioner. As Mrs Laffen quite rightly observed when she was cross examined by the Claimant, his pay was determined by reference to the role he was performing rather than his qualifications. We think the Claimant has been unable to take this on board and has overlooked that he elected to take a job for which he was potentially over-qualified.

22. We find that the Claimant and Mr Madu agreed with Mr Innes on 9 November 2016 that they would be paid £17,403 and £20,000 respectively once directly engaged by the Respondent. They completed the application forms Mr Innes had given them and returned these to him. The Claimant's completed application form is at pages 67 – 83 of the hearing bundle. The post title on the form is Support Worker Night. We accept Mrs Laffen's evidence at Tribunal that night workers at the Respondent are engaged (and paid) at Level 2. We further note that in providing his personal email address on the form, the Claimant wrote the number '2' in such a way that it could easily be mistaken for the letter 'z'. This is relevant for reasons we return to in this Judgment.

23. On 15 November 2016, Mr Innes produced two permanent contracts for the Claimant and Mr Madu. In paragraph 22 of his witness statement, the Claimant describes these as *"identical"*. In fact, they are not identical. The Claimant's is at pages 81 and 82 of the hearing bundle and Mr Madu's is at pages 85 and 86 of the hearing bundle. The Claimant's letter refers to the salary and holiday entitlement as *"pro rata"*. That was not the case in Mr Madu's letter. Both letters confirmed that if the offer was accepted the Respondent would confirm their start date and provide them with a statement of particulars. Each letter documented the pay as being £16,672 per annum. This was clearly incorrect and not what had been agreed. When the Claimant and Mr Madu raised this with Mr Innes he said that he would take the matter up with the Respondent's payroll, but asked them to sign the letters in the meantime. The Claimant took the matter on trust and signed the letter on 15 November 2016. He did not think to amend the salary figure by hand and initial the amendment. By contrast, Mr Madu was unwilling to sign his offer letter until the salary figure was corrected by the Respondent.

24. We believe the error in relation to the Claimant's and Mr Madu's pay is explicable by reference to the recruitment form at pages 87 and 88 of the hearing bundle. In the form, 'SCP 16' has been identified as the Claimant's starting point on the Respondent's pay scale. The Respondent's incremental scale point pay structure at the time (page 51 of the Claimant's bundle) confirms that the annual value at point 16 was £16,672, namely the

salary figure that was inserted in the Claimant's offer letter. It is the mid-point on the pay scale for a Level 2 worker.

25. At paragraph 23 of his witness statement, the Claimant asserts that the salary of £20,000 agreed with Mr Innes equated to the lowest level hourly rate for a Support Worker Level 3, namely £10.62 per hour. That is incorrect. The Respondent's incremental scale point pay structure confirms that at the time the lowest point on the scale for a Support Worker Level 3 working 37 hours per week was £10.31 per hour. £20,000 per annum equates to an hourly rate of pay of £10.39 for an employee working 37 hours per week, or £10.99 for an employee working 35 hours per week. Neither of those hourly rates are to be found in the Respondent's incremental scale point pay structure at that time. We find that the agreed salary of £20,000 per annum was simply the result of a negotiation between the Claimant and Mr Innes. We do not consider that it evidences any discussion or agreement between them that the Claimant's job function was to change to Support Worker Level 3.

26. In his witness statement, the Claimant refers to an anticipated transition date of 1 February 2017. In fact, the offer letter had anticipated a start date with the Respondent of 7 December 2016. The assignment extension letters do not provide any explanation for this or the subsequent delays.

Jodie, Robert and Nick

27. The Claimant complains that his colleagues Jodie, Robert and Nick (all of whom are white) were paid at the rate for having a Level 3 qualification when working at Haviland Way despite not having this qualification (paragraph 10(i) of the Case Management Summary). We disagree. Whilst it may be correct that they did not hold a Level 3 qualification (they were each working towards this), they were paid the relevant rate for a Support Practitioner (or Support Worker Level 3) because that was their job function. In the course of her evidence, Mrs Laffen acknowledged that the Respondent's use of the job title 'Support Worker Level 3' has the potential to cause confusion in the minds of individuals such as the Claimant who hold a Level 3 qualification. She identified this as one of a number of learning points. Be that as it may, we are clear that holding a Level 3 qualification did not confer any automatic right of progression to a Level 3 role at the Respondent nor did it confer any right to be paid at the rate for a Level 3 role whilst performing a lower level role.

The Claimant's trip to Nigeria in May 2017 and subsequent transition to direct engagement

28. The Claimant's seventh complaint of direct discrimination (paragraph 10(vii) of the Case Management Summary) is that on 20 April 2017, Mr Innes threatened the Claimant that he would not have a job to come back to if he took pre-arranged leave that month. The Claimant compares his treatment to that of white workers who he says were permitted to take arranged leave and were not subjected to such threats. However, in his witness statement and in his evidence at Tribunal, the Claimant did not identify who those white

workers were or put forward any other specific evidence as to how others were treated. The context is that on 10 March 2017 CBSbutler Limited wrote to the Claimant to advise him that his assignment was to be extended to 7 May 2017. The expectation was that the Claimant would transition to direct engagement with the Respondent on that date. We accept the Claimant's evidence that he was informed by CBSbutler Limited that he would need to use his accrued leave entitlement before the end of April 2017 and that he relayed this to Mr Innes. However, we find that he only communicated his actual plans at the last moment. His wife was awaiting confirmation of an appointment in Nigeria in order to secure immigration clearance to join him in the UK. The appointment was confirmed on fairly short notice, at which point the Claimant informed Mr Innes that he planned to travel to Nigeria**.** There is no evidence that the Claimant had already booked a flight to Nigeria at this time or was otherwise out of pocket. Notwithstanding the Claimant had informed Mr Innes in March that he would be taking his accrued leave, Mr Innes was unprepared for this and it seems there was no-one available at short notice to cover the Claimant's scheduled shifts. It is entirely possible that Mr Innes brought pressure to bear upon the Claimant to change his plans. In the event it was agreed between the Claimant and Mr Innes that his direct engagement would be deferred until after he had taken his leave and returned from Nigeria.

29. The Claimant travelled to Nigeria in the last week of May 2017 and returned to the UK on or around 28 June 2017. We accept the Claimant's evidence that he spoke with Mr Innes once he had booked his flights, when it was agreed that the Claimant would commence working directly for the Respondent on 3 July 2017.

30. In early May 2017, the Claimant had asked Mr Innes when he would be receiving his updated offer letter and particulars of employment. Mr Innes told him that he was still working on the matter but that he would let the Claimant know when these were ready for him. The Claimant asked Mr Innes about these again before he left for Nigeria when he was told that the documents would be ready for him on his return to the UK. It seems that Mr Innes did indeed have the matter in hand in May 2017, as he emailed the Respondent's Recruitment Service on 8 May 2017 with certain information it had requested in relation to the Claimant (pages 113 and 114 of the hearing bundle). We note in this regard that the 'Appointing Grade' was confirmed as Level 2, that the Appointing Scale Range was 'SCP 18' and that the weekly hours were identified as 'Casual hours'.

31. On his return from Nigeria in July 2017, the Claimant continued to work as before. Save that he was engaged directly by the Respondent, we find that his role and working arrangements did not otherwise change. The Claimant claims that the Respondent dictated the days when he worked and had full control, that it gave him a rota to work and that he was referred to as an employee. However, that is not supported by the documents in the hearing bundle, including the document at pages 113 and 114 just referred to. Nor is it consistent for example with the fact the Claimant was required to sign time sheets to evidence the days and hours he was working or with his

actions in September 2017 when he decided not to make his services available to the Respondent. We return to this.

The errors in the Claimant's pay

32. In August 2017 the Respondent was alerted to a potential issue with his pay. His first direct payment from the Respondent was paid into his bank account on or around 30 August 2017. Although he did not receive a pay slip, as he did not have the necessary access to the Respondent's online payroll records, he immediately knew that his pay was incorrect. He calculated that he was being paid at a rate of £9.11 per hour. Mr Innes was on annual leave at the time and accordingly the Claimant raised the matter with the Assistant Manager at Haviland Way. She said that she could not resolve the issue and asked him to speak with Mr Innes. Not surprisingly, the Claimant was not satisfied with that response and so contacted the Respondent's payroll and HR teams. We understood from Mrs Laffen's evidence that this may have been at a time when those teams were being restructured. Whatever the reason, the issue of the Claimant's pay was dealt with sub-optimally; the payroll and HR teams referred the matter back to Mr Innes to deal with. The Claimant escalated the matter to a more senior manager who again told him that it would need to await Mr Innes' return from leave. We think it inexcusable that any worker who believes they have not been paid correctly should be kept waiting and dealt with in this manner, particularly by those whose job it plainly is to address such concerns on a timely basis.

33. Undeterred, the Claimant called payroll and spoke with Jade Cranwell. He asked her for his revised offer letter and employment particulars. On 8 September 2017 she sent him his 'contract'. We find that she sent the Claimant a copy of a letter to him dated 10 May 2017 from Olivia Wells in the Respondent's Recruitment Service and the 'Agreement for Casual Workers' referred to in that letter. We accept that the Claimant had not seen these documents before. However, we reject the Claimant's suggestion that they were fabricated by Ms Cranwell. We believe there is a straightforward explanation for why the Claimant had not seen them before. We note that the letter of 10 May 2017 does not have an address on it. We believe the letter and agreement were intended to be hand delivered to the Claimant (possibly left in a pigeon-hole at work) but that this did not happen. We have regard to the fact that this was a failing service which Ofsted would subsequently assess as being 'unsatisfactory'. We conclude that the most likely explanation is that the paperwork simply went astray. Whilst the Claimant was in Nigeria, and as the documents had not been returned signed by him to the Respondent's recruitment team, a standard form reminder was issued to him by email. That email is at page 124 of the hearing bundle. It was addressed to the Claimant at an incorrect email address; the letter 'z' was substituted for the number '2' in his personal email address, with the result that he did not receive the email. We cannot say whether the sender, Olivia Wells (or Mr Innes, who was copied in on the email) received an alert to the effect that the email had not been delivered to the intended recipient. Mrs Laffen speculated at Tribunal whether any alert would have been caught by the Respondent's firewall with the result

that Ms Wells and Mr Innes may have been unaware that the email had not reached the Claimant.

The ongoing issues in relation to the Claimant's pay and his meeting with Mr Wyatt in October 2017

34. At paragraph 51 of his witness statement, the Claimant states that he queried his rate of pay in comparison to his white colleagues in September 2017. In fact, there is no evidence that he was making any such comparison in September 2017. We do, however, understand why the Claimant was frustrated in his efforts to secure a resolution to the issue of his pay. The Haviland Way service was plainly in a state of disarray, with various staff leaving and on suspension. The issue of the Claimant's pay came to a head again at the end of September 2017 when the Claimant was paid and he realised once again that his pay was still not at the rate agreed with Mr Innes. The Claimant's evidence is that he immediately stopped working. We find that he resolved not to work any further shifts until his pay was sorted out and that he understood he could do so because he was a casual worker and was at liberty to withhold his labour in this way.

35. Approximately two weeks later the Claimant learned that Mr Innes and two other managers may have been suspended or even have left the Respondent's employment altogether. This seems to have prompted him to get in contact with the Respondent. By then Mr Wyatt had temporarily assumed charge at Haviland Way and was leading efforts to turn the service around.

36. The Claimant arrived unannounced at Haviland Way on or around Monday 16 October 2017. He spoke very briefly with Mr Wyatt who was just going into a meeting. Mr Wyatt asked him to wait. Their accounts diverge as to what then happened. The Claimant alleges that Mr Wyatt told him he was busy and that he should leave his number and he would call him, which he did, but that he did not then hear from Mr Wyatt. Mr Wyatt's evidence is that when he emerged from his meeting, the Claimant had gone but that he had left his mobile number and a message for Mr Wyatt to call him. Mr Wyatt's evidence is that he telephoned the Claimant and asked him to liaise with Joy Bradley, the newly appointed Registered Manager of the service. We prefer Mr Wyatt's account. As we set out below, the Claimant was in contact with Mrs Bradley on 19 October 2017; it seems to us that the Claimant could only have known to contact Mrs Bradley if he had indeed spoken with Mr Wyatt and been directed by Mr Wyatt to speak to her.

The Claimant's interactions with Ms Bradley

37. When the Claimant and Ms Bradley spoke on 19 October 2017, she evidently recognised that there was an unresolved pay issue. In an email to the Claimant at 18:06 on 19 October she wrote,

> *"You are on the highest possible grade that we can put bank staff on (this is what John promised)."* (page 148)

38. That comment evidences Ms Bradley's understanding, having apparently spoken with Mr Innes, that the Claimant was a casual worker. The Claimant did not challenge Ms Bradley at the time when she referred to him as one of its bank staff. Her comments on 19 October also evidence that she believed the Claimant to be at the top of the potential pay scale for casual workers. She seems to have been unaware that Ms Cranwell had already sent the Claimant a copy of the Agreement for Casual Workers on 8 September 2017, as she said that she had requested a copy of his contract and would send this on to him. Her email concluded,

> *"I am going to be cheeky now and say – any chance you want to come back to us tomorrow night – it would be a massive help and [resident] has been asking for you!"*

39. Ms Bradley's email of 19 October 2017 evidences that she was trying to resolve matters for the Claimant and that she acted promptly following their discussion that day. However, it seems to the Tribunal that she had not necessarily fully grasped the issue, namely that regardless of whether the Claimant was at the top of the normal pay scale for casual workers he was not being paid at the rate agreed with Mr Innes almost a year earlier. Ms Bradley was, of course, new to the issue. She subsequently met with the Claimant on 27 October 2017. We think that was probably the first time that anyone at the Respondent took the time to listen to the Claimant and tried to understand his concerns.

40. Ms Bradley emailed Mr Sipple of the Respondent following her meeting with the Claimant on 27 October 2017. Her email evidences that she had a better understanding of the issues then. We note that she referred to the Claimant in her email as a bank worker. In her email, sent at 16:50 on 27 October, Ms Bradley advocated on the Claimant's behalf for an increase in his hourly rate of pay from £9.11 to £10.52 and for this to be backdated to when his contract was issued. In the circumstances, it is difficult for us to understand the Claimant's complaint that Ms Bradley discriminated against him by *"not honouring the same agreement"* that the Claimant says he reached with her. Her email of 27 October 2017 confirms that she was committed to securing a resolution for the Claimant and that she progressed the issue the same day that she had met with the Claimant. However, any decision was ultimately not Ms Bradley's to make. It could only be approved by a more senior manager, Bernard Campbell. The Claimant did not challenge this at Tribunal. We were told that Mr Campbell is black. On 13 November 2017 Mr Campbell gave his approval to the Claimant being paid £10.36 per hour (on the basis that this equated to £20,000 per annum). Mr Campbell stated that Rob Wyatt "will advise of the effective date of implementation". For completeness, we note that Mr Campbell's approval of the matter was seemingly only after the Claimant had complained in an email to Ms Bradley on 9 November 2017 that he had still not received any update about his pay rate. In his email he wrote,

> *"Among all the staff getting higher pay, I am the most experienced and qualified, but the less paid even though we are all doing the same job. Even though I deserved better I still have to fight for it, while others can get it on a platter of Gold which I find frustrating. It makes me think* [where] *is the Equality and Diversity they preach about? Is it something real or is it just to tick the box or just an hashtag…"* (page 154 of the hearing bundle)

41. The Respondent accepts that was a protected act by the Claimant.

42. We find that the Claimant's agreed pay of £20,000 per annum, or £10.36 per hour was more than the top rate of pay on the incremental pay scale for Level 2 employees, which as at 1 October 2015 was £9.02 for employees working 37 hours per week. In the circumstances, we have difficulty understanding the Claimant's complaint (paragraph 10(vi) of the Case management Summary) that the Respondent discriminated against him by paying white workers by reference to its pay scale, but not him. For example, the available pay data in relation to the Claimant's white colleague GS, a Support Worker Level 2, for the period 7 February 2017 to 1 April 2018, evidences that GS was paid at the prescribed pay scale. Given it was agreed that the Claimant would be paid at a rate above the prescribed pay scale, we can only conclude that the Claimant was treated more favourably than GS in the matter of their respective hourly rates of pay.

43. At paragraph 63 of his witness statement, the Claimant refers to an email he received from Ms Bradley on 13 November 2017. In summarising that email his evidence is as follows:

> *"She also stated that she had back dated the contract to when I first started and she promised to send me my new contract and employment particulars but she never did. She also said she was concerned about the discrimination issues that I had raised and she invited me to attend an interview which I did on the following day."*

44. That is not in fact what Ms Bradley's email of 13 November 2017 says. We refer to her email at page 155 of the hearing bundle. Whilst she had referred in her email of 27 October 2017 to back dating his pay, there was no such reference in her email of 13 November 2017. Likewise, whilst she had informed the Claimant on 19 October 2017 that she had requested a copy of his contract and would send this on to him once she received it, there was no mention of the contract in her email of 13 November 2017. Finally, she did not invite the Claimant on 13 November 2017 to attend an interview the following day.

45. In the circumstances, we cannot be confident, as the Claimant claims, that he met with Ms Bradley on 14 November 2017. If he had met with Ms Bradley on 14 November 2017 to discuss his discrimination concerns with her, one might have expected him to have identified this as a protected act at the Preliminary Hearing on 22 February 2019. He did not do so.

46. Ms Bradley emailed the Claimant on 21 November 2017 asking as to his availability to work various shifts. That evidences the casual nature of the arrangements, in the sense that the Claimant was under no obligation to work the shifts that were offered to him, contrary to what he says. We further note that he only worked 40 hours in December 2017 and that Ms Bradley referred to him as a bank worker in an email to a colleague on 14 December 2017.

The termination of the working relationship

47. At the end of December 2017, the Claimant was paid at the rate of £9.11 per hour. This is not dealt with in the Respondent's witness statement and accordingly we do not know whether he spoke to anybody at the Respondent about the matter at the time.

48. The situation came to a head on 26 January 2018 when the Claimant received his pay and realised that he was still being paid at the incorrect hourly rate. In an email to Ms Bradley that evening he wrote,

> *"I guess you lied to me about you telling me that you had negotiated my salary to £20,000 a year…*
>
> *Am on night shift now and I wanted to walk away and leave the shift and I want all shifts cancelled from now on. Can't deal with this rubbish anymore."* (page 196 of the hearing bundle)

49. That email signalled the end of the Claimant's working relationship with the Respondent. It is entirely understandable why the Claimant concluded that he could no longer work for the Respondent. His pay had been agreed with Mr Innes in March 2017. Mr Campbell had confirmed on 13 November 2017 that his agreed rate of pay was £10.36 per hour. Over two months later the Claimant was still not being paid at the correct hourly rate, and had still not been reimbursed the shortfall in his hourly rate dating back to 3 July 2017. It was a wholly unacceptable state of affairs and the Respondent is entirely to blame for it.

50. The Claimant's conduct of these proceedings, specifically his allegations that documents have been fabricated by the Respondent, as well as his refusal to fully engage with the Respondent's grievance and disciplinary processes, can only be viewed in the context that he was kept waiting nearly 18 months to be made a permanent member of the Respondent's staff and that in November 2016 he was offered direct engagement at £20,000 per annum albeit the offer was not then honoured over an extended period of approximately 7 months in spite of his extensive efforts to secure payment of the sums that were agreed as due to him. We think it unsurprising that the Claimant came to have little or no trust or confidence in the Respondent and indeed that he regards them with a degree of suspicion. His various complaints that documents have been fabricated are unfounded. Nevertheless, this is an unusual case in which we can understand why the

Claimant's experiences over an 18-month period have led him to take the position he has in these proceedings.

The sex harassment complaint and the Claimant's grievance

51. On or around 24 January 2018, concerns were expressed regarding the Claimant's and another worker's behaviour on the night of 20 January 2018. A fellow worker felt she had been spoken to in a derogatory way and that the Claimant and his colleague had made inappropriate comments of a sexual nature. It was reported that the worker concerned had been left feeling vulnerable and upset by their behaviour and wished to progress the matter by way of a formal grievance. She made a detailed statement on 25 January 2018. The allegations, though then unproven, were potentially serious, involving as they did repeated acts of alleged sexual harassment. Furthermore, as the alleged comments had been made in a home for children and young people, there were concerns as to whether the comments could have placed them at risk. In our judgment, the Respondent was plainly under a duty to investigate the allegations.

52. In answer to questions from the Tribunal, the Claimant confirmed that he had not told the complainant that he believed he had been discriminated against. Nor had he made her aware that he had raised concerns about discrimination with the Respondent. We did not see or hear any evidence that she was aware that he had done a protected act.

53. The Claimant's complaints that he suffered unfavourable treatment because of his protected acts are set out at paragraph 11 of the Case Management Summary at page 28 of the hearing bundle. The unfavourable treatment complained of is that the Claimant was informed on 19 February 2018 that he faced an allegation, or allegations, of sex discrimination; that on 23 February 2018, Mrs Olivo requested his email address and then sent him written confirmation of the allegations; and that the Respondent subsequently sent him seven letters concerning alleged sex discrimination. It is not necessary for us to recite the detailed contents of those communications. The relevant letters (there are nine letters in total) are at pages 206, 207 – 208, 231, 244 – 245, 267, 271, 272, 273 and 279 – 280 of the hearing bundle. They identify the allegations, confirm that an investigation was to be undertaken, and warn the Claimant at the outset that, if proven, the allegations could constitute gross misconduct. The Claimant was provided with copies of the Respondent's relevant policies and was also referred to a confidential employee assistance programme should he need support. He was subsequently invited to attend an investigation meeting with Mrs Olivo on 27 February 2018 and reminded of his right to be accompanied at that meeting. After he contacted Mrs Olivo to inform her that he would not attend the investigation meeting, the Respondent warned him that in those circumstances the investigation would proceed without further attempts to engage him in the investigation process, but that he would be advised of the outcome of the investigation, including whether he would be invited to attend a disciplinary meeting. He was further reminded that the allegations were to be treated in the strictest confidence.

Mrs Olivo prepared a detailed investigation outcome report running to some 11 pages, including appendices. Mrs Olivo wrote to the Claimant on 16 April 2018 to let him know that her report had been submitted to the responsible manager. The Respondent wrote to the Claimant again on 26 April 2018 inviting him to a disciplinary meeting to be held on 1 May 2018. When the Respondent did not hear from the Claimant, and as he did not attend the meeting, it was rescheduled and he was offered the opportunity to attend on one of two proposed new dates. Once again, the Claimant was invited to confirm his attendance, but also warned that if such confirmation was not forthcoming, then in the event he did not attend the meeting would go ahead in his absence. In the event, he did not attend the rescheduled meeting on 15 May 2018. Subsequently, on 17 May 2018, the Respondent wrote to the Claimant informing him of the outcome of the disciplinary meeting which had been held in his absence. The decision was to issue him with a Final Written Warning which would remain in place for a period of 18 months. In addition, it was proposed that a Performance Improvement Plan would be put in place. The Respondent's letter set out the reasons why he was being issued with a Final Written Warning. The Respondent concluded that the Claimant had made inappropriate comments of a sexual nature to a colleague which had caused her to feel distressed and vulnerable. Whilst the Respondent did not consider that children or young people had overheard the Claimant's comments, they felt that the Claimant had failed to consider them when he made his alleged comments and as such that he had breached its Code of Conduct in relation to Safeguarding. The Respondent's letter of 17 May 2018 indicates that active consideration was given to mitigating factors, in particular that the Claimant had a clean disciplinary record. In these circumstances, whilst the alleged misconduct could in the Respondent's view potentially have resulted in his dismissal, the appropriate penalty was felt to be a Final Written Warning. The letter concluded by reminding the Claimant of his right of appeal, a right which he did not exercise.

54. In our judgment the disciplinary proceedings were handled in accordance with best practice and in full compliance with the Acas Code of Practice on Disciplinary and Grievance Procedures. Although this was not identified within the list of issues at paragraph 10 of the Case Management Summary of 22 February 2019, the Claimant criticises the Respondent for allegedly informing the other alleged harasser and his supplying agency before the Claimant was notified of the allegations. He also complains that his work colleagues were appraised of the allegations before he was. There is no further evidence before us in that regard. The Claimant also criticises Mrs Olivo for allegedly failing to interview staff who were on duty on the night in question. Mrs Olivo had interviewed witnesses whose names were suggested by the complainant. She had additionally identified at least one further witness who she felt should be interviewed. The Claimant may well believe that Mrs Olivo should have spoken with one or more other potential witnesses, but the fact is that he did not engage in the disciplinary process. As a result, Mrs Olivo had no way of knowing that he believed there were other relevant witnesses. We can understand why the Claimant may have lost confidence in the Respondent and perhaps even why he decided not to

engage with the investigation process, but Mrs Olivo certainly cannot be criticised for the inevitable consequences of his non-engagement with the process.

Lone working

55. The Claimant complains that throughout his period of direct engagement by the Respondent he was required to cover night shifts alone, whereas white colleagues worked in pairs (paragraph 10(iv) of the Case Management Summary). It is a general complaint about his working arrangements and was not supported with further specific details. When questioned at Tribunal the Claimant clarified that he was only referring to those nights when a particular named child was at Haviland Way or when five children were resident. He had not provided that clarification when he wrote to the Tribunal on 9 March 2019 regarding the list of issues at paragraphs 10 and 11 of the Case Management Summary. Be that as it may, the evidence in the hearing bundle does not support the Claimant's complaint. The staff rotas at pages 20, 21 and 22 of the supplemental section of the hearing bundle evidence for example that on 3 July 2017 the Claimant was one of three people who worked the night shift (one of whom was working a waking night). By contrast, the Claimant's colleagues, Nick and Becky each worked a night shift alone on 11 and 19 July 2017. The Claimant sought to rely upon the rota at page 46 of the supplemental section of the hearing bundle as evidence that he worked alone (with just waking night support) when there were five children at Haviland Way over New Year 2017/2018. In fact, the rotas do not support his account. Instead, they evidence that two of the five children in question were not in fact at Haviland Way overnight, but instead returned to the property in the course of New Year's Day.

Law and Conclusions

56. We deal firstly with the Claimant's status once he was directly engaged by the Respondent. In our Judgment he was a worker rather than an employee. The weight of evidence is that he was a casual worker and that the relationship between himself and the Respondent was not characterised by any mutuality of obligation (which is a necessary element of a contract of employment). The Respondent was not obliged to offer him work and he was under no obligation to accept any shifts that were offered to him. He withdrew his labour in September 2017 without consequence and likewise evidently elected to work a limited number of shifts in December 2017. For the reasons set out in our findings above, we consider that when the Claimant moved from being an agency worker to being directly engaged by the Respondent this did not alter the fundamental character of the working arrangements, namely that the Claimant was part of the Respondent's bank of casual workers rather than a permanent member of its employed staff.

57. Our conclusion that the Claimant was a worker does not affect his right to complain of discrimination or to complain that he suffered an unlawful deduction of wages. Those claims can be pursued as a worker (section 13 of the Employment Rights Act 1996 and section 83(2) of the Equality Act

2010). However, an employer's legal obligation to provide written particulars of employment is limited to employees; likewise, the Tribunal's power to make an award of compensation in respect of an employer's failure in this regard is limited to employees. Regardless of whether or not the Claimant's other complaints succeed, the Tribunal has no jurisdiction to make an award in favour of the Claimant under section 38 of the Employment Act 2002.

58. Section 13 of the Equality Act 2010 provides:

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

59. The victim who complains of discrimination must satisfy the fact-finding Tribunal that, on a balance of probabilities, he or she has suffered discrimination falling within the statutory definition. This may be done by placing before the Tribunal evidential material from which an inference can be drawn that the victim was treated less favourably than he or she would have been treated if he or she had not been a member of the protected class: Shamoon v RUC [2003] ICR337. Comparators, which for this purpose are bound to be actual comparators, may of course constitute such evidential material. But they are no more than tools which may or may not justify an inference of discrimination on the relevant protected ground. The usefulness of the tool will, in any particular case, depend upon the extent to which the circumstances relating to the comparator are the same as the circumstances relating to the victim. The more significant the difference or differences the less cogent will be the case for drawing the requisite inference.

60. The comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class. The comparators that can be of evidential value, sometimes determinative of the case, are not so circumscribed. Their evidential value will, however, be variable and will inevitably be weakened by material differences between the circumstances relating to them and the circumstances of the victim.

61. It is possible for a case of unlawful discrimination to be made good without the assistance of any actual comparator or by reference to a hypothetical comparator. In the absence of comparators of sufficient evidential value some other material must be identified that is capable of supporting the requisite inference of discrimination. Discriminatory comments made by the alleged discriminator about the victim might, in some cases, suffice. There were no such comments in this case. Unconvincing denials of a discriminatory intent given by the alleged discriminator, coupled with unconvincing assertions of other reasons for the allegedly discriminatory decision, might in some case suffice.

62. Discrimination may be inferred if there is no explanation for unreasonable treatment. This is not an inference from unreasonable treatment itself but from the absence of any explanation for it.

63. The Claimant has to prove facts from which the Employment Tribunal *"could"* properly conclude that the Respondent committed an unlawful act of discrimination. This does not prevent the Tribunal from hearing, accepting or drawing inferences from evidence produced from the Respondent disputing and rebutting the complaint. Once a prima facie case is established, the burden of proof moves to the Respondent to prove that it has not committed any act of unlawful discrimination, but it does not shift simply on the complainant establishing the facts of a difference in status and a difference in treatment; it is only once the burden has shifted that the absence of an adequate explanation of the differential treatment becomes relevant: Madarassy v Nomura [2007] EWCA Civ 33.

64. In our judgment, and as already highlighted in our findings above, the Claimant has failed to put forward evidence and to establish primary facts from which discrimination could properly be inferred. We refer to paragraph 10 of the Case Management Summary:

    64.1 As regards his complaint that his colleagues Jodie, Robert and Nick were paid at the rate for having a Level 3 qualification despite not having this qualification, they were paid at the published rate for a Support Practitioner (or Support Worker Level 3) because that was their job function. It had nothing whatever to do with their race.

    64.2 Mr Innes' agreement that the Claimant should be paid the equivalent of £20,000 per annum once directly engaged by the Respondent was not honoured over a period of several months. In our judgment this was a combination of organisational change and upheaval within the Respondent's HR and payroll teams, as well as poor communication and management on the part of Mr Innes. We do not consider it reflected any discriminatory thinking or bias. As regards Ms Bradley, she was pro-active in trying to resolve the issue for the Claimant. Ultimately, the decision was not hers to make, but she sought to ensure the Claimant was paid the hourly rate that had been agreed by Mr Innes and that any arrears were made good.

    64.3 The Respondent did fail to act decisively, effectively and on a timely basis on the Claimant's complaints that he had been underpaid. He was working in a failing service for an organisation which was going through change and which plainly had certain administrative challenges. We have referred to the fact that he was dealt with sub-optimally. He relies upon the fact that a complaint by a colleague Kelly was dealt with on a timely basis. Nevertheless, we are satisfied that the Claimant's treatment had nothing whatever to do with his race but instead reflected the administrative and organisational challenges facing the Respondent at this time.

64.4 As regards the Claimant's complaint that he was expected to cover night shifts alone, the Claimant has failed to put forward basic information and evidence that might enable the Tribunal to make primary findings regarding his working arrangements and how these compared with his colleagues' working arrangements. On the contrary, as set out at paragraph 55 above, the available evidence does not support the Claimant's assertion that he worked alone and that others did not. His specific complaint in relation to 1 January 2018 is unfounded. Given that the Claimant has the burden, on the balance of probabilities, to establish primary facts from which the Tribunal could properly infer that discrimination has taken place, he has not put forward basic facts as to what he says happened. His complaint in this regard cannot succeed.

64.5 The Claimant alleges that on three occasions in July, August and September 2017 a white colleague failed to assist the Claimant on night shifts when he asked her for help. His complaints are out of time as he did not notify his potential claims to Acas under Early Conciliation until 27 February 2018. The Claimant's witness statement does not address why it would be just and equitable to allow the complaints to be brought out of time. Be that as it may, the Claimant has failed to put forward basic information and evidence that might enable the Tribunal to make primary findings regarding his colleague's conduct. For example, the Claimant did not give evidence as to the circumstances in which she is alleged to have failed to respond to his calls for assistance. The limited evidence at paragraph 50 of the Claimant's witness statement is,

"I also complained about [XX], the sleeping member of staff who was supposed to assist me, as she would not respond when I called for assistance."

This was not a matter about which the Claimant complained in his email to Ms Bradley on 9 November 2017. We have no information before us as to why any alleged failure to respond to the Claimant's calls for assistance may have been related to his race, colour or nationality. The Claimant has offered no comparison with how his colleague behaved in relation to other waking night Support Workers. Given that the Claimant has the burden, on the balance of probabilities, to establish primary facts from which the Tribunal could properly infer that discrimination has taken place, he has not put forward basic facts as to what he says happened. His complaint in this regard cannot succeed.

64.6 We refer to our findings at paragraph 42 above. For the reasons set out there the complaint cannot succeed. The Claimant was treated more favourably than his comparator.

64.7 We refer to our findings at paragraph 28 above. In our judgment the complaint cannot succeed. Mr Innes failed to plan for the Claimant's

absence. To the extent he may have brought pressure to bear upon the Claimant not to take his leave, that was nothing whatever to do with the Claimant's race and everything to do with poor management and communication on Mr Innes' part. In our judgment he would have treated anyone else in exactly the same way.

65. Section 27 of the EqA provides,

> (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.

66. Section 27(2) goes on to define the protected acts as including,

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

67. It is not in dispute that the Claimant did a protected act on 9 November 2017. It was suggested at the Preliminary Hearing on 22 February 2019 that the Claimant may have done protected acts on 20 October 2019 (albeit we did not see the email relied upon) and in February 2018. Nothing turns on whether there was a protected act in February 2018, given the protected act on 9 November 2017 is established.

68. There is no evidence before the Tribunal that the person who complained of sexual harassment in January 2018 was aware that the Claimant had done a protected act. As regards the Respondent, as we have set out in our findings above, it was plainly under a duty to investigate her allegations. We are further satisfied that it was required to let the Claimant know that allegations had been made against him. We do not uphold the Claimant's complaint that he was informed that he faced allegations of sexual harassment because he had himself done a protected act. Instead, he was informed because the Respondent reasonably believed he needed to be told. The Claimant's complaint that it was an act of victimisation is difficult to reconcile with his separate complaint that the Respondent should have informed him sooner. For the same reasons, Mrs Oilvo's actions in requesting the Claimant's email address and sending him written confirmation of the allegations were not because he had done a protected act, they were because a complaint had been made and the Respondent had a responsibility to investigate it. Finally, and for the reasons set out in paragraph 54 of this Judgment, the disciplinary investigation and proceedings were handled in accordance with best practice and the relevant Acas Code of Practice. The Respondent's letters to the Claimant reflected this and were not sent because the Claimant had done a protected act. In the circumstances, his various complaints that he was victimised are not well founded and shall be dismissed.

69. We turn finally to the Claimant's claim for unpaid wages. Whilst the burden of proof in this regard is on the Claimant, the Tribunals have long recognised

the evidential difficulties faced by Claimants who bring claims in relation to their pay. The Respondent did not put forward any evidence that the Claimant had taken any of his holiday entitlement by 26 January 2018 when he ceased working for the Respondent. We conclude that he did not take any paid leave. Page 118 of the hearing bundle evidences that the Respondent operated a common arrangement for casual workers, namely that they were granted 12.07% holiday hours for every hour worked. Between 3 July 2017 and 26 January 2018, the Claimant worked 608 hours in total, meaning that he accrued 73.39 hours' holiday. Given his hourly pay rate of £10.36 the Claimant was entitled to be paid £760.27 in lieu of that holiday. He was paid £518.04 on 1 March 2018. Doing the best we can on the limited information that has been provided by the Respondent, we conclude on the balance of probabilities that that payment was purportedly payment in lieu of the Claimant's accrued but untaken holiday. We are satisfied, on the balance of probabilities, that the Respondent's payroll team continued to process the Claimant's pay incorrectly. Accordingly, we conclude that there was a short fall of £242.23 in the payment in lieu of the Claimant's accrued but untaken holiday. We further conclude that the Respondent failed to make good the arrears of pay owing to the Claimant, namely 608 hours worked and paid at £1.25 per hour less than had been agreed. Accordingly, in our judgment, the Claimant is owed the further sum of £760 by the Respondent reflecting the shortfall in his hourly rate of pay. Together with the shortfall in his holiday pay, we calculate that the Respondent made unlawful deductions from his wages in the total sum of £1,002.23 and we shall order the Respondent to pay this sum to the Claimant. It will be subject to deductions for tax and national insurance as appropriate.

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Employment Judge Tynan

Date: 29 / 10 / 2019

Sent to the parties on: 1 / 11 / 2019

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For the Tribunal Office