EMPLOYMENT TRIBUNALS

SITTING AT: LONDON CENTRAL

BEFORE: EMPLOYMENT JUDGE F SPENCER

MEMBERS MR J CARROLL
MR M SIMON

BETWEEN: MR D OPOKA CLAIMANT

AND

INCENTIVE LYNX SECURITY LIMITED FIRST RESPONDENT
AXIS SECURITY SERVICES LIMTED SECOND RESPONDENT
MR S MAHMOOD THIRD RESPONDENT

ON: 26TH NOVEMBER – 9TH DECEMBER 2019

Appearances

For the Claimant: In person
For the First Respondent: Mr C Adjei, counsel
For the Second Respondent, Ms A Palmer, counsel
For the Third Respondent, No response,

RESERVED LIABILITY JUDGMENT

The Judgment of the Tribunal is that:

1. The Claimant's employment transferred to the Second Respondent on 1st October 2018. The Second Respondent is liable to the Claimant for the successful parts of this claim.
2. The Claimant was unfairly and wrongfully dismissed by the Second Respondent.
3. The Claimant's claim of victimisation contrary to section 27 of the Equality Act 2010 succeeds in part.
4. The Claimant' claim of direct race discrimination and harassment related to race is not well founded and is dismissed.
5. The Claimant's claim for direct disability discrimination is dismissed. His claim for failure to make reasonable adjustment succeeds in respect of the period from 8th May – 19th June 2017.
6. The Claimant's claim of detriment and dismissal for making a public interest disclosure fails and is dismissed.
7. The claim for holiday pay is adjourned to be heard at the remedy hearing fixed for 14th February 2020
8. The issue of remedy for the successful parts of the claim will be heard on 14th February 2020.

REASONS

1. The Claimant, who describes himself as black/African and of Ugandan ethnicity, was employed as a security officer by the First Respondent from 18 April 2016 working at a site known as Paddington Central. He complains of direct race and disability discrimination, harassment related to race, victimisation, detriment for making protected disclosures, automatic and ordinary unfair dismissal, wrongful dismissal (notice pay) and 17 days accrued but untaken holiday pay.

2. The First Respondent is a provider of security services to customers on a national basis and employs approximately 320 employees across the United Kingdom. On 1st October 2018 the First Respondent lost the contract to provide security to a site known as Paddington Central, and that contract was awarded to Axis Security, the Second Respondent. It is common ground that the transfer of this contract was covered by the Transfer of Undertakings (Protection of Employment) Regulations 2006,

3. There is an issue between the First and Second Respondent as to whether the Claimant (and liability for any actions of the First Respondent) transferred to the Second Respondent under TUPE.

4. The issues are extensive and are set out, for ease of reference, in the schedule to this judgment.

Evidence

5. The Tribunal had a significant number of documents. We heard evidence from the Claimant. For the First Respondent we heard from Mr S Hussain, Shift Supervisor, from Mr Sobkowiak, Security Supervisor, Mr Kovac Security Manager. For the Second Respondent we heard from Mr Eltayib, Key Account Director.

6. The First Respondent also intended to call (and had provided a witness statement from) Ms Turner, who is part of the First Respondent's HR team, but the Tribunal received medical evidence that she was not well enough to attend and give evidence person. We accepted her witness statement into evidence, with the usual caveats about the weight to be attached to any disputed evidence. In any event, Ms Turner's first-hand knowledge was limited to her involvement in the Claimant's grievance hearing in May 2018 and her evidence largely referred to documents in the bundle. Mr Hussain, Mr Sobkowiak and Mr Kovacs all transferred to the Second Respondent on 1st October 2018, but all three have now left the employment of the Second Respondent. Mr Kovac has returned to work for the First Respondent.

7. Mr Mahmood, who is a named Respondent in case no 2300380/18 (presented on 15th December 2017), had not provided a Response and neither party had managed to make contact with him. We were told he had left the employment of the First Respondent in October 2017 before the submission of the first claim. The address given in that claim form for service on Mr Mahmood was the address of the First Respondent; and by then he had left the Respondent. On 31st August 2018 the claim was sent to Mr Mahmood's last known private address and subsequent notices of hearing had been served on that address. The claim was reserved on him at the same address on 12th August 2019. There has been no response and it is not clear if Mr Mahmood was aware of these proceedings. The First Respondent confirmed, however, that it did not plead any statutory defence in relation to any of his actions.

8. The Tribunal has difficulty in ascertaining the facts in this case because many of the relevant witnesses have left the First Respondent and have not been called. In addition, the Claimant's witness statement, and his various written grievances and communications with the Respondent, tended to lengthy and confusing but were often short on specifics.

9. The Claimant had presented 5 claims (although one had been withdrawn) and the combined claims presented a significant number of issues. Unfortunately, although the Claimant had legal advice at the time that the claims were issued and despite a number of Preliminary Hearings, when we started the hearing on 26 November, some of the factual allegations remained unclear and were only clarified during the course of cross examination. Some of the detrimental treatment which the Claimant alleged

he had suffered because he had made protected disclosures or done protected acts predated the relevant protected disclosure or act. Equally, although the Claimant named 8 comparators, we had little or no evidence about most of them.

Relevant facts

10. The Claimant was, as we have said, employed as a Security Officer by the First Respondent from 18th April 2016 at the Paddington Central site. This is a large site with retail, corporate and residential uses, and covers a number of different buildings.

11. The Respondent has a diverse workforce (560 – 561). 18.6% of its workforce is African and 26.7% is British. Workers who identify as African comprise the second largest ethnic grouping across the Respondent.

12. The Claimant was employed on a zero hours contract but in fact worked regular shifts. Initially he worked days and nights, on a 4 day on 4 day off pattern, across the whole site, working different duties on a rotational basis. From April 2017 he worked nights only in one of the buildings on the site at 4 Kingdom Street (4KS). Initially his shift supervisor was Mr Mahmood, who is of Pakistani origin.

13. In 2011, before the Claimant started to work for the First Respondent he slipped on the stairs and fractured his right ankle. This did not heal well and in October 2012 he had a right ankle arthroscopy and debridement. In November of that year the consultant reported that there was now a good range of movement and no pain at all in the ankle. The consultant says that "I explained to him about the procedure and the precautions. I advised him about his activities. I advised him of the risk of progression of osteoarthritis in his ankle". It is not clear from that letter what advice about his activities was provided but in August 2016 the Claimant told HR that in

    2012 *"I was medically advised not to overload the foot with heavy activities like running and climbing stairs with heavy loads"* and we find that this is what he was advised. In the same letter the Claimant also he could*, "do most light activities as normal. I assess risks in this context and adapt to situations as best I can. For example, I wear shoes with flat soles instead of the ones with hilly soles. This allows me to walk normally without pain"*

14. When the Claimant began work he provided some medical evidence of an impairment to his ankle to Mr Hurd (the security manager in charge of the site), who agreed that he could wear non-uniform shoes. We find that he told Mr Hurd what he subsequently told HR - that he could not overload the foot with heavy activities like running and climbing stairs with heavy loads. The Claimant was also permitted to use the lifts rather than using the stairs which other officers were not permitted to do.

15. The Claimant now says that he could not walk anywhere with a gradient or steps, but we do not accept his evidence (only given in cross examination) that he told the Respondent this in 2016. His letter to HR says that he cannot climb stairs with heavy loads.

16. In or around 28th August 2016, when he was carrying barriers to a storeroom on site, Mr Mahmood called repeatedly on the radio to chase up the work that he was doing. The Claimant told Mr Mahmood that he considered the calls were to be "bordering harassment". (The Claimant accepted in evidence that he was able to carry the barriers one by one without problem.)

17. The Claimant says that subsequently Mr Mahmood called him into a meeting and said "Oh how I hate some of you black Africans." For reasons set out in our conclusions we do not accept that this remark was made.

18. Later that day the Claimant sent an email to HR asking for a transfer from Paddington Central. There is no reference to the barrier incident or the alleged remark, but he says that he came to do the work but not to *"engage in destructive, counter-productive politics in the workplace".* He wanted to work where there would be possibilities for overtime, night shifts and long hours. He refers to his ankle in these terms. *"Broken and operated ankle. It is worth noting that in 2012 I had an operation on my right ankle to repair a broken ankle. I was then medically advised not overload the foot with heavy activities like running and climbing stairs with heavy loads, but I can do most light activities as normal. I assess risks in this context and adapt to situations as best I can. For example, I wear shoes with flat sole instead of the ones with hilly sole. This allows me to walk normally without pain."*

19. On 19 September 2016 Mr Mahmood told the Claimant that he was not allowed to carry a bottle of pomegranate juice with him while he was on duty. On 29 September 2016 Mr Mahmood told the Claimant that he was not allowed to carry his personal bag around on site whilst on duty or to store it in the control room. The Claimant was aggrieved - other people had bags in the control room.

20. The Claimant emailed Mr Hurd (and copied Barbara Jones of HR) on 2 October 2016 to "report the discriminatory activities I have suffered in the last 3 months and to request a preventive step to avoid victimisation". He pressed Mr Hurd "to take his transfer request seriously". He referred to a vacancy he had seen on the First Respondent's website and asked to be placed in the vacancy.

21. The particular discriminatory activities which the Claimant reported (231I) were that:

a. He had been told by Mr Mahmood that it was "unprofessional" to carry personal bags on site whilst on duty, but that Tamara's bag and others were allowed in the control room when his wasn't.
b. He had been told he could not have bottles of refreshment whilst on duty because of company image. He was carrying a bottle of pomegranate juice. On the other hand, Tamara had been allowed to carry bottles of water with her without being reprimanded.
c. he had been removed from day shift reception duty because one of the receptionists perceived that he was patronizing, but he had been professional.

(Tamara is Czech national)

22. The email was acknowledged on 4 October 2016 by an HR adviser from the First Respondent. The Claimant was informed that he could apply for any existing vacancies. As to the allegations of discrimination she enclosed the Grievance Procedure and asked the Claimant to confirm if he wanted the grievance to be dealt with. The Claimant responded that he wanted to raise a formal grievance against Mr Mahmood, but he would be willing to drop his grievance if he could be transferred out of Paddington Central. Mr Hurd told the Claimant that he would investigate the possibility of transfer and would speak to the relevant manager to see if he could get the Claimant an interview. There was then some internal correspondence about the possibilities of a transfer, but beyond that there is no evidence that the First Respondent investigated or progressed the Claimant's grievance.

23. Both Mr. Sobkowiak and Mr Kovac gave evidence, which we accept, that the client had mandated that security staff could only carry water bottles and no other drinks containers could be used whilst on duty. At some point (though it is not clear when) the client had issued metallic flasks for use by security officers if they wished to store and carry drinks which were not water.

24. Equally security officers were not permitted to carry their bags about on site. The rule was that staff should leave their bags in lockers provided. Some staff (such as agency staff) who did not have lockers, or who were located some distance from the lockers were permitted to keep their bags in the control room, but this did not apply to the Claimant. This rule was relaxed at night and at weekends.

25. On 11th October 2016 the Claimant was late relieving the post room officer at 2 Kingdom Street (2KS) who was due to take his break. The Claimant was waiting for another security officer to relieve him. He says that when he called the control room to explain, Mr Mahmood directed him to leave his patrol and relieve the officer at 2KS and said that he should "use his common sense". The Claimant believed that this was unjustified.

26. On 13 October the Claimant reported water leaking from the air ducts into 2KS and the control room did not respond despite him having made 5 radio calls and stressing it was urgent.

27. At 5.30 on 14 October Mr Mahmood told the Claimant that he should not ask the control room to "hold on" when they tried to contact him by radio and that he should give such calls priority. The Claimant disagreed. He told Mr Mahmood that, if he was engaged with a customer, the control room should not contact him and that they should use the CCTV to see what he was doing, or otherwise inform him that the call was a priority. A file note records that the Claimant was told he should politely ask the person he was dealing with to hold while he answered the radio call. (231R)

28. About half an hour later Mr Mahmood spoke to the Claimant again and recorded a file note about a complaint received from the receptionist at 3SS and 2KS about the way that the Claimant had delivered the papers.

29. In October 2016 security officers were tasked with collecting the Evening Standard for distribution to the receptions in 3 Sheldon Square (3SS) and 2KS. The Claimant complains that between the 12th and 14 October 2016 he was *"instructed to carry out the mundane task of collecting newspapers a disproportionally higher number of times than other security officers*." In cross examination he clarified that his complaint was that over the course of 4 day shifts he had been asked to perform the task on 3 out of the 4 days. Once would have been reasonable, twice "a little bit reasonable" but 3 times was a calculated move to target him.

30. We find that the Claimant was asked to pick up the Evening Standard from Paddington Station for distribution to receptions at 2SS and 2KS on 13 October. Mr Hussain showed him how to do this on the 12th. The Claimant picked up the newspapers on 13th October but the receptionist at 2KS complained about the way he had placed the papers on the desk and about his attitude. On 14 October the Claimant was asked by Mr Hussain to swap with another member of staff and collect the papers. The Claimant was told that this was because the other patrol officer had not been shown how to do the task. On that day the Claimant collected the papers but did not deliver them to the 3SS reception only to 2KS. That too generated a complaint. A file note records that the Claimant was told he would be retrained on the process of collecting papers for reception on his next available day shift.

31. On 19 October Mr Mahmood radioed the 3SS post room. The Claimant answered saying it was the 3SS post room and gave his radio call sign but declined to give his name when asked. He told Mr Mahmood it was not professional to give his name told and he had been trained to give minimum information. The Claimant was told that he must re-read his assignment instructions which made it clear that he should give his name when answering. (237A). A file note was taken.

32. On 20th October one of the receptionists (who was not employed by the First Respondent) lodged a formal complaint about the Claimant's behaviour over the preceding months and in particular about his behaviour on 14th October. He said that they had had complaints that the Claimant was "very abrupt and rude" from occupiers and visitors. He requested that the Claimant should no longer cover reception duties at 3SS or 2KS. He also reported that on 14th October the receptionist had contacted the control room to complain about the way the Claimant had delivered the newspapers. He also said that on that day, when the Claimant came to reception at 5 pm, Mr Mahmood had spoken to the Claimant about this on the telephone, whereupon the Claimant had become cross, said that he was going to make a complaint to head office about victimisation and then accused the receptionist of "sticking his nose in where it did not belong." He complained that there followed an altercation between the Claimant and the receptionist which culminated in the Claimant telling the receptionist to "F off" and called him "nothing but a fucking secretary" (235 to 237). The receptionist provided a detailed contemporaneous account.
After this the Claimant was removed from day reception duties.

33. By this time the First Respondent had a number of "file notes" recorded about incidents with the Claimant over a very short period. File notes are not disciplinary matters, but record instances where an employee has been asked to revise his behaviour.

34. On 21 October 2016 the Claimant emailed Mr Ryan Cox, Associate Director of the First Respondent, copied to Mr Hurd headed "Grievance and urgent transfer request attached." This attached a lengthy complaint (238 – 243) about a number of matters (referred to above) such as being told to use his common sense, being told that he should give response to the radio as of priority, and about having to do the newspaper collection 3 times in a row. The Claimant complains in that grievance that he is experiencing victimisation and in particular that Mr Mahmood made the following statements on 19 October:

    a. The file notes I am gathering on you will be enough to ruin your image and no manager will be willing to put you in his/her team when they read it
    b. go ahead and put your grievance. I already know the outcome of your grievance, I was told about the outcome of your grievance, so good luck with it.
    c. Security sector is a small world. I have been a manager for 9 years, people talk.

35. There is no reference to this conversation in the file note signed by the Claimant on the 20th October (the day after the alleged comment.). The Claimant says that he did not refer to it because he thought he might be fired

if he did sign the file note, but that does not make much sense, given that the next day he reported the conversation to Mr Hurd.

36. On balance, while we do not accept that Mr Mahmood used those exact words, we do accept that he said something alone the lines of go ahead and put in your grievance so good luck with it and there may have been some reference to the accumulation of file notes. However, we find that was because the Claimant had become aggressive about the content of the file note and not because of the grievance.

37. On 20th October on receipt of the written complaint from the receptionist Mr Hurd emailed HR saying that he was looking to conduct an investigation meeting and said "Could you please confirm if this comes under gross misconduct. I am sure that once the client hears of this they will want him removed from site so would ideally like to be able to let her [the client] know what we are doing". We have not seen any response. The Claimant believes that this is evidence of a determination to get the Claimant out, but we do not read into it more than an enquiry about whether the alleged offence amounted to gross misconduct under the Respondent's procedures.

38. On 22 October 2016 Mr Hurd conducted a disciplinary investigation meeting into the complaint that had been lodged by the receptionist about the Claimant's behaviour in the 3SS reception. The Claimant did not accept that he had sworn but he did accept that he could have handled matters "a lot better". At the end of the meeting Mr Hurd told the Claimant that he would be recommending that the incident go to a disciplinary hearing and that it was for HR to determine if disciplinary action should be taken. It is common ground that no further disciplinary action was taken against the Claimant in relation to that incident, although he was taken off reception duties.

39. The Claimant's 21st October grievance was acknowledged (246B) on 24th October and the Claimant responded that he should be relocated to another team. There were then some discussions with the Claimant about a transfer to another team. At the end of November 2016 the Claimant transferred to the Alpha team, which he was pleased about, but he still wanted night shift work. The Respondent did not progress the Claimant's grievance further.

40. In February 2017 it was announced that the Respondent would start to provide security to the building known as Four Kingdom Street (4KS). Until then the Respondent had only been responsible for patrolling 4KS externally as there were building works going on at 4KS. The Claimant expressed an interest in applying for night only jobs at 4KS and asked for more information. On 9th February 2017 Mr Hurd responded to the Claimant that there were 2 different night positions one for the post room and a building night officer. It is worth quoting his email in full as it was the source of the majority of the Claimant's subsequent complaints and allegations.

41. Mr Hurd described the night time roles at 4KS as follows "*The post room position will be very similar to 2KS with all contractors booking in through there, all keys issued, not sure on access control and CCTV yet and the building fire panel will also be there. The post room officer will work with the building night officer to conduct all regulatory checks of the building. This will mean that you both share the load not one sits in the post room having an easy life. The post room will be very busy at least for the first few months with fit outs. The building officer position will cover the reception till 22:00 as they do other buildings, he will cover his own break and those of the post room night officer and as already stated conduct regulatory checks of the building…..The 4KS team will be self-sufficient, however they can cover campus wide overtime shifts.*"

42. The Claimant responded that *"any of the night positions especially the building officer will put me in better alignment for doing overtime in Delta and Alpha teams which means my employer will get more out of me than it does now. I am open to both Building and Post room but probably better off in the building that aligns with overtime to Delta or Alpha teams. This depends on the design of the timetable schedule and rota system."*

43. The Claimant duly applied and was allocated the night building officer role at 4KS. Unlike his previous duties, where security officers were allocated different rotations (or patrols) each shift, and worked a combination of day and night shifts, 4KS was largely a stand-alone site with 2 officers being attached to 4KS night shifts and 2 to 4KS day shifts. Mr. Hannou, who is Algerian was given the night post room position.

44. The 4KS building role came on stream on 17th April. The Claimant was immediately upset. When the rota was published it appeared that the night building officer was required to remain in reception till 22:00 hours and then to undertake patrols of the building for the remainder of the shift. The post room officer, on the other hand, remained in the post room for the duration of the shift. In his February email Mr Hurd had said that the post room officer would also conduct patrol and building checks and this was not the case. The Claimant believed that the post room officer had therefore got an easier position and that the night shift allocation of duties had been re-designed deliberately to disadvantage him, compared to the night shift post room officer. In addition, from time to time the building officer was required to undertake a patrol of the whole site (rather than simply within 4KS.). The rotas affected the other night building officer, Mr Tamang, who is Nepalese in the same way.

45. On 30th April the Claimant complained (249B) about the rota and in particular that, in the rota for 29 April, the 4KS night building officer had to patrol the whole campus. The Respondent did not respond to this complaint.

46. On 8 May 2017 the Claimant was given a fit note declaring him fit for work with amended duties for 6 weeks. The fit note recommended "less standing/walking/heavy lifting. Desk job preferable**.** "

47. The Tribunal had letter from the consultant surgeon at King's College Hospital typed on 13 July 2017 (reporting on a clinic visit on 6th July) which notes that the Claimant *"is not doing particularly well in terms of his ankle as he finds it difficult to walk long distances and also has difficulty fulfilling his everyday tasks in work such as lifting heavy objects.… We have talked about his potential treatment options ranging from losing weight, modifying his activities further keyhole surgery… I recommended that he have a serious discussion with his employers as to whether his activities can be modified on a long-term basis and I've provided him with a note which states this".* The only note before the Tribunal was the 6 week fit note*.* It goes on " *I have also recommended that he might want to look at less physically demanding work which requires less walking as he is also becoming quite frustrated with being able to do everything he needs to."*

48. The Claimant says he gave both these documents to Mr Hurd on 8 May 2017 (though he must have been mistaken as to the date as the second letter referred to above was not typed until 13 July). *It was put to the Claimant that the Respondent allowed the Claimant to undertake amended duties for a period of 6 weeks as provided by the fit note but we have had no first-hand evidence of this and we accept that no amendments were made.* The July letter goes further than the fit note and the Claimant gave this to Mr Bonfield, who had taken over as site manager on 27th September (271C).

49. On 14th August 2017 the Claimant sent a lengthy email to Sarah Taylor, deputy manager (251 to 268) as follows *"Dear Sarah, welcome to Lynx incentives. Please find attached my letter of pre-& proceedings, related policy documents and a list of suggestions for improving security working practice at 4 Kingdom Street. I can assure you, this is not my usual way of welcoming newcomers, but this got to be done. Sorry about any inconvenience caused by this email*". Attached to that email were:

    a. Extracts from the Company Handbook as to the conditions of service including, equal opportunities and health and safety.

    b. The First Respondent's "health and safety objectives and targets 2017", its health & safety policy statement, and its environmental policy statement.

    c. A page headed "Summary" in which the Claimant says this. *"Ever since I raised health and safety issues regarding adequate training and provision of appropriate tools for our job assignments, I have experienced harassment and victimisation by and on the watch of Jason Hurd and indeed the board of governance the Lynx Incentive Ltd. The latest acts of the kind were unjustified changes of my job*

role, pattern and title after recruitment and transfer to 4KS. I feel that this was done in bad faith, without consultation and no reasonable justification was good given. The unexplained patrol tasks included in my rota and change of my job title were constructively done in bad faith with intention to deliver maximum victimisation on me." He complained about stress at work presenting a risk to his health and safety because of "*unfair relationship, breach of employment contract, lack of adequate training for specific job, unclear communication, instructions, guidelines, unfair distribution of workload for similar role, little control no consultation of a working arrangement, persistent discrimination in the forms of harassment and victimisation*"

d. A document which the Claimant had put together headed "List of suggestions for Improving Security working practice at 4 Kingdom Street.".

e. A document headed "Contextual list of 7 grievance issues" in which the Claimant complains about being bullied and harassed by Mr Mahmood and Mr Hurd who were plotting to get him out of Paddington and were tarnishing his record "*by finding multiple cases against me*". He complains that they had "*plotted my dismissal plan"* by setting up a conflict with receptionist at 3SS. Mr Hurd had frustrated his attempt to transfer out, had changed his rota to include patrol duties and that the *"post room night officer sits all night while I get to do most of the night activities*" . He refers to there being a health and safety risk of RSI to the post room officer (but not why), suggested changes to the rota and said that I "whistle blew and sought advice". The reference to having blown the whistle does not identify what information he disclosed, or to whom.

50. The document is unclear and hard to understand. While it is clear that the Claimant is aggrieved about the rota and the file notes, strikingly there there is no reference in this document to any difficulties which the Claimant has with his ankle, or to any difficulties in carryinf out his role for medical reasons.

51. Two day later on 16th August, the Claimant sent a further email to Sarah Taylor as follows. "Just one last thing I hate to hesitate to expose race discriminatory *practices but please check the attached. He attached a document headed "undercurrent of discriminatory practices against African and Nepalese ethnicities"*. This referred to harassment of himself by Mr Mahmood, and alleged discrimination against three Nepalese security officers (268A) though the document makes difficult reading and it not wholly clear what complaints are being made.

52. These emails are relied on as protected acts and protected disclosures. The Claimant claims that as a result of the 14th and 16th August emails to Sarah Taylor of HR, on 25 August a new 4KS Rota was released "to allocate a disproportionate number of mundane task to the claimant." In his witness statement the Claimant says this. "On 25th August 2017 a new 4KS Rota dated 23rd August 2017 was released by Sajid and Jason (Syed Hussain in the background) with more of the same mundane, load-bearing tasks assigned to me most likely to be in retaliation to my complaints on 14th and 16 August 2017. As usual, no consultation, no assessment made before or after the Rota changes with regards to the ankle impairment." The Rota provided in the bundle for the night shifts (271 A) does not show any change to the normal rota and the Claimant did not identify in evidence what mundane tasks were allocated to him.

53. On 27 September 2017 the Claimant emailed Mr Bonfield, Head of Security (271B). He again complained that the nightshift rota duties had not been fairly allocated, but on this occasion he refers to his ankle injury. He attached letters from "his medical specialist" and said that in relation to emergency roles for KS "*I cannot climb stairs because the ankle injury. I can walk downstairs or flat with ease, but I must not put excess pressure on the ankle. This means I partly depend on the lift functioning. During some emergencies, lifts are disabled. Your predecessor had agreed that I would change roles with loading bay officer on duty such that I go to loading bay, he/she takes the building officer's role. Since I do not have access to 4KS Assignment Instructions or specific job descriptions, I do not know how this was communicated to other parties involved."*

54. The Claimant asked for clarification of the way forward with regards to *"discriminatory distribution of night shift task …and an emergency response plan in consideration of the limitation to his ankle injuries*". We accept however the Respondent's evidence that there was a "fireman's lift" at each site which meant that the lifts were not disabled in the event of fire or other emergency, so that the option of using the lift remained open to the Claimant. A further email of complaint was sent on 3rd October, though the specific matters complained of in that email were not clear.

55. Mr Bonfield forwarded these to the Associate Director, Mr Dhanjwant. Mr Dhanjwant acknowledged the Claimant's complaints and said that an investigator would be appointed (276). Unfortunately, the Claimant responded that he was not well, could not attend a meeting and that he had handed matters to his legal team. Mr Dhanjwant's efforts were too little and too late for internal handling. (275)

56. The Respondent's HR representative then asked the Claimant to confirm whether he wanted to pursue the formal grievance internally or whether he was declining the opportunity to pursue it. The Claimant's response is unclear (273) but he appears to be saying that he wants the investigators to

send any questions to him in writing and he will respond in writing. The Respondent asked the Claimant again if he wished to attend a grievance meeting in person and the Claimant again responded that they should send questions to him in writing. Given that the Claimant's written style is difficult to decipher, this was not helpful.

57. Further emails between the Claimant and the Respondent were exchanged and eventually the Claimant was sent a formal invitation to a grievance hearing to take place on 9 November (290). The Claimant responded on 7 November (295) that he was not available for "that hearing meeting" but he wanted to add to what he had written before.

58. The additional information was a very serious complaint that Mr Mahmood had told the Claimant that he "hated black Africans". The Claimant said "*Sajid expressed that he that he hated some black Africans when we met at 3SS reception".* He goes on to give "context" saying that he could not recall the date of the incident but it was at 3SS reception between July and September 2016 between 22:00 and 01:00 after the Claimant had been harassed by Mr Mahmood while he was carrying the barriers to the store room. He sets out what purports to be a clear recollection of this conversation (296). He describes that, in response to the Claimant asking him to stop harassing him, Mr Mahmood says "*Some of you black Africans! I gave you a reasonable instruction to take barriers to the storeroom what is wrong with that?"* and the Claimant responded that he *"will not accept any racially motivated or any kind of discrimination."* This comment is different to the remark set out at the start of the email (and consistently in these proceedings) that Mr Mahmood said that he "hated some black Africans".

59. The investigating manager sought to arrange to meet with the Claimant to discuss his concerns, but the Claimant again declined to do so. Instead, on 24 November 2017 the Claimant, represented by his solicitors Brown &Co., presented his first claim to London South Employment Tribunal, claiming race discrimination, harassment, detriments for having made protected disclosures and disability discrimination (adjusting the work rotas to give the Claimant a disproportionately high number of onerous tasks to perform and having to transport barriers).

60. On 15 December the Claimant, presented a second claim, this time against Mr Mahmood at the First Respondent's address.

61. On 29th November 2017 the Clamant sent an email to the client at Paddington Central headed "Beware of bad practice and their impacts. (296C)

62. The Claimant was rostered to work the Christmas shift and was keen to work it. The Claimant said he would have transport problems and asked if he could work his 24th and 25th December shifts back to back but, for obvious

reasons, this was refused. He asked Mr Bonfield how the fact that there was no public transport on Christmas Day would affect the rota. Mr Bonfield asked the Claimant if he knew of anyone on site that he could get to work with and said that parking was allowed, but there was no offer of assistance with transport. The Claimant responded "*don't mind about this challenge now. I will now sort out the transport issue shortly."*

63. Mr Hussain who was on duty that day agreed to provide lifts to 3 individuals who lived on his route into work from East London, including one officer who is black African. The Claimant lives in Dulwich, and we accept Mr Hussein's evidence that the Claimant was not offered a lift because he was not on Mr Hussain's route.

64. The Claimant was rostered to work on the 24th and 25th December. The Claimant came to work with his sleeping bag intending to sleep on site between his shifts. On Christmas day Mr Bonfield was told that "a man" was sleeping in the public area at 2KS. Mr Bonfield instructed the duty supervisor Mr Hussain to wake him up and move him on. He did so. Mr Hussain subsequently told Mr Bonfield that that it had been the Claimant who was found asleep in the reception.

65. Mr. Bonfield investigated and referred the matter for disciplinary action. A disciplinary hearing took place on 22 March before Mr Marandola, Senior Operations Manager at which the Claimant was charged with sleeping in the public area of 2Ks and "the potential of bringing the company into disrepute". The Claimant said he had intended to sleep at the site as he did not want to go home following his shift as taxis were too expensive. He was unapologetic. The allegation of sleeping on site on 25 December 2017 was found proven, but Mr Marandola accepted that the Claimant's actions did not bring the company into disrepute although they "may have caused a loss of faith" between the First Respondent and the client. Mr Marandola decided that the Claimant would be given "a letter of concern".

66. On 14 March 2018 the Claimant presented a claim against Mr Hussain and the First Respondent to the London Central tribunal. The claim was for direct race discrimination, racial harassment, victimisation disability discrimination and infringements of CCTV and health and safety. The main factual allegations in that claim were the changes to the rota, his exclusion from transport on Christmas day and using CCTV to spy on him to defame him on Christmas Day.

67. In November 2017 and March 2018 (C ws para 55) the Claimant noticed that the cameras in the post room were focused on the reception desk where the Claimant was working. He believed that Mr Hannou was spying on him.

68. On 9th May a rota was devised which required the night building officers (the Claimant and Mr Tamang) to do “Pergola dispersal”.(314A) Pergola was a night club on site. Mr Tamang was not disabled.

69. On 15 May 2018 the Claimant sent a further written complaint to Mr Marandola (315 to 347) complaining about “racially motivated and disability discriminatory behaviours, specifically the willful exclusion of him from staff transport arrangements on Christmas day, false allegation of bringing the employer into disrepute, “defamation by the malicious display” of CCTV while the Claimant was sleeping, breach of health and safety by failing to specify an emergency role for the Security Night building officer in emergencies but making clear the post room officer’s role. There are 32 pages of this complaint (including attachments). He complains of a failure to make a plan for disability emergency evacuation including “how to override fire lift during emergency” because he could not climb stairs due to his impaired ankle.

70. On 19th May 2018 another security officer Mr Pun (who is Nepalese) was assigned to patrol across the campus, including into 4KS and entered a room at 4KS which the Claimant was assigned to patrol as part of his 4KS duties. The Claimant complained about this during the subsequent grievance hearing saying that this was deliberate targeting of his position by the Respondent in order to harass him.

71. From time to time security officers based elsewhere would also patrol within 4KS. (ws74) The room in question had a patrol tag in place which such patrol officers were required to touch to prove that they had completed their patrol. The locations in which the tags were placed were mandated by the client, and not the First Respondent. The requirement for Mr Pun to patrol into KS was not a detriment to the Claimant.

72. On 21 May Ms Turner, HR and adviser, wrote to the Claimant inviting him to a stage one grievance hearing to deal with his grievance of 15 May 2018 (348). Although the Claimant did attend the hearing on 24th May (378) when he was asked to explain his concerns and to provide specifics the Claimant simply said it was all in writing and that the Respondent should not waste his time. He complained about the campus patrol officer patrolling into a room in 4KS, alleged that this was a health and safety issue and that the Respondent wanted to poison him because he had “an ET outstanding”. When asked what outcome he wanted the Claimant said he wanted “policies to be followed”.

73. The outcome was sent to the Claimant on 12th June 2018 (374). Mr Marandola did not uphold the Claimant’s grievance.

74. On the 16th and 30th June the Claimant’s rota was revised so that he was required to go to the Control room for half an hour. This was not located in

4KS but was a little distance away from 4KS. This was at the request of the client.

75. On 29 June 2018 the Claimant was required to do a 4KS fire watch patrol. Officers on the fire watch rota had to patrol on the first floor internally for some 3 or 4 days. Mr Hannou in the post room did not have to do this. Four other patrol officers on the campus were also required to carry out fire watch patrols. They were all of different ethnicities.

76. On 30th June 2018 one of security officers, Mr. Tarak, entered one of the rooms in 4KS during a routine patrol. He was required to go into that room in order to touch the patrol tag located in the room. The Claimant was praying at the time in the room. The Claimant believes that those in the control room at were aware that he was praying because they were monitoring him on the CCTV and that this is why Mr Tarak was sent into the room. This belief was misplaced. CCTV cameras did not extend into that room.

77. Mr Kovac transferred from Battersea to the Paddington Central site at the beginning of August 2018. On 3 August 2018 the Claimant emailed him to complain that he had not been getting overtime lately and that this was due to a protected campaign of Mr Hussain against him. He also alleged that Mr Hussain had been "falsifying records" and "serious harassment and discriminatory behaviours against me in particular but to other staff members". He alleged that Mr Hussain he was deliberately assigning campus patrol officers to harass him in 4KS, modifying his duty rota in favour of Mr Hannou. (375D and E).

78. Mr Kovac acknowledged the email and said that he would take the Claimant's comments "on board".

79. *There was no evidence before the tribunal that the Claimant was getting less overtime than other security officers. The Claimant has provided no details of the overtime that he and other officers worked.*

80. On 12 August 2018 the Claimant presented a further claim to the Employment Tribunal. This claim has now been withdrawn.

81. On 26th August Mr Hussain complained to Mr Kovac that the Claimant had been very aggressive towards him in the control room when he had arrived for an overtime shift, demanding that he do a particular rotation and that, as a result, Mr Hussain had had to rearrange the rotations.. Mr Hussain believed that the Claimant was behaving like this towards him because he had reported him for being asleep on Christmas day.

<u>TUPE Issues and the Claimant' dismissal</u>.

82. On 21st August 2018 Mr Kovac wrote to the team at Paddington Central to inform them that the First Respondent had not been retained as security

provider for Paddington Central, and that the contract had been awarded to Axis Security. He also advised them that the First Respondent believed that TUPE would apply and the employees would transfer across to the new provider. (377A)

83. The First Respondent provided the Second Respondent with a list of employees who were assigned to the Paddington Central contract. This included the Claimant. On 11 September 2018 the Claimant met with Mr Eltayib of the Second Respondent as part of the TUPE consultation process. The Claimant did not raise any issues with Mr Eltayib at that point. The meeting was followed up by a letter to the Claimant confirming that Axis had been awarded the Paddington Central contract, that this would be treated as a TUPE transfer, and enclosing an employee welcome pack.

84. On 18 September 2018 the Claimant sent an email to Mr Giraldo, Shift Manager, complaining of *"discriminatory practices through the implementation of the current nightshift rota designed by SH*." He says: "*At the same time reasonable adjustments and protected act should be taken into consideration in my case as well as others with similar cases and physical challenges.*" He does not spell out what adjustments he requires or why, or what protected acts he is referring to. Apart from his continuing dissatisfaction about the distribution of duties between him and the post room officer, the complaints he is making are very unclear.

85. On 22nd September the Claimant sent an email to Mr Eltayib headed "*The abuse of authority, protection of protected acts and the professionalism standard of the security operators in Paddington Central."* In the body of the email he referred to a "*deliberate and persistent campaign of discrimination by design and implementation of security night shift rota*". Although it is not clear from the email what particular actions the Claimant is complaining about, what is clear is that the Claimant has a significant grievance against the First Respondent. He says that Mr Hussain had disregarded the need for reasonable adjustments, and some of the "*old guard are looking for punitive measures because I made many protected acts that expose wrong doings."* The Claimant also forwarded the email (see above) that he had sent to Mr Giraldo in which he mentioned that he had brought a claim in the Employment Tribunal, and he attached various documents (387 to 418). He copied the client into the email.

86. Mr Eltayib acknowledged the email and said that he would ask the First Respondent to investigate. This prompted a response from the Claimant (433) in which he said that "*there are already many active cases at Employment Tribunal against the Incentive Lynx Security as well as individuals."* The Second Respondent had not at that stage been made aware by the First Respondent of the Claimant's Employment Tribunal claims.

87. Mr Antill, head of HR at the Second Respondent, liaised with Ms Roberts of the First Respondent to get further information about the Claimant. Ms Roberts confirmed that the Claimant had one outstanding Employment Tribunal claim (although by then he had four claims). She said that they had made a temporary adjustment for his ankle in 2017 while his ankle healed, that he had not raised this again “though he has linked this to his ET claim”. She said that there was not time to deal with his recent concerns before the transfer and that the Second Respondent should take matters up with him once he had transferred.

88. On 25 September Ms Roberts sent the Second Respondent documentation in respect of the Claimant’s first ET claim and a grievance outcome letter dated 12th June 2018.

89. Mr Eltayib and Mr Antill met with the Claimant on 27th September. It became clear from this conversation that the Claimant had lodged more than one employment tribunal claim. Mr Eltayib told the Tribunal that the Claimant had suggested that he had issued “5 or 6 clams” and they were shocked. They then sought to persuade the Claimant to object to the transfer. The Claimant was told that if he wanted to object to the transfer the Second Respondent “could arrange it”. They told the Claimant that they would not be able to respond to his claims as they knew nothing about them, and that he should stay with the First Respondent. Mr Antill gave the Claimant a draft of a letter from the Claimant to the First Respondent in which the Claimant objected to the transfer of his employment to the Second Respondent (527B). He was told to speak to his lawyer and seek advice. The Claimant did not sign the document and did not object.

90. The next morning Mr Antill emailed Ms Roberts to say that they had met with the Claimant the night before and had received details that there was more than one outstanding ET and that the Claimant had many unresolved grievances. He asked for further information and said that that a decision would be made by 5.30 p.m. that day “*concerning Damal Opoka’s right to transfer on the very small amount of detail you have provided.”*

91. At 15:25 that day Mr Antill sent Ms Roberts a second email confirming that the Second Respondent would not accept the Claimant *“as an employee attached to the grouping of workers who provide services to Paddington Central.”* He said they had reached this decision because the First Respondent had not provided correct employee liability information concerning the Claimant or his contract of employment. He continued *“please make arrangements for Damal Opoka to be informed that he is to collect any personal belongings and return any entry equipment to this site by Sunday evening. We will also communicate this information to Damal Opoka as soon as we can*”

92. At 16.19 Ms Roberts responded (505) to the effect that under TUPE the new employer takes over the contracts of employment all employees who are

employed in the undertaking immediately before the transfer. She confirmed that the Claimant would transfer to the Second Respondent and denied that they had sufficient grounds to refuse the transfer.

93. The Claimant's next shift was due to take place on Sunday night from 7 p.m. to 7 a.m. on 30th September. The transfer was due to take place at 6 a.am on Monday 1st October.

94. On Friday 28 September a member of the client's management team approached Mr Kovac to tell him that Mr Eltayib would be coming to speak with him because the Second Respondent had decided not to take the Claimant on, and that they would be paying him out instead. At about 4 p.m. Mr Eltayib told Mr Kovac that he was to suspend the Claimant's security passes so that he couldn't gain access to the site and that the Claimant would not be TUPEing to the Second Respondent. Mr Eltayib told Mr Kovac to instruct the team that when the Claimant arrived on site he should be told to contact Mr Eltayib directly. The Claimant would not be prevented from collecting his personal items but he needed to speak to Mr Eltayib first.

95. Just after 4 p.m. the Claimant was telephoned at home by a colleague who told him that Mr Kovac had ordered that his site access cards should be cancelled and asked the Claimant what was going on.

96. At 16.45 Mr Eltayib sent an email to the Claimant (519) informing him that the Second Respondent had decided that he would not TUPE to them on Monday 1st October and that the decision was because the First Respondent had not provided the correct employee liability information or the correct employment tribunal/ACAS early conciliation information. He was told he could collect his personal belongings from site on Monday, and that he should arrange this through Mr Eltayib in advance. However, if he wished to collect his personal belongings during the course of the weekend then he should let Mr Eltayib know so that he could arrange access.

97. On 29 September at 20.30 Mr Hussain sent an email to the Control room say that the Claimant was no longer working at Paddington Central and that Mr Tamang would cover his night duty shift on 30 September.

98. The Claimant went to Paddington Central over the course of the weekend, was admitted by a colleague and collected his belongings

99. On 1 October 2018 Ms Roberts wrote to the Claimant (527A) stating that in their view his contract of employment would continue with the Second Respondent. In the ensuing few days there was correspondence between the First and Second Respondent with each of then denying responsibility for the Claimant. The Second Respondent insisted that the Claimant had not transferred and suggested, wholly disingenuously, that the Claimant was not

assigned to the Paddington Central contract. The Claimant was paid by the First Respondent up until 30th September.

100. On 24th November 2018 the Claimant lodged a further claim with the Employment Tribunal.

The relevant law

101. Disability The definition of a disabled person is set out in section 6 of the Equality Act 2010 which provides that "a person (P) has a disability if he has a physical or mental impairment and the impairment has a substantial and longterm adverse effect on P's ability to carry out normal day-to-day activities".

102. This definition is supplemented by the provisions of Schedule 1 and the "Guidance on matters to be taken into account in determining questions relating to the definition of disability" issued by in April 2011 (the Guidance). The time at which to assess whether a person has a disability is the date of the alleged discriminatory act.

103. Paragraph 2 of Schedule 1 provides that

> "(1) The effect of an impairment is long-term if—
>
> (a) it has lasted at least 12 months;
>
> (b) the period for which it lasts is likely to be at least 12 months; or
>
> (c) it is likely to last for the rest of the life of the person affected.
>
> (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."

104. The word 'substantial' has been defined in the Guidance has been "more than minor or trivial" reflecting "the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people." If something is not trivial then it is substantial. There is no middle ground. Aderemi v South Eastern Railway 2013 ICR 591. The threshold is relatively low and the Tribunal must look at what the Claimant cannot do, rather than what he can do (McNichol v Belfour Beatty.

105. Paragraph 6 of Schedule 1 provides that in considering whether or not an impairment had a substantial adverse effect on the ability of a person to carry out normal day to day activities, the effects of medical treatment should be ignored, and it is necessary to consider the normal day to day activities which the individual will not be able to undertake without the medical treatment, see also *Goodwin v Patent Office, [1999] ICR 302.*

106. Section 39(5) of the Equality Act 2010 imposes a duty to make reasonable adjustments on an employer. Section 20 provides that where a provision, criterion or practice (a PCP) applied by or on behalf of an employer, places the disabled person concerned at a substantial disadvantage in

comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable to have to take in order to avoid the disadvantage.

107. Section 21 of the Equality Act provides that an employer discriminates against a disabled person if it fails to comply with a duty to make reasonable adjustments. This duty necessarily involves the disabled person being more favourably treated than in recognition of their special needs. The Code of Practice on Employment 2011 (chapter 6) gives guidance in determining whether it is reasonable for employers to have to take a particular step to comply with a duty *to* make adjustments. What is a reasonable step for an employer to take will depend on the circumstances of the particular case.

108. Para 20 (1) of Schedule 8 to the Equality Act also provides that a person is not subject to a duty to make reasonable adjustments if he does not know, and could not reasonably be expected to know, that the disabled person has a disability and is likely to be placed at a disadvantage by the PCP. An employer is required to make reasonable enquiries as to whether an employee is disabled and as to the effect of that disability.

109. In reasonable adjustment claims the tribunal must identify the PCP applied by or on behalf of the employer, the identity of non-disabled comparators (where appropriate), and the nature and extent of the substantial disadvantage suffered by the Claimant. Once these maters are identified then the Tribunal will be able to assess the likelihood of adjustments alleviating those disadvantages identified. The issue is whether the employer had made reasonable adjustments as matter of fact, not whether it failed to consider them. (Environment Agency v *Rowan 2008 ICR 218* and *General Dynamics Information Technology Ltd v Carranza 2015 IRLR 4).*

<u>Direct discrimination, victimisation and harassment</u>.

110. Section 39 of the Equality Act 2010 prohibits an employer discriminating against or victimising its employees by dismissing them or subjecting them to any other detriment. Section 40 prohibits an employer from harassing its employees.

111. Section 13 defines direct discrimination as follows:-

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

Race is a protected characteristic. Disability is also a protected characteristic.

112. Section 40 prohibits an employer from harassing its employees. Section 26 defines harassment as follows:

> (1) A person (A) harasses another (B) if—
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of— (i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

113. As to victimisation section 27 provides that

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because–
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act– (a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act; (d) making an allegation (whether or not express) that A or another person has contravened this Act.

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

114. The burden of proof, is set out at Section 136. It is for the Claimant to prove the primary facts from which a reasonable Tribunal could properly conclude from all the evidence before it, in the absence of an adequate explanation, that there has been a contravention of the Equality Act. If a Claimant does not prove such facts he will fail – a mere feeling that there has been unlawful discrimination, harassment or victimisation is not enough. Once the Claimant has shown these primary facts then the burden shifts to the Respondent and discrimination is presumed unless the Respondent can show otherwise.

115. As to time limits Section 123 of the Equality Act 2010 provides that complaints of discrimination should be presented within three months of the act complained of. An act extending over a period is treated as done at the end of that period although this should be distinguished from a single act with continuing consequences. The concept of an act extending over a period was considered in Commissioner of Police of the Metropolis v Hendricks 2003 IRLR 96 and given a wide interpretation. ...

Detriment and dismissal for making a public interest disclosure

116. Section 103A of the ERA provides that:- An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure".

117. Section 47B(1) gives an employee the right not to be subjected to a detriment on the ground that he has made a protected disclosure. Section 48(2) provides that in a case of detriment for making a protected disclosure it is for the employer to show the ground on which any act or deliberate failure to act was done.

118. Section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower, whereas section 103A requires the protected disclosure to be "the principal reason" for the dismissal. The former however is not a "but for" test.

119. The term "protected disclosure" is defined in Section 43A of the Act as a "qualifying disclosure" (as defined in Section 43B) which is made in accordance with sections 43C to 43H.

120. A qualifying disclosure means "any disclosure of information which, in the reasonable belief of the worker making the disclosure *is made in the public interest and* tends to show ...."that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject". (in Chesterton Global Ltd –v Nurmohammed 2017 WWCA Civ 979 the Court of Appeal clarified the application of the public interest test).

121. Section 43L specifically provides that a disclosure of information will take place where the information is passed to a person who is already aware of that information. On the other hand a disclosure must involve the provision of information in the sense of conveying facts. In Kilraine v London Borough of Wandsworth 2018 EWCA civ 1436 the Court of Appeal said that "In order for a statement or disclosure to be a qualifying disclosure., it has to have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)."

122. Guidance on how to approach the question of whether a protected disclosure has been made was given in Blackbay Ventures Ltd v Gahir 2014 IRLR 416:-
    a. identify each disclosure by reference to date and content;
    b. identify each alleged failure or likely failure to comply with the legal obligation and/or that matter giving rise to the endangering an individual's health and safety;
    c. Save in obvious cases the source of the obligation should be identified by reference to statute or regulation. It was not enough for the tribunal to lump together a number of complaints, some of which might not show breaches of legal obligations;
    d. determine whether the Claimant had the necessary reasonable belief;
    e. where a detriment short of dismissal was alleged, identify the detriment and the date of the act or deliberate failure to act;

f. determine whether the disclosure was made in the public interest.

123. In *Eiger Secrities LLP v Korshunova UKEAT/0149/16* the EAT held that those claiming whistleblowing protection will have to identify the obligation that has or might be breached and show that "The identification of the obligation does not have to be detailed or precise but it must be more than a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation."

TUPE dismissals and transfer of liability

124. Regulation 4 of TUPE provides so far as relevant, as follows

(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transfer or and assigned to the organised grouping of employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

(2) Without prejudice to paragraph (1)… on the completion of the relevant transfer

(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and: –

(b) any act or omission before the transfer is completed of or in relation to the transfer or in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.

(3) Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that are subject to a relevant transfer, is a reference to a person employed immediately before the transfer, or who would have been so employed if it had not been dismissed in circumstances described in regulation 7 (1).

125. Regulation 7 provides an employee who is dismissed is to be treated as unfairly dismissed if the sole or principal reason for the dismissal is the transfer. (A dismissal is not automatically unfair if the principal reason is an economic technical or organisational reason entailing changes in the workforce of the transfer or the transferee before or after a relevant transfer.)

Unfair dismissal

126. In a case of "ordinary unfair dismissal" it is for the Respondent to show that the reason for the Claimant's dismissal is a potentially fair reason for

dismissal within the terms of section 98(1). If the Respondent can establish that the principal reason for the Claimant's dismissal was a genuine belief in the Claimant's misconduct, then the Tribunal will go on to consider whether the dismissal was fair or unfair within the terms of section 98(4). The answer to this question "depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it
as a sufficient reason for dismissal and shall be determined in accordance with equity and the substantial merits of the case."

127. A complaint of unfair dismissal as well as a complaint of detriment for making a protected interest disclosure must be presented before the end of the period of three months beginning with the date of the dismissal or the act complained of or within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months. . In a case of detriment for making a protected interest disclosure the 3 months period also runs from the date of any failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them.

<u>Conclusions</u>

128. Finding the relevant facts in this case has been a more difficult task than would ordinarily be the case. This is largely because the Claimant's written style, (both in his witness statement and in the many emails he sent to the Respondent), is hard to understand, and he has a tendency to make assertions without clear specifics. The list of issues was very lengthy and poorly drafted.

129. Further, the Respondents did not call, and the Tribunal did not hear from, Mr Mahmood, Mr Hurd, Mr Marandola, Mr Bonfield- all of whom were individuals against whom the Claimant has made allegations of race discrimination. We did not hear from Sarah Taylor, HR officer at the relevant time. They all left the First Respondent's employment before the transfer. Mr Kovac, from whom we did hear, had only been working at Paddington
Central in the last few months of the Claimant's employment.
Mr Sobkowiak too had had limited interaction with the Claimant. The First Respondent undoubtedly did not properly get to grips with the Claimant's various grievances. The Tribunal has had to piece together what happened through an extensive examination of the documents in the bundle.

130. Turning then to the list of issues, we set out our conclusions in relation to each issue by reference to the numbering that appears in the Schedule.

<u>Race discrimination and harassment</u> <u>Issues 4-7 The racist remark</u>

131. The Claimant has alleged that Mr Mahmood made an overtly racist remark to him in August 2016. It was important for the Tribunal to determine if this remark was made as, if it had, it would be very strong material from which the Tribunal could infer discriminatory motive.

132. Although we have not heard from Mr Mahmood, the Tribunal does not accept that he said to the Claimant in August 2016 "Oh how I hate some of you black Africans". In the original claim the Claimant identifies this comment as having been made between June and September 2016 in the 3SS lobby. In his witness statement the Claimant pinned down the date to "on or around 28 August 2016". He says that it was this remark that prompted the request for a transfer which he made later that day.

133. Two matters emerge from that. First, if the Claimant says that this remark prompted the transfer request then it is odd that he was unable to pin the date down with more certainty before, especially as he had made the transfer request from his personal email account. Secondly the transfer request itself does not refer to this remark. In his witness statement the Claimant also says that he told Mr Hurd about the remark at the time, but this (critical) fact is not referred to in his various particulars of claim, in his further particulars or in the only written communication from the Claimant to the Respondent which describes this incident. His first ET1 just states that he reported the "discriminatory activities" of Mr Mahmood to Mr Hurd on 4th October 2016.

134. More fundamentally the Claimant did not make any written complaint about (nor did he refer to) this alleged remark until 7th November 2017 (295) over a year after the remark was said to have been made, and just after the Claimant had threatened legal proceedings. The allegation first appears in an email from the Claimant to Lee Russell dated 7 November 2017 (295) in the context of Mr Russell trying to arrange a grievance hearing in respect of complaints made in September 2017. (The email is internally inconsistent in that the Claimant alleged first that Mr Mahmood said that he "hated some black Africans" and later in the email that Mr Mahmood said
"some of you black Africans!".)

135. The Claimant says that he did not mention this remark earlier because he thought that the best solution was just to leave the site. This explanation would be more credible if it were not for the fact that the Claimant complained vigorously to the Respondent about his treatment over relatively trivial matters on numerous occasions without mentioning a remark as overtly racist and serious as this. It is apparent that the Claimant wished to be transferred to a site nearer to home and if the remark had been made it is difficult to understand why the Claimant would not have referred to it in support of his transfer requests. The Claimant made a number of written complaints before referring to the alleged remark:-

    a. On 2nd October 2016 the Claimant emailed Mr Hurd (copied to

Barbara Jones) to “report the discriminatory activities I have suffered” -referring to the bag issue the “refreshment issue” and being removed from day reception duties.

b. On 4th October 2016 the Claimant sent “a formal grievance to Becky Sutherington of HR (231F)
c. On 21 October 2016 (2380) in a lengthy grievance the Claimant accused his “colleagues in higher positions exhibiting traits of narcissistic personality disorder” and Mr Mahmood of victimising him, and of making specific remarks to demonstrate the Mr Mahmood was targeting him.
d. On 14th and 16th August 2017 the Claimant sent lengthy complaints to Sarah Taylor
e. On 27 September he complained to Mr Bonfield about the rota duties and on 3rd October he complained again to Mr Bonfield referring to “dehumanising of victim by mudslinging/propaganda”.

136. If this remark had been made as the Claimant alleges, it is most unlikely that the Claimant would not have referred to it in one of the above complaints and we find, on the balance of probabilities, that the remark was not made.

<u>Issues 1-3</u>

137. The Claimant has complained that Mr Mahmood made repeated calls to him to chase him up on work that he was doing when he was transporting barriers to a storeroom on site. He complains that he was instructed to collect newspapers a disproportionately higher number of times than other security officers. He complains that he was not allowed to have any bottles of refreshments whilst on duty and that he was not allowed to carry his personal bag on-site or have it in the control room. We have set out our findings of fact in relation to these matters above.

138. All of these matters appeared to the tribunal to be no more than straightforward management instructions. Mr Mahmood was the shift supervisor and was entitled to call the Claimant on the radio. We accept the Respondent’s evidence that the client at Paddington Central did not allow officers to carry round bottles of refreshment unless they were of water. Tamara was carrying water and so the circumstances were not comparable. In relation to the issue of bags, the Claimant had a locker and the Respondent was entitled to require him to keep his bag in his locker. As the Claimant accepted he was told at the time that that the reason he was asked to collect the newspapers on the 14th was because the other officer had not been shown how to do it, and there is no evidence before us to suggest that this was not the real explanation or that his race had anything to do with that instruction.

139. On the other hand a theme emerges from the documents that shows that the Claimant did not react well to reasonable management requests, and that he had a tendency to perceive ordinary instruction to be “targeted at him”.

The evidence does not suggest that other employees who were not of African origin would have been treated any differently.

140. (In any event by the time the claim was lodged all of the alleged detriments and the alleged remark were outside the primary time limit. Since the Claimant has been unsuccessful in these claims, we have not considered any just and equitable extension.)

Direct race discrimination Issues 24 (e) -(i) -26

141. In his third claim, issued on 14th March 2018 the Claimant also complains that because of his race, Mr Bonfield and Mr Hussain deliberately excluded him from staff transportation provision on 25 December 2017. There was in fact no formal staff transportation on Christmas Day. The Claimant was not offered a lift to work by Mr Hussain because he did not live on Mr Hussain's route into work.

142. On 16th and 30th June 2018 the Claimant's duties for the shift were amended so that he was required to go to the control room during his shift. The control room is some distance from 4KS. This was a minor variation to the Claimant's usual duties and we accept the changes were made for operational reasons. Mr Hannou was not required to go to the control room because he had a different job. The Claimant was assigned to undertake a fire watch patrol on 29 June 2018 but this was also an unremarkable management instruction. Other patrol officers (of varying ethnicities) were also required to carry out fire watch patrols. Mr Hannou was not required to do this because he had a different job and was required to remain in the post room.

143. The Claimant alleges that Mr Hussain allocated overtime duties for the period 25th - 28 August to Mr Hannou rather than to the Claimant "even after the Claimant had asked that Mr Hussain prioritise 4KS core staff." Mr Hussain was not asked about his in cross examination and we have had no evidence of the overtime that the Claimant did or the overtime that Mr Hannou did. Mr Hannou was also core KS staff. Mr Kovac said that after 3rd August 2018 he was responsible from the for the overtime shifts and, following complaints from the Claimant, was at pains to ensure that the overtime was allocated fairly. We find this allegation is not established on the facts.

144. The Claimant says that the investigations carried out on 26 March and 12 June 2018 "covered up harassment against the Claimant". The reference to the 26th March investigation refers to the disciplinary hearing conducted by Mr. Marandola, following which Mr Marandola concluded that the Claimant did not bring the company into disrepute. The Claimant goes on to say "the report deliberately omitted or covered up the discrimination, falsification of records and my concern for increased risk to 4KS staff and users health and

safety which was ignored by Tim and Syed Hussain. I was deeply distraught by the cover-up, threats." We have discerned no cover-up or threats in the outcome of this disciplinary hearing, which largely went in the Claimant's favour.

145. The reference to a cover-up on 12 June is a reference to the outcome of the Claimant's stage one grievance hearing. (374) By this stage the Claimant was making some outlandish suggestions about being poisoned and the deletion of CCTV and had been less than cooperative during the grievance hearing. The Claimant was not clear exactly what was "covered up" (In his witness statement he says that he felt like he was being "interrogated by the Gestapo or KGB"). While we consider that the grievance investigation could have been more thorough, we do not find that there was any attempt to cover up harassment against the Claimant – simply the outcome was not the one which the Claimant sought.

146. It is for the Claimant to establish the primary facts from which the Tribunal could conclude from all the evidence before it that he has been less favourably treated than others because of his race. Once he has done this then the burden shifts to the Respondent to provide an explanation. We have looked at all the Claimant's allegations both individually and in the round and find that he has not established the primary facts from which we could infer discrimination because of his race.

<u>Issues 27-30 Harassment</u>

147. Mr Pun was asked to patrol within 4KS which the Claimant regarded as "his" patrol area. We do not accept that this was conduct which violated the Claimant's dignity or created an intimidating hostile degrading humiliating or offensive environment for him. Nor do we accept that this instruction was related to the Claimant's race.

148. We do not accept that the Respondent monitored the Claimant at prayer. We do not accept that the CCTV extended into the room in which the Claimant was praying or that Mr. Tarak "deliberately interrupted the Claimant's prayer session.

149. We do not accept, as we have said that the investigations on 26 March and 12 June covered up harassment against the Claimant.

150. It has been a consistent theme of the Claimant's evidence that he was subjected to less favourable treatment than Mr Hannou. We accept that the Claimant believed that Mr Hannou had easier duties than he did, but this was not a view shared by the Respondent who believed that the post room role was just as busy - although it was a more sedentary role. The Claimant's sense of unfairness arose from the representation made by Mr Hurd in the February 2017 email that they would both share the load. However the rota

was not "changed" - as in February the rota had not been designed, and Mr Hurd's email was not specific as to the duties each would undertake. At that point 4KS was not operational and building works were going on. There was no evidence to suggest that any changes
(if there were any) had been made to "disfavour the Claimant" or were related to his race. If Mr Hannou had "easier" duties, this was because the Claimant had been allocated the building officer role while Mr Hannou had been offered the post room role. The fact that Mr Hannou was Algerian and the Claimant was African was entirely incidental. (We heard no evidence about the Claimant's other named comparator, Mr Soneji.)

Victimisation and whistleblowing. Issues 7-9 and 31-33.

151. The Claimant relies on protected acts as set out in paragraphs 7 and 10 of the Issues.

152. The Claimant says that (issues 9b-e) because of his complaints on 2nd and 4th October 2016 Mr Mahmood

a. told him to use his common sense and intervened with a handover;
b. on 28th August 2016 called the Claimant repeatedly while carrying out his duties
c. On 13th October 2016 refused to provide assistance when he reported a water leak;
d. made comments suggesting he was out to get him.

(The Claimant has also said that these detriments were because of the 14 and 16 August 2017 complaint but that it plainly impossible.)

153. He also says that because of this complaint the rota was changed on 17th April so that the Claimant had to undertake patrols of campus while on shift.

154. We do not accept the Respondent's submission that the Claimant made these complaints in bad faith or knowing that they were false. However, although the October complaints refer liberally to discrimination and victimisation, it is not clear that the Claimant is alleging breaches of the Equality Act. He does not refer to his race and does not suggest that he has been discriminated against because of any protected characteristic. Rather the terms discrimination and victimisation seem to be used in the looser layman's sense i.e. that he has been unfairly treated or picked on.

155. However even if the complaints he made on 2nd and 4th October do meet the definition in section 27 of a protected act, we do not accept that the alleged detriments amounted to unfavourable treatment because of the complaint. Detriment b (which occurred in August 2016) predates the complaint in any event. Detriments a and c are minor matters. A direction "to use common sense" was in all likelihood a straight reaction to the fact that the Claimant

had been late for a duty and Mr Mahmood did not accept the Claimant's explanation. We accept Mr Adjei's submission that it is unlikely that Mr Mahmood would have deliberately ignored the Claimant's calls for assistance over a water leak as that would have called his own competence into question, rather than the Claimant's. In relation to the comments said to have been made by Mr Mahmood, we find, on the balance of probability that he was reacting to the Claimant's threat to raise a grievance, rather than his complaint to Ms Taylor. As a stand-alone detriment it is significantly out of time, having been made in October 2016 and the first claim being presented in November 2017.

156. Issue 9a. The Claimant says that because of the October 2016 and August 2017 complaints the rota was changed on 25th August 2017 to allocate a disproportionate number of mundane tasks to him. As we have said, the rota was not changed, but we take the Claimant to be referring to the newspaper incident. The Claimant was shown how to do the task on one day, competed it the next and then was asked to swap with another officer to collect on the following day. There is no evidence to suggest a link with his complaint. It was unremarkable management instruction and does not amount to unfavourable treatment

157. Issue 9g. This is the alleged racist remark by Mr Mahmood and we have already found that this remark was not made. In any event it was alleged to have been said before the complaints relied on as protected acts

158. Issue 9f. As we have already said there was no change to the rota on 17th April. Rather the split of duties between the building officer and the post room officer was changed from what had been envisaged in February. This had nothing to do with the Claimant's complaints.

159. In his second set of claims (presented to the London Central Tribunal) the Claimant alleges further victimisation. He relies on the October 2016 and August 2017 complaints as well as his ET1s, emails in May 2018 to Mr Maradola, emails in August to Mr Kovac, and emails in September to Mr Giraldo and Mr Eltayib. We do not accept that the Claimant's complaints were in bad faith and accept that the Claimant made complaints alleging breaches of the Equality Act and which satisfied the definition of a protected act in section 27.

160. However, save for the dismissal itself we do not accept that the Claimant was unfavourably treated because of those complaints.

161. The detriments relied on are set out at paragraph 33 of the list of Issues. Issue 33a relates to the Christmas transport issue. As we have said the Claimant was not deliberately excluded from transport. Mr Hussain simply offered lifts to those on his route from home.

162. Issue 33b. The charge of gross misconduct was brought against the Claimant for genuine reasons. He had not sought permission to sleep on site. The evidence does not suggest that this was linked to his grievances.

163. Issues 33c and d. The requirement for the Claimant to patrol outside 4KS on 2 occasions in June and to undertake the fire watch patrol were wholly unremarkable management instructions. There was no detriment or unfavorable treatment of the Claimant. There is nothing from which we could infer an ulterior motive or a link to his grievances.

164. Issue 33e. Mr Kovac allocated the overtime. There is no evidence that the Claimant did not get a fair share of overtime.

165. Issue 33f. Mr Kovac cancelled the Claimant's access cards because he was instructed to do so by Mr Eltayib. Mr Eltayib instructed him to do so because he had become aware of the Employment Tribunal claims. This is was an act of victimisation by Mr Eltayib and is directly linked to the dismissal. (see below).

Whistleblowing

166. The "disclosures" relied on are 10 emails sent to various different members of management at the First Respondent, an email to the Second Respondent, and "ticking box 10.1" in his first 2 ET1s.

167. Despite having been represented by solicitors when he presented his first ET1s, there has been no proper attempt in the ET1s or in the issues to analyse either what information within those documents was disclosed, or what legal obligation was said to have been breached. There are simply vague references to "health and safety" and "breaches of legal duty", "miscarriage of justice" and "concealment of information". There is no attempt to address the public interest test. Unfortunately, that does not get us very far in determining whether a protected disclosure has been made. It is a lazy route for a paid legal advisor to take.

168. In the first two claims the Claimant relies on his emails of 14 and 16 August to Sarah Taylor. He says because of these disclosures he was denied the opportunity to work in the post room, his activity was monitored by Mr Hannou on 14th March 2018 and he was removed from day reception duty because the reception manager had made a complaint against him.

169. The 2nd October email is alleged to disclose breaches of health and safety and a breach of legal obligations (undefined). It does nothing of the sort. It is simply a complaint about the Claimant's own position and has no wider public interest. In any event his complaint that he was removed from reception duties because he sent that email is wide of the mark. The

reception manager had made a serious complaint about the Claimant's behaviour and that is why he was removed from reception duties. We do not accept that the receptionist was part of a conspiracy with Mr Hurd and Mr Mahmood to have him dismissed from Paddington Central or that it was all a "set up".

170. Nor was the Claimant "denied the opportunity to work in the post room" because of the 2nd October email. He was allocated the building officer rather than the post room role because that was the role that he had expressed a preference for.

171. The email of 14th August 2017 is also a complaint about the Claimant's own position; the "change" to the rota, the fact that he had not been transferred as requested and alleged bullying and harassment. Although lengthy and peppered with references to health and safety, stress at work and "I whistle blew and sought advise" there is no disclosure of sufficient specificity to meet the Kilraine test. In the 16th August email the Claimant complains about discrimination against a number of Nepalese members of staff but equally these are simply assertions of discrimination and lack the specificity required into meet the definition of a protected disclosure.

172. None of the above are disclosures that qualify for protection but, even if we are wrong about that and the test is met, we do not accept that the alleged detriments flowed from the complaints that he made. He was not placed in
the post room because he had expressed a preference for the Building Officer role. His activities were not monitored by Mr Hannou. (In any event it seems unlikely that Mr Hannou would have been aware of his complaints). He was not removed from reception duties because of disclosures but because of the complaint that had been made about the Claimant's behaviour.

173. In the second two claims the Claimant makes further allegations of detriment for having made protected disclosures. This time he relies on

a. the emails of October 2nd -6th 2016 (see above),
b. the emails of 14th and 16th August 2017 (see above) and
c. two email of 15th and 23rd May, 2018 to Mr Marandola
d. Two emails of 3rd and 19th August 2018 email to Mr Kovac
e. Email of 18th August 2018 ro Mr Giraldo
f. Emails in September 201 to Mr Eltayib and Mr Strickland; and
g. the ET1s.

The detriments relied in are the same detriments relied on for his victimisation claim and alleged to have been done because he had done protected acts.

174. Whatever the status of those emails we are satisfied that the Claimant did not suffer the detriments alleged (see para 36 of the issues) because of any disclosures.

a. The Claimant was not deliberately excluded from transport. Mr Hussain offered lifts to those on his route from home.
b. The charge of gross misconduct was brought against the Claimant for genuine reasons. He had not sought permission to sleep on site, it was not linked to his grievances.
c. There was no ulterior motive in requiring the Claimant to patrol outside 4KS on 2 occasions in June or to undertake the fire watch patrol. It was an operational requirement and there was no detriment or unfavorable treatment of the Claimant.
d. Mr Kovac allocated the overtime. There is no evidence that the Claimant did not get a fair share of overtime.
e. Mr Kovac cancelled the Claimant's access cards because he was instructed to do so by Mr Eltayib.

Disability

175. The Claimant claims that he was a disabled person by reference to the impairment to his ankle for the duration of his employment. He claims that the Respondent directly discriminated against him and that there was a failure to make reasonable adjustments. The Respondent denies that the Claimant was a disabled person and denies that they had actual or constructive knowledge of his disability or of the substantial disadvantage alleged.

176. Was the Claimant a disabled person at the relevant time? We had some medical evidence (188-198). We also had a document headed impact statement from the Claimant and further evidence in the Claimant's witness statement. However to the extent that these documents conflict with the contemporaneous medical or other evidence we have preferred the more contemporaneous documents in the bundle.

177. The medical evidence in the bundle establishes that the Claimant broke his ankle in April 2011. This did not heal well and in January 2012 he reported continuing pain when walking. In September 2012 he underwent an arthroscopy and debridement. In November 2012 the consultant reported that the Claimant had "a good range of movement now and no pain at all in the ankle". The consultant says that "I explained to him about the procedure and the precautions. I advised him about his activities. I advised him of the risk of progression of osteoarthritis in his ankle". While the letter does not spell out what advice about his activities was provided, in August 2016 the Claimant told HR that in 2012 *"I was medically advised not to overload the foot with heavy activities like running and climbing stairs with heavy loads, but I can do most light activities as normal. I assess risks in this context and*

adapt to situations as best I can. For example, I wear shoes with flat soles instead of the ones with hilly soles. This allows me to walk normally without pain. We find that this is what the Claimant was medically advised**.**

178. In considering whether the Claimant was a disabled person the threshold for "substantial adverse effect" is low. The Tribunal must look at what the Claimant cannot do rather than what he can do. On balance, therefore, we accept that the Claimant could not climb stairs with heavy loads or run. We accept that that this is a substantial adverse effect on his ability to do daytoday activities. If the advice was given in 2012 then by 2016 the impairment was long-term. We conclude that the Claimant was a disabled person by reference to his ankle impairment from the start of his employment. The Respondent had knowledge of the Claimant's medical condition.

179. By May 2017 there were some degenerative changes to his ankle and he had a six week fit note requiring adjustments, and a letter typed in July which stated that the Claimant had difficulty walking long distances and had difficulty lifting heavy objects.

180. <u>Direct disability discrimination</u>. The Claimant alleges that the Respondent treated the Claimant less favourably because of his disability in that

    a. On 17th April and 25th August 2017 the Respondent redesigned the night shift duty
    b. On 9/5/2018, 16/06/2018, 30/06/2018 the 4KS Security Night Shift duty rotation was re-designed to disfavour the Claimant by Tim Bonfield/Syed Hussain.

181. As to the former, (and as we have said before), there was no "change to the rota" on 17th April 2017 as there had been no previous rota. The exact duties of the building officer and post room roles had not been defined in February. There was also no change to the rota on the 25th August (271A).

182. In relation to the alleged rota changes in 2018 on 16th and 30th June the rota was revised to require the Claimant to go to the control room. On the 9th May the Claimant's duties included at 22.45 "Pergola dispersal" (314A). This was a night club on site.

183. These were all operational changes that also affected the other building officer Mr Tamang, who was not disabled. There was no less favourable treatment because of the Claimant's disability.

<u>Failure to make reasonable adjustments</u>

184. The "pcps" set out in the list of issues are clumsily defined but essentially can be summarised as a requirement to be mobile and to do his role (rather

than the post room role). The First Respondent accepts that it had in place a pcp requiring the Claimant to be mobile and to carry out his role.

185. Did that pcp place the Claimant at a substantial disadvantage? Prior to May 2017 the Claimant had been permitted to wear special shoes and had been advised not to overload the foot with heavy activities like running and climbing stairs with heavy loads. The Claimant had said in August 2016 that he could do most light duties and that by wearing different shoes he could "walk normally without pain". His job did not require him to run or to climb stairs with heavy loads. In February 2017 he requested the building officer role. He was aware when he applied for the job that it would require patrols, he had been doing patrols in his previous role, but was anxious to work nights. There was no reason for the Respondent to believe that these would cause him any difficulty. We find that he was not at that time at a substantial disadvantage. If he was the Respondent could not reasonably have been expected to know that the Claimant would be at such a disadvantage.

186. In May 2017 the Claimant obtained a fit note signing him fit for work with amended duties for a period of 6 weeks i.e to 19th June. We have seen no evidence that these adjustments to his duties were made and we find that in respect of this 6-week period there was a failure to make reasonable adjustments. We considered whether this claim was out of time. The Claimant's first claim was presented on 24th November, following a period of early conciliation from 9th – 22nd October 2017. The claim was therefore outside the primary time limit (which expired on 22nd October) by just over one month. This is not a very lengthy delay and we find, having heard all the evidence, that it would be just and equitable to extend the time to allow a remedy for this failure.

187. In July 2017 the Claimant obtained the letter from King's College Hospital (referred to at paragraph 47 above), from which it would appear that there had been some worsening of his ankle. He gave this to Mr Bonfield on 27th September and asked for an OH assessment. Despite the content of the medical letter in the same email the Claimant said that he "could walk downstairs or flat with ease". However, "he could not climb stairs" and needed to use the lifts. His complaint was that during "some emergencies the lifts are disabled". He wanted to change duties with the post room officer but did not say that he wanted sedentary duties. The distribution of duties between him and the post room officer had been the subject of a running complaint, and allegations of discrimination, since April 2017. The Claimant then refused to attend a grievance hearing and no changes were made to his duties.

188. The First Respondent failed to commission an occupational health report, which it plainly should have done on receipt of that letter, whether or not the Claimant wished to proceed with his grievance, (which in any event was primarily focused on other issues). Nonetheless the question is not whether

the Respondent properly considered the medical position but whether or not they should have made an adjustment.

189. We considered whether at this later date, following 27th September 2017, the Respondent was under a duty to make reasonable adjustments and to move the Claimant to a sedentary role or to a role which required less walking. Paragraph 20(1) of Schedule 8 to the Equality Act provides that the duty does not arise if the Respondent did not know or could not be expected to know that Claimant was at a substantial disadvantage because he was not in a sedentary role. Given the Claimant's statement that he could walk on the flat with ease, sought only an adjustment relating to the lifts during emergencies and the lack of any further fit notes suggesting that the Claimant should reduce his walking, on balance, and despite the content of the July letter we find that the duty did not arise. There was no requirement for him climb stairs. He could use the lift, even during emergencies.

<u>Dismissal</u>

190. It is accepted that the Claimant was dismissed but the Respondents disagree as to who dismissed the Claimant. Ms Palmer, on behalf of the Second Respondent says that the Claimant was dismissed when Mr Kovac suspended his security pass. At that time, the contract had not passed to the Second Respondent who had no authority to suspend the Claimant or to dismiss him. She submits that the Claimant was not employed by the First Respondent "immediately before the transfer". Mr Adjei asserts that the First Respondent did not dismiss the Claimant and that accordingly he transferred to the Second Respondent on 1 October.

191. We find that the Second Respondent dismissed the Claimant. At 16:45 on 28th September Mr Eltayib emailed to the Claimant to say that the Second Respondent had decided that he would not transfer to Axis Security Services on Monday 1st October 2018 and to collect his personal belongings on Monday, or during the course of the weekend (but in that event he would need to contact Mr Eltayib who would arrange access).

192. We find that this was a letter dismissing the Claimant with effect from 1 October 2018. The decision was that of the Second Respondent and took effect from the moment of transfer. The Claimant was therefore employed immediately before the transfer and transferred to the employment of the 2nd Respondent by virtue of regulation 4(1).

193. Although the Claimant's access was suspended that suspension did not constitute the dismissal. The telephone call that the Claimant received at 4pm was not a dismissal, it was simply a colleague phoning to ask what was happening. However, the letter sent at 16.45 by Mr Eltayib was a clear instruction that the Claimant was dismissed from the moment of transfer.

194. We also find that when Mr Kovac suspended the Claimant's access he was acting as agent for, and on the instruction of, the Second Respondent who would have control of the contract (and be Mr Kovacs employer) by the end of the Claimant's next shift. He had been told by the client that the Second Respondent way "paying out" the Claimant. There was no reason why the First Respondent would choose the moment before transfer to dismiss or victimise a Claimant who they had not dismissed despite his having presented for employment claims and made a significant number of grievances. Mr Eltayib was exercising de facto control - hence the instruction in the 16.45 email that the Claimant was to contact him and not the First Respondent if he wanted to gain access to the site over the weekend

195. The Second Respondent did not wish to have the Claimant on site at the moment of transfer, because they hoped to be able to argue that he was not employed immediately before the transfer and so could escape the automatic consequences of the TUPE regulations.

196. It is clear beyond any doubt that the reason that the Claimant was notified that he would not be transferring was that the Second Respondent had become aware of the Claimant's employment tribunal claims and of the fact that he was alleging discrimination. The Second Respondent had met with the Claimant and provided him with a welcome pack. At that point they intended that he would transfer. It was only when it became aware of the claims that Mr Eltayib sought to persuade him to object to the transfer in order to deprive him of his right to transfer. When he declined the Second Respondent said that they would not accept the Claimant on the knowingly false premise that he was not "an employee attached to the grouping of workers who provide services to Paddington Central".

197. This is not a potentially fair reason for dismissal. The dismissal was unfair. It was also a clear case of victimisation contrary to section 27 of the Equality act.

198. We considered this case to be clear-cut and are surprised that the Second Respondent has sought to argue otherwise.

199. (We add, for completeness, that even the Claimant had been dismissed by the First Respondent before the transfer (which we have found he was not) then the Second Respondent would still have inherited the Claimant's contract of employment and the dismissal would still be unfair. Regulation 4(3) provides for the transfer of persons who are employed immediately before the transfer "or who would have been so employed if it had not been dismissed in circumstances described in regulation 7(1)". Regulation 7(1) provides an employee who is dismissed is to be treated as unfairly dismissed if the sole or principal reason for the dismissal is the transfer. In other words if the principal or sole reason for the dismissal is the transfer the employee will transfer. In this case the principal reason was the impending transfer –

specifically the fact that Second Respondent would inherit the Tribunal claims and it was tainted with victimisation.

200. The Claimant also claims that he was wrongfully dismissed and is entitled to notice. He was clearly dismissed in breach of contract and is entitled to his notice pay.

201. Finally, the Claimant also claimed holiday pay (i.e. pay for holiday accrued but not taken. However, there was nothing in the Claimant's witness statement about holiday pay and this issue will be determined at the remedy hearing on 14 February 2020.

202. The Claimant should provide an updated schedule of loss to the Respondent no later than 7th February 2020. The parties are reminded of their ongoing duty of disclosure and the Claimant should provide the Respondent with any evidence not already provided relating to his attempts to find alternative employment or otherwise to explain why he is not in employment.

203. The Claimant must provide the Respondent with a witness statement detailing issues relevant to remedy no later than 31 January 2020. If the Second Respondent intends to call any witnesses to refute the Claimants evidence it must serve a witness statement on the Claimant no later than 7 February 2020

204. The parties are directed to liaise to provide a list of issues for determination at the remedy hearing to be provided to the tribunal no later than 4 p.m. on 13 February 2020.

____

Employment Judge Spencer
17th January 2020

JUDGMENT SENT TO THE PARTIES ON
20/Jan 2020
....
....
FOR THE TRIBUNAL OFFICE

SCHEDULE The Issues

Case No 2300207/2018–Race, Disability Discrimination, PIDA

Direct Race Discrimination

1. Did the following matters take place:-
    a. Between June and September 2016 –Sajid Mahmood made repeated calls to the Claimant to chase him on work that he was doing.
    b. Between 12 and 14 October 2016 – The Claimant was instructed to carry out the mundane task of collecting newspapers a disproportionately higher number of times than other security offers of the Respondent.
    c. On 19 September 2016 – Sajid Mahmood told the Claimant that he was not allowed to have any bottles of refreshment while on duty as it was detrimental to the company image and contrary to the instruction of the Respondent.
    d. 29 September 2016 – Sajid Mahmood treated the Claimant differently to other security officers as he instructed the Claimant that he was not allowed to carry his personal bag on site whilst on duty or have it in the control room.

2. Did the Respondent treat the Claimant less favourably than Adam Stacey, Amran Rahman, Gary Leighton, Tamara Bajdik, Tanka Punn, Kamel Hannou, Bhairab Tamang and Berlinski Marcin. Are the people identified accurate comparators?

3. Was the less favourable treatment because of Race - Black African and/or Ugandan ethnicity?

Racial Harassment

4. Was the Claimant subjected to unwanted conduct:-
    (a) Between June and September 2016 - Sajid Mahmood told the Claimant

        "Oh! How I hate some of you black Africans!"

5. Was the conduct related to race?

6. Having regard to s26(4) Equality Act 2010, did such conduct have the purpose or effect of:-
   (a) violating the Claimant's dignity or
   (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

Victimisation

7. Did the Claimant do a "protected act" on 14 August 2017, 16 August 2017, 2 October 2016, 4th October 2016?

DATE (and if e-mail or fax TIME as well)	HOW (E-MAIL, LETTER, FAX etc.)	TO WHOM SENT
14 August 2017@17:15	Email	Sara Taylor
16 August 2017@22:02	Email	Sara Taylor
2 October 2016@22:59	Email (grievance)	Jason Hurd, Barbara Jones
4 October 2016@15:17	Email	Becky Sutherington

8. Were the "protected acts" made in bad faith?

9. Was the Claimant subjected to a detriment by:-
   a. The rota being changed on 25 August 2017 to allocate a disproportionate number of mundane tasks to the Claimant.
   b. On 11 October 2016:
      i. the Clamant being told by Sajid Mahmood to use his common sense,
      ii. Sajid Mahmood intervening with a handover.

c. On a date that the Claimant can't recall Sajid Mahmood telephoning the Claimant repeatedly whilst he was carrying out duties. [During evidence the Claimant said that this was the 28th August 2016 barrier incident]

d. On 13 October 2016 Sajid Mahmood refusing to provide assistance to the Claimant in respect of an incident at the West Loading Bay.

e. Sajid Mahmood made the following threats to the Claimant on the 19 October 2016:

   i. *"the file notes I am gathering on you will be enough to ruin your image and no manager will be putting you in his/her team when they read it"*

   ii. *"go ahead and put in your grievance. I already know the outcome of your grievance, also the outcome of your grievance, so good luck with it"*. iii. *"Security sector is a small world. I have been a manager nine years, people talk"*.

f. On 17th April 2017- The Respondent required the Claimant to undertake patrols of the campus whilst on shift. [As pleaded the date is 9th February 2017 but in evidence the Claimant said he meant the 17th April]

g. Between June and September 2016 Sajid Mahmood told the Claimant *"oh! How I hate some of you black Africans"*.

Whistleblowing

10. Did the Claimant make a qualifying disclosure to the Respondent pursuant to s43(B) Employment Rights Act 1996? In particular:-

(i) What was the disclosure? The Claimant relies upon written disclosures of 14 August 2017 and 2 October 2016.

DATE (and if e-mail or fax TIME as well)	HOW (E-MAIL, LETTER,FAX etc.)	TO WHOM SENT	IDENTIFY WHAT IT IS SAID SHOWED A DANGER TO HEALTH AND SAFETY OF ANY INDIVIDUAL OR IDENTIFY LEGAL OBLIGATION
14 August 2017@15:15	Email	Sara Taylor	Legal obligations Danger to Health and safety
14 August 2017@22:02	Email	Sara Taylor	Legal obligations
2 October 2016@23:59	Email (grievance)	Jason Hurd, Barbara Jones	Legal obligations

(ii) Was there a disclosure of information?

(iii) What did the Claimant reasonably believe that it tended to show?

(iv) Did the Claimant reasonably believe that the disclosure was in the public interest?

11. Was the disclosure made to the employer or other responsible person in accordance with s43C Employment Rights Act 1996?

12. The Claimant states he suffered the following detriments?

    a. On 17 April 2017 – the Claimant suffered a financial loss as he was denied the opportunity to work in the Post room where the relevant officer monitored CCTV footage.
    b. On 14 March 2018 the Claimant's activity was monitored by Kamel Hannou in the Night Post room.
    c. Around 4 October 2016 – the Claimant was removed from the day reception duty due to the Receptionist Manager, Christian De Bruin making a complaint against the Claimant.

Direct Disability Discrimination

13. Was the Claimant disabled at the material time?

14. Did the Respondent have knowledge of the disability?

15. On 17 April 2017 and 25 August 2017 was the 4KS Security Night Shift duty rotation re-designed deliberately to disfavour the Claimant.

16. Did the Respondent treat the Claimant less favourably than Adam Stacey, Amran Rahman, Gary Leighton, Tamara Bajdik, Tanka Punn, Kamel Hannou, Bhairab Tamang and Berlinski Marcin. Are the people identified accurate comparators?

17. Was the less favourable treatment because of the Claimant's disability?

Reasonable Adjustments

18. Did the Respondent have in place a provision, criteria or practice (PCPs) –

    (a) Requiring the Claimant to be mobile.

    (b) Requiring him not to monitor CCTV.

    (c) Requiring him not to be emergency co-ordinator.

    (d) Requiring the Claimant not to do sedentary roles.

19. Did the PCP's place the Claimant at a substantial disadvantage in comparison to non-disabled persons because it caused increased pain in his ankle?

20. Did the Respondent have knowledge of the disability and of the substantial disadvantage?

21. Did the Respondent fail to make reasonable adjustments by failing to give him a sedentary role, failing to allow him to operate CCTV, failing to allow him to be emergency co-ordinator.

Time Limits

22. Is the Claimant's claim in whole or part brought within the statutory time limit of 3 months? Is there a course of conduct on part of the Respondent extending over a period of time?

23. If the claim is not in time, should time be extended?

Case No 2205734/2018 –Race, Disability Discrimination, PIDA

Direct Race Discrimination

24. Did the following matters take place:-
    e. On 25th December 2017, was the Claimant deliberately excluded from staff transportation provision by Tim Bonfield and Syed Hussain.
    f. On 16/06/2018, 30/06/2018 the 4KS Security Night Shift duty rotations were re-designed by Tim Bonfield and Syed Hussain deliberately persistently to disfavour the Claimant by favouring Kamel Hannou.
    g. On 29/06/2018 did Syed Hussain design a 4KS fire watch patrol rota which favoured Kamal Hannou in the Loading bay whilst the Claimant was assigned to patrol.
    h. On 3/08/2018 did Syed Hussain allocate overtime duties for the period 25 – 28/08/2018 to Kamal Hannou rather than the Claimant, even after the Claimant had asked that Mr Hussain prioritize 4KS core staff.
    i. Did the investigatons carried out on 26/3/18 and 12/6/18 cover up harassment against the Claimant

25. Did the First Respondent treat the Claimant less favourably than Kamal Hannou, and Kamlesh Soneji? Are the people identified accurate comparators?

26. Was the less favourable treatment because of Race [Black African and/or Ugandan]?

Racial Harassment

27. Was the Claimant subjected to unwanted conduct:-

(b) On 19/5/18 Tim Bonfield and Syed Hussain persistently deploying campus patrol officer Gunan to extend inside the Claimant's patrol area for 4KS.

(c) On 30/06 2018 at around 01:35 hours when his prayer session was deliberately disrupted by Dill Tarak under the order of Syed Hussain.

(d) Did the investigation carried out on 26/3/18 and 12/6/18 cover up harassment against the Claimant?

28. Was the conduct related to race?

29. Having regard to s26(4) Equality Act 2010, did such conduct which have the purpose or effect of:-
    a. violating the Claimant's dignity or
    b. creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

30. In deciding whether such conduct had the above-mentioned effect each of the following must be taken into account:
    a. the Claimant's perception;
    b. the other circumstances of the case;
    c. whether it is reasonable for the conduct to have that effect.

Victimisation

31. Did the Claimant do a "protected act" on Second October 2016, 6th October 2016, 14th August 2017, 16th August 2017, 24th November 2017, 15th May 2018, 23rd May 2018, 3rd August 2018, 12th August 2018, 18th September 2018 and 2Second – 25th September 2018.

DATE (and if e-mail or fax TIME as well)	HOW (E-MAIL, LETTER, FAX etc.)	TO WHOM SENT
2-6/10/16@ 23:59	email	Jason Hurd – Site Manager & Ryan Cox - Director

14/8/17@ 17:15	email	Sarah Taylor
16/8/17@ 22:02	email	Sarah Taylor
24/11/17@ 22:59	email	ET1 (2300207/2018)
15/12/17@ 08:30	email	ET1 (2300380/2018)
15/5/18@ 13:56	email	Dion Marandola
23/5/18@ 15:26	email	Dion Marandola Rob Strickland The Governing Respondent Body of the First
03/8/18@ 05:58	email	Stefan Kovac
12/8/18@ 10:38	email	ET1 633 ET1 34
19/8/18@ 16:22	email	Stefan Kovac
18/9/18@ 01:25	email	Jaiber Giraldo
22-25/9/18@ 14:17	email	Waleed Eltayib Rob Strickland

32. Were the “protected acts” made in bad faith?

33. Was the Claimant subjected to a detriment by:-
    a. Deliberately excluded from transport on 25th December 2017 by Tim Bonfield and Syed Hussain.
    b. On 8/3/2018 a gross misconduct charge was brought by Tim Bonfield and Syed Hussain.
    c. On 16/06/2018, 30/06/2018 the 4KS Security Night Shift duty rotations were re-designed by Syed Hussain deliberately persistently to disfavour the Claimant by favouring Kamel Hannou.
    d. On 29/06/2018 did Syed Hussain design a 4KS fire watch patrol rota which favoured Kamal Hannou in the Loading bay whilst the Claimant was assigned to patrol.

e. On 3/8/2018 did Syed Hussain allocate overtime duties for the period 25 – 28/08/2018 to Kamal Hannou rather than the Claimant even after the Claimant had asked that Mr Hussain prioritize core 4 KS staff.

f. On 28/9/18 did Stefan Kovac cancel the Claimant's access cards after confirming overtime for the Claimant for period of 1st – 7th October 2018.

Whistleblowing

34. Did the Claimant make a qualifying disclosure to the Respondent pursuant to s43(B) Employment Rights Act 1996? In particular:-

(v) What was the disclosure? The Claimant relies upon a written disclosure of 6th October 2016, 14th August 2017, 24th November 2017, 15th December 2017, 23rd May 2018, 12th August 2018 and 2Second – 25th September 2018.

DATE (and if e-mail or fax TIME as well)	HOW (E-MAIL, LETTER,FAX etc.)	TO WHOM SENT	IDENTIFY WHAT IT IS SAID SHOWED A DANGER TO HEALTH AND SAFETY OF ANY INDIVIDUAL OR IDENTIFY LEGAL OBLIGATION
2-6/10/16@ 23:59	email	Ryan Cox Becky Barbara Jones Jason Hurd	legal obligation
14/08/17@ 17:15	email	Sarah Taylor	health and safety
24/11/17@ 22:59	email	C relies on having ticked box 10.1 of ET1 (2300207/18)	health and safety & legal obligation
15/12/17@08:30	email	ET1 (2300380/18)	

23/5/18@ 15:35	email	Dion Marandola Rob Strickland Governing Body of the First Respondent	legal duty miscarriage of justice health and safety concealment information of
12/8/18@ 10:38	Email	C relies on having ticked box 10.1 of ET1 (2205734/18 & 205633/18)	concealment of information
22/9/18@ 14:17 to 25/9/18	email	Waleed Eltayib Rob Strickland	legal duty miscarriage of justice health and safety concealment information of

(vi) Did the Claimant reasonably believe that it tended to show one of the matters in s43B(1) Employment Rights Act?

(vii) Did the Claimant reasonably believe that the disclosure was in the public interest?

35. Was the disclosure made to the employer or other responsible person in accordance with s43C Employment Rights Act 1996?

36. The Claimant states he suffered the following detriments?

d. Deliberately excluded from transport on 25th December 2017 by Tim Bonfield and Syed Hussain.
e. On 8/3/2018 a gross misconduct charge was brought by Tim Bonfield and Syed Hussain.
f. On 16/06/2018, 30/06/2018 the 4KS Security Night Shift duty rotations were re-designed by Syed Hussain deliberately persistently to disfavour the Claimant by favouring Kamel Hannou.

g. On 29/06/2018 did Syed Hussain design a 4KS fire watch patrol rota which favoured Kamal Hannou in the Loading bay whilst the Claimant was assigned to patrol.

h. On 3/08/2018 did Syed Hussain allocate overtime duties for the period 25 – 28/98/2018 to Kamal Hannou rather than the Claimant, even after the Claimant had asked that Mr Hussain prioritize core staff.

i. On 28/9/18 did Stefan Kovac cancel the Claimant's access cards after confirming overtime for the Claimant for period of 1st – 7th October 2018.

Direct Disability Discrimination

37. Was the Claimant disabled with an ankle injury at the material time?

38. Did the Respondent have knowledge of the disability?

39. On 9/5/2018, 16/06/2018, 30/06/2018 was the 4KS Security Night Shift duty rotation re-designed deliberately persistently to disfavour the Claimant by Tim Bonfield/Syed Hussain.

40. Did the Respondent treat the Claimant less favourably than Kamal Hannou,?

41. Was the less favourable treatment because of the Claimant's disability?

Reasonable Adjustments

42. Did the Respondent have in place a provision, criteria or practice (PCPs) –

(a) Requiring the Claimant to be mobile.
(b) Requiring him not to monitor CCTV.

(c) Requiring him not to be emergency co-ordinator.

(d) Requiring the Claimant not to do sedentary roles.

(e) Requiring the Claimant not to interchange or share duties with Kamal Hannou.

43. Did the PCP place the Claimant at a substantial disadvantage in comparison to nondisabled persons because it caused increased pain in his ankle and exacerbated degeneration of the impaired ankle joint into osteoarthritis.

44. Did the Respondent have knowledge of the disability and of the substantial disadvantage?

45. Did the Respondent fail to make reasonable adjustments by failing to give him a sedentary role, failing to allow him to operate CCTV, failing to allow him to be emergency co-ordinator, failing to allow him to interchange or share duties with Kamal Hannou.

Time Limits

46. Is the Claimant's claim in whole or part brought within the statutory time limit of 3 months? Is there a course of conduct on part of the Respondent extending over a period of time?

47. If the claim is not in time, and should time be extended?

Case No 2206762/2018 (Unfair dismissal, notice pay, holiday pay, race, disability discrimination and victimisation)

Dismissal

48. It is not in dispute that the Claimant attended for work on 28/9/18 at the First Respondent and was sent an email by Mr. Eltayib of the Second Respondent on 28/9/18 headed "TUPE transfer" which confirmed that the Claimant would not transfer to the Second Respondent on 1st October 2018.

49. Was the Claimant dismissed?

50. If so, when was he dismissed and who dismissed him (R1 or R2)?

51. Was the dismissal automatically unfair under s.100 or s103A ERA 1996?

52. Was the reason or sole reason for dismissal the transfer under Reg 7 TUPE 2006?
53. Was the dismissal for an economic, technical or organisational reason entailing changes in the workforce?

54. If not was the dismissal unfair under s98(1) or (2) ERA 1996? Was the dismissal fair or unfair having regard to s98(4) ERA 1996?

55. Was any dismissal because of race, disability, victimisation, TUPE or whistleblowing?

    a. As against R1 the PAs are as set out in para 8 above.

    b. As against R2 the PA is the email of 2Second September 2018 sent to Waleed Eltayib. The issue at paragraph 9 is repeated in respect of this PA.

56. Is the Claimant entitled to 17 days accrued but untaken holiday pay?

57. Is the Claimant entitled to 1 months' notice pay?