EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr J Bassa	and	CGI IT UK Limited

Heard at Reading on: 4, 5, 6, 7, 8 November 2019 (hearing)
19, 20 December 2019 (in chambers)

Appearances:

For the Claimant In person

For the Respondent Mr P Linstead, counsel

Employment Judge Vowles **Members** Mrs A Brown
Mr J Appleton

RESERVED UNANIMOUS JUDGMENT

Evidence

1. The Tribunal heard evidence on oath and read documents provided by the parties and determined as follows.

Direct Race Discrimination – section 13 Equality Act 2010

2. The Claimant was not subjected to race discrimination. This complaint fails and is dismissed.

Direct Sex Discrimination – section 13 Equality Act 2010

3. The Claimant was not subjected to sex discrimination. This complaint fails and is dismissed.

Protected Disclosure Detriment – section 47B Employment Rights Act 1996

4. The Claimant was not subject to any detriment on the ground that he had made a protected disclosure. This complaint fails and is dismissed.

Automatically Unfair Dismissal – section 103A Employment Rights Act 1996

5. The Claimant was not dismissed by reason that he made a protected disclosure. This complaint fails and is dismissed.

Unfair Dismissal – section 98 Employment Rights Act 1996

6. The Claimant was not unfairly dismissed. This complaint fails and is dismissed.

Unpaid Wages – section 13 Employment Rights Act 1996

7. The Claimant was not subject to unauthorised deductions from wages. This complaint fails and is dismissed.

Breach of Contract – article 3 Employment Tribunals Extension of Jurisdiction (E&W) Order 1994

8. The Claimant was not subject to a breach of contract. This complaint fails and is dismissed.

Reasons

9. This judgment was reserved and written reasons are attached.

Public Access to Employment Tribunal Judgments

10. The parties are informed that all judgments and reasons for judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the Claimant and Respondent.

REASONS

SUBMISSIONS

1. On 7 September 2017 and 11 December 2017 the Claimant presented claim forms to the Tribunal with complaints of race discrimination, sex discrimination, protected disclosure detriment, automatically unfair dismissal, unfair dismissal, unpaid wages and breach of contract.

2. On 17 October 2017 and 28 February 2018 the Respondent presented responses and denied all the claims.

3. The claims were clarified at a Case Management Preliminary Hearing on 10 January 2018 and a case management order was produced. The Claimant was ordered to provide further and better particulars of the claims.

4. An agreed list of issues was produced by the parties on 28 March 2018 setting out the matters which the Tribunal considered at this full merits hearing.

EVIDENCE

5. The Tribunal heard evidence on oath on behalf of the Claimant from Mr Jason Bassa (Claimant and Leading Engineer / Systems Designer).

6. The Tribunal heard evidence on oath on behalf of the Respondent from Mrs Zena De Torres (HR Consultant), Mr Ian Rae (Consultant Architect), Mr Nigel Hay (Delivery Director), Mr Mathew Mills ((Delivery Manager), Mr Richard Walmsley (Vice President for Delivery and Dismissing Officer) and Miss Noreen Haider (HR Manager). The Tribunal also read a witness statement from Mr Mark Benton (Account Director) who was unable to attend due to ill-health.

7. The Tribunal also read documents in two folders containing 1330 and 95 pages respectively.

8. In addition, the parties each provided a written closing statement and a written response to the other party's closing statement.

FINDINGS OF FACT

9. The Respondent is a global information technology company which provides outsourcing services for clients. It is split into four business units servicing different clients. The Claimant worked predominantly in the Respondent's Central Government Business Unit which provided information technology outsourcing services to clients including Her Majesty's Courts & Tribunals Service and the Scottish Government.

10. The Claimant was employed as a Leading Engineer / Systems Designer from 25 June 2012 until his dismissal on 16 October 2017. He was employed on various projects alongside a project team. The relevant projects involved in this claim were the GSF Project 2012, the AFRC Project 2014 and the Juror Project 2016.

11. On 6 February 2017 the Claimant went absent on sick leave due to workrelated stress. He did not return to work after this date.

12. During his sick leave, the Claimant presented a number of grievances relating to the administration of his pension and various other matters related to his day-to-day work such as his role, tasks he had been asked to carry out, feedback he had received, and management conduct.

13. The Claimant's grievances were heard by Mr Benton on 11 May 2017 and the Claimant was notified of the outcome on 15 June 2017. Other than the grievance related to pension, the Claimant's grievances were not upheld.

14. On 3 July 2017 the Claimant wrote the Respondent about the grievances. The Respondent responded on 25 July 2017 informing him that as the matters related to his original grievance, they could not be submitted as a new grievance but instead should have been submitted as an appeal, but he had failed to appeal within the appropriate time limit.

15. During this period the Claimant remained absent on sick leave. His last GP fit note had expired on 28 June 2017. The Respondent sent reminders to the Claimant that he needed to provide a GP fit note on 25 July 2017, 8 August 2017 and 18 August 2017.

16. The Claimant did not provide a further GP fit note in response to this correspondence and instead informed the Respondent that his last GP fit note detailed the position and stated that there was no reason for more certifications after six months. Thereupon, a disciplinary investigation was undertaken into the Claimant's conduct.

17. The Claimant was invited to an investigation meeting on 5 September 2017 with Mr Hay but he failed to attend. Mr Hay produced an investigation report which stated that the Claimant has been absent without authorisation for an extended period of time and had not complied with the Respondent's sickness absence policy. He recommended that the allegations be taken forward to disciplinary process. A further allegation that the Claimant was operating a business was not taken any further.

18. On 19 September 2017 the Claimant was invited to a disciplinary hearing with Mr Walmsley. The Claimant replied that he would not attend the hearing as he felt it would be detrimental to his health and he raised further allegations regarding alleged conduct towards him by the Respondent's managers.

19. The Claimant did not attend the disciplinary hearing on 27 September 2017 and the hearing was rescheduled for 11 October 2017. The Claimant also failed to attend that hearing and it proceeded in his absence. Mr Walmsley decided to dismiss the Claimant for gross misconduct as follows:

(1) Failure to follow absence reporting procedures as detailed in the sickness absence policy.

(2) Absence without leave (AWOL from 29 June to present).

20. The letter was sent to the Claimant on 16 October 2017.

21. On 25 October 2017 the Claimant appealed against his dismissal. An appeal hearing was held on 7 November 2017 chaired by Ms Liz Drummond (Vice President Consulting Services). The Claimant failed to attend and it proceeded in his absence.

22. In a letter dated 8 November 2017 the Claimant was informed that his appeal had been unsuccessful.

23. Those are the background facts.

CLAIMS AND FINDINGS

24. The following claims and issues were identified and clarified in the case management order made during the case management preliminary hearing on 10 January 2018 and set out in the agreed list of issues dated 28 March 2018. They are set out below in **bold.**

Direct Race Discrimination - section 13 Equality Act 2010

25. Equality Act 2010

Section 13 – Direct Discrimination

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

Section 136 – Burden of Proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

26. There is guidance from the Court of Appeal in Madarassy v Nomura International plc [2007] IRLR 246. The burden of proof does not shift to the

employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination, they are not without more sufficient material from which a Tribunal could conclude that on the balance of probabilities the Respondent had committed an unlawful act of discrimination. The Claimant must show in support of the allegations of discrimination a difference in status, a difference in treatment and the reason for the differential treatment.

27. If the burden of proof does shift to the Respondent, in Igen v Wong [2005] IRLR 258 the Court of Appeal said that it is then for the Respondent to prove that he did not commit or is not to be treated as having committed the act of discrimination. Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof and to prove that the treatment was in no sense whatsoever on the prohibited ground.

28. In Ayodele v Citylink Ltd [2017] the Court of Appeal held that the burden of showing a prima facie case of discrimination under section 136 remains on the Claimant. There is no reason why a Respondent should have to discharge the burden of proof unless and until the Claimant has shown a prima facie case of discrimination that needs to be answered. Accordingly, there is nothing unfair about requiring a Claimant to bear the burden of proof at the first stage.

29. Section 23 - Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14 or 19, there must be no material difference between the circumstances relating to each case.

30. In Law Society and others v Bahl [2003] IRLR 640 EAT it was said that:

"Tribunals may find it helpful to consider whether they should postpone the question of less favourable treatment until after they have decided why the particular treatment was afforded to the claimant. Once it is shown that the protected characteristic had a causative effect on the way the complainant was treated, it is almost inevitable that the effect will have been adverse and therefore the treatment will have been less favourable than that which an appropriate comparator would have received. Similarly, if it is shown that the protected characteristic played no part in the decision-making, then the complainant cannot succeed and there is no need to construct a comparator.

The Claimant relies on being from an ethnic minority of Indian origin.

5. Has the Respondent subjected the Claimant to the following treatment failing within section 39 EqA 2010, namely by

5.a. Mr Benton telling the Claimant he needed to return to work during the grievance hearing on 11 May 2017.

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31. In his witness statement, the Claimant said the following:

"The entire investigation was flawed. They hijacked the intent of a grievance hearing. They demanded that I return back to work. My complaints were not properly investigated. …

Towards the end of the hearing, Mark Benton decided he wanted me to return to work (#467). His demeanour raised suspicion. He was not looking at me but down at the table and would not make eye contact as he demanded that I attend the workplace the following week, and he backed that up in the grievance letter outcome saying he was sorry that I was not back. In around March 2017, when a sick note was about to expire, Zena sent me an email saying that she wanted to see me in the office next week, back at work. I told her that that was reckless. This attempt by Mark was just another attempt to make the unreasonable demand that I return back to work while unfit."

32. Mrs De Torres was present at the grievance hearing and in her witness statement said the following:

"I understand that Jason has alleged in the context of these proceedings that Mark told him he needed to return to work, and that this was an act of direct discrimination on the grounds of race. This is absolutely not true and is a complete misrepresentation of Mark's comments at the grievance hearing. It was Jason who said he wanted to come back to work, and Mark encouraged him to take time and discuss with his GP. Mark's comments in relation to the support that CGI could offer could, in my mind, only have been viewed as suggestions to ensure Jason was aware of the types of assistance CGI could provide. They were not in any way a demand for Jason to return to work.

I took detailed notes if the grievance hearing (pages 414-418 of the hearing bundle). We worked together to prepare the final minutes of the hearing, which can be found at pages 432 to 325 of the hearing bundle."

33. A record of the key points discussed during the hearing were included in the bundle and that included the following:

ZDT	*Asked JB in what other ways could CGI help him return to work*
JB	*Said the relationship may be irreparable, he wants to know what CGI managers did each time he had informed them he was feeling stressed*

MB	*Confirmed these questions would be asked during the investigations, and asked JB if there was anything that could be done immediately to help him.*
JB	*Said he didn't know, but he did not want to be off work, he wanted to work*
MB	*Had a few suggestions as follows, but told JB just to have a think about them, not to make any decisions right here and now*
	1. *We could look at his current line management structure to see if we can change his reporting line* 2. *Look at new available roles that fits his career aspirations* 3. *If a role is found, we can help with arranging interviews* 4. *If successful, JB needs to ensure he has a clear TOR and a personal development plan that he can work through with his manager to ensure he is supported* 5. *Have regular interviews with a mentor or buddy*
JB	*Said he would be happy with all of the above*
MB	*Told him to go away and have a think about it, and to discuss with his GP in the first instance, as these were just some recommendations based on what he had discussed that day, he didn't want JB to think we were pushing him in any direction*
JB	*Said he would see his GP, discuss these, and get back to us with his thoughts*
ZDT	*Explained that he could also consider a phased return to work to gently reintroduce him back to the work place*
JB	*Said he felt a lot better, thanked us for our time.*

34. The Tribunal accepted Mrs De Torres's account, supported as it was by the record of the hearing which, in turn, was supported by the notes taken at the time by Mr Benton and Mrs De Torres.

35. The Tribunal found this allegation was not proved. The Claimant was not told that he needed to return to work in the grievance hearing.

36. Additionally, there was no basis for the allegation that anything said by Mr Benton was motivated by the Claimant's race.

37. The Claimant relied on Jeff Corney (White British) and Susan Yeung (Chinese) as comparators for this allegation of race discrimination. Mrs De Torres confirmed in her witness statement that both Mr Corney and Ms Yeung commenced a phased return to work following a period of absence and both also engaged with the Respondent's occupational health and permanent health insurance providers. Their circumstances were therefore materially different to the Claimant's. The Claimant gave no detail of his alleged comparators' circumstances. The Tribunal had no reason to doubt Mrs De Torres's account.

5.b. The Respondent's decision not to hear the Claimant's grievance appeal as per his emails of 3 and 5 July 2017.

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38. In the grievance outcome letter dated 15 June 2017, Mr Benton offered the Claimant the opportunity to appeal by 23 June 2017. This date was based upon the Respondent's grievance procedure which provides that employees have five working days in which to appeal.

39. The Claimant sent emails to Louise Ryan (HR) in which he complained about Mr Benson's conduct during the grievance hearing which he described as racial and sexual discrimination.

40. On 28 June 2017 Ms Ryan replied that the Claimant's complaints were regarded as an appeal which was out of time. The appeal was therefore denied because the deadline had passed.

41. The Claimant relied upon a hypothetical comparator.

42. The Tribunal found no evidence from which it could conclude, or infer, that the refusal to allow the appeal was motivated by the Claimant's race. Mrs De Torres provided a clear, non-discriminatory reason for the refusal, namely the application of the Respondent's grievance appeal procedure.

43. Although this allegation was factually correct, the Tribunal found that it was not an act of race discrimination.

5.c. The manner in which the Respondent's HR team dealt with the Claimant's grievance and sickness absence and related correspondence between 6 February 2017 to 16 October 2017.

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44. The Tribunal found this allegation was not proved. As averred by the Respondent, it was broad, vague and un-particularised.

45. Mrs De Torres set out in considerable detail in her witness statement the way in which the Claimant's grievance, sickness absence and correspondence were dealt with during the period between 6 February 2017 and 16 October 2017.

46. There is no evidence from which the Tribunal could find, or infer, any race discrimination by the Respondent in respect of these matters.

5.d. How the Claimant was treated by the Respondent (Ian Rae, Matthew Mills and Mark Hayden) with respect to his role, seniority, chances for promotion,

assigned work and duties and/or any remuneration. The Claimant has confirmed this complaint relates to the following allegations:

> **5.d.(i) GSF Project 2012: upon commencement of employment with the Respondent (on 25 June 2012), the Claimant was engaged by the Respondent at Level 2, but was asked to replace another employee at Level 3 (Danilo Acosta) who was not performing on the GSF project.**

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47. In respect of the allegations made in paragraph 5(d), the Claimant relies upon Neil Deane (British), Gordon Mackie (British) and Nigel Barlass (British) as comparators.

48. The Claimant accepted that he agreed to take on this role.

49. When it was put to him during cross-examination, he agreed that he was not asked to accept the role on the grounds of race.

50. The Claimant referred to this appointment in paragraph 12 of his witness statement but has not provided any evidence from which the Tribunal could find, or infer, that the appointment was motivated by the Claimant's race. Indeed, during cross-examination, he had denied this was the case.

51. The Tribunal found that this was not an act of race discrimination. Even had it done so, it would have found that the complaint was so far out of time, by some five years, and not part of any continuous act, that the Tribunal would not have jurisdiction to consider it by reason of time limits. Nor were there any grounds to extend time on a just and equitable basis.

5.d.(ii) AFRC Project 2014: around August 2013, a client of the Respondent (the Scottish Government) requested that the Claimant undertake the role of release Manager on the AFRC project, refusing other more senior employees and paying the Respondent £1,200 per day (plus expenses) for the Claimant's services. The Respondent allegedly refused to allow the Claimant to perform this role without hindrance; the Claimant has confirmed that this complaint relates to pressure from Ian Rae to misreport;

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52. The Claimant deals with this matter at paragraphs 50 – 54 of his witness statement.

53. In response, Mr Rae denied that he asked the Claimant to falsify records and mislead the customer at paragraphs 13 – 16 of his supplementary witness statement.

54. There was clearly a dispute between the Claimant and Mr Rae regarding these matters. However, the Tribunal could find no evidence that anything done or said by Mr Rae was motivated by the Claimant's race. The Claimant provided no evidence to establish a causal link between his alleged treatment and his race.

Refusal by the Respondent's managers on site to comply with the release management process that the Claimant had defined and agreed with the customer.

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55. The Tribunal could find no specific reference to this matter in the Claimant's witness statement.

56. However, as above, the Tribunal could find no evidence that any treatment of the Claimant by Mr Rae, or anyone else, was motivated by the Claimant's race.

Refusal by the Respondent's managers to engage with the Claimant on delivery issues that the Claimant (as project level Release Manager) was responsible for.

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57. The Tribunal found that this allegation was un-particularised and set out in general terms.

58. The Claimant said at paragraph 66 of his witness statement that:

"Ian, Gordon, the onsite CGI management and their contractors were acting like a wolf pack. They would bypass me and go straight to the DART team."

59. Mr Rae denied that he bypassed the Claimant.

60. Once again, the Tribunal could find no evidence from which it could find or infer that any such treatment was motivated by the Claimant's race.

5.d.(iii) AFRC Project 2014: Not being considered by the Respondent for promotion having been asked to perform the release Manager's role on the Scottish Government AFRC project in around August 2013 and instead being subsequently assigned roles of coding and as a tester (which the Claimant considered a lower role to that undertaken on the AFRC project).

Failure to promote the Claimant.

61. In his witness statement at paragraph 15, Mr Rae said:

"To be clear, towards the end of the AFRC project, I did consider whether to promote Jason and I also had a number of conversations about promotion in my role as his career manager. He had joined the project at a level 2. Given the small number of career levels at CGI, moving between grades was a process that would typically run over a number of years. I recall saying to Jason that I did not feel he was ready to be promoted to level 3. This was mainly because of the imbalance between his individual technical skills on one hand and his consultative and collaboration on the other. As I have said, technically Jason was excellent, but his consultative and collaboration with a career level 3 CGI employee. Career level 3 was considered a leadership role, at which point employees would assume some responsibility for more junior employees. I felt that Jason lacked the necessary team-working and leadership skills for that role. Level 3 employees are expected to lead by example, and this did not fit with Jason being unable to work effectively across a range of skills and personalities. I had been a staff manager in CGI for some seven years at this point. CGI have an annual promotion cycle so this was a process I was experienced in and had received significant training in.

I recommend a number of courses to Jason to assist with his development in this area, as well as his communication style, which at times could be viewed as abrupt. This can be seen as an area of improvement identified in Jason's Personal Development Plan (pages 536-541 of the hearing bundle) and I provided Jason with links to a number of suggested courses to assist in his development in this area on 20 August 2014 (page 542 of the hearing bundle)."

62. The Tribunal found that the Claimant was considered for promotion and Mr Rae gives a clear and non-discriminatory reason why he was not promoted. He also explained during the course of the hearing that promotion could not be awarded by him, but must be approved by a panel of reviewing managers following a recommendation from one of the reviewing managers.

63. There was no evidence of any treatment motivated by the Claimant's race.

Being assigned role of coding as a tester (which the Claimant considered a lower role to that undertaken on the AFRC project).

64. In his witness statement at paragraph 82, the Claimant said:

"I could not help but think that a lot of time and money had been wasted at the outset and as a result the project was now well behind. I raised the issue with the Project Manager Ming by copying in emails to Dan. I was deboarded from the project soon after. I was then contacted by Shabnam Latif, Test Team Manager and asked to be a tester on the DMU which I did for a couple

of weeks. It was completely unsuitable work and a step down. I could not understand why CGI would want this. By this stage my skills and experience were far more valuable."

65. The Respondent denied that the requirement to do coding was a detriment and asserted that it was a normal part of the role of a developer as confirmed by Mr Rae and Mr Hay.

66. The Tribunal could find no evidence of a causal link between being assigned roles of coding and as a tester, and the Claimant's race.

5.d.(iv) Juror Project 2016: the Respondent's alleged refusal to allow the Claimant to perform the role of Architect on the 2016 Juror Project, but was instead asked to perform the roles of Tester, Software Developer, Scrum Master, Delivery Manager and Bid Team Member (as allegedly the role of software development (coding) was not required on the 2016 Juror Project).

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67. This allegation is described by the Claimant at paragraphs 88 onwards in his witness statement where he said:

"I joined Juror as an architect in February 2016. Director Jeet Kumar advised me to be strict about the job description. I was to take over from Nigel Barlass."

68. In his supplementary witness statement, Mr Mills, at paragraph 2, said:

"The Claimant has alleged at paragraph 88 of his witness statement that he joined the Juror project as an architect. This is simply not true, he did not. Nigel Barlass was the solution's architect for the Juror project."

69. In November 2016 and again in January 2017, Mr Mills responded to the Claimant's request for a clarification of his role description as follows:

"30 January 2017

Hi Jason

Doing a bit of a catch-up this week, when I recalled as part of your taking on the tech lead role for the project a set of role descriptions were produced that included a tech lead role for you that you agreed. See enclosed.

I am fulfilling the Scrum Master role, the only subjective deviation from the Scrum Master responsibilities is that you wanted to run the daily stand-ups for the ODSC dev team and had asked me to sit that out to give you the space to run it."

"Scrum Master (SM): The scrum master acts as a facilitator to the team and in addition works to remove and blockers which may be inhibiting the team's ability to progress as efficiently as possible. …

"Technical Team Lead (TL): The Technical Tea, Lead acts as the technical focal point setting the technical objectives and direction of the team. …

Going forward, as the team matures and has a level of comfort in relation to its performance the TL make take on SM responsibilities as agreed with the project."

70. There is no reference to the Claimant being the Juror Architect. The Respondent accepted that there was an initial intention for the Claimant to progress into a Solution Architect's role but, as the project progressed, it became clear that he needed significant support from Mr Barlass and was not equipped to deliver in that role.

71. It was clear that the Claimant aspired to the role of architect but was never employed as such.

72. The Tribunal found this allegation was not proved.

73. There is no evidence to support any finding or inference of race discrimination in respect of these matters. So far as being asked to perform the roles of Tester, Software Developer, Scrum Master, Delivery Manager and Bid Team Member were concerned, it is clear that the Claimant was asked to act up whilst others were on holiday but not on a permanent basis.

5.d.(v) Juror Project 2106: Allegedly being the Trainer for Melanie Hobdey (Test Manager) on the 2016 Juror Project.

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74. In his witness statement at paragraph 100, the Claimant said:

"I had provided Melanie Hobdey with detailed support from the very beginning, including job roles, where she could get additional support and outlining my restrictions due to governance (329-332). I work within the rules (#436). Peter dale told me more than once that Melanie had nothing to do with the Glasgow team and I should ignore her."

75. In his witness statement at paragraphs 21 and 22, Mr Mills confirmed the status and relationship between Ms Hobdey and the Claimant. He said that Ms Hobdey carried out a different type of work to the Claimant with more than 10 years' experience in her field and that it was not necessary or appropriate for the Claimant to train her. However, when she joined the

team, she did ask for detail about how the technical team had been testing software to date as she needed this information to understand what additional quality assurance was needed from her.

76. The Tribunal could find no evidence that the Claimant was required to train Ms Hobdey and, even if that was the case, there was no evidence of any such request being motivated by the Claimant's race.

5.d.(vi) Juror Project 2016: Not being considered by the Respondent for promotion to the Juror Project in September 2016 when he was asked to be Team Leader and stand-in Delivery Manager while the Delivery Manager and Digital Director were on annual leave and he was later asked to participate in winning the bid.

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77. The Respondent accepted that the Claimant was asked to be a Team Leader and stand-in Delivery Manager when people were away in August 2016.

78. The Respondent said that the reservations held by Mr Rae on the AFRC project regarding the Claimant's suitability for promotion were also held by other senior managers on the Juror Project.

79. In any event, there was no evidence upon which to link the failure to promote the Claimant on the Juror Project with his race.

5.d.(vii) Not being at Level 6 or Director Level within the Respondent, and accordingly not being paid £150,000 (salary, bonuses and benefits) as per Level 6 or Director Level; and instead being paid £50,000 during this time in relation to the above three projects.

6.b. In respect of 5(d) above, the Claimant relies on Daniel Deane (British), Gordon Mackie (British) and Nigel Barlass (British) as comparators.

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80. The Claimant relied upon the three comparators above for the allegations at **5d** above. The Respondent set out in some detail in its evidence the positions of the comparators.

81. Mr Deane started at a similar level to the Claimant and became a Director based upon his performance.

82. Mr Mackie headed the AFRC project and effectively line-managed all staff on that project. The Claimant had no line manager responsibility for AFRC.

83. Mr Barlass had 10 years' experience as a Solutions Architect and was in a much more senior position than the Claimant.

84. There was, however, no detailed evidence of the three comparators' promotion history or the circumstances in which they came to be promoted.

85. The Claimant's case appeared to be that he was so competent that he should have been promoted. The fact that others were promoted, and the Claimant was not, does not of itself establish less favourable treatment because of race. There was no evidence of any racial motivation in the promotion or circumstances of the three comparators or the circumstances in which the Claimant was not promoted.

Summary of Race Discrimination Allegations

86. The Claimant mentioned race at various paragraphs in his witness statement.

87. At paragraph 24 (Vodafone SOBE 2013):

"I joined as a developer in early March 2013 and left as a developer. All of the development team (myself, Amit, Sharad, Prakash and three other ethnic female developers) except Gareth were from an ethnic minority. The people running the project were Corrina and Bill Surviston. Bill was very aggressive and abusive."

88. At paragraphs 35, 37 and 38 (AFRC Project 2014):

"I had an excellent relationship with the Scottish Government and Red Hat and this was recorded in several reviews. I spoke to my colleague (possibly called Syeed Rizvi), a Security Architect of Pakistani descent and he said that he too had received a poor review; he said that the three of us who had received such a rating were all ethnic. Avtar Virdee who had done some exceptional work on AFRC also mentioned to me his review. …

There was a huge divide between the ethnic and Caucasian staff. In the scrum of scrums for example, from January 2014 onwards, there were just two ethnic people out of perhaps twenty-five. The other ethnic lady contractor was dismissed leaving just me as the only ethnic person on the scrum of scrums. …

I asked some of the Indian developers why they were not raising the issues that were causing the project problems. Many of them said that they were told by their project manager that Gordon Mackie had said that if any of them raised any issues, they would be put on the next flight home. My friend Prasad, was a project manager. Prior to being sent home in December 2013 with the other Indian project managers, he described to

me a number of threatening encounters with Gordon Mackie; Gordon would bang his fists down onto the table and demand that Prasad push the Indian developers."

89. At paragraph 142 (Investigation of racial discrimination grievance):

"During the investigation of racial discrimination, I mentioned to Mark that there were very few ethnic people as Directors. He named just two. I said is that all you can recall. He could not think of any others; a discussion ensued but this has not been recorded in the minutes and if this sort if information was not there, then the investigation could not have had all the facts in hand."

90. These references in the Claimant's witness statement suggest a disparity in the number of ethnic minority staff compared to Caucasian staff. They also recount the Claimant's conversations with the ethnic minority staff members.

91. The disparity in numbers and the references to what others had told the Claimant were not supported by any documentary or other evidence. Nor was there any evidence that those who told the Claimant they had been badly treated had stated that the treatment was because of their race. Nor were any of these matters raised relevant to, or related to, the Claimant's individual allegations of race discrimination referred to above.

92. Despite the Claimant's assertions, the Tribunal found no evidential basis for any of the Claimant's allegation of race discrimination above.

Time Limits

93. The Respondent asserted that there was no evidence of any discriminatory regime within the Respondent's organisation. The Tribunal found that the various projects referred to (GSF Project 2012; AFRC Project 2014; Juror Project 2016) were self-contained projects involving different managers and different work.

94. The allegations regarding GSF Project 2012 were against the conduct of Steve Scott and Simon Fontanillas. They were not involved in any of the later projects worked on by the Claimant.

95. In the AFRC 2014 Project, the Claimant's allegations were against the conduct of Mr Rae.

96. The Juror Project 2016 allegations were made against Mr Mills.

97. The allegations are unconnected. There was no evidence of any continuing act for the purposes of time limits.

98. A Tribunal can extend the time limit if it considers it just and equitable to do so. The Tribunal took account of the Court of Appeal decision in Robertson v Bexley Community centre [2003] where it was said that:

There is no presumption that an employment tribunal should consider exercising the discretion to extend time limits for discrimination cases unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.

99. The Claimant did not put forward any evidence or grounds for an extension of time based upon the just and equitable principle.

100. The Tribunal accepted that, even taking account of the extension of time granted by the early conciliation process, any act of discrimination prior to 23 May 2017 was out of time.

101. The Tribunal has not found any evidence of race discrimination. But in addition, all the allegations at paragraph **5.d**. above were presented so far out of time that there were no grounds for a just and equitable extension.

Direct Sex Discrimination - section 13 Equality Act 2010

102. The Claimant's sex discrimination allegations rely upon hypothetical comparators.

9. Has the Respondent subjected the Claimant to the following treatment falling with section 39 EqA 2010, namely by:

9.a. The manner in which the Respondent handled the Claimant's complaints about Ms Hobdey in January 2017. The Claimant has confirmed that his complaint relates to the following allegations:

9.a.(i) Matthew Mills insisted that the Claimant continued to work with Ms Hobdey despite the complaint the Claimant made of bullying and harassment by Ms Hobdey.

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103. The Claimant had made a complaint to Mr Mills on 24 January 2017 that Ms Hobdey was bullying him.

104. Accordingly, Mr Mills arranged a telephone mediation between the Claimant and Ms Hobdey in which Mr Mills also participated. The call took place on 26 January 2017. Although there was a heated discussion between the Claimant and Ms Hobdey (the Claimant said *"Melanie and myself were shouting and swearing at each other"*) in fact at the end of the call Mr Mills

asked both of them if they could put their differences behind them and they both agreed that they could do so. The Claimant produced a note of the meeting which was contained in the hearing bundle. There is nothing in the note which suggests that Mr Mills insisted that the Claimant should continue to work with Ms Hobdey. Mr Mills said in his witness statement that both the Claimant and Ms Hobdey said they could put the issues behind them and carry on working. He said that if either of them had said that they felt unable to work together, he would have explored other alternative roles to allow one of them to move on from the project.

105. The Tribunal found that Mr Mills' denial that he insisted the Claimant continued to work with Ms Hobdey despite his complaint of bullying and harassment, was supported by the Claimant's account of the telephone discussion. Mr Mills took reasonable steps to resolve the conflict between them. The Tribunal found that there was no insistence as alleged by the Claimant.

106. Also, the Tribunal found no evidence of any less favourable treatment because of sex. Mr Mills treated both the Claimant and Ms Hobdey equally.

9.a.(ii) Jeet Kumar demanded that the Claimant withdraw the complaint of bullying and harassment against Ms Hobdey.

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107. Although Mr Mills was content that both the Claimant and Ms Hobdey were happy to move on after the telephone call, he was still concerned that the Claimant had alleged bullying and he therefore referred the matter to Mr Kumar.

108. In his witness statement, the Claimant said:

"Jeet telephoned me (27 Jan 17) Jeet advised me that Mark and himself had been forwarded my email about the employment Tribunal and demanded me to withdraw the word bullying. I withdrew the word."

109. During the course of the investigation, the Claimant said:

"JB told Matt he wanted to raise a grievance against Melanie, someone briefed Jeet as he got in touch to discuss. Jeet was supportive but sent an email asking me to withdraw the complaint because HR would get involved and asked me if I was suffering from stress.

JB agreed to withdraw the complaint against Melanie (via email to Jeet) and told Jeet he wasn't suffering from stress which he based on what the OH doctor had told him about recognising symptoms after his sickness in Edinburgh."

110. On 26 January 2017, Mr Kumar wrote to the Claimant as follows:

"Hi Jason
It was good talking to you just now.

As discussed, please do share the outcomes of the meeting you had with Mat and Melanie by sending a note across to them and cc'ing Mark Hayden and myself.

Given the concerns raised by you, please do address the following two points in the email you send too:

1. *The health question (as in if you have any more health concerns about carrying on working for this project)*
2. *The wrong use of word 'bullying' (as highlighted by you in our chat) to ensure we put all of this to bed.*

Any questions, please give me a shout."

111. On the same date, the Claimant wrote to Mr Kumar in response and included the following:

"Hi Jeet
Thanks for that chat, it was very useful for me.

1. *I have no further health concerns having now clarified that the continued demands will cease.*
2. *I am happy to withdraw the word bullying.*

I would also like to apologise for the way in which these matters have arisen. There has been a lack of a suitable escalation path."

112. Based upon the above, the Tribunal found that there was no demand that the Claimant withdraw the complaint of bullying and harassment. It was merely suggested that he should do so and he said that he was happy to withdraw the word 'bullying'.

113. The Tribunal found no evidence of sex discrimination.

9.b. The manner in which the Respondent allegedly failed to comply with its health and safety obligations to the Claimant in respect of not conducting a risk assessment, after the following:

9.b.(i) Written recommendations made by medical Doctor Slavin on 11 November 2014.

114. In the report by Dr Slavin dated 11 November 2014, Dr Slavin refers to having a long conversation with the Claimant about the nature of his work and the pressures that he was under working on the project at that time. He said it was a presentation of overstretch or work stress and suggested:

"If you have a risk assessment process in place for stress at work, this would be a good time to approach it. Otherwise the HSE publish management standards which you could follow. My feeling is that Mr Bassa needs some space and time to do his core tasks and to deliver the project as best he can until he is moved in the spring of next year which I understand is a routine cycle."

115. Mr Rae explained in an email dated 14 December 2014 that the Claimant was *"now unassigned so following through points on the assessment was not so relevant"*. He went on to say: *"Jason is still unassigned so I'll be chatting to him this week"*.

116. The Tribunal found that Mr Rae had a non-discriminatory reason for not following up the risk assessment, namely that it was based upon a diagnosis of stress at work and the Claimant's assignment which was the project that was causing the stress had concluded.

117. The Tribunal found no evidence of sex discrimination in respect of this matter. Even had it done so, it would have found that the complaint was so far out of time, by some 3 years, and not part of any continuous act, that the Tribunal would not have jurisdiction to consider it by reason of time limits. Nor were there any grounds to extend time on a just and equitable basis.

9.b.(ii) Comments made by Dr Roope's on the Claimant's first sick note dated 21 February 2017

118. This relates to a statement of fitness for work by the Claimant's GP, Dr Roope, in which he was certified as not fit for work due to *"work-related stress – has all 6 factors identified by HSE as likely to cause stress"*. There was no request or requirement to conduct a risk assessment and there was no evidence that the Claimant asked for one. This fit note was produced two weeks into the Claimant's absence on sick leave and he never returned to work thereafter. However, Mrs De Torres confirmed that she did offer to refer the Claimant to the Respondent's occupational health provider but he was not willing to do so. He was also offered support to assist with the return to work but he never returned.

119. There was no evidence of any sex discrimination.

9.c. The manner in which the Respondent's HR team dealt with the Claimant's grievance and sickness absence and related correspondence between 6 February 2017 to 16 October 2017.

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120. This allegation is the same as at paragraph 5.c. which was an allegation of race discrimination.

121. The Tribunal made the same findings as in 5.c. above. The Tribunal found this allegation was not proved. It was broad, vague and un-particularised.

122. On the basis of Mrs De Torres' evidence the Tribunal found that the Claimant's grievances were dealt with properly and fairly.

123. There was no evidence from which the Tribunal could find, or infer, any sex discrimination by the Respondent in respect of these matters.

124. Overall, despite the Claimant's assertions, the Tribunal found no evidential basis for any of the Claimant's allegations of sex discrimination above.

Protected Disclosure Detriments - sections 43B and 47B Employment Rights Act 1996

125. Employment Rights Act 1996

Section 43A - Meaning of protected disclosure

In this Act a protected disclosure means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

Section 43B - Disclosures qualifying for protection

(1) In this Part 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 one or more of the following-

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

Section 47B - Protected disclosures

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A) A worker (W) has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done -

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority, on

the ground that W has made a protected disclosure.

Section 48 - Complaints to employment tribunals
(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B. (2) On a complaint under subsection …. (1A) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

126. In Ministry of Defence v Jeremiah [1980] ICR 13, the Court of Appeal said that "detriment" meant simply "putting under a disadvantage" and that a detriment exists if a reasonable worker would or might take the view that the action of the employer was in all the circumstances to his detriment. What matters is that, compared with other workers (hypothetical or real) the complainant is shown to have suffered a disadvantage of some kind. Someone who is treated no differently than other workers, even if the reason for an employer's treatment is perceived to arise from, or be connected to, the act of making a protected disclosure, will find it difficult to show that he or she has suffered a detriment.

127. The Tribunal took account of the requirement for a reasonable belief in the public interest in making a disclosure and referred to the case of Chesterton Global Ltd v Nurmohamed [2018] ICR 731 in which it was said:

"The question whether a disclosure is in the public interest depends on the character of the interests served by it rather than simply on the number of people sharing it. CG Limited went too far in suggesting that multiplicity of persons sharing the same interest can never by itself convert a personal interest into a public one. The statutory criterion of what is in the public interest does not lend itself to absolute rules and the Court of Appeal was not prepared to discount the possibility that the disclosure of a breach of a worker's contract of the Parkins v Sodexho kind may nevertheless be in the

public interest or reasonably be so regarded if a sufficiently large number of employees share the same interest. Tribunals should however be cautious about reaching such a conclusion. The broad intent behind the 2013 statutory amendment is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers even where more than one worker is involved."

128. The Court of Appeal went on to hold that where the disclosure relates to a breach of the worker's own contract of employment, or some other matter where the interest in question is personal in character, there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker.

129. There were then four factors which it was suggested might be relevant:

129.1 First of all the numbers in the group whose interests the disclosure served.

129.2 Second, the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed.

129.3 Third, the nature of the wrongdoing disclosed.

129.4 Fourth, the identity of the alleged wrongdoer.

Has the Claimant made a disclosure of information, which in the reasonable belief of the Claimant was made in the public interest and tended to show that the Respondent had failed to comply with legal obligations to which it was subject (a qualifying disclosure pursuant to s43B(i)(b) of ERA 1996), by the following alleged disclosures:

13.a. The emails the Claimant sent to representatives of the Respondent between 12 April and 25 October 2017 regarding his health and safety (as referred to at paragraph 2.2.3 of his Further and Better Particulars).

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130. The following paragraphs at pages 97 – 99 of the bundle were the parts of the relevant emails set out in the Claimant's further and better particulars and a copy of the relevant section is attached as an Annex to this Judgment.

131. The Tribunal's findings were as follows:

131.1 12 April 2017 – The Claimant accepted in cross-examination that he did not have a reasonable belief that this disclosure was made in the public interest.

131.2 28 April 2017 – The Tribunal found that the matters referred to in the extract from this email were entirely personal and related to a

disclosure of information related to his health and safety. It was entirely personal and the Tribunal found that the Claimant could not have had a reasonable belief that the disclosure was in the public interest.

131.3 26 June 2017 – Apart from the reference to "other employees have also been off for stress", the disclosure of information is exclusively about the Claimant's own health and safety. The Claimant was questioned about the "number of emails from staff describing their experience" and accepted that he had only emails from one member of staff, Susan Yeung. The Tribunal found that a disclosure of information about the health and safety of two people could not involve a reasonable belief that the disclosure was in the public interest.

131.4 5 July 2017 – This was a disclosure about health and safety but was entirely personal about the Claimant. The Tribunal found there could be no reasonable belief that it was in the public interest.

131.5 14 August 2017 – This again was entirely personal about the Claimant's health and safety and there could not be a reasonable belief that it was in the public interest.

131.6 25 September 2017 – Although there was a reference to *"the number of cases of work-related stress suffered by other employees at CGI"*, this was again a reference to the Claimant's personal situation in respect of health and safety. It was not a disclosure of information tending to show that others had had their health and safety endangered. There could have been no reasonable belief that this was in the public interest.

131.7 11 October 2017 – As with the email above, the Tribunal found it was not a disclosure of information tending to show that there had been an endangerment of the health of any other employees, simply that others suffered work-related stress. Otherwise, as above, the email was solely about the Claimant's personal health and safety and there could not have been reasonable belief that it was in the public interest.

131.8 16 October 2017 – This was an email notifying the Respondent that the Claimant had been admitted to hospital and it did not amount to a disclosure of information regarding health and safety. It could not be considered to be a disclosure which the Claimant had a reasonable belief was made in the public interest.

131.9 25 October 2017 – Again, this relates solely to the Claimant's personal health and safety and there could not have been a reasonable belief that it was made in the public interest.

132. The Tribunal concluded that none of the above emails amounted to protected disclosures within section 43B of the Employment Rights Act 1996. There was no basis for the Claimant to have held a reasonable belief that any of the disclosures were made in the public interest.

13.b. The Claimant's notification to Reading Borough Council and Safety Department on 3 April 2017 regarding his health and safety concerns in respect of the Respondent

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133. During the course of the hearing, the Claimant confirmed that he was no longer pursuing this matter as a protected disclosure.

13.c. The Claimant's notifications to the Pension Regulator and Pensions Advisory Service in around June 2017 regarding the Claimant's pension with the Respondent

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134. The Claimant referred to his contact with the Pensions Regulator at paragraph 131 of his witness statement as follows:

"I had an extensive conversation with the Pension Regulator on 1 June 2017. They commenced an immediate investigation and also told me to contact the Pensions Advisory Service. The Regulator told me that missing pension funds must be reported to them by the CGI Pension Fund Trustees by telephone or email immediately. I gave them the name of Mohammed Faris as the Financial Controller and agreed that they could reveal my name. They pointed me to several of their documents online in which they listed the responsibilities of the Trustees. I also filled in an online whistleblowing form. The Regulator's is here, #953 – 955."

135. The Claimant said that this disclosure was made orally and that he filled in the online form but had not provided the written form. With only the Claimant's account of his oral disclosure at paragraph 131, there was insufficient information to establish what information was disclosed and what it tended to show other than that he personally was missing some pension contributions from his personal pension fund. There was insufficient information for the Tribunal to find that it amounted to a protected disclosure under section 43B of the Act.

136. The Claimant's complaint to the Pensions Advisory Service is at page 852 of the bundle of documents dated 20 July 2017. It is headed *"Continued refusal by CGI IT UK Limited to pay into my pension scheme"* and he requested assistance in enforcing payment of £2,965.79 that was not paid

into his pension plan in June 2016. In the letter, he stated that the Respondent was *"extremely dishonest, there are a number of reports on their conduct from Audit Scotland etc. I have grave concerns"*. He suggested that the Respondent company was a "Ponzi scheme".

137. The Tribunal found that the allegations of dishonesty were unparticularised and that the complaint to the PAS was about the Claimant's personal pension fund. There could not have been a reasonable belief that the complaint was in the public interest. It was a purely personal matter which affected only the Claimant.

138. The Tribunal found that this did not amount to a protected disclosure under section 43B of the Act. Additionally, the Tribunal found that the Respondent was not aware of this correspondence.

139. Although an email was sent to Mrs De Torres by PAS on 23 August 2017, the Tribunal accepted her account that the email went into her junk email folder, and she did not see it. A second reminder she found in her junk mail folder on 19 October 2017, three days after the Claimant had been dismissed.

14. If so, are any of the above disclosures qualifying disclosures for the purposes of s.43C ERA 1996?

15. Was the Claimant subjected to the following alleged detriment(s) on the ground that he had made a protected disclosure(s) within the meaning of section 47B(1) of ERA 1996.

15.a. The Claimant being subjected to a disciplinary process between 29 August 2017 and 16 October 2017 that resulted in the termination of his employment (which further resulted in the loss of wages and benefits).

15.b. The Respondent writing to the Claimant on 29 August 2017 inviting him to an investigatory hearing (without first assessing his health) to investigate whether he was running an IT business from his home address; and

15.c. The manner in which the Respondent's HR team dealt with the Claimant's grievance and sickness absence and related correspondence between 6 February 2017 to 16 October 2017, including a failure by the Respondent's HR to reply to the Claimant's correspondence as follows:

15.c.(i) The Claimant's email to Zena de Torres on 23 June 2017 at 13:53, regarding the Claimant's requests about being "recklessly ambushed" and clarification of his employment contract following demands from the

Respondent and

15.c.(ii) The Claimant's email to Louise Ryan and Zena de Torres on 3 July 2017 at 08:01, regarding emails that had allegedly been deleted from the Claimant's email account and raising complaints of racial and sexual discrimination and about health and safety.

Automatic Unfair Dismissal - section 103A Employment Rights Act 1996

140. Section 103A Employment Rights Act 1996 states:

> *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.*

16. Was the reason (or, if more than one, the principal reason for the dismissal of the Claimant that he had made a protected disclosure(s) (as above)?

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141. The Tribunal has found above that the Claimant did not make any disclosures which amounted to protected disclosures under section 43B of the Employment Rights Act 1996, and therefore did not go on to consider the allegations of protected disclosure detriment in paragraph **15** or the allegation of automatic unfair (protected disclosure) dismissal in paragraph **16**.

Unfair Dismissal – section 98 Employment Rights Act 1996

142. Under section 94 of the Employment Rights Act 1996 an employee has the right not to be unfairly dismissed by his employer.

143. *Section 98. General*

(1) In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or if more than one the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it-

… (b) relates to the conduct of the employee, …

> *(3) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case.*

144. For cases involving misconduct, the relevant law is set out in section 98 of the Act and in the well-known case law regarding this section, including British Home Stores v Burchell [1978] IRLR 379, Post Office v Foley [2000] IRLR 827, and Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23. From these authorities, the issues for the Tribunal to determine were as follows.

145. Firstly whether there was a potentially fair reason for the dismissal under section 98(2) and did the employer have a genuine belief in the misconduct alleged. The burden of showing a potentially fair reason rests with the employer.

146. Secondly whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the employee under section 98(4), in particular did the employer have in mind reasonable grounds upon which to sustain a belief in the misconduct and, at the stage at which the employer formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances of the case. Did the investigation and the dismissal fall within the range of reasonable responses.

147. Thirdly the Tribunal must not substitute its own view for that of the employer, but must assess the actions of the employer against the range of reasonable responses test. That test applies to all stages in the procedure followed by the employer, including the investigation, the dismissal and the appeal.

148. In Santamera v Express Cargo Forwarding [2003] IRLR 273 the EAT said that fairness does not require a forensic or quasi-judicial investigation for which the employer is unlikely in any event to be qualified and for which it may lack the means. In each case the question is whether or not the employer fulfils the test laid down in British Home Stores v Burchell and it will be for the Tribunal to decide whether the employer acted reasonably and whether or not the process was fair.

149. The ACAS Code of Practice on Disciplinary and Grievance Procedures sets out the steps which employers must normally follow in such cases. That is, establish the facts of each case, inform the employee of the problem, hold a meeting with the employee to discuss the problem, allow the employee to be accompanied at the meeting, decide on appropriate action and provide the employee with an opportunity to appeal.

17. What was the reason or principal reason for the Claimant's dismissal?

18. If the Respondent establishes that the Claimant was dismissed for a fair reason (namely his conduct in accordance with s. 98(2)(b) ERA 1996), did the Respondent act reasonably in treating that reason as sufficient to dismiss and in particular:

18.a. Did the Respondent have a genuine belief in the Claimant's misconduct?
18.b. Was such belief on reasonable grounds?
18.c. Did the Respondent conduct a reasonable investigation?
18.d. Was dismissal within the range of reasonable responses and could the Respondent have taken any other action other than dismissal for gross misconduct?

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150. The Respondent's sickness absence policy includes the following:

"Where the absence continues, or is likely to continue beyond 7 calendar days (inclusive of Saturdays and Sundays), you must forward a valid Statement of Fitness for Work (i.e. a 'medical fit note') or, where appropriate, a hospital certificate to your People Manager (or designated person) as soon as possible to cover the period of absence beyond the seventh calendar day.

Medical fit notes must be submitted to your People Manager at regular periods to fully cover the absence. If you anticipate a delay in submitting any fit notes you must notify their People Manager prior to the expiry of your most recent fit note. Unjustifiable delays in returning medical fit notes or gaps in cover may result in company sick pay being stopped or suspended and not backdated at company discretion; subsequent disciplinary action may take place. The Company reserves the right to qualify the validity of certification provide by contacting your GP directly.

Where a possible return to work date has been indicated and this is then subject to change, you should inform your People Manager of this as soon as practicable, supported by a further medical fit note. Please refer to section 6.1 for more detail on record keeping."

151. Long term absence is defined as a single period of continuous absence lasting four weeks or more. For the first three months (65 working days) of long term sickness absence, employees continue to receive full pay. For months four to six of long term sickness absence, employees receive twothirds of full pay. After six months of sickness absence, employees do not receive company sick pay but may be provided with financial support of up to 75% of salary under the PHI scheme providing they are accepted by the PH provider.

152. The Claimant went absent on sick leave from 6 February 2017 and did not return to work up to his dismissal on 16 October 2017. Although some of the sick notes provided by the Claimant were late, and reminders were sent to him, he did provide GP fit notes for the period 6 February 2017 up to 28 June 2017. Thereafter he remained absent form work but did not provide any further GP fit notes. He was reminded in a letter dated 25 July 2017 that his GP fit note had expired and that he needed to provide a further fit note for the outstanding period.

153. On 8 August 2017 Ms De Torres sent a further email to the Claimant as follows:

"Dear Jason

I am writing concerning your current absence from work and lack of sufficient contact with CGI.

Further to our previous letter which was sent to you on 25th July 2017, I would like to remind you of the statement in the CGI Sickness Absence Management Policy which states that 'unjustifiable delays in returning medical fit notes or gaps in cover may result in company sick pay being stopped or suspended and not back dated at company discretion; subsequent disciplinary action may take place."

Absence from work without permission and without just cause is regarded as a serious disciplinary matter, which could result in disciplinary action up to and including dismissal.

I am extremely concerned that you have now been absent from work uncertified since 21st June 2017. In addition to our previous letter dated 25th July 2017, we have reminded you on several occasions that fit notes need to be submitted. You have also not given consent for us to refer you to our Occupational Health provider, and have refused to participate in any additional support CGI have offered.

I should be grateful therefore, if you would contact me by Monday 14th August 2017 at the latest, to let me know why you have failed to provide an up to date fit note and when you expect to return to work. At this stage, your conduct in failing to report for work or providing certification for your absence implies that you intend to resign, or have resigned, your position with the organisation. If this is the case, please let me have your resignation in writing. If this is not, however, your intention and you are proposing to return to work, I would advise you to contact me no later than the 14th August 2017."

154. The Claimant replied on 14 August 2017 as follows:

"Hi Zena and Louise
This matter is now in process with the Employment Tribunals. You should receive notification from them in due course.
We will both have an opportunity to have our cases heard honestly in the ET rather than end up in yet another CGI fraud.
My Doctor has advised me again that attendance at CGI will not be beneficial for my health but will be detrimental. As I have mentioned throughout this last episode my health is paramount and a priority. You have the last sick note that details the position and there is no reason for more certifications after six months.
I have not resigned. I do not have to vacate this employment space due to the harassment and victimisation that I have received over the five years at CGI. There is also sufficient fraud for anybody to be concerned. Logically CGI must vacate this space or get ejected to leave it free for honest employers.
You should both make yourselves aware of the employer that you are representing, the comments by the US Dept of Justice and others concerning CGI, fraud, corruptions, racketeering and the like, your directors will be well acquainted with these comments. The grievance that I raised in good faith and expecting an honest investigation was far from that expectation.
There must be punishment for my treatment at CGI. There will be punishment. Regards
Jason."

155. On 18 August 2017 Ms Ryan (HR) sent an email to the Claimant which included the following:

"You were requested to provide a medical certificate covering your absences from 21st June 2017 onwards by Tuesday 1st August 2017. As you failed to respond to this letter and provide a valid fit note, we wrote to you again on 8th August 2017 and provided you with a further opportunity to supply the fit note to us no later than 14th August 2017. Again we made it perfectly clear that absence from work without permission and without just cause is regarded as a serious disciplinary matter, which could result in disciplinary action up to and including your dismissal.

We acknowledge from your email that your doctor has advised you not to attend work, however, we do not have a medical note concurring with your statement despite reported requests from CGI. At no point does our sickness absence policy allow for non-certified absence regardless of the duration.

Your absence is currently recorded as being unauthorised and we will therefore be inviting you into an investigative meeting for unauthorised absence without leave, under separate cover."

156. The Claimant's absence from work was investigated by Mr Hay. He wrote to the Claimant on 20 September 2017 with a copy of his disciplinary investigation report and invited him to a disciplinary meeting on 27 September 2017 with regard to the following allegations:

(1) Failure to follow absence reporting procedures as detailed in the sickness absence policy.
(2) Absence without leave (AWOL from 29 June to present).

157. On 25 September 2017 the Claimant responded by email and stated that he would not be attending the hearing as he considered it detrimental to his health. He also raised a range of concerns relating to his personal working relationships and issues with the Respondent as his employer.

158. On 27 September 2017 Mr Hay replied to the Claimant. He rescheduled the disciplinary meeting for 11 October 2017 and stated that if the Claimant did not attend, the hearing would go ahead in his absence. However, he was offered alternative options available as follows:

"(1) Attend by phone using the teleconference details provided above; (2) Submit written evidence to support your case to the hearing in advance and this will be taken into consideration;
(3) Confirm a work colleague or representative will attend on your behalf and submit your written evidence and mitigation. …

Please be aware CGI's disciplinary policy lists offences which are normally seen as gross misconduct. These include "persistent absence without leave". You should be aware that if this allegation is upheld at the disciplinary hearing, dismissal is one of the sanctions that may be applied. I will be attending as the Investigating Officer and Noreen Haider, HR Manager will also be present via teleconference."

159. About half an hour before the disciplinary hearing was due to start, the Claimant emailed Mr Hay to say that he would not be attending the meeting. He referred to the *"issue of my health and safety"* and said that the allegations were *"baseless and malicious"*.

160. The meeting on 11 October 2017 went ahead in the absence of the Claimant and Mr Hayward summarily dismissed him for gross misconduct.
The letter dated 16 October 2017 included the following:

"Re: Outcome of Rescheduled Disciplinary Hearing (Gross Misconduct)

Following the rescheduled disciplinary Hearing held at our offices in Reading on Wednesday 11th October 2017, which were also attended by Nigel Hay (Disciplinary Investigation Manager) and Noreen Halder (HR Manager) via teleconference, I write to confirm the outcome of the meeting. I received your email (11 October 2017 at 09:34) confirming you would not be attending this second rescheduled meeting at 10am, we did provide you with dial in details should you have felt more comfortable joining via a call and other alternative suggestions and I note you chose not to join the meeting. As a result the disciplinary hearing took place in your absence and the disciplinary decision has been reached based on the information available to me.

As you are aware, the hearing was held to discuss and consider the following gross misconduct allegations:

1. *Failure to follow absence reporting procedures as detailed in the sickness absence policy.*
2. *Absence Without Leave (AWOL from 29th June to present).*

During the hearing Nigel detailed the available information to address the question as to whether you have complied with the CGI Sickness Absence Policy, and I reviewed the mitigation you have previously provided. As a result of the evidence presented and, having considered your comments, I conclude that:

- *You were made fully aware of your responsibilities as a CGI member under the sickness absence policy and reporting process.*

- *As mitigation to the allegation you have advised "CGI have refused to provide a suitable mechanism to keep in regular contact nor provide the terms for such". Having looked at the evidence I do not find this to be the case and to this end I can confirm you have been advised on numerous occasions how you can keep in contact by telephone and where to send your fit notes and which you have not followed.*

- *You also advised the following in your email of 25 September 2017 and sent at 07:58 "As far as gaps in previous medical certificates are concerned, you will be aware that there is a massive strain on GP resources. My GP will not provide a sick note in advance. These issues of sickness do need to be discussed with the GP who is unable to provide an appointment for nearly a month" I do not see this as a valid explanation as to why CGI have not received a medically certified fit note since 29th June 2017 to present date 16th October 2017.*

After giving consideration to the evidence presented and your mitigation, I have found that the allegations above are proven. Persistent absence

without leave represents a case of gross misconduct, and as such, under the CGI Disciplinary Policy, I have had to make the decision to terminate your employment with CGI with immediate effect."

161. The Claimant was given a right of appeal.

162. The Claimant appealed the dismissal on 25 October 2017 and he was offered an appeal hearing on 7 November 2017, either in person or via telephone. He sent an email saying that he would not attend. The appeal hearing proceeded in his absence. The appeal officer, Ms Liz Drummond (Vice President Consulting Services) sent an appeal outcome letter updated 8 November 2017. The letter dealt with the Claimant's grounds of appeal which were:

""I would ask you to review all of the documentation used for the disciplinary including my email from 25 September 2017 to Nigel Hay and must include the details that he had crossed out from that email. …

CGI have dismissed me in order to cover up dishonesty that I have exposed as a whistle-blower. None of these reports to regulators are a secret, the bulk of the issues on this subject were discussed at the grievance hearing in May 2017. …

This dismissal is also because of my non attendance at CGI premises which is as a result of Health and Safety concerns that I have raised time and time again and asked CGI time and time again to conduct a medical review which has resulted in refusal. …

The manner of this dismissal also constitutes racial discrimination"

163. Ms Drummond addressed each matter in turn in an outcome letter dated 8 November 2017 and concluded:

"Following a review of the grounds of your appeal by myself and Claire Jenkins, I confirm that I will not be upholding your appeal to your dismissal on the grounds of gross misconduct for failure to follow the absence reporting procedures and being absent without leave as I have found no evidence to support any of your grounds for appealing and am satisfied your disciplinary investigation, process and dismissal were handled fairly and in line with our Disciplinary Policy. Your dismissal from CGI IT UK Limited will therefore stand."

164. The Tribunal found that the reason for dismissal was misconduct. There was no evidence of any other reason or motive for the dismissal. The Respondent provided cogent evidence through its witnesses that the sole reason was misconduct. There was no evidence that the Respondent's treatment of the Claimant during the disciplinary process and his dismissal

were in any way motivated by race or sex or protected disclosures as alleged by the Claimant.

165. The Claimant also alleged that there was a conspiracy against him on the orders of senior managers in Canada because of his race and gender. There was no evidence whatsoever to support this allegation.

166. The Tribunal found that the Burchell tests were satisfied and the charges were found proved on sufficient reliable evidence by the Respondent. There was a reasonable investigation and the Claimant was informed of all the evidence against him before the disciplinary hearing. He was given the opportunity to attend the disciplinary hearing. When he said that he would not attend, it was rescheduled to enable him to attend and he was given the option of attending in person, attending by telephone conference call or attending by a representative. He failed to take the opportunity to attend by any of these means. It was not unreasonable in these circumstances for the Respondent to proceed with the hearing in his absence.

167. The investigation provided reasonable and sufficient grounds to sustain the Respondent's genuine belief in the Claimant's misconduct. Although the Claimant complained that he was effectively dismissed simply for not providing a GP fit note, in fact he had been absent without leave for three and a half months without providing a GP fit note.

168. The outcome of the hearing was confirmed in a reasoned and detailed decision letter.

169. The Claimant was allowed an appeal and an appeal hearing was convened but, again, the Claimant failed to attend. The appeal hearing therefore proceeded in his absence. The Respondent provided a written detailed outcome in respect of the appeal.

170. The Tribunal found no procedural unfairness. The Respondent's disciplinary policy was followed and the basic requirements of the ACAS Code of Practice on Disciplinary Procedures were complied with.

171. The Tribunal took account of all the matters raised by the Claimant at the time and during the Tribunal hearing, and found there was nothing which made the dismissal unfair.

172. The dismissal fell within the range of reasonable responses. Despite several reasonable requests for information regarding the Claimant's absence, he did not provide any further GP fit notes after 28 June 2017. It was not unreasonable for the Respondent to conclude that the Claimant was still absent due to sickness in view of the previous sick notes provided since 6 February 2017, and his email of 14 August 2017 stating that the Respondent already had fit notes and no more were required after six months.

173. The Tribunal found that it was reasonable for the Respondent to conclude that the Claimant was failing to engage with its requests for information regarding his continued lengthy absence from work. He had been clearly warned in writing that continued unauthorised and uncertificated absence could lead to disciplinary action and ultimately dismissal.

174. The Claimant's failure to participate in both the disciplinary and the appeal hearings was said by the Claimant to be because of concerns regarding his health and safety but this was not supported by any current medical evidence.

Unlawful Deduction from Wages - section 13 Employment Rights Act 1996

175. Employment Rights Act 1996

Section 13

(1) An employer shall not make a deduction from wages of a worker employed by him unless -

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) ……

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions) the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

19. Did the Respondent make a deduction from the Claimant's wages by paying him in accordance with its sick policy (by paying his 2/3rds salary between 8 May and 9 August 2017 and no salary between 10 August and 16 October 2017)?

20. If so, was the deduction lawful, pursuant to section 13 ERA 1996 because:

20.a. The deduction was required or authorised by a statutory provision or a relevant or a relevant provision of the Claimant's contract of employment; and/or

20.b. The Claimant had given prior written consent to the deduction?

176. The Claimant's entitlement to company sick pay is set out in paragraph 9 of the Respondent's sickness absence policy as follows:

"SICKNESS PAYMENT FOR LONG TERM ABSENCE

During the period when you are not covered under the Company sick pay scheme, you may receive statutory sick pay. Where salary has been paid for these days, a deduction of any overpayment will normally be made through payroll in the month following any absence.

Company sick pay will not exceed 6 months and covers both long term and short term periods of absence.

- *For the first three months of qualifying absence (65 working days), company sick pay will be paid inclusive of statutory sick pay*
- *For months four to six of qualifying absence, company sick pay will be paid based on two thirds pay, inclusive of statutory sick pay (also 65 working days).*
- *If you are returning to work after a period of long term absence on a phased return, sick pay as above will only be paid for unworked time if you have not exhausted your entitlement for the relevant 12 month rolling period.*

Note that any period of short term absence will reduce the above eligibility, both in the number of days and in payment. For example, if 10 days of short term absence is followed by 65 days of long term absence, then the 10 days plus 55 /65 days are covered by full company sick pay, the remaining 10 days are paid at two thirds."

177. The Tribunal found that the Claimant had received all that was properly payable under the sickness absence policy in accordance with the above provisions.

178. The Claimant continued to receive company sick pay after 28 June 2017 notwithstanding the fact that it was a requirement of the sickness absence policy that he should comply with the requirement to provide GP fit notes.

179. The Tribunal found that there was no unauthorised deduction from the Claimant's wages.

Breach of Contract – article 3 Employment Tribunals Extension of Jurisdiction (E&W) Order 1994

21. Did the Respondent breach the Claimant's contract of employment by allegedly:

21.a. Failing to pay the Claimant's wages, pensions and benefits.

21.b. Discriminating and/or harassing the Claimant.

21.c. Dealing with the Claimant's grievance and any potential grievances in the manner which it did. The Claimant complains that the grievance was not carried out fairly, the conclusions were reached unreasonably and the refusal to hear the Claimant's appeal led to a breakdown in trust between the Claimant and the Respondent.

21.d. Failing to act in accordance with the implied obligation to take all reasonable practicable steps to protect the Claimant's health, safety and well-being.

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180. The Tribunal found that the above list did not include any matters over which the Tribunal has jurisdiction other than the failure to pay wages which has been dealt with under the heading of "Unauthorised deduction from wages" above.

……
Employment Judge Vowles

Date: …24.02.2020

Sent to the parties on

.....02.03.2020.....

.....

For the Tribunal office

Attachment: Pages 97-99 - parts of the relevant emails set out in the Claimant's further and better particulars and referred to at paragraph 130 above.