EMPLOYMENT TRIBUNALS

Claimant: Zakaria Kioua

Respondent: Lainston House Ltd

Heard at: Southampton **On:** 16 – 18 March 2020 (in person)
And 3 to 7 August 2020 (remote)

Before: Employment Judge M Street
Mr M Richardson
Mr P Bompas

Representation

Claimant: Mrs Bow (lay representative)
Respondent: Miss Platt (counsel)

JUDGMENT having been sent to the parties on 21 August 2020 and reasons having been requested by the respondent in accordance with Rule 30(5) of the Rules of Procedure 2004.

REASONS

1. **Evidence**

The Tribunal heard from the claimant, from his wife and representative Mrs C Bow, and for the Respondent from Patricia Lee, Housekeeping Manager, Samantha Davis, Human Resources, James Webb, Operations Manager, Miranda Russell, Deputy Head Housekeeper, and Gaius Wyncoll, then General Manager. The Tribunal read

the documents in the bundle referred to and heard the transcript of the interview between Mr Webb and Mr Kioua on 18 April 2018

2. **Issues**

2.1. The claimant claims direct discrimination and harassment on the grounds of race and religion, victimisation, failure to make reasonable adjustments in respect of disability and constructive unfair dismissal. There are issues in respect of the time limits for the claims brought.
2.2. Judgment was given on 30 April 2019 that the claimant was disabled by reason of anxiety and depression.
2.3. The claim was amended to include constructive dismissal on 22 November 2019, following the claimant 's resignation in September 2019.
2.4. The issues were clarified on Monday 16 March to re-word the claim in respect of reasonable adjustments for disability.
2.5. The issues before the Tribunal to decide are now as set out below. The numbering reflects that in the Orders, for consistency of reference.

"9 Section 26 Harassment on grounds of Religion (from the Order of Judge Dawson 30 September 2019)

9.1. Did the Respondent engage in unwanted conduct as follows:
9.1.1. At the meeting on 8 May 2018, being the grievance meeting in respect of the swapping of the raffle prize:
9.1.1.1. Comparing the Claimant 's religion to a nut allergy.
9.1.1.2. Attempting to explain away what happened in respect of the raffle prize by reference to the Claimant 's religion.
9.1.1.3. Failing to investigate the Claimant 's allegation of theft in relation to the swapping of the cognac for chocolates.
9.1.2. Following the grievance, fabricating an explanation that the decision to swap the cognac for the chocolates was a management decision.
9.1.3. In the response to the appeal against the grievance implying that the Claimant had been wrong to bring the grievance.

9.2. Was the conduct related to the Claimant 's protected characteristic?
9.3. Did the conduct have the purpose of violating the Claimant 's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?
9.4. If not, did the conduct have the effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?
9.5. In considering whether the conduct had that effect, the Tribunal will take into account the Claimant 's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

10. Section 26: Harassment on grounds of Religion and Race

10.1. Did the Respondent engage in unwanted conduct as follows:

10.1.1. In an appraisal on 15 March 2018 Ms Lee falsely recording that the Claimant would monitor laundry and help with the rooms.
10.1.2. Subjecting the Claimant to too many appraisals, at least 3 per year.
10.1.3. Ms Lee singling the claimant out in that he was the only person not permitted to leave work early on the date of the staff party.
10.1.4. Ms Lee leaving the staff rota visible for 3 weeks which showed that he was the only person not permitted to leave work early on the date of the staff party
10.1.5. The claimant was not permitted to use to use the staff restaurant after 5pm from 2 December 2017; the claimant was the only person so prevented.
10.1.6. Ridiculing the claimant on 10 June 2017 (as set out in detail in the Schedule of Complaints,36)
10.1.7. Being threatened on 1 March 2017 by Ms Lee that if oven gloves were sent again for dry cleaning in the future, the Claimant's salary would be deducted.
10.1.8. When raising the question of workload on 10 January 2017, 16 March 2017 and 1 October 2017 the Claimant was met with a hostile response as set out in allegation 9 of the Schedule of Complaints (41)

10.2. Was the conduct related to the claimant 's protected characteristic?
10.3. Did the conduct have the purpose of violating the claimant 's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?
10.4. If not, did the conduct have the effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?
10.5. In considering whether the conduct had that effect, the Tribunal will take into account the Claimant 's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

11. Section 13: Direct discrimination on grounds of Religion

11.1. Did the Respondent subject the claimant to the following treatment falling within section 39 Equality Act, namely
11.1.1. At the meeting on 8 May 2018, being the grievance meeting in respect of the swapping of the raffle prize:
11.1.1.1. Comparing the claimant 's religion to a nut allergy
11.1.1.2. Attempting to explain away what happened in respect of the raffle prize by reference to the claimant 's religion
11.1.1.3. Failing to investigate the claimant 's allegation of theft in relation to the swapping of the cognac for chocolates
11.1.2. Following the grievance, fabricating an explanation that the decision to swap the cognac for the chocolates was a management decision.
11.1.3. In the response to the appeal against the grievance implying that the claimant had been wrong to bring the grievance.

11.1.4. Swapping the bottle of Cognac for chocolates by Ms Lee on 9 January 2017

11.2. Did the respondent treat the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies upon hypothetical comparators.

11.3. If so, can the claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

11.4. If so, what is the respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

12. Section 13: Direct discrimination on grounds of Race and Religion

12.1. Did the respondent subject the claimant to the following treatment falling within section 39 Equality Act, namely

12.1.1. In an appraisal on 15 March 2018 Ms Lee falsely recorded that the claimant would monitor laundry and help with the rooms.

12.1.2. Ms Lee subjected the claimant to too many appraisals, at least 3 per year

12.1.3. Ms Lee singling the claimant out in that he was the only person not permitted to leave work early on the date of the staff party.

12.1.4. Ms Lee leaving the staff rota visible for 3 weeks which showed that he was the only person not permitted to leave work early on the date of the staff party

12.1.5. The claimant was not permitted to use the staff restaurant after 5pm from 2 December 2017, the claimant was the only person so prevented.

12.1.6. Being ridiculed on 10 June 2017 (as set out in detail in the Schedule of Complaints, 36)

12.1.7. Being threatened on 1 March 2017 by Ms Lee that if oven gloves were sent again for dry cleaning in the future, the claimant 's salary would be deducted

12.1.8. When raising the question of workload on 10 January 2017, 16 March 2017 and 1 October 2017 the claimant was met with a hostile response as set out in allegation 9 of the Schedule of Complaints (41)

12.2. Did the respondent treat the claimant as alleged less favourably than it treated or would have treated the comparators?

12.2.1. The claimant relies upon hypothetical comparators in respect of the matters set out in paragraphs 12.1.1 and 12.1.6

12.2.2. The claimant relies upon actual comparators

12.2.2.1. in relation to 12.1.2 to 12.1.5 and 12.1.8 being Zbigniew Michalik

12.2.2.2. in relation to allegation 12.1.7 the comparator named is "Oliver"

12.3. If so, can the claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

12.4. If so, what is the respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

13. Section 27: Victimisation

13.1. Did the Claimant carry out a protected act by
    13.1.1. orally alleging discrimination against him in June 2017
    13.1.2. alleging discrimination in his grievance
13.2. If there was a protected act, did the Respondent carry out any of the treatment set out in paragraph 9.1.1 to 9.1.3 and 10.1.1 to 10.1.6
13.3. If the Respondent did do the treatment alleged did it amount to a detriment and was it because of the protected act.

14. Reasonable adjustments: section 20 and section 21

14.1 "Did the Respondent apply the following provision, criteria and/or practice ('the provision') generally, namely requiring staff to be flexible and to carry a heavy workload."
14.2. Did the application of any such provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that he was not able to cope with the workload
14.3. Did the Respondent take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie on the claimant; however, it is helpful to know the adjustments asserted as reasonably required and they are identified as follows:
    14.3.1. Lessen the workload
    14.4. Did the Respondent not know, or could the Respondent not be reasonably expected to know that the claimant had a disability or was likely to be placed at the disadvantage set out above?

15. Time/limitation issues

15.1. The claim form was presented on 23 August 2018. Accordingly, any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the tribunal may not have jurisdiction.
15.2. Can the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?
15.3. Was any complaint presented within such other period as the employment Tribunal considers just and equitable?

12. Constructive unfair dismissal (from Order of Judge Livesey of 22 November 2019)

12.1 The claimant claims that the Respondent acted in fundamental breach of contract in respect of express and/or implied terms of the contract relating to pay reviews and/or mutual trust and confidence. The breaches were as follows:

12.1.1 Denial of his right to use his holiday entitlement in April 2019
12.1.2 Failure to carry out a return to work interview on 21 August 2019 as scheduled
12.1.3 A failure to carry out a salary review in April 2019.

12.2 Did the claimant resign because of the breach? The respondent runs a positive case in that respect. It asserts that the claimant no longer wished to work for it and/or that he had found alternative employment.
12.3 Did the claimant tarry before resigning and affirm the contract? The respondent also runs a positive case in that respect.
12.4 In the event that there was a constructive dismissal, the respondent is not seeking to allege that it was otherwise fair within the meaning of s.98 (4) of the Act.

(In respect of the claim of unfair constructive dismissal, there is no issue arising in relation to the time limits for the claim.)

16. Remedies

16.1. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.
16.2. There may fall to be considered, a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings, and/or the award of interest

3. Findings of Fact

3.1. These are the Tribunal's findings of fact, including, where conflicts of evidence can be dealt with briefly, findings on contested matters. More complex analysis is to be found under the heading "Reasons".
3.2. References are to page numbers in the bundle, with "sb" referring to the supplementary bundle. Witness statement references use "ws". References such as 2/10 indicate oral evidence, with the first number indicating on which day of the hearing the evidence was given.
3.3. The allegations relied on are included in the text for ease of reference.

Mr Kioua

3.4. Mr Kioua was born on 18 May 1983. He is of Algerian nationality. He is a Muslim.
3.5. Mr Kioua suffered anxiety and depression from June 2017, a recurrence of an earlier condition. He is a disabled person as identified in the Judgement of Judge Dawson.
3.6. He has qualified as vet elsewhere and was studying for a UK qualification while working for the respondent.
3.7. His spoken English is good without confident command of idiom; comprehension can be less good.

The contract

3.8. Mr Kioua's employment with the respondent began on 11 May 2015 (88), initially as a kitchen porter. On 23 June 2016, his contract changed to describe him as a Linen Porter (91).

3.9. The Respondent operates hotels. Mr Kioua worked at Lainston House, as did the other staff mentioned here.

3.10. Housekeeping teams were drawn from many nationalities. Ms Lee mentioned Romanian, Portuguese, Spanish, Czech, Italian, Polish. She mentioned none from continents beyond Europe.

3.11. Mr Kioua signed his job description on 27 May 2016 (92 – 94), the same day as he signed the amendment to the contract. It sets out the duties of the role as follows,

> "Working as part of the Housekeeping Team, the Linen Porter will be responsible for stock control of linen in the Hotel and supporting the Housekeeping Team with daily duties" (92).

3.12. Specific tasks referred to include to –

- "Assist the rest of the team by remaining flexible and covering hours to meet the business needs….
- Help clean the hotel when necessary including public areas and bedrooms…" (92)

3.13. On the page that Mr Kioua signed, the last bullet point is,

> "The above description is not to be regarded as exhaustive. Other tasks and responsibilities of a broadly comparable nature may be added on a temporary or permanent basis, as appropriate."

3.14. There is provision for changes to the role, for which there will be consultation.

3.15. Mr Kioua denies seeing the first page, which sets out the requirements to help clean the hotel and to remain flexible. That is the basis for his complaint that he was being asked to undertake two jobs at once and that he could have regarded himself as dismissed in spring 2018 for breach of contract (151). It seems unlikely that he would have been asked or agreed to sign a document that did not include the front page. We are satisfied that Mr Kioua was given the complete job description and that his duties as Linen Porter included helping to clean rooms when necessary.

3.16. He accepts that the three-page document is clear –

> "If they had given it to me, it would have finished the issue about having to do one or two jobs". (oral evidence 2/10)

3.17. A revised contract was issued in April 2018 (97) and Mr Kioua signed to accept the terms on 14 April 2018.

3.18. In the new contract, it is expressly stated that the respondent does not pay holiday pay outstanding save on termination of employment (98 and 2 supp bundle). Holiday may not be carried forward to the next holiday year unless a period of statutory maternity, paternity or adoption leave has prevented the employee from taking it in the relevant year. The Employment Handbook says,

> "Untaken holiday entitlement may not be carried forward into the next holiday year, no payment will be made for unused holidays and they will be forfeited."

3.19. By April 2019, Mr Kioua had a holiday entitlement of 32 days per annum.

Policies

3.20. The respondent provides for free staff meals on breaks during their shifts:

> "You may be entitled to one 30-minute unpaid lunch or dinner break where your meal and drinks will be provided free of charge in accordance with your contractual hours" (61 and 67).

3.21. For sickness, the respondent requires medical certification.

3.22. The respondent has an Equality and Diversity Policy set out in the Handbooks, with Sexual, Racial and Disability Harassment Policies (64, 2016 and 78, 2018). The text includes as examples of unacceptable behaviour anything based on an employee's protected characteristics and which is unreasonable, unwelcome and offensive. Specifically, it mentions insults or ridicule relating to a protected characteristic and offensive or intimidating comments.

3.23. Misconduct should be challenged, with provision for reporting to more senior managers:

> "It must be made clear to the person who is harassing you that their behaviour is unwelcome." (64)

3.24. There is also an anti-bullying policy.

> "Bullying means offensive, intimidating, malicious or insulting behaviour, or an abuse or misuse of power intended to undermine, humiliate, denigrate or injure a colleague. It does not include legitimate or constructive criticism of your performance or behaviour, an occasionally raised voice or an argument." (64)

3.25. There had been a system of appraisal, but it was abandoned, and quarterly job chats replaced appraisals. It is not established that the job chats were carried out strictly quarterly. The records produced of when there were job chats are obviously inaccurate.

3.26. The job chat forms produced have little significant content, whether for Mr Kioua or other staff members or from the point of view of the respondent. They are generally positive in their content. Mr Kioua did not raise any issues in them, and the

respondent, while having recurrent difficulties over his interpretation of the contract did not highlight or resolve those in the discussions.

Mr Kioua's faith

3.27. Mr Kioua had disclosed his faith at interview but saw it as a private matter. His religious faith was nonetheless known. In June 2017, Samantha Davis sent a note to Patricia Lee to let her know that Mr Kioua was fasting over Ramadan (120). Ms Lee agrees that she was aware of Mr Kioua's faith before that (WS para 13). He was known to be from Algeria, a Muslim country (oral evidence 2/10), something he had talked to Miranda Russell about and he had talked to James Webb about Ramadan in 2016. He was known not to drink alcohol, and why.

2016

3.28. Patricia Lee was Mr Kioua's manager from the summer of 2016, with Miranda Russell as Deputy Housekeeping Manager. His main colleague in Laundry until March 2017 was Zibi. Thereafter, he was the only Linen Porter although other staff undertook laundry duties.

3.29. From June 2016, much of the laundry work was sent out under new arrangements (Russell ws para 5, 251). That reduced the workload in the laundry, and laundry staff were expected to clean rooms as well when necessary. Mr Kioua initially expressed himself to be keen to learn to do the room cleaning but later did not see this as part of his job description. It clearly was. His role required flexibility and to support the housekeeping team as necessary.

3.30. In October 2016 there was a meeting with Mr Wyncoll, Human Resources ("HR") and Mr Kioua. His duties were outlined.

3.31. He has relied since then on an agreement having been reached that he would not have to clean rooms when on his own in the laundry.

3.32. On this Mr Wyncoll says,

> "I never agreed with him that he could not be required to clean rooms if Zibi was not there. (ws para 2).

3.33. He expanded on that in oral evidence,

> "I am confident flexibility was discussed….
> We had a full laundry with everything done on site. Instead we built a garage-size building, a linen cupboard in effect, with washing machine and tumble drier, we used to outsource sheets and tablecloths then towels too, so the workload was becoming less in the laundry and therefore flexibility was needed, that Mr Kioua agreed to, and he was very willing and keen to learn to do rooms and I was pleased with his response."

3.34. We are satisfied that the management would not introduce restrictions on job roles or duties that might limit their ability to get rooms ready in a timely way for guests.

On that, we do not accept what Mr Kioua says. There was no agreement that he would not be asked to clean rooms, even when working alone in Laundry.

3.35. The Quarterly Chat notes in October 2016 that,

> "Mr Kioua has now been trained to clean rooms and public areas**."** (107)

3.36. It goes on,

> "On some occasions Mr Kioua gets frustrated and feels he cannot do everything on a day to day basis. I have assured him the work will be given out equally between the team".

3.37. Ms Lee also notes that his performance is affected by his moods, and he is encouraged to communicate, to ask for help when needed and not to let his moods affect his work.

3.38. His comments are,

> "I do not have Any Issues and I will try to Do my best"
> "It has been a bit hectic in the summer as a New laundry was being built, but now everything seems to be Perfect and back to Normal".

3.39. From then, Mr Kioua would be given rooms to clean on a frequent and regular basis.

3.40. Miranda Russell was entitled to ask Mr Kioua to clean rooms if his help was needed. She tells us Mr Kioua objected, but would probably then do the rooms and would do them very well. Zibi would also be asked, and would say he was "busy, busy, busy" but he too did the rooms. Because Mr Kioua did not see this as part of his job description, he saw himself as being asked to do two jobs. He was not being asked to do two jobs.

2017

Raffle Prize

Swapping the bottle of cognac is pleaded as direct discrimination on the grounds of religion.

3.41. There was a staff party on 7 January 2017. Mr Kioua was not present. His ticket was drawn and he had won a bottle of alcohol, that he understands to have been Cognac. He was not given Cognac; he was given a box of chocolates. Ben Leach and Mr Wyncoll were distributing the prizes. Ben Leach describes saying that Mr Kioua did not drink alcohol and that Mr Wyncoll on the spur of the moment suggested the substitution. Ms Lee had gone up to collect Mr Kioua's prize for him, said "Yes" to the substitution and took the gift for Mr Kioua in his absence.

3.42. By way of background, Mr Kioua had been given a bottle of champagne on the anniversary of being in post, in 2016. He gave it to Ms Lee. She knew that he had no objection to being given alcohol. She agreed the substitution and accepted the

chocolates on his behalf. She did not point out that he would accept alcohol even though he did not drink it.

3.43. Mr Kioua was upset at the substitution.

> "As a human, I should have been asked, if it is my property, I should have been asked. They know I do not have problems receiving alcohol. Like the first year anniversary, Taittinger.**" (ref)**

3.44. Mr Kioua challenged Ms Lee on the substitution on the next working day, having been told of his win. She was dismissive.

3.45. There was not a complaint of discrimination.

Cleaning rooms

> **That, when raising the question of workload on 10 January 2017, 16 March 2017 and 1 October 2017,the claimant was met with a hostile response as set out in allegation 9 of the Schedule of Complaints is pleaded as harassment and direct discrimination on the grounds of race and religion**

3.46. On 10 January 2017, Miranda Russell asked Mr Kioua to clean rooms. He protested on the basis we have found to be unfounded that he had an agreement with Gaius Wyncoll that when he was solely responsible for laundry, he did not have to do rooms. She says,

> "He had refused to do the rooms before, even though I had been told he could be asked to when needed, then he would be ok for a while. It happened maybe every few weeks." (ws para 6)

3.47. Mr Kioua does not say that Ms Russell asked him to do the room cleaning in January because of his faith or nationality. He denied that, in oral evidence. His complaint is that she was hostile to him over this and the later incidents he describes.

3.48. She acknowledges being abrupt. She was faced with a member of staff refusing to follow an instruction that she has been told is reasonable and within the terms of his contract. She told us that it worried her, she was getting a little bit apprehensive coming to work, because she did not know what reaction she would get from him. She did not find Mr Kioua easy to manage.

3.49. She does not feel she was hostile. She is clear she did not shout at him. Mr Kioua says she was hostile. We accept that she showed her frustration in her manner. The conduct of Ms Russell is sufficiently explained by the circumstances. She was dealing with an employee who was resistant to following reasonable instructions to do work that needed to be done.

3.50. Ms Russell had not had such resistance from Mr Kioua's colleague, Zibi. In March 2017, Zibi stopped working primarily in the laundry, moving to cleaning rooms instead. That left Mr Kioua in sole charge of the laundry, albeit that others were able to do some of the associated work. He felt responsible for it and for the administration including risk assessments.

3.51. Ms Russell continued to ask him to do cleaning of rooms in addition. Because of the outsourcing of the bulk of the laundry work, the laundry itself was now small, with limited facilities. The workload was very different from before the outsourcing, so the job of laundry porter or assistant was not considered to be onerous. It was seen as reasonable for one person to do it and to support the cleaning as well.

3.52. Mr Kioua protested. He complains of facing critical or angry comments when he protested.

3.53. Mr Webb was aware of Mr Kioua's objections to doing rooms, he was kept informed by Ms Lee and Ms Russell. He did not see the requests made as unreasonable. They were consistent with the job description.

3.54. The complaints made by Mr Kioua to Ms Russell continued to be that he was being asked to do two jobs at the same time.

Clocking system and workload

3.55. The clocking system uses fingerprint identification. On clocking early or late, options are offered including routine explanations such as "forgot to clock" or "transport difficulty", "arrived early" or "staying late". If extra work was being done, the options were "start time change" or "end time change". Those additional hours of work could attract pay if authorised by the manager, and in looking at working hours, they would be considered against the requirements of the rules on minimum wage and maximum hours.

3.56. If "staying late" was recorded, as against "end time change", that did not count as additional working time.

3.57. Mr Kioua was staying late, often. That shows on his clocking records. He was not clocking out late on the basis that he had stayed to work. He clocked himself out as having stayed late, rather than recording late working, "end time change".

3.58. Neither Ms Lee nor Ms Russell themselves worked late. They both left mid-afternoon. Both they and Mr Webb are clear that when they left, they did so on the basis that those working later had manageable tasks; that they would not leave the premises leaving someone struggling. Mr Wyncoll was confident that his managers would not leave those finishing later with an undue workload. Most housekeeping tasks must be done by early to mid-afternoon, since guests need the rooms.

3.59. The accounts department scrutinise hours, to ensure that the regulations regarding the national minimum wage are not being breached and as a matter of good management. Accounts did not flag up to Ms Lee that Mr Kioua was working excessive hours (oral evidence 5/24).

3.60. Nothing therefore flagged up in the records that Mr Kioua had a workload that he could not cope with save by staying late, nor did his managers see him failing to manage the workload. The records showed him as working his normal working week.

3.61. He has not protested that he worked late, or that he did so on an unpaid basis.

3.62. On this Ms Lee was asked,

> "Did you see that he was staying late?"

> "If I saw that, I would say to him why did you not check out. He might say I went to canteen, or I was hanging around, not necessarily work, or maybe he said sometimes my wife is working late. So, I do not know what he was doing work wise, there was no workload for him to do, but so far as I was concerned if he was on the premises, that was his choice."

3.63. Mr Kioua had a practice of taking his evening meal in the restaurant after the end of his shift which goes in part to explain his late departures. It was part of the social life that he enjoyed with colleagues.

Oven Gloves

Being threatened on 1 March 2017 that if oven gloves were sent again for dry cleaning in the future, the claimant 's salary would be deducted is pleaded as harassment and direct discrimination on grounds of race and religion

3.64. In March 2017, Patricia Lee heard from the chef that oven gloves had been sent for dry cleaning, when they should have been cleaned in-house, thereby incurring unnecessary expense. She agrees that she asked Mr Kioua if he had sent them out (179). She later learned that the mistake had been made by someone else, when Mr Kioua was not on duty.

3.65. Mr Kioua says Ms Lee threatened to dock his salary next time and that she was angry and shouted. She denies doing so, nor was it something she had the power to do.

3.66. The chef's note on this relates that they had agreed Ms Lee would speak to Mr Kioua about this because of the unnecessary cost incurred.

3.67. There are other references to the threat to his salary being made. James Webb remembers a similar complaint from Mr Kioua, in June 2017, when he laughed to reassure Mr Kioua, saying that nobody could touch his salary.

3.68. We find, on balance, that there was such a threat, even though it was unfounded. It is a not unusual threat made by managers under pressure.

3.69. Mr Kioua did not pursue a complaint about it. He agreed in oral evidence that he did not relate that incident to his race or religion at the time.

Incident June 2017

Ridiculing the Claimant (as set out in detail in the Schedule of Complaints p36, para 11 – bathrobes wrongly sent for laundry, laughter at plans to study for vet qualification and driving licence) **is pleaded as harassment and direct discrimination on grounds of race and religion and victimisation**

3.70. In June 2017, Mr Kioua was called to Patricia Lee's office. Katarzyna Amarowicz (Katie) was also present. He was asked about bathrobes that had been sent out to the linen company unnecessarily. Again, there was a threat of a salary deduction. Ms Lee was critical. He was embarrassed and humiliated.

3.71. That was followed by a discussion about which Mr Kioua makes a strenuous complaint. He agrees it was common knowledge that he was studying to obtain his UK veterinary qualification, and that he enjoyed cooking. He had just been in Algeria for his brother's wedding. The conversation moved from different cultural practices – such as who pays for the wedding – to questions about what he was doing in the UK, which he found intrusive. He now describes sniggering between the two women, eye rolling, laughter and an unpleasant tone of voice. He describes feeling distress, embarrassment. He called his wife and told her about it.

3.72. His wife, Ms Bow, without his knowledge, rang Mr Webb. She was concerned about his distress. She says, when he called her, "initially, he could not speak. The sound from him was groaning and shortness of breath. I asked "What's happened" repeatedly before he responded. He began to speak, whispering through crying, "They are going to take my salary". "She accused me "They were laughing". "I got called into room" (ws para 2).

3.73. Oral evidence from Ms Bow:

> "When he was on the phone, when he eventually started talking, he said, "She is going to take my money" and he said that over and over again. And he kept saying they are laughing at me, and he was crying."

3.74. It was agreed that Mr Kioua was not to know of that conversation, at Mrs Bow's request (175).

3.75. Mr Webb spoke to Ms Lee. He describes her as shocked and disappointed at that reaction. She had not seen anything untoward in the conversation. She spoke to Mr Kioua to apologise – without disclosing the telephone call – "I did not mean to pry into your life, I am sorry I talked about your private life in front of Katie…." (Kioua ws para 30, Lee, ws para 22).

3.76. Mr Kioua did not relate any of this to his race, nationality or religion at this time and concedes that there was no reference made to his religion.

3.77. This took place when he was fasting (ws 40).

3.78. Mr Webb kept in touch with Mr Kioua after that, to check that he was all right and says,

> "Each and every time he would thank me for asking and tell me everything is fine and make an effort to shake my hand and say "Thank you my friend", "Everything is fine my friend" (240 and 247).

3.79. Ms Lee and Ms Russell note that from this period, their relationship with Mr Kioua changed – he became more withdrawn and subdued.

Mr Kioua's health

3.80. On 25 July 2017, Mr Kioua consulted his GP asking to be prescribed anti-depressants, having been on them in 2014 (296). Counselling was recommended with a review in a month.

3.81. On 12 September, Mr Kioua was prescribed Citalopram. The GP notes that he works in Laundry, never been without work, likes his job.

Room cleaning

3.82. Mr Kioua continued to be on the rota to clean rooms, but under protest. He complains again of being shouted at by Ms Russell in October 2017. She again says she was frustrated by his attitude to a reasonable and legitimate request. She says he rang to say to her that he would not do the rooms – not could not, but would not. He would however then come and do them and do them well.

Quarterly Chat

3.83. On 20 October 2017, there was a quarterly chat between Ms Lee and Mr Kioua. His recorded comment is,

> "I do not have any concerns, I think so far is Ok. I do think that I can manage my job pretty well considering I have been doing it for a long time now." (123)

3.84. Ms Lee's comment is,

> "I have told him to talk more… so know how he feels and why"

Meals in the Staff Restaurant

The claimant was not permitted to use the staff restaurant after 5pm from 2 December 2017; that the claimant was the only person so prevented is pleaded as harassment and direct discrimination on grounds of race and religion and victimisation

3.85. Meals were provided to staff free of charge during their working hours.

3.86. The practice had developed of staff sometimes taking their free meals after the end of their shifts, often together. Food sometimes ran out while staff still working needed meals. Senior management wanted the practice to be challenged, reserving staff meals for those on duty and to reduce food costs. Heads of Department were told in December 2017 to tackle it.

3.87. Mr Kioua was identified as one of those departing from the policy by the chef, Mr Birch.

3.88. The rule applied to entitle those during a shift to a free meal, but those who finished at 5 were not authorised to wait until the evening meal was served at 5.30. Amongst housekeeping staff, most left earlier than that, although there would be one or two on shifts ending at 5 or later. Both mangers left earlier.

3.89. In December 2017, Ms Lee told Mr Kioua not to eat the meals provided in the staff canteen after the end of his shift. She had prioritised speaking to him, given Mr Birch's comment.

3.90. For Mr Kioua, there was a longstanding problem with a lack of vegetarian options in the restaurant – there would be such options on Mondays and Tuesdays, but those were days he did not work, and there might be only soup or salads available that he could eat.

3.91. The day after Ms Lee spoke to Mr Kioua, one of the chefs had prepared a vegetarian dish specifically for Mr Kioua. He had stayed to eat it and was reminded again of the instruction not to eat after his shift ended.

3.92. The policy of enforcing the rule was reiterated in January (143). Arrangements for live-in staff were different – not all had the means to cater for themselves.

3.93. Zibi continued to eat in the canteen until March. Ms Lee agrees it may have been some weeks before she told Zibi perhaps longer.

3.94. Mr Kioua mentioned to his GP in January that he had been excluded from the canteen (291c). He saw himself as personally targeted, and found that others were unaware of the enforcement of the rule.

3.95. The practice continued to be widespread. (132 *272*). On 20 March 2018, Mr Birch emailed Ms Lee asking her to take up with Mr Kioua that he was not to stay after his shift to eat food provided for staff on their shifts,

> "This is a regular thing not just from him but several staff meaning that we keep running out of staff food on a regular basis." (147)

3.96. Mr Kioua felt himself to be singled out and that others saw him as having been singled out.

Staff party

Leaving the staff rota visible for 3 weeks which showed that he was the only person not permitted to leave work early on the date of the staff party and Singling the Claimant out in that he was the only person not permitted to leave work early on the date of the staff party are pleaded as harassment and direct discrimination on grounds of race and religion and victimisation

3.97. In December 2017, the rota was posted for the holiday period, including the day of the staff party. There were late shifts to be done throughout the holiday period.

3.98. Mr Kioua was the only member of staff scheduled to work late on the day of the staff party. He had said that he was not going to the staff party.

3.99. The rota was posted three weeks in advance but he only noticed on the day of the party that others were scheduled to leave earlier than him.

3.100. Mr Kioua had not intended to go to the staff party but saw unfairness in being the only one to be scheduled to work late and that being so publicly displayed. He thought that others were getting time off in addition to the contractual time off when they were released early.

3.101. The contract shows that hours are annualised. The clocking arrangements meant that those leaving early would have to make up those hours later – they would not be classed as leaving at the end of their shift.

3.102. He felt unfairly treated in being the one to work late. He did not at the time relate this to his race, nationality or religion.

3.103. Mr Kioua was also rota'd to work late on Christmas Eve, until 9pm. He had been given Christmas Day off but had not explained that he would be travelling on Christmas Eve and could not work late. Ms Lee changed the rota to enable him to catch his train (176, 182) although that change was initially refused (226).

2018

Quarterly Chat 10 February 2018

In an appraisal on 15 March 2018, Ms Lee falsely recording that the claimant would monitor laundry and help with the rooms is pleaded as harassment, direct discrimination on grounds of race and religion and victimisation.

3.104. On 10 February 2018, Mr Kioua had a further Quarterly Chat (146). He said,

> "For the time being I'm happy with my job in laundry."

and

> "I am very open for anyone to come and discuss any issues or concerns and I'm willing to do the same as well."

3.105. Mr Kioua signed this form in the usual place and after the manager's comments. It is the only job chat form we have seen that has the employee's signature added a second time at the bottom.

3.106. In the manager's comments, after,

> "As Mr Kioua mentioned he needs to speak to me when he feels there are any issues."

is the following,

> "Zac has now agreed.
> to monitor our laundry and help with rooms"

The last bit is a little squeezed in over Patricia Lee's signature.

3.107. Mr Kioua says that he had been pressed to sign the form at the bottom as well as in the usual place, and that the text from "Zac has now agreed… "was not there when he signed the form. Ms Lee denies changing the form after he had signed it. This is discussed more fully below.

Room cleaning March 2018

3.108. The problem that Mr Kioua identified with being asked to do two jobs arose again immediately.

3.109. Samantha Davis (HR) gave an account in June 2018 of earlier events (253). In March 2018, she had encouraged Ms Russell to give rooms to both Kasia, usually in public areas, and to Mr Kioua. Both had objected. They were to be treated equally, in spite of Ms Russell's objection that "she wouldn't give Mr Kioua rooms because she knew that he wouldn't be happy and would probably complain/ refuse to do it" even though it was in his job description. Mr Wyncoll was present and they agreed Mr Kioua must be asked to do rooms if the business need was there.

3.110. Mr Kioua complained to Ms Davis that he had been allocated rooms and that he would not clean them, on 15 March 2018. She showed him the job chat completed by Patricia Lee indicating that he had agreed,

> "I asked him about this because it was my understanding that he should be cleaning rooms when required. We discussed his recent job chat and Mr Kioua said that he had not said he'd clean rooms. I showed Mr Kioua the job chat form. He said that he had not seen the comments from Trish on there before (that he would clean rooms) and that it hadn't been written on the form at the time he signed it." (253)

3.111. Mr Kioua agreed to clean the rooms pending a meeting, which took place on 21 March 2018, with himself, Ms Lee and Ms Davis. He was offered the chance to have cleaning as his primary responsibility but said that,

> "because he was trained on laundry, and many of the team weren't, he felt responsible for it and wouldn't be happy to work on rooms whilst also feeling that he might be held responsible for dealing with a backlog of work in the laundry." (253)

3.112. He suggested instead that everyone was trained in laundry and everyone took a turn in covering that role. That was accepted and training was planned for early April (148).

3.113. That seemed to present a happy solution to the issue that Mr Kioua had about being asked to do two jobs.

18 April 2018

3.114. Mr Kioua had parcels, items bought online, delivered to the hotel because there was no-one at home to receive them. He was told not to. It was his understanding that others did the same (156).

3.115. On 18 April, more parcels were delivered for him. Reception asked Ms Russell to take the matter up with Mr Kioua – it was an inconvenience and interrupted their work for the guests.

3.116. Ms Russell told him not to have parcels delivered to the hotel. She describes him as visibly distressed, shaking, ill – the first time she had seen him like that. She was shocked and worred (ws para 24).

3.117. He felt unfairly treated,

> "and talking to me in such a bad way, I said ok I've just had enough…. I've been seeing people getting their parcels delivered here… I've just had enough, I just felt I can't, I can't really carry on working at this place, I told her that, she said, I hope it's nothing to do with me, I said, well I don't know it's in general, it's like a build-up of things, you know….." (156)

3.118. Mr Kioua spoke to both Samantha Davis and James Webb that day.

3.119. Ms Davis' note of what he said to her includes the following, (150)

- Nervous and confused, "doesn't want to work here anymore".
- Can't do both jobs (meaning cleaning and laundry)
- His contract was for laundry work. There had been no formal process to change his contract
- He was told not to have parcels delivered to the hotel. Others did.
- He was told in December he was "not being allowed to eat staff food whilst off duty" – but others were doing it and Zibi was not told till March 3rd.
- The absence of a vegetarian option during lunch breaks
- The failure to give him the cognac that he won in the raffle
- Being blamed for sending out the oven gloves, with a threat from Ms Lee to deduct from his salary; no apology given, though it was someone else.
- Feeling he was being bullied, not well enough to finish his shift, going home and was going to see his doctor.

3.120. Although he complained about doing rooms and laundry, he is also noted as saying that he had agreed with Gaius (Wyncoll), Sam (Evans) and Tricia (Lee) the job share and that he would give it a go, "It all seems ok at the moment" (150).

3.121. This was his first account of his complaints.

3.122. He does not to Samantha Davis speak of being treated differently by reason of race or religion.

3.123. Mr Kioua then spoke to Mr Webb, a discussion which he recorded covertly and which the Tribunal heard. He spoke repeatedly about being treated differently and unfairly, but did not identify race, religion or any other ground. The issues raised include

- Rooms and laundry – making him cover two jobs
- Failing to formally change his contract to cover that
- Complaining about him having parcels delivered, given that that was common practice
- Him not being allowed to eat in canteen, while others continued daily (152/6)

- The food situation, there being nothing for him to eat as a vegetarian at lunchtime (152/3)
- The failure to give him the raffle prize cognac
- The oven gloves complaint, with the threat to deduct from salary
- Having too many appraisals (quarterly chats)

3.124. He said he felt intimidated, excluded. He had seen a solicitor. He said he had grounds for unfair dismissal because of the change of contract.

3.125. He did however confirm that he had agreed to give the shared laundry arrangement a go, and that all seemed ok with that at the moment (155).

3.126. Mr Kioua did not at any stage in this meeting or with Ms Davis relate the long history he gave of unfair treatment to his health, his faith or his race.

> "You did not in this meeting say you were being racially harassed or discriminated against?"
> "I did not say that until the grievance with Mr Gaius" (oral evidence)

3.127. He agreed that he had not raised these grievances during the quarterly job chats,

> "I couldn't say anything on my appraisal on how I had been treated or I am not accepting this, I could only say I am all right, doing fine." (oral evidence)

3.128. Neither to Ms Evans nor to Mr Webb did he mention concerns about the discussion with Ms Lee in June 2017.

Sick Leave

3.129. Mr Kioua was encouraged by both Samantha Davis and Mr Webb to see how he felt after a break but he went home.

3.130. He was off sick thereafter, so from 19 April 2018 until his resignation on 3 September 2019.

3.131. Mr Kioua had seen or spoken to his GP several times since citalopram was prescribed in September 2017. His depression had continued to be troubling. The GP noted on 12 December that his exams for his veterinary qualification were due in April 2018, and that he was hoping to have the job he likes after passing. The citalopram was continued. The sense of exclusion from the canteen is noted at the consultation on 23 January, and stress at work was mentioned at the next appointment on 27 March 2018.

3.132. The medical consultations had not been mentioned at work before Mr Kioua went off on sick leave.

3.133. The GP noted at the consultation on 24 April 2018, that Mr Kioua again reported stress at work and being bullied. Issues included excluding him from the free canteen meal, preventing him from using the work address for parcels like anyone else, changing his rota without consultation, picking on mistakes, threatening to deduct money off his salary, blaming him for mistakes that are not his. As he saw it, he was entitled to a meal per duty, the duty finished just before meal time,

everyone else was allowed to eat in the canteen but him. He worked at two jobs. His problems at work had led him to miss some of his exams for his veterinary training (291b).

3.134. A medical statement was issued for a month, saying he was not fit for work, with the diagnosis "stress at work".

3.135. BY way of background, some months previously, Mr Kioua's rota had been changed without consultation; he had been granted two fixed days off, contrary the usual practice, and when it was thought he no longer needed it for his studies, that had been changed. His fixed days off were restored to him when he protested.

3.136. By April 2018, the meals policy was being more widely enforced, although it remained an issue, eventually even affecting live-in staff, who were provided with the facility to self-cater.

Grievance

3.137. On 1 May 2018, Mr Kioua lodged a grievance against Patricia Lee and Miranda Russell (173 – 178).

3.138. This is the first time that he raises the question of discrimination on the grounds of his nationality, as an immigrant to the UK, or religious discrimination.

3.139. The complaints he made in brief summary were these:

- Being blamed for sending oven gloves out wrongly in March 2017 and threatened with a deduction from salary
- Intimidation/humiliation because of his personal circumstances as a migrant to the UK – being blamed for sending bath robes out wrongly and being subject to intrusive questioning and ridicule in June 2017
- Being singled out/excluded/treated differently to other members of staff, not being allowed to eat with colleagues or use the staff restaurant, referring to racism, and being the only one not given a half day off work on the day of the staff party in January 2018
- Being treated differently due to his religious beliefs, in not being given the bottle of Cognac that he had won
- Experiencing unfair treatment in changing his shifts, ignoring his holiday commitments, by being put on an unusually late shift on Christmas Eve 2017, jeopardising his holiday travel arrangements and issuing threats if he did not comply
- Excessive overloading of work duties, by harassment and pressuring him to carry out the work of 2 people/ 2 separate jobs, abandoning the October 2016 agreement that when working alone in the laundry, only laundry work would be required, threatening him when he protested, being treated differently from Zibi who refused to do rooms, and was not given as many to do as he was, being ignored when he complained that he could not cope mentally and physically doing 2 jobs, being harassed and threatened by Miranda Russell when he protested again in October 2017 at being given rooms, conduct repeated in January and March 2018

- Subjecting him to excessive numbers of appraisals and falsifying them, specifically, adding a false statement to the February 2028 Quarterly Chat to reflect an agreement to do room cleaning

3.140. In addition to the issues itemised, he mentioned the food situation and the complaints made to him about parcels being delivered.

3.141. He raises race/nationality and religious discrimination here for the first time and reports being unable to cope physically or mentally with doing two jobs.

Grievance Investigation and hearing

At the meeting on 8 May 2018, being the grievance meeting in respect of the swapping of the raffle prize:

- **Comparing the claimant 's religion to a nut allergy**
- **Attempting to explain away what happened in respect of the raffle prize by reference to the claimant 's religion**
- **Failing to investigate the claimant 's allegation of theft in relation to the swapping of the cognac for chocolates**

are pleaded as harassment on grounds of religion, direct discrimination on grounds of religion and victimisation

3.142. Gaius Wyncoll was the manager handling the grievance.

3.143. Mr Kioua was interviewed on 8 May 2018. He made a covert recording of the meeting and the references below are to the transcript of the recording.

3.144. Zibi was supposed to be with him but failed to attend. Mr Kioua agreed to proceed without a companion present.

3.145. He amplified the issues raised in his grievance, commenting for example that he found questions from both Ms Lee and Ms Russell, "Are you OK?" "Have you any worries?" intrusive, prying, even extreme in their persistent questions (197). He should not have been asked what he was doing in the UK – it was both prying and singling him out, treating him differently from a person from the UK (198).

3.146. Because he had been singled out for eating in the canteen after the end of his shift without any general communication to staff, he saw it as racism, based on his background, religion, colour of skin – saying many people had suggested that as an explanation, including his doctor (200).

3.147. In the discussion about the Cognac, Mr Wyncoll explored the issue by making the following comparison,

> "But for example someone has got a nut allergy or a nut intolerance and they were given a box of chocolates that contains nuts do you not feel it would be appropriate that we then change that prize, you know, on the night?" (203)

3.148. Mr Kioua was not persuaded,

> "It's not the same. It's different. They don't want that prize to be going to me and they've used my religion to get what they want…. And to humiliated me at some point and to ignore me…. if you do it behind my back and take my prize …. This is what I find unacceptable. I felt really ignored and humiliated and not cared about." (203).

3.149. Mr Wyncoll's account is,

> "The decision made there purely based around the fact that he doesn't drink, it was mentioned, shall we give him the chocolates instead, that would be a nice thing to do. My comparison, I know members of the team, it is about tailoring a gift or an experience, around, so if somebody has a nut allergy, I wouldn't give them a hamper of Christmas nuts, it is was considered a thoughtful gesture to change that. (6/21)

3.150. He holds to the point even though it is pointed out that the immediate context is treating Mr Kioua differently because of religion.

> "To me it had no bearing whatsoever on his religion."

3.151. Mr Wyncoll had some quick, unrecorded preliminary discussions about the grievance, noted his initial response and carried out further investigations, including speaking to Patricia Lee, Ben Leach, Zbigniew Michalik (Zibi), Miranda Russell and Katie Amarowicz. He reviewed documents (222)

3.152. Mr Wyncoll dismissed the grievance, on 19/05/18. He wrote a detailed response, which echoed many of his initial thoughts.

3.153. He wrote in the grievance outcome,

> "I believe that there was no ill-intention behind the different treatment you received due to your religious beliefs."

3.154. He now says,

> "I think that is my punctuation. I believe there was no ill intention. I am trying to rephrase this, because in my opinion there was no different treatment, it was not related to religious beliefs."
>
> "That is not the intention behind what I am saying there. I genuinely believe and I know there is no doubt in my mind that there is no connection with religious beliefs."

3.155. These, in summary, were his findings.

3.156. He found that Ms Lee had made reasonable enquiry about the oven gloves to find out what had happened. She had not accused Mr Kioua of making the mistake.

3.157. Similarly, she had been making reasonable enquiry about the bathrobes error.

3.158. She had not threatened any deduction of salary.

3.159. The intrusive questioning complained of he placed as taking place at the time of the bathrobes complaint and from Katie's account, arose from the discussion of the rota change, after Mr Kioua had finished his veterinary work experience. It had been thought – without consultation - that he no longer needed those particular days off. It was that, he concluded, which had sparked the discussion about Mr Kioua's personal plans and arrangements including his studies, his future plans, for the purchase of a car and driving lessons, a discussion that Mr Kioua complained of as intrusive. Mr Wyncoll promised to give guidance to the team to avoid personal questioning, but also guided Mr Kioua to complain if he found a conversation intrusive (224).

3.160. Enforcement of the meals while on duty rule had begun in the Autumn of 2017, when live-in staff accommodation had been or was being improved and food budgets were under scrutiny. Mr Wyncoll had himself asked Heads of Department to speak to any member of the team who had been eating when off duty. The practice was not widespread, so there had been no need for a general note. Mr Kioua had named Zibi as the source of the criticism that his treatment was racist, but Zibi himself had denied that, saying he understood it was about costs (225).

3.161. Someone had to be on duty on the night of the staff party, although others were allowed to leave early because there were no residents present that night. Mr Wyncoll could see the reason behind Mr Kioua's sense of unfairness but he said there was "no intention to exclude you or for you to be singled out". The rota had been reasonable and when offered the chance to go home a bit early, Mr Kioua had refused.

3.162. In relation to the Cognac, Mr Wyncoll had no recollection of the incident, but concluded that the substitution was in good faith and without any ill-intention. He noted the objection that it was not appropriate for someone else to substitute a prize without the winner's consent and would apply that in future raffles.

3.163. The Christmas Eve late shift had, he found, arisen because Mr Kioua had not alerted his manager to his travel plans, and the shift had eventually been changed to accommodate him. Nor did he find any threat made to him, other than that if on the rota, he was required to work.

3.164. In relation to cleaning rooms, Mr Wyncoll was clear that in October 2016, when there had been individual consultations about the reduction in the workload in the laundry, it had been made clear that flexibility would be required. It was reasonable for Ms Russell to request that Mr Kioua cleaned rooms in January 2017 (227). Zibi had confirmed that it was not unreasonable to carry out duties across rooms and laundry.

3.165. Mr Kioua had reported that Ms Russell said that if he complained about her instruction to senior management, he would "shoot himself in the foot. Mr Wyncoll did not find that to be appropriate language but he understood the intention behind it; highlighting to more senior management the refusal of a reasonable instruction was not going to be helpful.

3.166. There was financial stringency at the start of 2018, the laundry outsourcing had not made sufficient savings, so Mr Kioua had been right that when there was a resignation in the housekeeping team, authority had not been given to replace that person (227). Flexibility was required. Mr Kioua's suggestion of the whole team

rotating to cover the laundry work had been a very good one. Mr Wyncoll understood from his investigation that Mr Kioua was happy with the change. He added that if a change in working practices significantly increased the hours he was working over a sustained period, that would be identified and reviewed with his welfare in mind.

3.167. There remained disagreement between Mr Kioua and Ms Lee over the disputed sentence in the 2018 quarterly chat document, but Mr Wyncoll considered there had been ample discussion of the requirement for flexibility and for Mr Kioua to clean rooms as needed. He intended to remind department heads that appraisals should be copied to the employee concerned – given that Mr Kioua had identified the disputed sentence only two months later, on seeing it when meeting Miss Davis.

3.168. Mr Wyncoll agreed that some other staff had not had as many appraisals as Mr Kioua and in particular Zibi had never had a formal and written appraisal. That was attributed to a language barrier. Other colleagues in the team had been treated in a similar way to Mr Kioua, and the number of appraisals was reasonable in the light of the changes that had taken place and the concerns that he himself had been expressing.

3.169. It was reiterated that personal parcels should not be delivered to the hotel on any regular basis, and the matter had been raised with Mr Kioua because he had seemed to be having a lot of deliveries, interfering with the work of reception.

3.170. In dismissing the grievance, Mr Wyncoll added that both managers had genuinely worked to support Mr Kioua with his welfare in mind. In particular, he did not find evidence of any intention to intimidate or humiliate Mr Kioua because of his personal circumstances as a migrant to the UK.

3.171. He suggested a further meeting at the start of Mr Kioua's shift on 23 May to clarify and discuss the report –

> "I would very much like to ensure that we can move forward positively from this meeting." (229)

Appeal

3.172. On 22 May 2018, Mr Kioua appealed the outcome of the Grievance. His grounds included,

- Failure to conduct a full and impartial investigation
- Failure to interview personnel/witnesses
- Inaccuracies and omissions in witness evidence
- Failure to establish the facts
- Failure to provide the minutes of the meeting he had with Mr Wyncoll
- Minimising the seriousness of the complaints made

3.173. Some of his detailed criticisms go beyond what he had said previously;

- In relation to the incident on 10 June 2017,

> "!, Zakaria Kioua, was summoned to perform a menial task for the express purpose of bullying and intimidation by being questioned and laughed at because I am not from the UK and of migrant status on a visa. (234) (This is a reference to his being initially called to the room to move a chair).

- In relation to eating in the canteen,

> "Zibi was informed of this rule only when it became apparent to Patricia **Lee** that Zakaria Kioua was gathering evidence of his exclusion."

- In relation to the Cognac, he says that the grievance outcome confirms that the prize was taken from him due to his religious beliefs, and

> " Patricia Lees took this prize on behalf of Zakaria Kioua at the raffle…. Patricia Lees then exchange to a cheap box of chocolates she obtained/purchased independently." (235)

- He strongly challenged the nut allergy comparison made by Mr Wyncoll himself,

> "I stated to you that a religion or belief is not an illness."

- His statement that he could not cope mentally and physically doing two jobs had been ignored; he was still expected to do more than other members of staff and that had not been addressed (235).

> "What I cannot do is physically be in two places at once, which is what was being ordered, and no matter what tasks I undertook, I was then blamed for any backlog in the laundry when I was ordered to work elsewhere."
>
> "You have ignored the fact that I informed Patricia Lee that the continued overloading was affecting my health. You have ignored the overloading and my health concerns entirely.

3.174. He ended by condemning company procedures in failing to provide a fair appraisal system, to ensure employees received copies of appraisals and to prevent falsifying appraisals.

The Grievance Appeal

3.175. The Grievance Appeal was held on 8 June 2018. It was held in Mr Kioua's absence because of his illness, with his consent (239).

3.176. Julian Tomlin, Group Director of Operations was charged with conducting the appeal. Mr Tomlin dismissed the appeal on 29 June 2018 (260).

In the response to the appeal against the grievance implying that the claimant had been wrong to bring the grievance is pleaded as harassment and direct discrimination on grounds of religion

3.177. The reference here is to the finding that the allegation against Ms Lee of theft (ws 88) was unfounded. Mr Tomlin wrote,

> "It is accepted that a decision was made to change the gift and this was done in good faith … in deference to your religious beliefs. It was not intended to cause you offence… but the decision to accept or reject the original should have been made by yourself." (260)

3.178. Mr Tomlin offered Mr Kioua a replacement bottle of Cognac of similar standard.

3.179. Mr Kioua's health had not improved. In July he suffered chest pain over a period of some ten days, diagnosed as stress related (283). On 28 July 2018, Mrs Bow asked the company to address all communications to her, because of his illness though he later changed that in concern over her health.

3.180. There was an informal discussion between Mr Kioua and Mr Pecorelli, Managing Director on 8 August 2018 which indicates that Mr Kioua in no way accepted the appeal findings. Another replacement bottle of Cognac was offered and rejected.

The claim

3.181. The Employment Tribunal claim was submitted on 23 August 2018.

3.182. On 2 September 2018, Mr Kioua went to Algeria. His mother was then diagnosed with breast cancer (298)

3.183. Once his entitlement to statutory sick pay was exhausted, in October 2018, Mr Kioua's next medical certificate was returned to him (324). That came from the financial controller, without guidance about future certification of absences.

3.184. In November 2018, the Respondent obtained a medical report from Mr Kioua's GP. It confirmed symptoms of depression and anxiety, the symptoms first presented on 25 July 2017. The report was not written by the GP who had been seeing Mr Kioua, who had left the practice, and says little beyond referring to work-related stress issues and listing symptoms including difficulty sleeping, emotional lability, depression, feelings of hopelessness, low self-esteem, difficulty in concentrating, agitation and restlessness (287). There was no guidance as to when he might return to work. The GP identified no underlying medical impairment that might have a long-term adverse effect. The report concludes that,

> "The majority of people with depression and anxiety would be able to recover from this and render regular and efficient service in the future provided the triggers for this were resolved."

3.185. It said that an Occupational Health assessment might assist in respect of reasonable adjustments.
3.186. The Respondent commissioned an Occupational Health report in December 2018 and learned at that point of Mr Kioua's absence in Algeria (sb 6).
3.187. He continued under medical advice and medication while in Algeria.

2019

3.188. In January 2019, Ms Davis wrote to say that Mr Kioua was in breach of the Sickness Absence policy, attaching the relevant extract from the handbook. The last medical certificate supported absence from work until 9 November 2018 (supp bundle p12). There is no reference to the medical certificate that had been returned to him.
3.189. Mr Kioua provided certification from the Algerian doctor, but it was not worded to address fitness for work (288). Given his absence abroad, Ms Davis asked for an "updated letter on a monthly basis" until his return to the care of his GP in the UK (12). Mr Kioua complied with that, sending regular emails.
3.190. No guidance was given to Mr Kioua at any time about his holiday entitlements while off sick.
3.191. In April 2019, Mr Kioua did not receive the usual salary review letter. Ms Davis says it did not occur to her to send it – he was off sick, not in receipt of pay and in Algeria.
3.192. Ms Davis tried to insist on the Occupation Health report being prepared by the beginning of February at the latest (331) but it was not until April that Mr Kioua made himself available, having returned for a preliminary hearing. (sb 8)
3.193. That report, completed by a specialist practitioner in Occupational Health, finds Mr Kioua to be suffering anxiety and depression (296). Acute symptoms arose in around June 2017 and continued. There is a suggestion that better treatment would be possible, mentioning talking therapies taking a Cognitive Behavioural approach (296)
3.194. The report concludes,

> "In my opinion, Mr Kioua is likely to be fit for work. However, Mr Kioua is unfit to work for his current employer due to the breakdown of relationship and trust." That applied for the foreseeable future (299).

Holiday Pay

3.195. Mr Kioua raised on 23 April 2019 the question of pay for annual leave for the previous year,

> "Just a quick note about my holiday pay for last year, as I still have not received any payment yet, would you arrange for it to be paid as per my contract/the employee handbook says please?" (328)

3.196. Ms Davis replied on 25 April 2019,

> "On pay for annual leave, I will need to get back to you on this and it may be something we need to sit down and discussion on your return to work. I need to review your period of absence and the number of days covered/not covered by the medical certification required/requested in line with the company policy." (sb 16).

3.197. The contract and Handbook extracts produced are silent about arrangements for holiday during periods of sick leave.

3.198. Ms Davis did not advise him about taking holiday or about carrying it forward.

3.199. Ms Lee said that he could have booked holiday while off sick, but she did not know what the arrangements were for those on long term sick. She usually gets prompts if people have not taken their holiday,

> "We get an email, and we tell them, Guys, you need to take your holiday."
> "No, I did not get a prompt while he was off sick."

3.200. It did not occur to her to ask on his behalf.

3.201. Mr Kioua returned to Algeria on 2 May 2019. In July 2019, he advised Ms Davis of his intention to return on 26 August.

3.202. In response, on 19 July 2019, the Ms Davis offered a review of his long-term absence.

> "Our ultimate objective is to support and facilitate your return to work with us … We are willing to explore a range of options, including workplace mediation between you and key members of management at Lainston House with whom you say trust has broken down, or a move for you to employment in a different department or at one of our other hotels.
> However, we first need to understand your position, in order to ascertain whether there is any realistic prospect of you returning to work." (sb 21).

3.203. Mr Kioua identifies five references in that email suggesting that he would not return or emphasising the risk that he might not be able to return, "It felt negative" (ws para 17)

3.204. The proposed meeting was first scheduled for 21 August but rescheduled for 9 September on 16 August. It was changed to suit the availability of the new General Manager, Sunil Kanjanghat**,** and that of the location, with Mr Kioua's consent,

> "Thank you for your email and that's fine about the appointment on 9th September." (sb 17/18),

3.205. On 29 August, Ms Davis sent Mr Kioua copies of the Handbook, the Occupational Health report, a list of vacancies in the respondent's wider business and the meeting invitation for 9 September.

3.206. She wrote,

> "The purpose of the meeting is to discuss your continued and long absence from work, and if/how we might realistically facilitate your return to work in the near future, taking into account the contents of the Occupational Health Report."

3.207. She suggested he review that report, and listed the following as issues for the meeting,

- His willingness to return in his current role, and the time frame, and whether any adjustments to the role or a phased return might help
- Whether, if not, anything could be done to address his reasons for being reluctant to return and whether a move to a different department or a different hotel might offer options
- Whether they might have to consider terminating his employment, for example because of a lack of any realistic prospect of the employer successfully facilitating his return (sb 28).

3.208. He says he saw this as pushing him to leave (ws 36 para) He had been looking in (I said July because Mr B said July and) ***CHECK*** August for vacancies and he found three roles for immediate start and accepted a new post starting on 9 September

3.209. His GP provided a backdated certificate covering the period from 10 October 2018 to 14 August 2019, which Mr Kioua provided on 3 September 2019, with a request for holiday pay (24 supp bundle).

3.210. On 3 September 2019, Mr Kioua resigned with immediate effect. No reasons were given (sb 31).

3.211. In the letter responding to the resignation, Ms Davis wrote to refuse any holiday pay. She said the contract did not authorise holiday to be carried forward, his absence since 2 April 2019 was unauthorised because of the lack of medical certification and his absence from the UK. She added that he had failed to give proper notice.

3.212. Mr Kioua started new employment on 9 September 2019 (ws2 para 37).

3.213. His claim in respect of unfair constructive dismissal was lodged as an amendment to the previous claim on 20 September 2019. He claims fundamental breach of contract including of the implied term of mutual trust and confidence and relies on the denial of the right to use holiday entitlement in April 2019, the denial of salary review in April 2019 and the failure to conduct the return to work interview in August 2019.

4. Law

Frustration

4.1. Frustration occurs by operation of law, regardless of the intention of the parties. The question to be determined is whether it was impossible to fulfil the original contract of employment.

4.2. In *Marshall v Harland & Wolff Ltd* [1972] I.C.R.101, the test was formulated:

> "Was the employee's incapacity, looked at before the purported dismissal, of such a nature, or did it appear likely to continue for such a period, that further performance of his obligations in the future would either be impossible or would be a thing radically different from that undertaken by him and accepted by the employer under the agreed terms of his employment".

4.3. Derived from that and *Egg Stores (Stamford Hill) Ltd v Leibovici* [1977] ICR 260 at 265, [1976] IRLR 376 at 378, EAT, the following factors fall to be considered:

- the terms of the contract, including any provisions as to sick pay;
- how long the employment was likely to last in the absence of sickness, a temporary or specific hiring being more likely to be frustrated;
- the nature of the employment, in particular whether the employee was in a key post which had to be filled permanently if his absence was prolonged, or whether it could be held open for a considerable time;
- the nature of the illness or injury, how long it has continued and the prospects for recovery;
- the period of past employment, a longstanding relationship being less easily destroyed;
- the risk to the employer of acquiring obligations in respect of redundancy payments or compensation for unfair dismissal to a replacement employee;
- whether wages have continued to be paid;
- the acts and statements of the employer in relation to the employment, including the dismissal of, or failure to dismiss, the employee;
- whether in all the circumstances a reasonable employer could be expected to wait any longer.

Constructive Dismissal

4.4. A termination of the contract by the employee will constitute a dismissal within section 95(1)(c) of the Employment Rights Act 1996 ("ERA 1996") if he or she is entitled to so terminate it because of the employer's conduct. That is a constructive dismissal.

4.5. For the employee to be able to claim constructive dismissal, the employee must establish that the following four conditions are met:

i) There must be a breach of contract by the employer.

ii) That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving.

iii) The employee must leave in response to the breach and not for some other, unconnected reason.

iv) The employee must not delay too long in terminating the contract in response to the employer's breach, otherwise he or she may be deemed to have waived the breach and agreed to the variation of the contract or affirmed it.

4.6. A repudiatory breach of contract is a significant breach, going to the root of the contract *(Western Excavating (ECC) Ltd v Sharp [1978] ICR 221). That* is to be decided objectively by considering its impact on the contractual relationship of the parties *(Millbrook Furnishing Industries Ltd v McIntosh (1981) IRLR 309)*

4.7. It also follows that there will be no breach simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held. If, on an objective approach, there has been no breach, then the employee's claim will fail *(see Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493, [2005] IRLR 35).*

4.8. Employment contracts contain an implied term of mutual trust and confidence. The parties to the contract will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust which should exist between employer and employee *(Malik v BBCI SA (in liq) [1998] AC 20*).

4.9. It is not simply about unreasonableness or unfairness. The question is whether the conduct complained of was likely to destroy or seriously damage the relationship of trust and confidence.

4.10. it is not necessary in each case to show a subjective intention on the part of the employee to destroy or damage the relationship, a point reaffirmed by the EAT in *Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT*. As Judge Burke put it:

> "The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of…"

4.11. The general principles of contract law applicable to a repudiation of contract are that if one party commits a repudiatory breach of the contract, the other party can choose either to affirm the contract and insist on its further performance or he can accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses: if he once affirms the contract, his right to accept the repudiation is at an end, but the election to affirm is not required within any specific period.

4.12. Delaying too long or, by conduct, indicating acceptance of the change, can point to affirmation. It is not simply a matter of time, in isolation. In *WE Cox Toner*

(International) Ltd v Crook, [1981] IRLR 443, it is established that mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation. Simply continued working and the receipt of wages points towards affirmation. Nevertheless, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation.

4.13. In *IBM UK Holdings Ltd v Dalgleish [2017] EWCA Civ 1212, [2018] IRLR 4* it was held that in general the circumstances will have to be 'extreme' for a refusal of a pay increase per se to breach the term of trust and confidence; although there will be cases of arbitrary or capricious refusals of pay rises (instancing *Transco plc v O'Brien [2002] IRLR 444, [2002] ICR 721, CA*)

Direct Discrimination

4.14. Direct discrimination is provided for under the Equality Act 2010 ("EA 2010") by section 13(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.'

4.15. By section 39(2) of the EA 2010,

> 'An employer (A) must not discriminate against an employee of A's (B)
> (a) as to B's terms of employment;
> (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
> (c) by subjecting B to any other detriment.'

4.16. Detriment does not require a physical or economic consequence; it is sufficient that a reasonable person might take the view that they have been disadvantaged:

> "Detriment exists if a reasonable worker would, or might, take the view that the treatment accorded to her had in all the circumstances been to her detriment. It is not necessary to demonstrate some physical or economic consequence." (Shamoon v Chief Constable of RUC [2003] IRLR 285 HL)

4.17. As the Equality Act Statutory Code of Practice on Employment (the "Code of Practice"), explains, at paragraph 3.5:

> 'It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated – or would have treated – another person.'

The comparator

4.18. Essential to the consideration of less favourable treatment is the question of comparison.

4.19. By section 23 of the EA 2010,

> "On a comparison of cases for the purposes of sections 13, 14 and 19, there must be no material difference between the circumstances relating to each case."

4.20. This is dealt with by the Code of Practice at paragraphs 3.22 onwards.

4.21. The other approach is to say but for the relevant protected characteristic, would the claimant have been treated in this way? That may be helpful in identifying a hypothetical comparator (Code of Practice, 3.27).

Failure to make reasonable adjustments

4.22. The EA 2010, by section 39(5), imposes a duty on employers to make reasonable adjustments.

4.23. The duty is set out at section 20 of the EA 2010.

4.24. The duty comprises three requirements. Here the first is relevant and that applies where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

4.25. A failure to comply with those requirements is a failure to make reasonable adjustments. By section 21(1) and (2), "A discriminates against a disabled person if A fails to comply with that duty in relation to that person".

4.26. The duty does not arise where A did not know and could not reasonably be expected to know that B has a disability and is likely to be placed at the disadvantage referred to – that is the effect of schedule 8, paragraph 20, as amended, to the EA 2010. However, the employer must do all they can reasonably be expected to do to find out whether a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. So, knowing of a condition such as dyslexia, the employer has a duty to do what it reasonably can to establish the effects of that and so avoid the risk of a substantial disadvantage arising.

4.27. Guidance is given in the ACAS Code of Practice in Employment (2011), at paragraph 6.19,

> What is reasonable to do will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers

> should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.

4.28. The following example is then given,

> "A worker who deals with customers by phone at a call centre has depression which sometimes causes her to cry at work. She has difficulty dealing with customer enquiries when the symptoms of her depression are severe. It is likely to be reasonable for the employer to discuss with the worker whether her crying is connected to a disability and whether a reasonable adjustment could be made to her working arrangements."

4.29. In *Wilcox v Birmingham CAB Services Ltd [2011] Eq:R.S810*, the EAT took the view that unless the employer had actual or constructive knowledge of the disability, the question of substantial disadvantage did not arise. An employer will be taken to have the requisite knowledge provided that they are aware of the impairment and its consequences. There is no need for them to be aware of the specific diagnosis *(Jennings v Barts and the London NHS Trust [2013] Eq:R 326 EAT*). If an agent or employee knows in that capacity of a worker's disability, the employer will not usually be able to claim that they do not know, see para 6.21 of the Code.

4.30. Where a disabled person keeps a disability confidential, no duty arises for the employer "unless the employer could reasonably be expected to know about it anyway." (Code para 6.20)

4.31. And,

> "If a disabled person expects an employer to make a reasonable adjudgment, they will need to provide the employer … with sufficient information to carry out that adjustment."

4.32. No like for like comparator is required – the comparison may be between those who could do the job and the disabled person. As explained *in Royal Bank of Scotland v Ashton ([2011] ICR 632)*, the tribunal must identify the non-disabled comparator or comparators. That may be a straightforward exercise,

> "In many cases, the facts will speak for themselves and the identity of the non-disabled comparators will be clearly discernible from the provision, criterion or practice found to be in play." (*Fareham College Corporation v Walters ([2009] IRLR 991)*

4.33. There is no onus on the disabled worker to suggest what adjustments ought to be made. It is good practice for employers to ask. If the disabled person does make suggestions, the employer should consider whether such adjustments would help overcome the substantial disadvantage and whether they are reasonable. (Code of Practice para 6.24)

4.34. It is a good starting point for an employer to conduct a proper assessment, in consultation with the disabled person concerned, of what reasonable adjustments

may be required. … It is advisable to agree any proposed adjustments with the disabled worker in question before they are made. (Code of Practice para 6.32.)

4.35. In considering whether there has been a failure to make reasonable adjustments, the tribunal must identify the step or steps it is reasonable to take to avoid the disadvantage.

4.36. The process for the Tribunal therefore is to identify:

> (a) the employer's provision, criterion or practice which causes the claimant 's disadvantage
> (b) the identity of the persons who are not disabled with whom comparison is made
> (c) the nature and extent of the substantial disadvantage suffered by the employee
> (d) what step or steps it is reasonable for the employer to have to take to avoid the disadvantage *(General Dynamics Information Technology Ltd v Carranza [2015] IRLR 43).*

4.37. The Tribunal must identify all of those to judge whether the proposed adjustment is reasonable. It must identify the nature and extent of the substantial disadvantage suffered by the claimant, including, if applicable, any cumulative disadvantage, say, from both provisions applied and physical features. In the absence of that, it is not possible to identify the adjustments that are reasonable to prevent the disadvantage. There is no need to find that the adjustment would have prevented the adverse effects. The Tribunal is entitled to find that the adjustment proposed was a reasonable option with a not unreasonable chance of success *(The Environment Agency v Rowan [2008] IRLR 20).*

4.38. Assessing the reasonableness of any particular step, relevant factors will be how effective it will be in preventing the substantial disadvantage, how practicable it is, how much it will cost and how disruptive it may be, the size and resources of the employer and the nature of the business. It may also be relevant that external resources are available to help provide adjustments (Code para 6.28).

4.39. Failure to make a reasonable adjustment cannot be justified, but only reasonable steps fall within the duty. Whether or not adjustments were reasonable in the circumstances is to be determined by the employment tribunal objectively, *(HM Land Registry v Wakefield [2009] All E R 205 (EAT).*

4.40. There must be at least a prospect, a possibility, that the proposed adjustments would succeed but not more (*Cumbrian Probation Board v Collingwood [2008] UKEAT/0079/08, paragraph 50; Leeds Teaching Hospital NHS Trust v Foster [2011] EQLR 1075, paragraph 17; North Lancs Teaching Primary Care Trust v Howorth UKEAT/0294/13.)*

Harassment

4.41. By section 26(1) of the EA 2010,

"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."

4.42. In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must, by section 26(4), 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."

4.43. Harassment is discussed in Chapter 7 of the Code of Practice. Paragraph 7.8 explains that,

> "The word 'unwanted' means essentially the same as 'unwelcome' or 'uninvited'. 'Unwanted' does not mean express objection must be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment."

4.44. Paragraph 7.9 explains that "related to" has a broad meaning, in that the conduct does not have to be "because of" the protected characteristic.

4.45. Section 26(4) is more fully discussed at paragraph 7.18 of the Code. The perception of the worker is a subjective question and depends on how the worker regards the treatment.

4.46. In paragraph 15 of *Richmond Pharmacology v Dhaliwal 2009 [IRLR] 336,* the nature of harassment is explored in similar terms:

> "The proscribed consequences are, of their nature, concerned with the feelings of the putative victim; that is, the victim must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created. That can, if you like, be described as introducing a "subjective" element; but overall the criterion is objective because what the tribunal is required to consider is whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. ….It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence…..:"

Victimisation

4.47. Section 27(1) of the EA 2010 provides that:

> "A person (A) victimises another person (B) if A subjects B to a detriment because –
> B does a protected act . . ."

4.48. A protected act includes bringing proceedings under the Act: s 27(2). There is no concept of less favourable treatment as such in this formulation of the wrong. However, if a tribunal finds that the reason for particular conduct adverse to an employee is victimisation, there is implicit in that conclusion a finding that but for having taken the protected act, the employee would have been treated more favourably.

Burden of proof

4.49. By section 136(2) and (3) of the EA 2010, the test in respect of the burden of proof is set out:

> "(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.'

4.50. The switching of the burden of proof is simply set out in the Code at para 15.34:

> "If a claimant has proved facts from which a tribunal could conclude that there has been an unlawful act, then the burden of proof shifts to the respondent. To successfully defend a claim, the respondent will have to prove, on balance of probability, that they did not act unlawfully. If the respondent's explanation is inadequate or unsatisfactory, the tribunal must find that the act was unlawful."

4.51. For the burden of proof to shift, the claimant must show facts sufficient – without the explanation referred to – to enable the tribunal to find discrimination. The Barton guidelines as amended in the Igen case *(Igen v Wong, 2005 IRLR 258 CA),* remain the basis for applying the law notwithstanding the re-enactment of discrimination legislation in the 2010 Act. It is those guidelines that establish the two-stage test,

> "The first stage requires the complainant to prove facts from which the Employment Tribunal could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. The second stage, which only comes into effect

> if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld *(Peter Gibson LJ, para 17, Igen)*

4.52. The Tribunal is required to make an assumption at the first stage which may be contrary to reality.

4.53. In *Hewage v Grampian Health Board [2012] UKSC 37,* the application of the Barton/Igen guidelines to cases under the EA 2010 is approved at the highest level. At paragraph 33, Lord Hope, on the burden of proof provisions, says,

> "They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence…"

4.54. In *Laing and Manchester City Council and others, 2006 IRLR 748,* the correct approach in relation to the two-stage test is discussed,

> "No doubt in most cases it will be sensible for a tribunal formally to analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case…. (para 73)
> The focus of the tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race (*or other)* discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a tribunal to say, in effect, 'there is a nice question as to whether the burden has shifted, but we are satisfied here that even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race'.

4.55. The nub of the question remains why the claimant was treated as he or she was:

> "The bare facts of a difference in status and a difference in treatment 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." *(Madarassy v Nomura International plc) 2007 IRLR 246).*

4.56. In that case, in a judgment later approved by the Supreme Court in Hewage, above, Mummery LJ pointed out that the employer should be able to adduce at stage one evidence to show "that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or the situations

with which comparisons are made are not truly like the complainant or the situation of the complainant."

4.57. The "something more" that may lead a Tribunal to move beyond the difference in status and treatment need not be substantial – it may be derived from the factual context including inconsistent or dishonest explanations *(see Base Childrenswear Ltd v Otshudi 2019 EWCA Civ 1648 CA; Veolia Environmental Services UK v Gumbs EAT 0487/12.*

4.58. The presence of discrimination is almost always a matter of inference rather than direct proof – even after the change in the burden of proof, it is still for a claimant to establish matters from which the presence of discrimination could be inferred, before any burden passes to his or her employer.

4.59. In drawing inferences, an uncritical belief in credibility is insufficient' as Sedley LJ pointed out in *Anya v University of Oxford 2001 IRLR 377 CA (paragraph 25)* it may be very difficult to say whether a witness is telling the truth or not. Where there is a conflict of evidence, reference to the objective facts and documents, to the likely motives of a witness and the overall probabilities can give a court very great assistance in ascertaining the truth.

4.60. In *Talbot v Costain Oil, Gas and Process Ltd and ors 2017 ICR D11, EAT*, His Honour Judge Shanks — having looked at the relevant authorities — summarised the following principles for employment tribunals to consider when deciding what inferences of discrimination may be drawn:

- it is very unusual to find direct evidence of discrimination
- normally an employment tribunal's decision will depend on what inference it is proper to draw from all the relevant surrounding circumstances, which will often include conduct by the alleged discriminator before and after the unfavourable treatment in question
- it is essential that the tribunal makes findings about any 'primary facts' that are in issue so that it can take them into account as part of the relevant circumstances
- the tribunal's assessment of the parties and their witnesses when they give evidence forms an important part of the process of inference
- assessing the evidence of the alleged discriminator when giving an explanation for any treatment involves an assessment not only of credibility but also of reliability, and involves testing the evidence by reference to objective facts and documents, possible motives and the overall probabilities
- where there are a number of allegations of discrimination involving one person, conclusions about that person are obviously going to be relevant in relation to all the allegations

- the tribunal must have regard to the totality of the relevant circumstances and give proper consideration to factors that point towards discrimination in deciding what inference to draw in relation to any particular unfavourable treatment

- if it is necessary to resort to the burden of proof in this context, S.136 **EqA** provides, in effect, that where it would be proper to draw an inference of discrimination in the absence of 'any other explanation', the burden lies on the alleged discriminator to prove there was no discrimination.

4.61. Unreasonable conduct or poor management does not of itself point to discrimination. There must be indications from the evidence that point to the unreasonable conduct relating to the prohibited ground *(Laing v Manchester City Council and anor 2006 ICR 1519, EAT).*

4.62. In *Glasgow City Council v Zafar 1998 ICR 120, HL*, Lord Browne-Wilkinson considered that 'the conduct of a hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be a reasonable employer. If he is not a reasonable employer he might well have treated another employee in just the same unsatisfactory way as he treated the complainant, in which case he would not have treated the complainant "less favourably".' His Lordship also approved the words of Lord Morison, who delivered the judgment of the Court of Session, that 'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances'.

4.63. Equally, it cannot be simply inferred that the fact that an employer has acted unreasonably towards one employee means it would have acted the same way towards others. A failure to explain unreasonable conduct by the employer can support an inference of discrimination. If an employer acts in a wholly unreasonable way, it may be inferred that the explanation offered is not the true or full explanation *(Rice v McEvoy 2011 NICA 9 NICA).* In all cases, the drawing of inferences involves careful consideration of the surrounding facts:.

> "Facts will frequently explain, at least in part, why someone has acted as they have" (Elias P in Laing (above).

4.64. However,

> 'Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic.' Simler P, *Chief Constable of Kent Constabulary v Bowler EAT 0214/16*

4.65. As stated by the House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL*, an unjustified sense of grievance does not point to less favourable treatment.

4.66. Where a case consists of several allegations, the Tribunal must consider each separately to determine whether less favourable treatment occurred by comparison with others, so as to shift the burden of proof, rather than taking a broad-brush approach in respect of all the allegations *(Essex County Council v Jarrett EAT 0045/15).*

Appraisal and Grievances

4.67. In the ACAS Code of Practice on Employment, this guidance is given,

> "An appraisal is an opportunity for a worker and their line manager to discuss the worker's performance and development. Appraisals usually review past behaviour and so provide an opportunity to reflect on recent performance. They also form an important part of a worker's continuing training and development programme." (para 17.78)
>
> "Employers should also be aware of the duty to make reasonable adjustments when discussing past performance. For example, they should consider whether performance would have been more effective had a reasonable adjustment been put in place, or introduced earlier. Appraisals may also provide an opportunity for workers to disclose a disability to their employer, and to discuss any adjustments that would be reasonable for the employer to make in future." (17.80)
>
> "To avoid discrimination, when conducting appraisal, employers are recommended to make sure that performance is measured by transparent, objective and justifiable criteria using procedures that are consistently applied.

4.68. The following guidance is given on grievances:

> "Where a grievance involves allegations of discrimination or harassment, it must be taken seriously and investigated promptly and not dismissed as "over-sensitivity on the part of the worker" (17.94)
>
> "It is strongly recommended that employers properly investigate any complaints of discrimination. If a complaint is upheld against an individual co-worker or manager, the employer should consider taking disciplinary action against the perpetrator.

Time Limits

4.69. Section 123 of the EA 2010 sets out the period within which proceedings are to be brought.

4.70. Proceedings on a complaint within section 120 may not be brought after the end of:

(a) the period of 3 months starting with the date of the act to which the complaint relates or
b) such other period as the employment tribunal thinks just and equitable.

That means that a claim must be presented before the end of the three-month period beginning when the act complained of was done.

4.71. By section 123(3),

" For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

4.72. By section 123(4)

"In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

4.73. In *Hendricks v Metropolitan Police Commissioner [2002) EWCA Civ 1686,* in particular paragraphs 51 and 52, continuing acts are explored, concluding simply,

"The question is whether there is an act extending over a period as distinct from a succession of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed."

4.74. The question is whether the employer is responsible for "an ongoing situation or continuing state of affairs" in which the members of the defined group are treated less favourably. It is wrong to pay close attention to words such as 'policy', 'rule', 'practice', 'scheme' or 'regime', as these are but examples of when an act extends over a period.

4.75. Citing from *Hendricks*, Choudhary P in S*outh Western Ambulance NHS Foundation Trust v King* [2020] IRLR 168. warned '… that reliance cannot be placed on some floating or overarching discriminatory state of affairs without that state of affairs

being anchored by specific acts of discrimination occurring over time. The claimant must still establish constituent acts of discrimination or instances of less favourable treatment that evidence that discriminatory state of affairs.' (at [36])

4.76. The time limits set are extended by section 140B of the Equality Act to facilitate conciliation before the institution of proceedings.

4.77. Section 140B sets out that extension, as follows.

> "In this section—
>
> (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and
>
> (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.
>
> (3) In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.
>
> (4) If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

4.78. The day on which the claimant complies with the requirement to provide information to ACAS is ("Day A"). The period between the day after Day A and ending with the day on which the claimant receives or is treated as having received the conciliation officer's certificate ("Day B") is not counted in computing time for the purposes of time limits.

4.79. Once early conciliation has ended, the claimant has at least one calendar month to present the claim. "One month" means on the 'corresponding date' so where day B is 30 June, the time limit will expire on 30 July *(Tanveer v East London Bus & Coach Co Ltd [2016]*

4.80. If a time limit would otherwise expire during the period, beginning with Day A and ending one month after Day B, the time limit expires one month after Day B.

4.81. If the time limit would otherwise expire after the period of one month after day B, then time is extended by a period equivalent to the early conciliation period – that is, the period from the day after Day A and ending with Day B.

5. **Submissions**

5.1. Ms Platt provided written submissions, amplified at the hearing. Ms Bow made some oral submissions. Both were helpful throughout the hearing.

6. **Reasons**

Background

6.1. The hearing was conducted in Southampton in person over 3 of 6 allocated days. The Employment Judge was then required to self-isolate following exposure to the Covid 19 virus. It was not practicable to offer an in-person hearing within a reasonable period of time. The hearing resumed by video link with the consent of the parties, over a further five days. The Respondent had requested written reasons throughout. Any difference from the oral judgment relates to style and detail only.

Discussion

6.2. We take the factual and legal issues here in date order because that is helpful in relation to considering the overall picture.

Swapping the bottle of cognac by Ms Lee is pleaded as direct discrimination on the grounds of religion.

6.3. The first instance relied on is at the staff party in January 2017. Mr Kioua won a bottle of Cognac, or possibly some other alcoholic drink of some value. He was given a box of chocolates instead.

6.4. Mr Wyncoll denied that his faith played any part.

> "Are you not aware that a tenet of the Islamic faith may be that a person is abstinent from alcohol?"
> "It wouldn't have crossed my mind".
> "Was there any comment on the occasion that he was a Muslim and didn't drink".
> "No definitely not" (oral evidence).

6.5. We do not accept that.

6.6. Both the grievance and the appeal outcome acknowledge that the decision was in deference to his faith.

6.7. Mr Wyncoll himself said this, in the letter dismissing the grievance,

> "I believe that there was no ill-intention behind the different treatment you received due to your religious beliefs." (226).

6.8. In the letter dismissing the appeal, Mr Tomlin says this,

"It is accepted that a decision was made to change the gift and this was done in good faith on the part of those involved in deference to your religious beliefs." (260)

6.9. That the intentions may have been kind – and we recognise that that is not how Mr Kioua sees it – could not alter the fact that Mr Kioua was not given the prize he had won and that was because of his religion. That discrimination cannot in law be justified.

6.10. The precise wording of the issue concerns Ms Lee's role. While acknowledging that hers was not the central role in that decision, she was a party to a decision involving direct discrimination against Mr Kioua on the grounds of religion. She agreed the substitution. She also knew that Mr Kioua had no objection to receiving alcohol as a reward, given that he had given her his bottle of champagne the previous year and she did not raise it.

6.11. We find direct discrimination on the ground of religion as pleaded.

6.12. There remains an issue in respect of the time limit, given the date of the claim, addressed below.

When raising the question of workload on 10 January 2017, 16 March 2017 and 1 October 2017 the claimant was met with a hostile response as set out in allegation 9 of the Schedule of Complaints. This is pleaded as harassment and direct discrimination on the grounds of race and religion.

6.13. The reference to allegation 9 is to the following allegations, in summary (41),

- 10 January 2017 – Mr Kioua felt threatened if he did not do rooms as well as laundry when working alone, in reliance on the agreement in October 2016 with Mr Wyncoll;
- 16 March 2017 – Mr Kioua reports that he was shouted at after that if, when managing the laundry alone he was asked to clean rooms, he tried to point out that it had been agreed that he would concentrate on laundry work when working alone
- 1 October 2017 – Miranda Russel was angry when he refused to do rooms on the basis that he had to concentrate on laundry work, , telling him to "shut up" and she would find someone who could do the job.

6.14. These instances all relate to requests by Ms Russell to clean rooms. They are consistent with her evidence of meeting resistance or refusals to clean rooms when she asked Mr Kioua. She was told that that was within his duties and she was entitled to ask him. He was relying on an agreement he claimed was reached with Mr Wyncoll and Ms Lee that when alone in the laundry, he would concentrate on that work, and not also clean rooms.

6.15. We have not found that there was any such agreement.

6.16. Ms Russell told us, and Ms Davis confirmed in her note, that she was apprehensive about asking Mr Kioua to do rooms. She denies threatening him or being angry or

using words such as “Shut up”. We have found that she showed frustration in her manner.

6.17. Taking his evidence at its best, he is complaining about having to do work that was part of his contractual duty. In our judgment, nothing relates the instance on 10 January 2017 to race or religion. His evidence does not. He did not see it in that context at the time and does not identify any basis for the allegation other than the accumulation of grievances over time. Even taking the three instances here together, we do not see a connection between his race and/ or religion.

6.18. His comparator here is Zibi, and in his Schedule of Complaints, allegation 9, he also says that he was given an unfair burden, by comparison with Zibi, that he was given more rooms to clean. We do not find that he was given more rooms than Zibi when both worked in laundry up until around March 2017 – they worked together on the same rooms, eventually sharing a list because the computer only accepted one name.

6.19. After March 2017, Zibi worked primarily on rooms and not in the laundry.

6.20. Whether or not the burden of proof shifts, and we do not find that it does, the explanation for what Mr Kioua calls a hostile response is simply that he was resisting doing work that fell squarely within his job description.

6.21. We do not find harassment related to the claimant ’s protected characteristics. Nor do we find direct discrimination.

6.22. This complaint is repeated, in March and in October and, Mr Kioua says, at other times when he protested at being given rooms. In no case, do we find evidence that raises a question in our minds about discriminatory or unwanted conduct on the grounds of his protected characteristics. He was being asked to do his job.

6.23. As Patricia Lee put it, in her investigation interview for the appeal, with some vigour,

> “We didn’t need someone to stand in the Laundry for 7 hours”.

Being threatened on 1 March 2017 that if oven gloves were sent again for dry cleaning in the future, the Claimant ’s salary would be deducted is pleaded as harassment and direct discrimination on grounds of race and religion

6.24. The allegation concerns Ms Lee.

6.25. We have accepted that Ms Lee challenged Mr Kioua over the oven gloves incident – both she and the chef saw him as the person responsible for the laundry and she did not make enquiry before raising it with him. We have accepted too that she threatened that his salary would be affected if it happened again. We have found her evidence to be somewhat confused, with somewhat different accounts being given.

6.26. Mr Kioua did not identify any element of discrimination based on faith or nationality in relation to this at the time or pursue any complaint of that nature He confirmed in oral evidence that he did not speak to Mr Webb about it at the time. It is raised as an issue of discrimination in May 2018, and without any basis for the connection other than the number of grievances then raised. He says he could now see “the whole picture”.

6.27. The context he gives in the Schedule of Complaints (39) is that Ms Lee began in around March 2017 to ask questions about or refer to his religion which he found to be unsettling and intrusive. This was shortly after the terrorist attack on the Houses or Parliament, itself a distressing and worrying context. That is not the context in which he presented it in his grievance. There, he specifically raises the question of religions discrimination, but only in relation to the substitution of chocolates for his raffle prize. He raises discrimination on the basis of race and nationality, given his status as a migrant to the UK, in relation to the incident in June 2017 and in relation to the staff canteen, for example, but not in relation to the oven gloves incident.

6.28. His comparator is Oliver, of a different nationality and faith. Oliver is the culprit, who was not reprimanded by Ms Lee, according to the account Oliver gave Mr Kioua.

6.29. The difference between Oliver and Mr Kioua is a difference in treatment and a difference in status. That on its own does not show discrimination. It may point at a possibility of discrimination but something more is required. We look for something in the evidence that points to unreasonable conduct relating to the claimant 's race or religion.

6.30. We do not find it. We do not find it even taking into account the accumulation of other grievances on which Mr Kioua relies. It is particularly important to take an overall view, given that this incident comes up in the Grievance, which should perhaps be read as giving an overall picture of unfair treatment tainted by race and religious discrimination. We do not find a common thread pointing to something going badly wrong in the way Mr Kioua was treated that is related to his race, nationality, or religion, even taking an overall view of the complaints before us.

6.31. In our judgment, this is not conduct on the basis or grounds of religion or race. The fact is simply that Mr Kioua was the main laundry worker. Oliver was not. That was in part the substance of his complaint of being required to do two jobs – he felt responsible for the laundry, and that he would be regarded as responsible for anything that went wrong, even while doing the rooms. There is some truth in that, in that on two occasions when things went wrong, he was asked about them, when he had not been directly involved. He was seen as the laundry person.

6.32. The burden of proof does not pass to the respondent, but if we are wrong on that, the explanation from the facts is simply that this was a laundry issue, and Mr Kioua was the person generally responsible for the laundry. It was poor management to raise the oven glove error with him without enquiry and without asking him to make enquiry, but it does not point to discrimination or harassment on the prohibited grounds.

Ridiculing the claimant on 10 June 2017 is pleaded as harassment and direct discrimination on grounds of race and religion and victimisation

6.33. This relies on the detail in the Schedule of Complaints (p36), which sets out a challenge to Mr Kioua by Patricia Lee over bathrobes wrongly sent out for cleaning, followed by laughter between her and Katie Amarowicz at him and over his plans to study for his veterinary qualification and driving licence. It is a fuller account of what he says briefly in his Grievance (175)

6.34. The nub of his complaint here is this, in relation to questions about what he was doing in the UK -

> "To ask about my private life in front of a colleague. The tone and style of the question, what are you doing and when are you having your vet exams and sniggering and laughing"
>
> ". Not just tone, all about my private life in front of the colleague after being intimidated and threatened".

6.35. These are questions he says he found to be intrusive, infringing on his privacy, and related to his status as an immigrant. The account is capable of founding a complaint of discrimination.

6.36. He acknowledged in oral evidence that it was probably not based on or related to his religion.

6.37. n the Schedule of Complaints too, the allegation is of racism, conduct on the grounds of national origins, not of religious discrimination.

6.38. Mr Kioua relates a further separate incident that he says took place on the same day, of intrusive questioning by Patricia Lee including into his religion and whether he needed somewhere to pray at work, or time to pray. That is not within the issues we are asked to address.

6.39. We therefore consider these allegations on the basis of race and nationality only. The connection with Mr Kioua's faith is not established.

6.40. Mr Kioua did not relate any of this to his race or nationality at the time. That is his oral evidence.

6.41. Mr Kioua did not complain to Ms Lee about this conversation. Mr Kioua spoke to Mr Webb and to his wife and his wife rang Mr Webb to complain.

6.42. Mr Webb remembers the discussion being about deduction from salary, as Mrs Bow confirms, and that he tried to allay Mr Kioua's concerns. Mr Webb does not recall a discussion with Mr Kioua at the time beyond the one about salary deductions. He specifically does not recall allegations of harassment or discrimination being made to him by Mr Kioua.

6.43. Mr Webb also recalls Mrs Bow's telephone call, alleging bullying behaviour.

6.44. Mr Kioua relies on his discussion with James Webb about this on 10 June 2017 as a protected act.

6.45. His own evidence on this is limited to saying that he told James Webb everything that happened (ws 35), or, "I complained and raised all the issues of the morning" (oral evidence, 2/27). That does not establish the content of the conversation.

6.46. There is nothing documented at the time.

6.47. Mr Kioua raised a series of difficulties with Samantha Davis on 18 April 2018, in some distress. He does not rely on or refer to this meeting. That is surprising given the level of distress it is described as causing and the weight now given to it.

6.48. He then had a conversation with Mr Webb, one that he recorded. He says he discussed this incident. This is what he relies on.

> " On the October 2017, Miranda gave me rooms again, I said I'm not doing them, then I came to you and I spoke to you about it and I spoke to you about ,

you know, me being called into a room and being like, trying to belittle me, talking about my private life and what I have achieved in this country, what I have not achieved, and you know…." (155)

6.49. That is said to be a reference to this conversation. It does not mention Patricia Lee or Katie or bathrobes and it does not contain anything that anchors it to June 2017. It does not link in any obvious way to the discussion now reported about Mr Kioua's veterinary studies and getting his driving licence.

6.50. The detailed account given in the Schedule of Complaints is unfortunately unconvincing, presented more than a year later as if a verbatim script. It is not a credible account.

6.51. We accept that Mr Kioua was challenged over an error about bathrobes and that there was a threat, albeit an empty threat, to make a deduction from his salary if it happened again – that is supported by Mrs Bow and Mr Webb. He was distressed. He complained to Mr Webb who tried to reassure him and who raised the question of the distressing conversation with Patricia Lee.

6.52. Beyond that, the claimant has not established that there was an intrusive and discriminatory or harassing conversation in which he was subject to unwanted conduct or unfavourable treatment based on race or nationality. That is because the evidence points to his concern at the time being about the threatened deduction from salary and being blamed in respect of the bathrobes error. That is consistent with his failure to see the matter as related to race or religion at the time and his failure to mention the incident altogether when speaking to Samantha Davis on 18/04/18, his first spontaneous account, or to mention it to James Webb in the terms in which it is now presented, later that day.

6.53. There is evidence that his wife thought he had been faced with bullying conduct. If we are wrong in our conclusion, and if this was an instance of harassment or direct discrimination on the grounds of race, an issue arises about the time limits and the Tribunal's jurisdiction, considered below.

6.54. We do not find that Mr Kioua made a complaint at this time to Mr Webb that amounted to a protected act under section 27(2) of the Equality Act. It is very unclear what was said. The evidence points to the complaint being about a threat to his salary due to the error over bathrobes. There was not a report on which Mr Kioua can rely in his claims of victimisation. He cannot rely on his wife's complaint because the wording of section 27 requires that the protected act be his own; he knew nothing of her action and did not authorise it.

6.55. In any event, the alleged treatment relied on is listed at items 9.1.1 to 9.1.3 and 10.1.1 to 10.1.6.

6.56. The last item is the conduct complained of on 10/06/17 which logically cannot be both the basis for the complaint that is relied on as the protected act and conduct carried out because of the protected act.

6.57. 10.1.1 and 10.1.2 are the allegations in respect of appraisals. They are discussed more fully below but it is hard to see any connection between them the suggested protected act in June 2017. Mr Kioua does not, for example say that he had more appraisals or more adverse appraisals after June 2017. There is no basis for linking the claimed protected act in June 2017 and the alteration of the job chat form in

February 2018, which we find to be a response instead to Mr Kioua's narrow interpretation of his duties.

6.58. The remaining incidents relate to his use of the staff restaurant, the staff rota, the late shift on the night of the staff party, all being matters in December 2017 or later, Involving Ms Lee, and matters arising in the course of the grievance and appeal, concerning Mr Wyncoll and Mr Tomlin. The causal connection is not established. These matters are more fully discussed below. We cannot relate them to the June 2017 discussion with Mr Webb or see them as pointing to any wrongful influence based on race or religion.

The claimant was not permitted to use the staff restaurant after 5pm from 2 December 2017; that the claimant was the only person so prevented is pleaded as harassment and direct discrimination on grounds of race and religion and victimisation

6.59. Was Mr Kioua singled out in being barred from eating in the staff restaurant after 5 pm and if so, why; was there a change in policy, and when was it applied to others?

6.60. There was a change of policy, as Mr Kioua himself agrees. It was an attempt to save money and to ensure that food was available for those entitled to it during breaks on duty. It began to be applied in December. It was intended to apply to all staff other than those living-in who had no alternative. It continued to be discussed at management level through the months that followed, with eventually provision being made so that live-in staff could cater for themselves, thereby reducing their reliance on the restaurant too. That is well supported by the documents as well as the oral evidence.

6.61. There was no general announcement. Most people did not stay after the end of their shift, so it was not seen as requiring one. We accept that – although a general announcement would have been fair and open, avoiding the risk of any individual feeling singled out.

6.62. Mr Kioua had a settled practice of eating in the staff restaurant after his shift had ended, as he agrees, and as was well known. His name was given to Patricia Lee as someone who did that. He was therefore told promptly about the decision to apply the policy strictly, that is, that meals were for staff on duty only.

6.63. Ms Lee says she told others in the team. She could not be clear when. Ms Russell says she knows Ms Lee told others, because they asked her about the change, asking why they could not have two meals in a day (ws 13). Mr Wyncoll was involved in the stricter management of the policy and aware that others had been spoken to (200).

6.64. When interviewed for the investigation, Ms Lee said she may not have been told about Zibi – she would not herself be there to see who was eating at 5.30 pm.

6.65. She agrees that she did not tell Zibi at the time. She cannot be clear when she told Zibi, but Mr Kioua is clear that he wasn't told until 2 March.

6.66. We can see why Mr Kioua felt singled out.

6.67. Other people continued to eat in the canteen – but they may have been live-in staff, or those taking a break on shift; or those who had not yet been told. Housekeeping staff had late shifts – Zibi too could have been on breaks at times when eating.

6.68. Mr Kioua tells us that he did not eat in the canteen after the end of his shift, having being told in December not to, but the memo in March from Mr Birch suggests otherwise - he was seen there. Mr Webb also tells us he was seen there.

6.69. It is unfortunate that neither Ms Russell nor Ms Lee could give us better details of who was told, how and when – the accounts are vague. Mr Wyncoll could not pin down his list of culprits to more than two or three of those who did not live-in (where considerations were different). It is unfortunate too that a settled practice, part of the staff social life at the hotel, was not challenged by use of messages to everyone at the same time.

6.70. The issue has been confused by this being described as barring Mr Kioua from the canteen, excluding him altogether - as , for example, in his witness statement and in, the summary of the grievance, "being permanently excluded from eating in the staff restaurant whilst ALL other employees can." (174). That was not the detailed complaint in his grievance, nor does it reflect what happened.

6.71. In his fuller grievance statement and in the identification of the issue, he explains the position accurately, that he was told "I'm not allowed to stay and have dinners when I finish at 5 even though I have been having dinners since I have started working in the hotel (175). That was the complaint that was investigated and it was the basis of the appeal, "There was no other person at Lainston House who was being told not to eat in the staff canteen at certain times." (234)

6.72. The confusion did colour his understanding. Katie Amarowicz in May 2018, when interviewed, speaks of trying to explain to him that the issue was about staying on to eat after the shift end (218).

> "So, had you spoken to Zak about the canteen yourself? Did he ask you to clarify his conversation with Trish?"
> "He didn't ask me to clarify a conversation. He just didn't seem to understand it. He asked many people about this."
> "And did he mention to you anything about racism?"
> "No, not about racism…. It was to clarify about living-in staff because they could eat. I tried to explain to him that it's different for the living-in staff because they can't go home. If he was working, then he can eat in the canteen but if he's staying later then he can't eat in the canteen when he's staying after his shift's finished."

6.73. In conclusion, Mr Kioua concedes that there was a policy change over the enforcement of the limits of the free meal provision and that others were gradually told, by March. There was a reason for singling out Mr Kioua for an early warning given his settled practice which contravened the policy.

6.74. It is a fine question as to whether the burden of proof shifts because Mr Kioua was singled out and told early not to take his free meal after working hours, up to three months earlier than others. His comparator is Zibi, on the evidence, not told until March.

6.75. There is a reason and it is one that we accept and that does not raise a hint of discrimination based on race or religion, harassment or victimisation. It is that he was known to be one of the relatively few members of staff regularly staying on after

his shift ended at 5.00 pm to eat the meals provided from 5.30 pm for staff still on duty. We do not take the step of drawing the inference that the difference in treatment between him and Zibi was down to race or religion. It is more likely to be simply that his name was given to Ms Lee and Zibi's was not. In so concluding, we have regard to the overall picture and the other complaints before us. The context does not require explanation beyond that.

Leaving the staff rota visible for 3 weeks which showed that he was the only person not permitted to leave work early on the date of the staff party and singling the Claimant out in that he was the only person not permitted to leave work early on the date of the staff party are pleaded as harassment and direct discrimination on grounds of race and religion and victimisation

6.76. Mr Kioua complains that exhibiting the rota three weeks in advance was humiliating - it showed that he was the only person required to work late on the night of the staff party.

6.77. The reason for exhibiting the rota is business necessity – staff need to know the rota in order to make holiday arrangements.

6.78. There were other late shifts – everyone had to do them over the holiday period.

6.79. Mr Kioua did not accept that he was on the rota late because he had said he was not going to the staff party.

6.80. We are satisfied that that was the reason – he was the obvious choice for an unpopular shift because he was least affected by being late that night.

6.81. He did not at the time relate this to his race, nationality or religion. Asked about this, he said,

> "At that time, I did not know what was going on. Later I could see the whole picture."

6.82. He attributes the decision to Patricia Lee, and sees it as part of the pattern in her conduct towards him.

6.83. Displaying the staff rota three weeks before the party and selecting the claimant for the late shift on that night are both explained by reference to business necessity. We find no connection with his race or religion.

Subjecting the claimant to too many appraisals, at least 3 per year is pleaded as harassment and direct discrimination on grounds of race and religion and victimisation

6.84. We accept that Mr Kioua was not sent copies of his job chats until he pursued his grievance.

6.85. The heading on the job chat form is "Quarterly Chat". The policy intention was four per year. On the evidence, he did not have that many. He does not say he did. He says two or three.

6.86. We have had poor evidence in relation to how many others had (242). It seems at best to have been somewhat erratic. There is evidence that they were being conducted – Mr Kioua was not the only one having job chats.

6.87. It is clear that Zibi did not have any (211). Reasons for that have been inconsistent. It is attributed to a language difficulty or to his refusal to take part, seeing them as unnecessary.

6.88. Both Mr Wyncoll and Mr Tomlin considered the complaint about excessive job chats or appraisals. They found that while Zibi had not had them, others had had similar numbers to Mr Kioua.

6.89. The job chats themselves are benign and of little real merit as used. They are seen an opportunity for the employer and employee to raise matters. On the evidence we have seen, neither do. Mr Kioua's reluctance to accept the nature of his duties is not flagged up by his manager nor does he raise his many concerns about unfair treatment. In their content they are no more revealing than the reassurance he gave James when repeatedly asked – "Everything good, my friend" (248)

6.90. On balance, notwithstanding the weakness of the respondent's evidence, we are satisfied that Mr Kioua was not given too many appraisals, an unfair number, nor that the appraisals or job chats were in themselves unfavourable treatment although we accept that he may have found them uncomfortable. They were intended to be quarterly – he had fewer than that. They are seen as an opportunity for him to raise issues. Their tone is positive. They were not used to criticise him.

6.91. Again, Zibi stands out, but we cannot properly conclude that that is because of the difference in race or religion between these two individuals, in a multi-cultural, multi-racial team. There is not a basis on which we can point to overt evidence of improper conduct or from which we can draw the inference of wrongdoing based on the difference in status and treatment. There is not the "something more" that raises a question, even bearing in mind the wider context and accumulation of complaints. We do not find direct discrimination or harassment.

6.92. The complaint of victimisation requires a finding that the frequency of the appraisals was a detriment because of his oral allegation of discrimination in June 2017. We have not found that he made such an allegation but in any event, cannot see a causal connection here. There was no early job chat after June, and no increase in their frequency. There was one in October 2017 and one in February 2018.

In an appraisal on 15 March 2018, Ms Lee falsely recording that the claimant would monitor laundry and help with the rooms is pleaded as harassment, direct discrimination on grounds of race and religion and victimisation.

6.93. There is a conflict here between Mr Kioua saying that he did not sign to signify agreement to undertake cleaning rooms as well as handling the laundry and Ms Lee saying that he did, after they had discussed it.

6.94. He says that she pressed him to sign the form at the bottom as well as in the usual place and that the entry about helping with rooms was not there when he signed. (oral evidence, 2/20 and 3/9*).*

6.95. He says cleaning rooms had not been discussed.

> "She knows the reason from my point of view, they were trying to gain my signature on doing the two jobs which is laundry and housekeeping after I have been left on my own in laundry…. and we had an agreement with Mrs Lee to stay in laundry because I wouldn't be able to manage mentally or physically, and she wanted to overload me, she wanted my signature, setting me up to fail, I did not know the reason at the time but now I have got the whole picture. There was no conversation whatsoever about doing rooms." (oral evidence)

6.96. Ms Lee denies adding anything to the form after he signed it. She explains that they were trying to make better use of their resources (251).

6.97. Ms Lee could not really explain the entry, beyond saying it was all written at the meeting. She agreed that "Mr Kioua has now agreed" related to needing to explain if he felt there were issues. She also said it related to his agreement to monitor laundry and help with rooms.

6.98. We find it improbable that Mr Kioua would have agreed to monitor laundry and clean rooms after protesting for more than a year that that represents two jobs. His objection was well known and long-standing. It did need addressing, and the job chat was a proper vehicle to address it, but nothing else in the form suggests that that difficult subject had been tackled and agreement on it reached. That is why we accept that that part was not written while he was there, but squeezed in later.

6.99. Mr Kioua claims harassment and direct discrimination on the grounds of religion and race in respect of the addition of this rider to the job chat form, committing him to both laundry and cleaning. Given the history of his objections to doing the work he was expected to do, it is clear to us that Ms Lee wanted to be able to demonstrate that she had tackled it. It is not good management, but it is hard to see a connection to race or religion. It was about his performance of his contract. There is no basis to look for explanations based on discrimination. He does not explain how he makes the connection, save that he has by now a long list of grievances and that is the explanation he finds.

6.100. We do not find that this founds his claims of discrimination. Nothing in our judgment points to this conduct being because of his race or religion, or related to those protected characteristics.

6.101. He has claimed that this is victimisation. It is remote in time from the claimed protected act and it is hard to see that the complaints made about the June 2017 conversation played any part here – there is a simple explanation based on the difficulty that Miranda Russell in particular had had in getting Mr Kioua's co-operation in doing his job in relation to cleaning rooms.

Summary

6.102. In summary, in relation to the matters raised before Mr Kioua went on sick leave, there are some unsatisfactory elements in the Respondent's case – they have not produced clear evidence in relation to the number of appraisals others faced, they couldn't identify clearly when other staff knew or were told about the policy in relation to canteen meals, there were inconsistencies over the reasons for Zibi

having no job chats and being told so late about the stricter attitude to canteen meals; there is a lot of conflict over what workload was reasonable in conjunction with the laundry work, that is, how many rooms were reasonable for Mr Kioua to undertake and how many he was asked to do.

6.103. That did lead us to consider the picture overall and not simply issue by issue. However, a number of the allegations could not succeed – those in relation to the Christmas staff rota and the late shift, for example could not be seen as other than reasonable business practice. The issues raised as to the response to Mr Kioua's reluctance to clean rooms are not attributable to race or religion but to his reluctance to fulfil his contract. The same lies behind the comment on the February job chat.

6.104. The remaining allegations – the raffle prize, the oven gloves issue, the June 2017 discussion, the warnings about off-duty meals, the frequency of job chats, are themselves isolated one from the other and do not, even by inference, prompt consideration of a pattern of behaviour or of a common thread. We do find discrimination on the grounds of religion in relation to the raffle prize but not elsewhere, and even taking the overall picture, we cannot draw the inference that race or religion was a factor in the sequence of events.

At the meeting on 8 May 2018, being the grievance meeting in respect of the swapping of the raffle prize:

- **Comparing the claimant 's religion to a nut allergy**
- **Attempting to explain away what happened in respect of the raffle prize by reference to the claimant 's religion**
- **Failing to investigate the claimant 's allegation of theft in relation to the swapping of the cognac for chocolates**

are pleaded as harassment on grounds of religion, direct discrimination because of religion and victimisation.
Fabricating an explanation that the decision to swap the cognac for the chocolates was a management decision

6.105. The nut allergy reference was a clumsy way to address a complaint of discrimination on the grounds of religious faith. In the event complained of, there is a plain and obvious connection between the claimant 's faith and abstinence from drink and the substitution of chocolates for the bottle of alcohol. This is an industry built on the service of people from a wide range of cultures and faiths, many of them immigrants to the UK, and we are confident, without rehearsing all the references to his faith, that his faith and its tenets were well known, just as a number of managers have made reference to the possibility that he might wish to pray on site, or to fasting at Ramadan – discussion he found unwelcome.

6.106. There was no simple comparison between the Muslim faith and a nut allergy. But the comparison made is between someone who does not drink with someone with a nut allergy and we are confident that this issue arises because the abstinence from alcohol was due to religious faith, and that that was the known context. To say that Mr Kioua's faith was not part of the picture is simply not credible.

6.107. A nut allergy is an illness, a life-threatening illness. It is not an acceptable point of comparison. It minimizes the importance of Mr Kioua's beliefs and practices.

6.108. The point is not that it was well-intentioned. The point is that it should not have been said, just as the decision should not have been made to change Mr Kioua's prize. Both are on the grounds of his religion and neither should have happened; both are offensive and caused him distress. It was wrong and that should have been clearly acknowledged, including at the hearing.

6.109. The reference made in our judgment amounts to harassment. It is unwanted conduct related to the claimant 's protected characteristic of religion and it had the effect of violating his dignity.

6.110. The reference to attempting to explain away what happened in respect of the raffle prize by reference to the claimant 's religion might refer to the nut allergy comment itself but also refers to Mr Kioua's belief that "they" or Patricia Lee were trying to get the cognac and that they used the reference to his religion to change his prize, the allegation of theft that was pursued at the appeal (28 and 203).

6.111. This allegation goes with the alleged failure to investigate the claimant 's allegation in the Grievance of theft in relation to the swapping of the cognac for the chocolates, which ends with the suggestion "I was told by colleagues that Patricia Lee had taken the cognac for herself." (176)

6.112. The complaint to the Tribunal is of what happened at the meeting, as covertly recorded by the claimant at the time, of which the transcript is on page 203.

6.113. The discussion during the meeting is brief. Apart from the nut allergy comment, Mr Wyncoll acknowledges the allegation against Patricia Lee, encourages Mr Kioua to explain his grievance more fully and promises investigation. He acknowledges the complaint that the change of prize should not have been made without consultation. There is not anything – other than the nut allergy comment – that can support the complaint made.

6.114. The matter can perhaps be better understood if taken with the Grievance outcome (226). where Mr Wyncoll concludes that the substitution was made in good faith because Mr Kioua did not drink alcohol, leading to different treatment due to his religious beliefs.

6.115. Mr Wyncoll was faced with an allegation of frank theft made 16 months after the event. It is not a credible allegation. Mr Wyncoll had been there, it was a very public event. Ms Lee took the chocolates on Mr Kioua's behalf – she did not walk away from the raffle with both chocolates and cognac and any suggestion that she did or later substituted a newly purchased box of chocolates is fanciful. It is not clear what happened to the bottle of cognac – it might have been raffled later or returned to the supplier but there is no basis on which to allege that Ms Lee took it for herself. It is equally fanciful to suggest that it could have been investigated nearly 18 months later. We are confident, in passing, that it is within the discretion of management to substitute a prize for the one that was raffled.

6.116. It is true that in the investigation the discussion with Ben Leach did not cover this, and nor did the discussion recorded with Patricia Lee, though another discussion is not recorded. The point is that this is not a credible allegation that merited investigation.

6.117. We do not find that Mr Wyncoll fabricated the explanation for exchanging the Cognac for chocolates or attempted to explain the substitution away by reference to Mr Kioua's religion.

6.118. We do not find these latter three complaints to be well founded. They are not instances of harassment or discrimination on the grounds of race or religion. Victimisation is considered below.

In the response to the appeal, implying that the claimant had been wrong to bring the grievance is pleaded as harassment, direct discrimination and victimisation on the grounds of religion

6.119. This relates to Mr Tomlin's conclusion in relation to the awarding of the raffle prize. Mr Tomlin dismissed the allegation that Patricia Lee had stolen the Cognac,

> "You have made a serious allegation against your manager which is unfounded. It is accepted that a decision was made to change the gift and this was done in good faith on the part of those involved in deference to your religious beliefs." (260)

6.120. Mr Tomlin dealt with this aspect of the Grievance appeal appropriately. He found the theft allegation to be unfounded and said so. The allegation of theft was not a credible allegation and he was entitled to dismiss it in the terms that he did. No further explanation is required. These claims do not succeed.

Victimisation

For victimisation, the remaining protected act is alleging discrimination in his grievance on 1/05/18 (173)

6.121. The only protected act we find is the allegation of discrimination in the Grievance on 1 May 2018.

6.122. The matters relied on as unfavourable treatment or detriment because of that allegation are those relating to the conduct of the grievance hearing (9.1.1 to 9.1.3 p20), that is,

- comparing the claimant 's religion to a nut allergy,
- attempting to explain away what happened in respect of the raffle prize by reference to the Claimant 's religion and
- failing to investigation the Claimant 's allegation of theft,
- the allegation that Mr Wyncoll fabricated an explanation that the decision to swap the cognac for the chocolates was a management decision, and
- Mr Tomlin in the response to the appeal against the grievance implying that the Claimant had been wrong to bring the grievance.

6.123. In relation to the nut allergy comment, identified as a successful claim of harassment, the facts do not support a finding that Mr Wyncoll so acted because of

the reference to discrimination in the Grievance. He was trying to explain a well-intentioned action. His difficulty is want of understanding and very limited training

6.124. The Respondent takes on people from many different nationalities and with different faiths. The training is computer based. Mr Wyncoll thought he had probably done in some years ago. Staff knowledge of the principles of equal treatment and non-discrimination is limited.

6.125. The remaining matters have been discussed above. We do not accept that any are well-founded, they do not reflect unfavourable treatment or detriments because of the allegation of discrimination in the Grievance. Nothing supports that causal connection being made.

Reasonable adjustments: *the Respondent's knowledge of disability.*

6.126. Mr Kioua was disabled. That is of course confirmed by the earlier judgment, but also from the history of depression and anxiety, a recurrence of an earlier condition. There are clear signs of the severity of the condition in the medical notes showing calls to the NHS line, 111, GP and hospital consultations, for example in the summer of 2018.

6.127. The respondent denies any knowledge that he was disabled or suffering anxiety and depression.

6.128. Neither his employer nor his colleagues or managers knew that Mr Kioua was seeing the doctor or was suffering diagnosed depression during 2017 and 2018 up to April, while he was still at work. He does not say that he told them; he concedes he did not. In general, he insisted on his privacy.

6.129. He specifically said things were fine when asked by his managers. He complains that he was asked too frequently about his well-being, that that was itself harassment (185, 197 and oral evidence). In his quarterly chats, he reported that he was fine, he did not draw attention to his workload or to his health.

6.130. There was an allegation that he was not able to take time off to see the doctor, which is not supported by his oral or any documentary evidence.

6.131. We are satisfied that the respondent and the respondent's managers did not know from him that he was disabled or that he was consulting his GP and under treatment for his diagnosed condition until he went off sick.

6.132. If the managers were not told of his depression and anxiety, the question is should they have known?

6.133. Samantha Davis says that her first knowledge of the suggestion that workload was affecting his health was in around March 2018 ((ws para 3). She agrees that in March 2018, Mr Kioua, faced with doing work in the laundry and cleaning rooms, "wanted to focus on the work he's doing and not do "two jobs" as this would make him ill." She recalls him saying that he needed to see the doctor at around this time, but cannot pin it down to March or April (ws para 10).

6.134. Mr Kioua refers to the reports of investigations where those being interviewed acknowledged that he was reluctant to do the work in the laundry and to take on cleaning rooms.

6.135. Katie reports that he said doing both rooms and laundry was too difficult (217).

> "To be honest, we can deal with the laundry and rooms but he doesn't seem to like the fact that we can do both."

6.136. Miranda Russell confirmed that Mr Kioua objected to doing rooms as well as laundry.

> "Others managed it. Mr Kioua kept saying he couldn't do two things at once" (219).

6.137. Neither report any reference to Mr Kioua's mental or physical health, nor does Patricia Lee when interviewed (253).

6.138. In the interview with Samantha Davis, on 18/04/18, when Mr Kioua's distress was reported, he says that he is going to see the doctor and that he is not feeling well. He does not say that he has been struggling with his health. He says that he can't do two jobs, but that he had agreed to give doing laundry /rooms and "It all seems ok at the moment." (150) In the conversation with James Webb on the same day, he again seems to be saying that workload is "OK at the moment" (155). He does not raise his health.

6.139. There were some clues, perhaps with hindsight:

- Mrs Bow's phone call reporting on his distressed state of mind in June 2017;
- Ms Lee's and Ms Russell's observation that he was more withdrawn and low from June 2017;
- His volatility; that he had difficult moods comes from Miranda Russell's evidence and from the job chats – although his moodiness is mentioned in October 2016, before his illness;
- the quarterly chats show that Patricia Lee knew he did not share difficulties, that he bottled things up.
- his complaints to Ms Lee and Mr Webb that he would not be able to manage the workload, needed just to be in laundry, particularly since others were not saying the same. That might make more sense in the context of a health difficulty. (251 245)
- Ms Davis' observation in March 2018 that he appeared "aggravated" and that he felt unable to work on both laundry and rooms, - to do two jobs would make him ill. (ws para 7).

6.140. On balance, we do not find that there was enough to put the respondent on notice that Mr Kioua was experiencing health difficulties. His managers are clear that they asked after his welfare, that he always presented himself as being fine. He was not seen as an easy colleague to manage but there is little to relate that to his health. He protected his privacy. He did not raise his health in his job chats, where others raised, for example, financial difficulties. We accept that what he said about it was that the work would make him ill if he had to do "two jobs", not that it had made him ill. At the same time, he did the tasks he was given well, even, for the most part, cleaning rooms, and there was no evidence for his managers in his working hours of him having to work excess hours to cope. He did not complain of having to do

unpaid overtime. We do not have evidence that the managers left him floundering when they left. On the contrary, there is evidence of teamwork and mutual support. Ms Russell reports that he performed well.

6.141. In particular, we are satisfied that he was not failing to perform his duties and he was not reporting health difficulties or difficulties that they should have seen as relating to his health. The respondent and its managers were not on notice that he had health difficulties.

6.142. If we are wrong on that, and if there was sufficient to flag up that there was a health problem or a disability, the question that then arises is whether reasonable adjustments should have been made.

6.143. The respondent questions the first limb of this issue, that is, that the respondent required flexibility and that staff carry a heavy workload.

6.144. We have heard evidence from Mr Kioua's managers of the demands of the job, of the number of rooms that even managers might have to clean, sometimes at short notice, with changes in demand and resources, and we are satisfied that this is fairly worded.

6.145. Mr Kioua did not fail to cope with the workload, but he became ill and ill on what proved to be a prolonged basis. He became more and more focused on the difficulties he was having at work. The adjustment proposed and reasonable to consider is that the workload should be lessened.

6.146. This was discussed in March 2018. We recognise that he was regarded as the key laundry person, and responsible for failures in the laundry service. That is the context for raising with him the errors over oven gloves and bathrobes. He was the one to sign off laundry risk assessments. He protested on the basis that he could not handle those additional responsibilities while also cleaning rooms. At his suggestion, the laundry responsibility was taken off him, to be shared amongst the team, who would be trained up to handle it. He would be a member of the housekeeping team, sharing those duties.

6.147. Mr Kioua expressed himself to be happy with those changes. Training for staff was to begin by the week of 8 April He went off sick on 18 April.

6.148. That was the reasonable adjustment required. It was made at his suggestion and he welcomed it at the time. It had a reasonable prospect of succeeding.

6.149. We do not accept that he was told that if he moved to cleaning rooms, he would be given more rooms than the other staff. He had again expressed himself reluctant to work in the laundry if primarily cleaning rooms. We are confident that he was simply being told that if he refused his share of the laundry work, he would have to do more rooms to make up for it. The whole discussion was in the context of meeting his concerns about doing two jobs.

6.150. In summary, the respondent did not know and could not be expected to know of his illness, but in any event, in response to his concerns, adjustments were made to his role. He would have no additional responsibilities, instead taking a greater share of the general housekeeping duties alongside others. Had a reasonable adjustment been required to address disability, the right adjustment was made by 8 April.

Termination of the Contract

Frustration

6.151. This should have been raised as an issue at the preliminary hearing when the issues were discussed, although it was flagged up in the original response. It was addressed because if the contract is frustrated, that happens as a matter of law. It operates independently of intention, so no additional evidence was required. Mrs Bow was given some notice that the point was relied on.

6.152. This contract was a permanent one. The employee was not in a key post. It was not a highly skilled job. Given staff turnover, it is unlikely that the employer was at a significant risk of being overstaffed on Mr Kioua's return or of incurring liabilities towards new employees.

6.153. Wages were not being paid. Statutory sick pay had been exhausted. The absence was low cost to the employer.

6.154. The illness recurred in June 2017. The GP finds no permanent incapacity and the Occupational Health report suggests that treatment can be improved and that Mr Kioua was already fit for work elsewhere. The issue remained with the present employer.

6.155. Both are ultimately positive reports. Cognitive behavioural therapy or other talking therapies might have helped Mr Kioua with a return to his job.

6.156. The Occupational Health report is by an Occupational Health practitioner on a single visit. The GP reporting did not know Mr Kioua, had not seen him personally.

6.157. There is no medical evidence pointing to there being no prospects for recovery or return to work.

6.158. The employer had not thought fit to act either in respect of Mr Kioua's absence in Algeria or the delay in making himself available for the Occupational Health report. In that respect, Mr Kioua had been generously treated – many employers would have taken action, for example, on his failing to attend promptly for the preparation of the Occupational Health report.

6.159. There had not yet been any exploration of other possible teams or work that Mr Kioua might do if unable to return to his present job, or of other adjustments that might help him. Those matters awaited the back to work meeting.

6.160. Until at least the back to work meeting, it would be premature to conclude that Mr Kioua was permanently unable to return or that the original contract could not be fulfilled.

6.161. The contract had not been frustrated.

Constructive Dismissal

6.162. The claimant relies on breach of express and/or implied terms of the contract relating to pay review and/or the implied term of mutual trust and confidence. The breaches identified are

12.1.1 Denial of his right to use his holiday entitlement in April 2019;

12.1.2 Failure to carry out a return to work interview on 21 August 2019 as scheduled;
12.1.3 A failure to carry out a salary review in April 2019.

6.163. Mr Kioua did not explain his resignation when he resigned with immediate effect on 3 September 2019. It is not explained until his application to amend the claim to the Employment Tribunal on 20 September 2019.

Denial of the right to use holiday entitlement

6.164. The simple answer here is that there was no denial of Mr Kioua's right to use his holiday entitlement in April 2019. That is not what he asked for. He asked for pay in respect of outstanding holiday from the previous year (327 – 328).
6.165. The holiday booking system remained available to him. At no time after taking sick leave, did he book holiday.
6.166. He was not refused the right to take holiday.
6.167. There is a more complex picture.
6.168. The specific case made in the letter of 20/09/19 is of not being allowed to use his holiday entitlement up to and including that date. The reliance on April 2019 came in when the issues were defined.
6.169. Holiday and holiday pay while off sick is a difficult and rapidly evolving area of law. The policy and contractual documents we have seen do not address the question of holiday pay for an employee while off sick.
6.170. Ms Davis did not advise Mr Kioua of the position with regard to holiday while off sick. Ms Lee was not notified that he had not taken the holiday accruing due in 2018/19, as the end of the year approached, as was the practice with employees at work. So, he had no guidance.
6.171. The accounts department had sent back his medical certificate in relation to fitness for work covering the period from 9 November onwards, saying his statutory sick pay had been exhausted. Until then, there was no complaint in relation to his provision of certificates. No guidance was given to him at that point about certification.
6.172. In January 2019, Ms Davis realised that there was a gap in the certification – perhaps not appreciating that his medical certificate had been seen and returned to him as irrelevant, given the ending of statutory sick pay. She asked for an updated letter on a monthly basis until he returned to the UK and the care of his GP (sb 12).
6.173. She did not ask him to send a monthly medical statement confirming that he was not fit for work and setting out the period it covered. She did not send him the policy documents.
6.174. He sent the monthly statement, in a personal email, unsupported by medical evidence; but it complied with her instruction.
6.175. When he raised the question of holiday pay for the previous year, Ms Davis replied that she would have to get back to him on this. She did not write to him again, or clarify the position (sb 16).

6.176. At that point, in April 2019, Ms Davis referred to a possible failure of certification in relation to his absence. Again, she did not give guidance, but deferred the issue to be addressed later.

6.177. She reverts to that again in her closing letter to him in September 2019, when she refused to authorise payment for outstanding holiday, because his absence had been unauthorised.

6.178. In those circumstances, it was unfair to rely on a failure of certification in relation to holiday or holiday pay entitlements: his medical certificate had been sent back to him without guidance and he had complied with the later requests made. Ms Davis had concerns about his certification from January but did not make clear to him what she expected.

6.179. There may have been an entitlement to carry holiday forward, or to take holiday while off sick, and it is not clear why pay for outstanding holiday would not be payable on termination. Clear guidance was needed and was not given. Mr Kioua's one express request may have been for the wrong thing – but the respondent owed him a duty to set out his entitlement and how to claim it.

6.180. We understand why Mr Kioua was confused. He had not been fairly treated or given appropriate guidance.

6.181. There was conduct by the employer which amounts to a breach going to the implied term of trust and confidence; it is not the specific breach that Mr Kioua identifies in the issues as defined but it is flagged up in his claim. He was not, as the claim says, unable to take his holiday, but he was given no guidance as to when and how he could do so nor was he dealt with fairly over pay in lieu of holiday on termination.

Failure to carry out the return to work interview as scheduled

6.182. The failure to carry out the return to work interview on 21 August 2019 was not a breach of contract. The meeting was only deferred, for a brief period, and Mr Kioua agreed the deferral.

6.183. It is worth repeating that the employer had not pressed Mr Kioua to attend a return to work meeting while he was abroad in Algeria. It was scheduled only when he wrote to say that he would be returning to the UK permanently on 16 August 2019 (sb 22).

Salary review

6.184. All employees were given a revised contract letter, setting out the annual pay rise and other details. It was sent out in April.

6.185. In April 2019, Mr Kioua was not sent that letter. The other employees were. The reasons given are very weak, that he was off sick, not being paid, not in the country, it did not seem relevant.

6.186. Mr Kioua remained a staff member, even though he was on zero pay. The same process should have applied, even if it did not immediately affect him. It would affect him on his return to work.

6.187. As with the holiday/ holiday pay issue, there is a want of care to a sick employee.

6.188. This was a contractual matter, and Mr Kioua was treated differently from other employees. Again, this goes to the implied term of trust and confidence.

The reason for the resignation

6.189. The next question arising is whether Mr Kioua resigned in response to the respondent's breaches of contract.
6.190. Mr Kioua resigned without notice on 3 September 2019.
6.191. His new job started on 9 September 2019, in the same week and on the day for which his return to work meeting had now been scheduled.
6.192. He had been absent on sick leave since April 2018. Nothing had happened to prompt immediate resignation.
6.193. The meeting had been moved a couple of weeks earlier. He had agreed to the new date on 19 August 2019. Nothing had happened since. He was not resigning because of the change in the date of the meeting – that does not accord with the sequence of events.
6.194. Moving the return to work meeting could not in any case justify resignation.
6.195. The other breaches on which he relies had been outstanding for some months.
6.196. He had not raised the question of holiday pay since April. He had never raised a question about his salary review.
6.197. The natural inference from those facts, and the one that we draw, is that Mr Kioua resigned on 3 September 2019 because he had found other employment. He resigned to go to his new job. That is what lies behind the immediate, without notice, resignation, and the urgent request for his P45. That conclusion is supported by the absence of any complaint about his treatment to the employer leading up to his resignation or any account of his reasons at the time of his resignation.
6.198. This was not a constructive dismissal. Mr Kioua did not resign in response to breach of contract on the part of the respondent.
6.199. Having said that, the failures in respect of the pay review and the holiday entitlement are serious omissions and Ms Davis' evidence on those was weak and confused. We would expect more care from a company of this size and status in terms of the care of those on long term sickness absence with mental health problems.

Time/limitation issues

6.200. We have found direct discrimination in January 2017 and harassment on the grounds of religion in May 2018.
6.201. The claim was made on 23 August 2018. The claimant contacted ACAS on 2 July 2018 and the certificate was issued on 16 August 2018. Where the time limit for litigation expired between 3 July 2018 and 16 August 2018, the time limit expires on 16 September 2018. That means that matters in early April are in time on this claim but those arising prior to 3 April 2018 potentially are not.
6.202. The claim in respect of the raffle prize in January 2017 is out of time unless part of a continuing act or the Tribunal extends time.

6.203. Having considered each allegation, we do not find a continuous act. The other matters pleaded prior to April 2018 have not been found to be discriminatory. The two claims found to be discrimination are isolated from each other in time and concern different individuals. There is no pattern or link between them.

6.204. The Tribunal does not find it just and equitable to extend time. At the time of the staff party in January 2017, Mr Kioua was not unwell. He was able to speak to Patricia Lee about the prize being substituted immediately afterwards. HE continued to work normally and to pursue his studies. Nothing prevented him from raising the matter then or within a reasonable period. The delay itself is prolonged before it was mentioned to his employers, and more prolonged again before the claim was made, albeit that at that point, he was ill, and on the evidence, deteriorating.

6.205. The claim in respect of discrimination on the grounds of religion in the substitution of a raffle prize is out of the jurisdiction of the Tribunal to consider.

6.206. We did not find discrimination in respect of the claims made about 10 June 2017. Had we done so, the claim was substantially late. The same reasoning applies as above – at the time Mr Kioua had not seen his doctor and symptoms, if any, were at the early stage. Medication was not prescribed until September. He continued to work and study. He was able to pursue his complaints. The incident is not part of any continuing act and it is not just and equitable to extend time.

6.207. The successful claim is in respect of harassment, in the analogy drawn with a nut allergy on 8 May 2018. That is in time.

6.208. The remaining claims are dismissed.

Remedy

6.209. The Tribunal awarded £2000 in respect of injury to feelings.

6.210. The impact on Mr Kioua of the first incident, the raffle prize substitution, lived with him. He says he felt ignored, humiliated, and not cared about. The comment made about nut allergy underplayed the original incident. It was an opportunity to accept that things had been dealt with badly, and this attempt at explaining or exploring the matter backfired. Mr Kioua was mentally ill at the time of this second incident in May 2018, and the more sensitive because that. Although this was a one-off event, anything that belittles or denigrates or is dismissive of the importance of religious beliefs is serious in itself.

6.211. Interest was awarded.

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Employment Judge Street

Date: 3 September 2020