



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Hamza Elbuhaisi

v

Alaraby Television Network Ltd

Heard at: Watford

On: 2 November 2020 (in person)
4/5/6 November 2020 (by CVP)

Before: Employment Judge Allott
Mrs L Thompson
Mr D Wharton

Appearances

For the Claimant: Ms D Gilbert, Counsel
For the Respondent: Mr S Sanders, Counsel

JUDGMENT

The judgment of the tribunal is that:

1. The claimant's claims are dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent on 1 August 2014 as a news journalist. He was dismissed on 24 April 2018 for gross misconduct. By a claim form presented on 7 November 2018 the claimant claims direct race discrimination, direct religious/belief discrimination, discriminatory dismissal and victimisation.

The issues

2. The agreed list of issues is as follows:-

Claims

The surviving claims are:

- 2.1 Direct race discrimination (s.13 Equality Act);
- 2.2 Direct religious discrimination (s.13 Equality Act);
- 2.3 Discriminatory dismissal (s.13 and s.39 Equality Act); and
- 2.4 Victimisation (s.27 Equality Act)

Issues

- 3. Jurisdiction
 - 3.1 Noting that paragraph 8 of the Judgment sent to the parties on 18 July 2019, following a preliminary hearing on 13 May 2019, states that: “On the basis that it is contended that the rejection of the appeal was the last act in a series of discriminatory actions, I find that the claimant’s claim was presented within the 3-month limit”; are the claimant’s claim(s) time barred under s.123 of the Equality Act 2010 because they were presented out of time (taking into account the extension to the limitation period by participation in ACAS Early Conciliation), meaning the tribunal does not have jurisdiction to hear all or any such claim(s)?
 - 3.2 Do the claimant’s allegations of discrimination amount to conduct extending over a period of time within the meaning of s.123(3)(a) of the Equality Act 2010? If so, which time period does such conduct relate to and was the claim brought in time following the last of such acts?
 - 3.3 If the claimant’s claim(s) are out of time, would it be just and equitable for the tribunal to extend time for the submission of such claim(s)?
- 4. Definition of claimant’s religion or belief
 - 4.1 Does the claimant seek to rely on religion or belief in respect of his claims under the protected characteristic of “religion or belief”?
 - 4.2 If “belief”:
 - 4.2.1 Did the claimant genuinely hold this belief?
 - 4.2.2 Does the claimant’s belief qualify as “belief” within the meaning of s.10 of the Equality Act?
 - 4.3 If religion: did the claimant genuinely hold the religion in question for the purpose of the Equality Act 2010?
- 5. Direct race and/or religion or belief discrimination
 - 5.1 Has the respondent treated the claimant in the following ways?
 - 5.1.1 Since the outset of his employment, was he tasked with responsibilities and duties beyond those required of a news

journalist, including the duties that would be expected of a producer and investigation manager? (paragraph 13 GOC).

- 5.1.2 Were other employees who had commenced employment at the same time as or after him, including Mr Mohammed Shams (Egyptian – paid more than £70,000, promoted to head of investigation unit in about May 2017), Molhem Sabbag (Syrian) and Mr Mohamoud Omar (raised in Egypt – paid more than £45,000) promoted ahead of him and/or given higher salaries (paragraph 16 GOC)?
 - 5.1.3 Were the claimant's qualifications and experience not taken into account because they were gained in Palestine? (paragraph 60 GOC).
 - 5.1.4 In about December 2017 – January 2018 did the respondent internally advertise job postings and was the claimant prevented from taking the internal examination based assessment? (paragraph 7 FBPs).
 - 5.1.5 Did the claimant in April 2017 raise a grievance with his line manager, Mr Abdelmonim Mahmood, alleging that he was performing duties additional to those of his job title? If so, did Mr Mahmood fail to take any action or address the claimant's grievance (paragraph 15 GOC).
 - 5.1.6 In January 2018, was the claimant effectively demoted back to the position of journalist without any explanation from the respondent? (paragraph 8 FBPs).
 - 5.1.7 From September 2017 to March 2018 was the claimant only given night shifts? (paragraph 41 GOC).
 - 5.1.8 Was the claimant invited to a disciplinary hearing on 13 April 2018? (paragraph 41 GOC).
 - 5.1.9 Was the claimant given less than 48 hours' notice of the disciplinary hearing? (paragraph 41 GOC).
 - 5.1.10 Was the claimant not given an adequate opportunity to have a fair determination? (paragraph 42 GOC).
 - 5.1.11 On 24 April 2018 the claimant was dismissed (paragraph 43 GOC).
 - 5.1.12 The claimant appealed against the decision, which appeal was ultimately refused by the respondent on 18 June 2018 (paragraph 43 GOC).
- 5.2 If so, in respect of each alleged treatment, was the claimant treated less favourably than an actual or hypothetical comparator?

- 5.3 If so, was the claimant's race and/or national origin (Palestinian) the reason for any less favourable treatment?
- 5.4 And/or if so, was the claimant's religion or belief (or lack thereof), namely liberal/non-orthodox Islamic, the reason for any less favourable treatment?

6. Victimization

- 6.1 Did the claimant do a protected act in April 2017 and was this false or made in bad faith. The claimant relies on a complaint which he alleges he raised verbally and by email sent on or around April 2017 to June 2018 to his line manager and then to HR. If so:
- 6.2 Has the respondent treated the claimant in the following ways?
 - 6.2.1 Between September 2017 and March 2018 was the claimant put on a disproportionate number of late shifts, including being assigned late shifts for seven consecutive months? (paragraph 47 GOC).
 - 6.2.2 Was the claimant subject to various baseless investigations without any prior warning such as the first investigation of August 2017, to silence his allegations of discrimination? (paragraph 48 GOC).
 - 6.2.3 In April 2017, did the respondent fail to conduct any or any reasonable investigation into the claimant's concerns relating to his pay grade and/or allegations of discrimination? (paragraph 49 GOC).
 - 6.2.4 Did the respondent fail to investigate the claimant's grievance relating to his pay grade? If so, did the respondent breach the Grievance Policy? (paragraph 51 GOC).
 - 6.2.5 Did the respondent unreasonably refuse to provide the claimant with an opportunity to defend the allegations against him brought forth in August 2017, by way of a proper hearing? If so, did the respondent breach the Disciplinary Policy? (paragraph 50 GOC).
 - 6.2.6 Were constant efforts made by the respondent to ensure that the claimant was not given morning or afternoon shifts, and were his complaints to the Human Resources' Ms Ritu constantly ignored? (paragraph 20 GOC)
 - 6.2.7 Did the respondent convene the disciplinary hearing in breach of its own policies and procedures, namely the disciplinary policy in that the respondent failed to give three days' notice, contrary to s.4 Notification of Hearing? (paragraph 53 GOC).

6.2.8 In the disciplinary hearing, did the respondent raise unfounded allegations about the claimant's work and attitude? Alternatively, were these allegations used to unfavourably describe the claimant's assertion of a statutory right and doing of a protected act? (paragraph 54 GOC).

6.2.9 On or about 24 April 2018 the claimant was given a dismissal letter advising him that he was being dismissed on the basis that his conduct was construed to be gross misconduct (paragraph 55 GOC).

6.2.10 Was the appeal hearing unfair or biased because it was chaired by Mr Tarek (Janoudi), owing to a close relationship with Ms Bassil? (paragraph 57 GOC).

6.2.11 The claimant's appeal was not upheld and the respondent's decision to dismiss him remained. (paragraph 58 GOC).

6.3 If so, did the treatment amount to a detriment to the claimant?

6.4 If so, was the detriment because of the claimant's alleged protected act?

7. Remedy

7.1 What remedy (if any) is the claimant entitled to?

The law

8. The legal principles set out below are largely taken from Mr Sanders' skeleton argument for which we are grateful.

9. Jurisdiction

9.1 The basic position in relation to the tribunal's jurisdiction to hear discrimination complaints based on the time limits for bringing such claims is set out in s.123 Equality Act 2010. S.123 provides:

“Proceedings on a complaint within s.120 may not be brought after the end of

- (a) The period of three 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.”

9.2 If, however, the claimant can demonstrate that the discrimination suffered over a period of time amounted to a continuing act of discrimination extending over the whole period then the relevant date for s.123 Equality Act purposes will be the end of that period (s.123(3)(a) Equality Act).

- 9.3 The burden is on the claimant to show that there has been a continuing act of discrimination, and in order to do so he must show that the acts complained of constituted a continuing state of affairs rather than a succession of unconnected or isolated acts (Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530 (CA)).
- 9.4 When considering whether acts are “so linked as to be continuing acts or to constitute an ongoing state of affairs,” one relevant factor will be whether the same or different individuals were involved in the alleged discrimination (Aziz v FDA [2010] EWCA Civ 304).
- 9.5 Further, in order to constitute part of a continuing act of discrimination an act must actually be discriminatory. Consequently, a non-discriminatory act is not capable of extending a continuing act or the relevant period for s.123 purposes, even if it is in some way connected to a previous discriminatory act (South Western Ambulance Services NHS Foundation Trust v King [2020] IRLR 168 (EAT)).
- 9.6 If the claimant cannot show that there was a continuing act of discrimination extending to within the three month time limit then he must show that it would be just and equitable to extend that time, and that he brought his claim within such further period as was just and equitable. The burden is on the claimant to show that this extension should apply, and it is the exception, not the rule (Robertson v Bexley Community Centre, T/A Leisurelink [2003] IRLR 434 (CA)). In considering this question, the tribunal should look at all relevant circumstances, and can be assisted by considering the factors contained in s.33 of the Limitation Act 1980 (see Robertson).

10. Direct Discrimination

- 10.1 The elements that must be shown in order to found a claim for direct discrimination are set out in s.13(1) Equality Act, namely:
- 10.1.1 The claimant has to prove the alleged treatment. The alleged treatment is set out in the list of issues.
- 10.1.2 Any treatment established has to be less favourable than the way the respondent did or would have treated others. For these purposes a real or hypothetical comparator in not dissimilar circumstances is to be considered.
- 10.1.3 Any less favourable treatment must be because of a protected characteristic – in the present case the claimant’s nationality and/or religious beliefs.

11. Victimisation

11.1 The elements of a victimisation claim are set out in s.27 Equality Act, namely:

11.1.1 Did the claimant do a protected act, namely making an allegation (whether or not express) that the respondent or another person had contravened the Equality Act 2010 (s.27(2)(d)).

11.1.2 Did the respondents subject the claimant to detriments because the claimant had done a protected act.

11.1.3 In addition, in oral submissions we were taken to paragraph 19.27 “Allegations of contravention of EqA” IDS Employment Law Handbook “Discrimination at Work” and the cases of:

Biniste v Kingston University EAT 0393/05

“A claim does not identify a protected act in the true legal sense merely by making a reference to a criticism, grievance or complaint without suggesting that the criticism, grievance or complaint was in some sense an allegation of discrimination or otherwise a contravention of the legislation.”

Durraini v London Borough of Ealing EAT 0454/12

“Although using the word discrimination, the claimant had not raised any complaint that which could be understood as alleging treatment contrary to ... the EqA. All will depend on the circumstances.”

Fullah v Medical Research Council and anor EAT 0586/12

“The context of a complaint has to indicate a relevant complaint.”

Gutfreund v Big Lottery

In context, reference to #Times Up and #Me Too, which are widely known movements against sexual harassment, in a tweet sufficient to be an allegation of contravention of the EqA.

12. Burden of Proof

12.1 While claimants ordinarily have to prove their case, since the claimant is alleging discrimination he benefits from an adjusted burden of proof set out in s.136 Equality Act, which provides:

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

(3) But sub-section (2) does not apply if A shows that A did not contravene the provision.”

- 12.2 Consequently, if the claimant can prove a “prima facie” case of discrimination, then the burden shifts to the respondent to show that such discrimination did not in fact occur.
- 12.3 In order to establish a prima facie case, the claimant has to show that he was treated less favourably than others were or would have been treated, and in addition to this also needs to show “something more” which indicates that discrimination may have occurred:

“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.” (Madrassy v Nomura International plc [2007] ICR 867 (CA))

13. The evidence

- 13.1 We were provided with a hearing bundle running to 398 pages. In addition we were provided with a supplementary bundle running to 87 pages. Many of the screenshots and email exchanges are in the Arabic language. We have been provided with translations by unknown individuals but no objection was taken to the accuracy of the translations.
- 13.2 We had witness statements and heard oral evidence from the following:-
- 13.2.1 The claimant;
 - 13.2.2 Mr Ian Pollock, NUJ representative;
 - 13.2.3 Mr Ali Ibraheem, an independent investigative journalist;
 - 13.2.4 Mr Naytham Kamil, head of the editing department at the respondent at the relevant times;
 - 13.2.5 Mr Mohammed Aboulenein, the claimant’s supervisor until February 2017 and his line manager thereafter.
 - 13.2.6 Ms Ritu Parihar, HR unit manager at the respondent;
 - 13.2.7 Mr Abdalkarim Elhag, input editor at the respondent and who chaired the disciplinary meeting on 18 April 2018;
 - 13.2.8 Mr Tarek Janoudi, digital unit manager at the respondent and who chaired the appeal against dismissal.
- 13.3 In addition we were provided with a cast list, a chronology, an opening skeleton argument for the respondent and a bundle of legislation and authorities from the respondent.
- 13.4 The hearing of this case was listed for an in-person hearing for five days from Monday 2 November 2020. The hearing on Monday 2 November was in person. However, it was drawn to the attention of EJ Alliot on the evening of 2 November that he may have been in contact with an individual who had tested positive for Covid19 on Saturday 31 October 2020. Consequently, as a precaution, EJ Alliot

self-isolated and the hearing was converted to a remote hearing by CVP to recommence on 4 November 2020.

14. The facts

14.1 The respondent operates an Arabic language television network broadcasting from London across the Middle East and the rest of the world. The respondent broadcasts a wide range of content (created internally and commissioned externally) varying from news to entertainment aimed at an Arab speaking audience.

14.2 The respondent first went on air in 2014 and the evidence we heard indicates that it grew quickly from start-up to a point where it had a 270 strong workforce by 2018.

14.3 Having been employed in 2014 the claimant joined the respondent at or around the time it was starting up.

14.4 Ms Parihar gave evidence to us that there were a lot of start-up changes and that as far as HR was concerned they kept up as best they could but that the record keeping was not as good as it might have been. The impression we gained from all the respondent's witnesses was that for the first few years the combination of setting up from scratch and rapid growth led to employees on occasions having to take on ad-hoc roles as and when required. Mr Aboulenein told us that in the early days there were often overlaps in roles, for example between journalist and producer. His witness statement states:-

“There is always an overlap between the tasks of the journalist and producer especially at the stage Mr Elbuhaisi is speaking about.”

14.5 In addition it appears that there was a wholesale change in the management in 2017 following what the claimant has referred to as a corruption scandal. Whether or not there actually was such a scandal has not been corroborated before us.

14.6 As part of his discrimination claims the claimant has relied on the protected characteristic of religion/belief. The claimant has provided a witness statement in respect of his religious belief. The claimant was born in Palestine and is a Palestinian national who, by 2018, had been residing in the UK for approximately seven years. The claimant grew up as a Muslim. The claimant describes his religion/belief as follows:-

“My particular type of religion which I describe as intellectual liberal/non-orthodox Islamic is also sometimes referred to as “progressive Islam” that has a philosophical background which I practice in my Islamic law higher studies. It is criticised by tradition/orthodox Muslims as being “too western” or “too rationalistic”.

- 14.7 Whilst the list of issues raises the question as to whether or not that religion/belief qualifies as a protected characteristic of “religion or belief”, the matter has not been put in issue by the respondent and it is accepted for the purposes of this case that it is.
- 14.8 Nevertheless, the respondent’s witnesses were cross-examined using somewhat broad categories of “orthodox” and “liberal”. In particular it was suggested that the pre-2017 management had been predominantly Egyptian and orthodox in its outlook and that that was a reason behind some of the claimant’s treatment.
- 14.9 Insofar as such general terms as “orthodox” and “liberal” are apposite, from the evidence we heard we find that the respondent can be regarded as a liberal television channel. Mr Aboulenein told us that it had a varied output including music, drama and soap opera as well as news, which would not be contained in more orthodox channels. We heard that the female news presenters did not wear headscarves and that many of the respondent’s employees did not pray five times a day or observe Ramadan. Examples of the respondent channels’ ethos were that it sought to appeal to a younger Arab speaking audience and broadly supported the “Arab Spring” and, incidentally, the Palestinian cause. Both Mr Aboulenein and Mr Janoudi told us that the claimant did not discuss his particular beliefs and that they were unaware of them.
- 14.10 With the exception of Mr Pollock, all the witnesses we heard from, including the claimant, we have assumed do not have English as their first language. We did not specifically request this information, hence our assumption, and all the witnesses’ English was extremely good. Notwithstanding this we record that in assessing their evidence we have made due allowance for the fact that English may not have been their first language.
- 14.11 In addition, whilst we saw part of the claimant’s evidence in person, the remainder of all the evidence has been given by CVP. Again, we record that this is an unfamiliar experience to most individuals and that we have made due allowance for evidence being received via videolink.
- 14.12 The claimant has suggested that the senior management of the respondent was predominantly Egyptian, especially in the management team prior to the change in 2017 and that this accounted for his treatment due to him being Palestinian. Mr Aboulenein gave us evidence as to the nationalities of the senior management at the relevant time. These were as follows:-

Chief Executive Officer: Egyptian
Head of News: Algerian
Head of Operations: Algerian
Head of Marketing: Egyptian
Head of Research/Plannning: Bahraini

Creative: Lebanese/Iraqi

and in the management level below that:

Department Head of News: Egyptian

Head of Bulletins: Lebanese

Head of Assignments: Moroccan

Mr Aboulenein described himself as of British/Egyptian origin

Head of Research: Egyptian

Head of HR: French

Other HR: British

- 14.13 In addition Mr Elhag told us that he was Eritrean and Mr Aboulenein told us he was married to a Palestinian. Mr Elhag referred to the respondent as being pan-Arab in both its outlook and management and we find that it was.
- 14.14 The claimant tells us that he has a baccalaureate in media studies and a diploma in professional English from Palestine. He has over fifteen years of professional experience working in the media primarily as a journalist. Eight of those years of experience were gained in Palestine prior to his move to Britain. The claimant tells us he is an award winning journalist. We have no reason to doubt him. Indeed, Mr Aboulenein told us that he was a good journalist.
- 14.15 Ms Fida Bassil was at all material times a presenter on the respondent's channel. We were told that she was very popular with the viewers. She was a work colleague of the claimant.
- 14.16 We heard evidence from the claimant in person and via videolink. In our assessment the claimant was not a wholly credible witness. We found that he was garrulous and discursive. We found that he had a misplaced regard for his own abilities as a producer. We found aspects of his evidence unreliable as recorded below. Lastly, we found that the claimant totally lacked any insight into his interaction with his colleague, Ms Fida Bassil.
- 14.17 We begin by considering the claimant's dismissal. We do that because, as appears from judgment dated 13 May 2019, the claimant relies upon the rejection of his appeal against dismissal, communicated to him on 19 June 2018, as being the last act in a series of discriminatory actions which would mean that his discriminatory complaints were brought within the primary three month time limit. If the rejection of the appeal was not the last in a series of discriminatory actions then the claimant's other allegations of discrimination are out of time and we will have to consider whether it would be just and equitable to extend time.

15. Dismissal executive summary

- 15.1 We find that, whilst aspects of the claimant's dismissal were procedurally unfair, the decision to dismiss the claimant and the decision to reject his appeal had nothing whatsoever to do with the claimant's nationality, religion or belief and was wholly unconnected to any alleged protected disclosure made by the claimant.

16. Dismissal

- 16.1 On 29 July 2017 Ms Fida Bassil sent an email to Ms Ritu Parihar at HR reporting the following:-

“Dear Madame,

This email is provoked by a recent event, when I spotted my colleague, Hamza Elbuhaisi, in the garden opposite my house which I reported it to the police.

This is not the first time this happens, as his harassment followed me not only in public but also reached my house door in one of the incidents.

Hence, I am forced to report an awkward harassment behaviour by my work colleague Hamza Elbuhaisi.

The outrage behaviour has been going on for more than two years despite my best efforts to enlighten him that I am not interested in any relationship outside workplace and that I only socialise with him as work colleagues.

I am not really feeling safe with such behaviour and I am ready to provide whatever details needed in the investigation of this matter.

Kindly take appropriate action regarding this issue as it became very stressful for me.

Your fast response is much appreciated.

Yours sincerely

Fida Bassil.”

- 16.2 When cross-examined about the complaint, the claimant stated that he did not know why she complained about him and he accepted that she was not aware of any grievance he may have raised concerning his pay. He accepted that the investigation of Ms Bassil's complaint was completely separate to his complaints about his pay.
- 16.3 In addition, the claimant told us that “we were very close”, that “she contradicts herself” and he even went so far as saying “I was victimised by her”. We found these comments to be not only inappropriate and inaccurate but somewhat delusional.
- 16.4 A meeting was held between Ms Parihar and Ms Bassil on Monday 31 July 2017 to discuss the allegations. At that meeting Ms Bassil gave Ms Parihar a victim care card from the Metropolitan Police, indicating that she had reported the matter to the police on 29 July

2017. In addition she handed across a handwritten poem that the claimant had given her. We have the notes of the meeting held on 31 July 2017 which records Ms Bassil outlining numerous instances of stalking and harassment by the claimant. We do not recite them here but they include visits to her flat, some late at night, confrontations on a bus and in the street and numerous telephone and Whatsapp messages wherein the claimant asserts that he is in love with Ms Bassil and can't stop thinking about her.

- 16.5 Following the meeting Mr Peter Johnson, employee relations & policy specialist, had a meeting with the claimant to discuss the harassment complaint.
- 16.6 Following that meeting, the claimant sent an email on 31 July 2017 alleging bullying and indirect abuse by his managers. The email does include the word 'discriminations', but in the context of comments relating to how young he was. Whether or not the timing of this email was coincidental, it does not touch on the allegations of harassment at all.
- 16.7 As a result of the meeting with Ms Bassil on 31 July 2017 the claimant was suspended. The suspension letter is headed: "Suspension Pending Disciplinary Investigation".
- 16.8 On 4 August 2017 Ms Bassil provided samples of the messages that she had been sent by the claimant in 2016. Most of the messages are undated but we have at least three dates, namely 16 and 26 January 2016 and 10 June 2016. Again we do not set out in any detail the content of those messages but it is clear that the claimant is endeavouring to express his love for Ms Bassil and that she responds to the effect: "Can you respect my wishes and stop". One particular message of importance is as follows:-
- "26 January 2016
- Claimant: I love your eyes and I want to kiss them, my "duck". Enjoy your days and we will speak soon."
- 16.9 In cross-examination the claimant tried to make out that all these messages related to only one day, which we find is obviously wrong.
- 16.10 As part of the investigation, Mr Aboulenein provided an email report on 7 August 2017. This records Ms Bassil's complaints about the claimant's conduct both at work and not at work. When asked why she had not complained before apparently Ms Bassil said that she did not want to affect his status in the country negatively or else she would have reported him to the police.
- 16.11 Mr Janoudi also provided a report concerning his recollections of issues between the claimant and Ms Bassil in 2016. Again we do not recite the contents of that report but in essence it is recorded that:

“She told me that H was very aggressive approaching her despite clearly telling him she no longer wished to have any contact with him.”

16.12 It is quite clear to us that the claimant was indeed pursuing a course of harassment of Ms Bassil.

16.13 On 22 August 2017 the claimant was invited to an investigation meeting on 24 August. This letter states:-

“Re: Investigation Meeting

I am currently in the process of conducting an investigation into your unacceptable behaviour of stoking (sic) and sexual harassment towards senior presenter Fida Bassil which we believed happened during working hours and outside working environment despite you were warned by other members of staff and asked to stop but you decided to ignore and continued your conduct.

...

I would stress that this is not a disciplinary hearing and the statutory right to be accompanied does not apply. The purpose of this meeting is to give you the opportunity to provide an explanation for the matters being investigated.”

16.14 We agree with Mr Pollock that this reads as if the claimant has already been found guilty of the alleged behaviour and that despite being referred to as an investigation meeting it has the hallmarks of a disciplinary meeting.

16.15 The claimant complained about these procedural defects in emails on 22 August. Mr Johnson responded that no decision had been made and in the event that any of the allegations were substantiated the claimant would be invited to a disciplinary hearing and would be allowed to be represented.

16.16 The investigation meeting took place on 24 August 2017 and we have the notes of that meeting. The notes are fairly extensive and we do not recite them here but in essence the claimant was maintaining that he had a friendship with Ms Bassil. His position can be captured by the following exchange:

“45. PJ asked HE (the claimant) why he continued to message FB when she asked him to stop and HE said that FB sent messages to him. He said that FB smiled when he saw her, she gave him hints. HE reiterated that FB said officially she didn’t want to speak to him in the messages, but in reality she was different. HE said that FB walked close to him when they were walking together. HE said that FB was stalking him, he was not stalking her.”

16.17 We do not accept the claimant’s evidence on this point.

16.18 Following the meeting the claimant provided “selfie” photographs of him with Ms Bassil along with some text messages between the two of them. Again the claimant’s position is summarised in an email dated 26 August 2017 wherein he states:-

“The “evidence” provided to you by Fida includes messages on social media apps and otherwise. But I attach copies of text messages and photos from the time when Fida says I was stalking or harassing her. How can I have been stalking or harassing her while she was acting in such a friendly manner towards me?”

16.19 At this time the police were involved in the allegation of harassment. In an email dated 1 September 2017 the claimant refers to a letter from the police being strictly confidential. In his witness statement the claimant states:-

“The police took no action against me save for giving me a “harassment warning letter” without the admission of guilt and I was asked not to contact Ms Bassil for any purposes, other than those relating to work, for six months.”

16.20 At paragraph 21 of the respondent’s grounds of resistance it is asserted that on or about 1 March 2018 the “injunction issued by the police” against the claimant in relation to contact with Ms Bassil was lifted. That would suggest that the harassment letter was issued towards the end of August/beginning of September 2017. At paragraph 44 of the claimant’s witness statement he refers to the police harassment warning expiring on 2 March 2018.

16.21 On 18 September 2017 the claimant’s suspension was lifted and he was also provided with a letter dated 18 September 2017 entitled “Outcome of Grievance Investigation”. This letter states:-

“This letter provides formal confirmation of the decision reached following the formal grievance investigation meeting, which took place on 24 August 2017.

...

Decision

Based on my findings from the investigation, the investigation could not find sufficient evidence to fully uphold grievance raised against you, therefore the grievance is partially upheld. No further action will be taken in the relation to the complaint and you are reminded to maintain professional conduct in the workplace and outside working environment, any breach or further complaint, will lead to the disciplinary action against you.

Recommendation from the Investigation

The investigation recommended the following:

1. Due to recent unwanted conduct towards Fida Bassil senior presenter, stop with an immediate effect any correspondence with Fida Bassil, unless its work related matter, this applies to you and Fida Bassil.

...

As part of my recommendation, you will be transferred to the News Department as a journalist/producer from 19 September 2017.

Any incident of unwanted conduct that may raise any concerns you will be required to report to your line manager. If your line manager is not available, you

will need to speak to a member of Human Resources Department to address your concerns. Any future reported unwanted conduct will be dealt appropriately according to the disciplinary procedure. This letter is to confirm that written warning will be in your personal file for the period of twelve months from the date of this letter.”

- 16.22 The letter went on to recite that the claimant had a right of appeal.
- 16.23 This letter is plainly procedurally unfair. The claimant had only attended an investigatory meeting and had not been subjected to the disciplinary process and had not been allowed representation at a disciplinary hearing. The letter states that the grievance against the claimant had been partially upheld. In one sentence it states that no further action would be taken but later in the letter the claimant is informed that a written warning was to be placed on his personal file for a period of twelve months.
- 16.24 Notwithstanding the procedural unfairness, Mr Pollock told us that the decision was made not to take the matter further and to let sleeping dogs lie as the claimant had got his job back.
- 16.25 Notwithstanding the procedural unfairness, we find as follows:-
- 16.25.1 That had a fair procedure been adopted the overwhelming probability is that the outcome would have been the same, if not worse.
 - 16.25.2 As a matter of fact the claimant had a written warning on his personal file and had not appealed that outcome.
 - 16.25.3 In any event the instruction to stop with an immediate effect any correspondence with Fida Bassil unless its a work related matter constituted a reasonable management instruction in the circumstances.
- 16.26 Following the grievance/disciplinary process outcome, the respondent made efforts to ensure that there was little or no contact between the claimant and Ms Bassil at the workplace. The claimant's shift pattern was altered so that he would not coincide with Ms Bassil and he was instructed not to visit the second floor where she worked.
- 16.27 It would appear that the claimant abided by the police harassment warning letter. However, during the subsequent investigation, information came to the respondent that the moment the six month period was up the claimant resumed calling Ms Bassil on 2 March 2018.
- 16.28 On 5 April 2018 Ms Bassil sent Ms Parihar an email in the following terms:-

“Dear Ritu

Hope this email finds you well.

I am writing this email to inform you that I was harassed lately by Mr Hamza Bouheissy again.

I had to go to the police as I was scared for my life, as this is getting worse and worse and it seems that the measures taken last year did not prevent him from approaching me, my friends and my close circle of colleagues at work, in his attempt to speak again to me.

Kindly find below the case number from the police complaint, 6005938/18.

I would like to re-open the case, as I am extremely terrified of what could happen next.

Kindly let me know of the proper procedure to follow.

Regards,
Fida Bassil”

16.29 Ms Parihar states in her witness statement as follows:-

“We met and she complained that as soon as six months had passed following the police warning he turned up to her doorstep and that now he started coming in on days he should be off shift when she was on shift and hovering around her, approaching her to talk and following her as well.”

16.30 On 9 April 2018 the claimant was suspended from work with immediate effect pending an investigation. Ms Bailey was appointed to investigate the complaint. On 10 April 2018 Fida Bassil sent Ms Bailey screenshots of what she stated were attempts by the claimant to contact her. She states:-

“Dear Elaine, Hope this email finds you well, as we agreed yesterday I am sending the screenshots (sic) of his different attempts. The recording of the first call was 2-3-2018 from an unknown number has been sent to Ritu however I was clear that I don't want him to call me again he tried again as show in the last screen shot below when I blocked him on the phone he sent me whatsapp as show in the first screen shot below. Unfortunately when I blocked him on whatsapp he sent messages from unknown facebook profile when u look to this profile u can see gender male – solidarity with Gaza – post talking about oud (the musical instrument that he is fan of) the facebook message proof that he was following me the day before.

Best
Fida Bassil”

16.31 None of the accompanying screenshots definitively prove that they came from the claimant. The claimant denied being anything to do with a facebook account “Rosace Rosace” and denied that any of the communications emanated from him. We do not believe him. One of the messages refers to a restaurant near to the respondent's work premises.

16.32 At the same time questions were raised as to the claimant's non-attendance for work. The claimant had been due to attend work on 6 and 7 April 2018, a Friday and a Saturday which was included in his normal work shifts. However the time card report that we have seen indicates that he attended work on 2 April, a Monday, for 4 hours and on 3 April 2018, a Tuesday, for 2.25 hours. The claimant sought to justify his attendance on the basis that he had no regular shift pattern and it was left to him when he came into work. We do not believe him. Whenever the claimant went into work he worked a full shift of at least 8 hours and sometimes up to 10 or 12 hours. Going in for 4 hours or 2.25 hours suggests to us that the claimant was indeed dropping by work with a hope of bumping into Ms Bassil.

16.33 Ms Bailey produced an investigation report. The investigation findings include the following:-

“Summary of written and physical evidence

From the face to face interview with Fida it was established that Hamza Elbuhaisi has tried to re-establish contact with her despite being told not to make any contact with her.

HE bombarded Fida with telephone calls, WhatsApp messages and numerous facebook messages. He phoned her on an unknown number, she unknowingly answered her phone only to discover it was Hamza. She made it perfectly clear to him that his behaviour was unwanted and he was to cease from making any further contact with her.

During a recorded telephone conversation she tried to tell him not to contact her and that she did not wish to speak to him. He talked over her and clearly displayed no concern for what she was saying. He proceeded to talk about himself and allegedly what other people were saying about her.

Hamza was told previously that he was not allowed to be on the second floor where Fida worked, he showed up on days he was not scheduled to work and sat at a desk behind Fida.

His behaviour was both menacing and intimidating, his presence at work on days he was not scheduled to work, affected her ability to undertake normal activities, due to his attempts to speak to her. FB explained each time she needed a comfort break and moved from her desk she would try to approach her, she had to ask her colleagues to go with her.

Once the period of injunction imposed by the police had elapsed, he resumed the stalking and harassment. He made numerous attempts to speak with Fida, the following day after the ban was lifted.”

16.34 In addition the report sets out details of a confrontational and verbal assault directed at the head of support services and unauthorised absence.

16.35 On 11 April 2018 the claimant was invited to a disciplinary hearing due to be heard on Friday 13 April 2018.

16.36 Whilst the claimant denied most of the alleged contact with Ms Bassil, a telephone call he had made had been recorded by Ms Bassil and so he could not deny it. As he states in his witness statement:-

“I accept that I made a phone call to Fida in early April 2018. I wanted officially to ask for my old phone back and to say that I had no hard feelings about the way she had treated me and to wish her well. She thanked me for calling and asked that I do not call her again, which I agreed to...

I was polite and respectful and I wished Fida well.”

16.37 Having read the transcript we do not accept the claimant's characterisation of this telephone call. We find that the claimant was yet again trying to establish contact with Ms Bassil and that she was quite clear she did not want this.

16.38 Against the fact that the claimant was scheduled to go to a disciplinary meeting on Friday 13 April 2018, the following facebook post came to the attention of Fida Bassil. This was translated in an email which Ms Bassil has referred in the subject line to “Translation of Hamza's facebook post to Fida”.

16.39 The text of this facebook post is in the form of an allegory and some extracts from it are:-

“There is a very kind duck who is certainly not against the monkey or wants to treat him terribly. She is used to swimming in a special river with her monkey.

Suddenly a thug appeared and wants to interfere between the monkey and the duck saying that the monkey annoyed the duck again and must be dealt with harshly and kicked out of the farm and investigated because he is forbidden from talking to the duck.

A paper (letter) related to the duck was given to the monkey saying that there is an accusation from the duck yet I feel this is a fabrication.

...

For his part, the monkey will remain a monkey whatever happens and in all cases the monkey will deny all the thugs accusations and has his way.

...

The duck should think about sending a message on Friday morning saying that she did not accuse the monkey of anything in order for her to succeed in controlling the jungle because the monkey is thinking of leaving to complete his studies or there are other things but he was compensation in order to invest in a house with a garden and enjoyment and security but it seems there are no real guarantees or serious discussion until this moment.”

16.40 As recorded already, we have evidence that the claimant referred to the Ms Bassil as “duck”. The post refers to the monkey being

forbidden from talking to the duck, accusations being made, a disciplinary process and a meeting on the Friday morning. The claimant denied this post had anything to do with him. We do not believe him. The translator refers to the post including threatening language and we agree. On the balance of probabilities we find that the claimant did send it.

- 16.41 The claimant's NUJ representative was unable to make the disciplinary hearing on 13 April and accordingly it was moved to 18 April 2018. It was accepted by the respondent that the investigation report and documentary evidence in support was only sent to the claimant on 17 April.
- 16.42 Were we considering issues of fairness, it could well be that the provision of the documents to be relied upon for the disciplinary process only on the day before the hearing would be regarded as unfair. However, no complaint was made by the claimant at that hearing. The hearing went ahead on 18 April and the claimant was represented by his NUJ representative.
- 16.43 The hearing was chaired by Mr Elhag. Both in his witness statement and in cross-examination we found that Mr Elhag explained his decision to dismiss the claimant in compelling terms. He told us that allegations 1 and 2 (namely contacting Fida Bassil and missing shifts) were intertwined and that the altercation with a manager was a minor issue. He told us that he did not consider the claimant's contact with Fida Bassil was reasonable and was a clear case of stalking. He said that he believed the claimant not attending according to the rota was in order to be close to Fida Bassil and that the claimant came in on the days she was working and was sitting close to her. He told us that he felt the stalking was unacceptable and that his main concern was the wellbeing of a colleague. He was concerned that the claimant had contacted her one day after the police restraint order had expired and that the claimant's attitude was that nine months of keeping distance had been enough. He told us that the claimant's only real argument was that he, the claimant, believed enough time had elapsed and it was fine for him to approach Fida Bassil. Mr Elhag told us that he found the claimant's behaviour to be threatening and concerning.
- 16.44 On 24 April 2018 the claimant was sent the disciplinary hearing outcome letter dismissing him on the grounds of gross misconduct. We find that the reasons for the dismissal are as set out in that letter and that the reason for dismissal was gross misconduct. We find that the dismissal had nothing to do with the claimant's nationality, religion or belief.
- 16.45 The claimant appealed his dismissal and the appeal hearing was held on 13 June 2018. It was chaired by Mr Janoudi. From a procedural point of view it could be said that Mr Janoudi should not have taken the appeal given that his independence could be called

into question as he had provided a witness statement in the original investigation in 2017. Further, it appeared to us that Mr Janoudi was not entirely clear as to his role on appeal as he told us that he concentrated on whether there was any fresh evidence rather than reviewing the procedure as a whole. Nevertheless, we accept that Mr Janoudi concluded that the claimant had been guilty of gross misconduct and that dismissal was the appropriate sanction. We are quite clear that the rejection of the claimant's appeal was nothing to do with his nationality, religion or belief.

16.46 It is noticeable that throughout the whole of the claimant's employment with the respondent and during the disciplinary process at no time did the claimant expressly complain that any of the alleged treatment was on the grounds of his nationality, religion or belief.

16.47 Accordingly, the claimant's claim of discriminatory dismissal is dismissed.

17. Consequently we deal with the questions raised in the list of issues concerning the disciplinary process as follows:-

8(h) We find that the claimant was invited to a disciplinary hearing on 13 April 2018.

8(i) We find that initially the claimant was given less than 48 hours' notice of the disciplinary hearing but that the initial disciplinary hearing on 13th was postponed until 18 April 2018.

8(j) We find that the claimant was given an adequate opportunity to have a fair determination notwithstanding the procedural defects that we have found.

8(k) The claimant was dismissed on 24 April 2018.

8(l) The claimant did appeal against the decision, which appeal was ultimately refused by the respondent on 18 June 2018.

18. We do not find that this treatment was less favourable than any actual or hypothetical comparator. Further, we do not find that such treatment was on the grounds of the claimant's race and/or national origin and/or religion or belief.

Direct Discrimination / Victimisation

19. Dealing with the treatment alleged in support of the victimisation claim:

13(b) We find that the claimant was not subjected to various baseless investigations without any prior warning in August 2017 or thereafter. We have found procedural defects in the initial grievance/disciplinary process but we find that this was not instigated in order to silence his

allegations of discrimination. We find there were in fact no allegations of discrimination.

- 13(e) We have found that the August 2017 investigation/grievance/disciplinary process was procedurally unfair and as such did breach the respondent's disciplinary policy.
- 13(g) We have found that the respondent did initially arrange a disciplinary hearing in April 2018 giving less than three days' notice but this was subsequently corrected.
- 13(h) We find that the respondent did not raise unfounded allegations about the claimant's work and attitude. We find that the allegations were not used to unfavourably describe the claimant's assertion of a statutory right and doing of a protected act.
- 13(i) On 24 April 2018 the claimant was given a dismissal letter advising him that he was being dismissed on the basis that his conduct was construed to be gross misconduct.
- 13(j) We find that Mr Tariq Janoudi did not have a close relationship with Ms Bassil and as such the appeal hearing was not unfair or biased.
- 13(k) The claimant's appeal was not upheld and the respondent's decision to dismiss him remained.
20. Given that we have found that the rejection of the claimant's appeal and his dismissal did not constitute acts of discrimination, so the claimant's claim of direct discrimination and/or victimisation stand to be considered in isolation. The last specific acts appear to be in relation to the night shifts from September to March 2018. However, given that the claimant was a persistent complainer about his level of pay, it could be said that that complaint ran up to the date of dismissal on 24 April 2018. Consequently the claimant's claims for discrimination and victimisation are three months and fifteen days out of time as per the reasoning in the judgment at the Open Preliminary Hearing given on 13 May 2019. By a parity of reasoning, we have heard nothing to persuade us that it would be just and equitable to extend time for these claims and accordingly they are dismissed as being out of time.
21. Nevertheless, having heard the evidence we make the following findings:-
22. Whether or not a salary of £40,000 pa was mentioned at the claimant's interview, the fact is that his offer letter, signed on 3 August 2014 stipulates a job title of journalist along with a salary of £35,000. That is the salary contained in his contract of employment.
23. We find that in the initial stages of the respondent's channel the role of journalist often did overlap with the role of producer and that the claimant was undertaking the duties of a producer.

24. In addition, the claimant was asserting that until July 2017 he was acting as head of the investigation unit. We find that whilst there was no official investigation unit, unofficially the claimant was probably told at times to co-ordinate the commissioning of investigations and took it upon himself to try and carve out such a position for himself. Mr Kamil told us that various people on occasions were told they were head of the investigation unit but it was all rather informal. We have seen, for example, an email from the claimant wherein he is trying to set out the formal job description for such a position.
25. It is clear to us that the claimant complained regularly that he was not being paid enough for the jobs he was doing. In 2016 he was claiming an “acting up allowance” for working as a producer but was told that acting up allowances were no longer going to be paid. On 27 October 2016 he was informed:-

“ “Acting up allowance” is not paid any longer to any members of staff. I would suggest that you regard the additional responsibilities of working as a producer, managing a team and producing an on-air programme as a great opportunity to gain excellent experience within your field of work. This experience will help your professional development and later move up the professional ladder.”
26. Consequently dealing with Issue 8(a), the claimant was tasked with responsibilities and duties beyond those required of a news journalist, including the duties that would be expected of a producer and investigation manager.
27. As regards Issue 8(b), the other employees who the claimant has identified, we find were not comparators to the claimant. Mr Shams and Mr Sabag were not journalists and so were not on the same banding as the claimant. Mr Omar, who was in fact Palestinian as well, began on the same starting salary as the claimant but with the job title of producer. We later heard that Mr Omar was promoted on merit and we so find.
28. As regards issue 8(c), we heard little or no evidence concerning the claimant’s qualifications other than he had obtained awards for journalism in Palestine. We have already found that the claimant was a good journalist and that it was in relation to acting as a producer that he was on occasions found wanting. Mr Aboulenein told us that as a gallery producer he had problems with his performance and sometimes with his attitude. The re-mapping exercise in January 2018 did take into account the claimant’s exam results and did not disregard his Palestinian qualifications.
29. As regards issue 8(d), the respondent did internally advertise job postings in December 17/January 18 but the claimant was not prevented from taking the internal examination based assessment. In early 2017 the claimant had taken an externally sourced independent test. In that test he had scored 195 out of 400. We have an email dated 10 January 2018 wherein the results were set out for the claimant and he was asked if he would like to use that result for his applications or if he wished to take part in a new assessment. The evidence we heard was that the claimant did not want to

have a re-assessment and that he refused to take the second test. He denigrated the test and agreed that he did not take the second exam as he considered it to be rubbish and there was no point.

30. As regards issue 8(e), we find that the claimant probably did raise a grievance with his line manager, Mr Mahmood, alleging that he was performing duties additional to those of his job title. We find that this was not a formal grievance complaint but an informal and oral complaint to Mr Mahmood. We did not hear from Mr Mahmood, but Mr Aboulenein told us that "I do recall that Mr Elbuhaisi complained about his status and salary. I recall this being looked into at the time on more than one occasion, however his complaints weren't well founded and he was treated no differently to anyone else."
31. We find that the claimant regularly complained about his pay and responsibilities. In actual fact on 6 February 2017, as a result of his complaints, his job title of news journalist was changed to journalist/producer and his salary was increased from £35,000 to £40,000 per annum. Thus the circumstances are that within two months of having a new job title and a salary raise, the claimant was complaining again about his status and pay. This is the alleged protected act relied upon for the victimisation claim. The claimant readily accepted in cross-examination that when complaining about his status, workload or pay, he never suggested that this was discriminatory behaviour on the grounds of his nationality, religion or belief. As such, no express allegation was made of contravention of the Equality Act. We find that the circumstances or context of his complaints were not such that they constituted allegations that the respondent had contravened the Equality Act 2010. As such we find this informal grievance and any subsequent follow up with human resources not to have been a protected act. Further we find that an allegation that Mr Mahmood failed to follow up and act on the claimant's informal grievance was unjustified and was not less favourable treatment on the grounds of the claimant's nationality, religion or belief. We find that following a recent pay rise and new job title the respondent's management understandably did not act on the claimant's further complaints.
32. As regards issue 8(f), we find that there was a total restructure of the respondent's business and that everyone was mapped to new roles. In January 2018 the claimant was mapped to the job title of broadcast journalist. His salary was increased by £500. It is fair to say that he was no longer acting as a producer but the hitherto overlap between the two roles was extinguished for everybody. Whether or not this was a demotion, we find that it was applied to everyone and so was not less favourable treatment than any actual or hypothetical comparator and in any event was not on the grounds of the claimant's nationality, religion or belief.
33. As regards issue 8(g), the claimant was not given only night shifts from September 2017 to March 2018. During that period the evidence before us was that he worked 15 early shifts, 9 mid shifts and 25 night shifts. We find that such a shift pattern was not unusual, especially as the claimant accepted he had requested night shifts. The claimant told us that it was for

a period of three weeks only but we note that in his disciplinary hearing of 18 April the claimant stated:-

“HE said he prefers to work the overnight shifts. He had asked Izzalden whether he could work night shifts in order to avoid problems with his friends.”

34. In addition the claimant had been rostered on shifts so as not to work on day shifts with Fida Bassil. Consequently we do not find the alleged treatment has been proved and in any event we find that this was not less favourable treatment than any actual or hypothetical comparator and was not on the grounds of the claimant’s race and/or religion and belief.
35. The outstanding allegations of treatment under the victimisation claim have been dealt with and in any event do not arise as we have not found that there was a protected act.
36. For the above reasons the claimant’s claims are dismissed.

Employment Judge Alliot

Date: 14/12/2020

Sent to the parties on: 16/12/2020

Jon Marlowe
For the Tribunal Office