EMPLOYMENT TRIBUNALS

Claimant: Reverend I Ibe

Respondents:
1. SPS Security Limited
2. Victoria Plum Limited
3. John Beharrell
4. ……..
5. Jack Tolson
6. Daniel Little
7. Adam Pearson

This was a hybrid hearing (H). The claimant and counsel for both respondents attended the hearing in person, but the witnesses for the respondents all attended remotely because of the current restrictions arising from Covid 19.

Heard at: Leeds

On: 25, 26, 27, 28 and 29 January 2021.
8 February 2021 (in chambers).

Before: Employment Judge D N Jones
Mr R Stead
Mr I Taylor

REPRESENTATION:

Claimant: In person
Respondents 1, 3, 5 and 6: Ms C Millns, counsel
Respondents 2 and 7: Mr J Boyd, counsel

JUDGMENT

The Tribunal unanimously holds:

1. The claim for direct race discrimination is dismissed.

2. The claim for harassment related to race is dismissed.

3. The claim for being subjected to detriments for having made public interest disclosures is dismissed.

4. The claim for holiday pay is dismissed.

REASONS

Introduction

1. The claimant alleges direct discrimination because of race, harassment related to race, detriments on the ground of protected disclosures and failure to pay holiday pay.

2. The first respondent (SPS) is a company which provides security guards. The second respondent (VP) is a company which supplies bathroom appliances. The claimant was employed by SPS as a security guard from 13 August 2018 to 13 December 2019. The claimant worked at the Doncaster warehouse of VP on night shifts from 6 July 2019 to 1 October 2019. His claims arise from the circumstances in which he was removed from his placement there.

3. The claimant alleges he was subjected to four detriments because of his colour (he is black) and/or on the ground of his protected disclosures:

3.1. On 1 October 2019, Mr Adam Pearson (R7, Operations Administrator for VP), sent an email to Mr James Bevens (Head of Warehouse Operations for VP) saying that the claimant had "unauthorised access to cleaners' cupboard storing his personal belongings".

3.2 In the same email, Mr Pearson said that the claimant had been "wearing incorrect footwear (flip flops were in his belongings he left)."

3.3 From the second week in July to 1 October 2019, the following people singled the claimant out for daily monitoring: Mr Daniel Little (R6 and General Manager for SPS), Brendan Wilson (employee of SPS), Jack Talson (R5 and Group Projects and Compliance Manager for SPS) and Mr Pearson (R7, Operations Administrator for SPS).

3.4 By an email dated 1 October 2019 to Mr John Beharrell (R3, Managing Director of SPS), Mr James Bevens (Head of Warehouse Operations for VP) asked SPS to remove the claimant from VP's site.

4. The claimant alleges that he made the following protected disclosures, all orally.

4.1 That the access entrance door was damaged and would cause accidents to people going in and out of the site to:

a. Anthony Smith (night foreman with VP) in mid-July, 30 September and 1 or 2 October 2019;

b. Brandon Wilson and Shaun Durose (employees of SPS) in the first and second week of July 2019;

c. James Bevens (Head of Warehouse Operations for VP) in mid-July 2019;

d. Andrew Walker (Operations Manager for a third party) in mid-July 2019.

4.2 That guards were asleep during working hours to:

a. Brandon Wilson (employee of SPS) in mid-July 2019, and gave him photographs;

b. Anthony Smith (night foreman for SPS) in mid-July 2019, 30 September and 1 or 2 October 2019;
c. James Bevens (Head of Warehouse Operations for SPS) in mid-July and late September or early October 2019;
d. Andrew Walker (Operations Manager for a third party) in mid-July and late September 2019;
e. Steve Rodnicki (Control Manager for VP) on 30 September 2019;
f. Jack Tolson (Group Projects and Compliance Manager for SPS) in September/October 2019;

4.3 That the roof was leaking into a room containing electrical equipment to:
a. Andrew Walker (Operations Manager for a third party) in September 2019;
b. Brandon Wilson (employee of SPS) in September 2019.

5. The claimant makes two allegations of harassment related to race.
5.1 During a telephone call shortly before 13 November 2019 during which the claimant alleged that guards had been sleeping on shift, Mr John Beharrell (R3, Managing Director of SPS) said to the claimant: "I've told you if you raise this issue and I lose this contract, I'm going to report you to the local authority and they will send you back to where you came from".
5.2 In an email dated 14 November 2019 Mr Beharrell said to the claimant: "Furthermore, as stated on the phone, I have received a complaint from Victoria Plum about your harassment of one of our officers. This continued contact has made members of their team feel unsafe and they would like SPS to report your behaviour to the Local Authorities."

6. The claimant alleges that R1 did not pay him holiday pay during the period of his employment from 13 August 2018 to 13 December 2019.

The issues

7. At a preliminary hearing on 13 July 2020 Employment Judge Cox identified the relevant issues in the case.

Direct discrimination

8. Were any of the matters in paragraphs 3.1 to 3.4 detriments?

9. Did the alleged detriment in paragraph 3.3 occur?

10. Was the claimant subjected to any, or all, of the detriments because of his colour?

Protected disclosure

11. Did the claimant make all or any of the disclosures in paragraph 4?

12. Did he believe that he was making the disclosures in the public interest and that the information he was giving tended to show that someone's safety was being endangered?

13. If so, was that belief reasonable?

14. Was the disclosure to his employer?

15. If not, were the other conditions in Sections 43C to 43H of the Employment Rights Act 1996 met?

16. Did the alleged detriment in paragraph 3.3 occur?

17. Did the claimant make one or more protected disclosures?

18. Have the relevant respondents established that any detriment that occurred was not done on the ground of one or more of the protected disclosures?

Holiday pay

19. Was there a failure to pay the claimant for any untaken holiday leave at the end of his employment?

Evidence

20. The Tribunal heard evidence from the claimant.

21. VP called Mr James Bevens, Head of Warehouse and Operations. The seventh respondent, Mr Adam Pearson, Facilities Co-ordinator but formerly the Operations Administrator of VP gave evidence.

22. SPS called Miss Rachel Dackombe, Head of HR at VP, Mr Steve Rodnicki, formerly control room supervisor of SPS and Mr Brandon Wilson, security officer employed by SPS. The third respondent Mr John Beharrell, the Managing Director of SPS, the fifth respondent Mr Jack Tolson, Group Projects and Compliance Manager of SPS and the sixth respondent Daniel Little, General Manager of SPS gave evidence. A statement from another security officer of SPS was submitted, but he was not called to give evidence.

23. A bundle of documents, running to 467 pages, was submitted. It included a number of documents which the claimant produced on the first day of the hearing and contiuned to refer to by exhibit numbers rather than their respective page numbers in the bundle. Counsel for the respondents assisted on each such occasion by finding the equivalent page number in the bundle.

24. The claimant was not grateful for the assistance. He accused the respondents' representatives of having failed to include his documents in the bundle. He was rude to Ms Millns, accusing her of unprofessional conduct when she asked permission to raise a supplemental question after she had closed her cross examination and demanding an apology. He also accused both counsel of having visited his house and broken his windows.

Background/Facts

25. SPS is a security company which employs approximately 280 members of staff. VP is one of its clients.

26. The claimant was one of the security guards employed by the SPS who was assigned to work at VP's premises in Doncaster on night shifts from the beginning of July 2019. He had previously worked at the Doncaster College in High Melton.

27. On 30 September 2019 Mr Pearson sent to Mr Bevens an email about an incident at the entrance of their premises earlier that day, at 5.20am. Several members of staff could not enter the building because the entrance doors would not open. The door was opened at 5.28 am. Mr Pearson had viewed CCTV footage of the incident. The claimant was seen to be tugging the door for several minutes, but it was magnetically locked. A key was stuck in the door.

28. The claimant had not recorded the incident in the security log at VP. He had contacted the control room at SPS that morning. He told Mr Rodnicki that a door was faulty and the key would not work. Mr Rodnicki told him to try again as the cold weather might be making the lock stick.

29. On 30 September 2019 Mr Bevens forwarded the email from Mr Pearson to Mr Beharrell and asked him to investigate.

30. On 1 October 2019 Mr Bevens sent another email to Mr Beharrell and asked him to replace the claimant. He referred to a "comedy of errors" over the last 2 days. He forwarded another email from Mr Pearson. A series of concerns were identified by bullet points:

- showing up late by 32 minutes, as well as being late on the Sunday shift;
- the security log recording a start at 18:00 hours;
- unauthorised access to the cleaners' cupboard to store his personal belongings;
- use of a heater which was not PAT tested;
- wearing incorrect footwear, flip-flops;
- charging his electric bike under a fire escape with a charger which had not been PAT tested.

31. Mr Beharrell had difficulties finding cover for the shift at short notice and asked Mr Bevens if he would agree to the claimant working a shift that night. Mr Bevens agreed. That was the last shift the claimant worked at VP. He was notified of this in a letter from Mr Little dated 3 October 2019 and that an investigation was to take place about the reasons for his removal. The claimant was offered a number of shifts at the Doncaster College. The claimant did not respond to the offer.

32. On 9 October 2019 the claimant submitted a grievance to Mr Beharrell. He complained of discrimination by race and nationality by Mr Little and that he had punished him for having raised health and safety concerns. The claimant attended a grievance meeting with Mr Tolson on 11 October 2019. The grievance was not upheld. By letter on 16 October 2019, Mr Tolson informed the claimant he had a right of appeal. An appeal was considered by Mr Beharrell at a meeting on the 12 November 2019. It was not upheld. During the appeal meeting, the claimant said that there had been a broken door at VP which he complained about to various people and that a number of security guards had been sleeping on duty but not removed from site. He said they were white. The claimant showed Mr Beharrell's photographs

of guards who were sleeping. The claimant said he had reported this, when asked. The claimant forwarded the photographs to Mr Beharrell by email on 13 November 2019 following the meeting and stated he had reported this to Mr Little and Mr Tolson.

33. Miss Dackombe telephoned Mr Beharrell on 14 November 2019. She complained that the claimant had been attending at site and intimidating members of staff. She had spoken to the claimant herself when he had called and informed him to stop threatening staff at VP. Mr Dackombe asked Mr Beharrell to inform the police. Mr Beharrell apologised for the claimant's actions and said he would deal with matters.

34. On 15 November 2019 Miss Dackombe wrote to the claimant and informed him that he had been causing distress to members of staff who felt harassed and intimidated by him when he had attended the site several times and spoken to them. She informed him that it would be an act of trespass for him to visit again and that any unwanted conduct may be referred to the police or legal action may be taken.

35. On 14 November 2019 Mr Beharrell telephoned the claimant. He informed him that staff were feeling unsafe at VP, where he had been turning up and telephoning. He told the claimant that he would have to report his actions to the local authorities because of the concerns this was causing. He then instructed Mr Tolson to report the matter to the police. This was done, as is apparent from an email Mr Tolson sent to Mr Beharrell at 18.43 that day. The police later informed Mr Tolson that they would not investigate the matter further because that would require a complaint from the individual who had been harassed.

36. There is a dispute about the telephone conversation of 14 November 2019. The claimant alleges, at paragraph 53 of his witness statement, that Mr John Beharrell "*told me that he will report me to the local authority to remove me and send me back to wherever I came from*". This is the precise wording set out in the claim form. The additional and different wording "*I told you if you raise this issue and I lose this contract, I'm going to report you to the local authority and they will send you back to where you came from*", was raised at the preliminary hearing. Mr Beharrell said that he told the claimant that he had received a call from VP, their staff were feeling unsafe because of the claimant's actions and they would have to report him to the local authorities because VP's staff were starting to feel concerned.

37. We prefer the evidence of Mr Beharrell which reflected the documents which were written at the time in contrast to the claimant's evidence which did not.

37.1 In an email he sent to the claimant that day, at 16.05, Mr Beharrell stated that he had received a report from VP about harassment which had made the team feel unsafe and that they would like SPS to report the claimant's behaviour to the local authorities. He stated that his behaviour and actions were not helping. This written record, made shortly after the discussion, is consistent with his account of what Mr Beharrell had said in the phone call.

37.2 The claimant said that he had reported Mr Beharrell to the police that day about his threat to have him deported. He said the police visited him at home. Having shown them his passport, he said the police told him he did not need have any concerns. He said the police then contacted Mr Beharrell. Mr Beharrell denies any contact from the police. In support of this, the claimant

produced an email from Superintendent Thomas of the South Yorkshire police, sent to him on 3 January 2020. The Superintendent addressed two incidents. Each had case numbers. In respect of 14 November 2019 he stated, "*the incident has been updated to state that a male called John Beharrell has suggested he would make enquiries to have you deported however you have informed our call handler that you are a British citizen and therefore could not be deported. You appear to have asked for this matter to be logged at the point of ringing which was duly undertaken. No further investigation took place*."

37.3 This email was produced on the third day of the hearing by the claimant. It suggests the statement of Mr Beharrell about deportation had been added at a later date to the initial report, when the incident was 'updated'; this contradicts the claimant's account that he had reported this to the police on the day of the phone call with Mr Beharrell.

37.4 The email states no further investigation took place. That contradicts the claimant's account that the police visited him at home.

37.5 On 18 November 2019, the claimant sent an email to Mr Beharrell to provide further information in response to queries he had raised for the purpose of investigating the grievance appeal. There was no reference to a threat the claimant would be sent back where he came from. In respect of the telephone call, the claimant wrote, "*you stated that you report Rev Ibe to the LOCAL AUTHORITES to do what with Rev Ibe……. Please Mr John Beharrell, I will humbly request that you explain to me in writing the reason WHY you said to me over the phone last week that you will report me to the Local authorities. This statement was overheard by Email my wife and we have been terrified, panicking and distress because of your comments that you will REPORT Rev Ibe to the Local Authority*". There would have been no need to ask why Mr Beharrell had said he would report the claimant to the local authorities if he had already said it was to have the claimant deported.

37.6 By that stage the claimant had made allegations of discrimination against a number of people who worked for SPS including Mr Little and Mr Tolan. There was no reason for him not to have included Mr Beharrell's threat of deportation in this email.

37.7 There is no reason the additional remark, which the claimant first attributed to Mr Beharrell at the preliminary hearing, that he would make the report if the SPS lost the contract with VP, should not have been in the claim form, which was written on 18 December 2019, a month after the call, or in the claimant's witness statement. Mr Beharrell denied ever having said this in cross examination. The claimant then misrepresented this, saying Mr Beharrell had admitted it in evidence. This was one of a number of instances of the claimant revising the evidence inaccurately to fit his narrative of events.

37.8 Mr Beharrell said he uses the term 'local authorities' as a generic term for the police, fire and ambulance services. 'Reporting to the authorities' is an expression sometimes used to mean the police or other regulatory bodies. The Home Office, not local authorities, have responsibility for immigration. If Mr Beharrell had meant to convey the threat of deportation, a reference to the authorities might extend to the Home Office, but not local authorities. The claimant may have construed it in that way, given his request for clarification in his email of 18 November 2019 and in his later discussion with the police

when he updated his complaint. Be that as it may, we reject the allegation that Mr Beharrell made this threat, spoke of what he would do if he lost the contract or that he would have the claimant sent back to where he came from. There are many unsatisfactory aspects to the claimant's recollection and evidence in support of it.

The Law

Discrimination

38. By section 39(2) of the Equality Act 2010 (EqA):

> *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 dismissing B;*
> *(d) by subjecting B to any other detriment*.

39. By section 41 of the EqA a principal must not discriminate against a contract worker by not allowing the worker to continue to do the work or subjecting him to any other detriment.

40. By section 109(1) of the EqA, anything done in the course of a person's employment must be treated as done by the employer and by section 109(3) it does not matter whether the thing is done with the approval or knowledge of the employer.

41. Direct discrimination is defined in section 13 of the EqA:

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

42. By section 9 of the EqA, race includes colour.

43. By section 23 of the EqA:

> *On a comparison of cases for the purpose of section 13… there must be no material difference between the circumstances relating to each case.*

44. By section 26 of the EqA,

> *(1) A person (A) harasses another (B) if—*
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
> *(b) the conduct has the purpose or effect of—*
> *(i) violating B's dignity, or*
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
> *(a) the perception of B;*

(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

Burden of proof

45. In respect of complaints of discrimination and harassment, by section 136(1) of the EqA, 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. Section 136(2) provides that does not apply if A shows that A did not contravene that provision.

46. The Court of Appeal has approved and revised guidance to the application of the burden of proof in previous legislation which will include the following considerations[1].

46.1 In deciding whether the claimant has proved such facts [to discharge the burden] it is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers will be prepared to admit such discrimination even to themselves.

46.2 The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. The Tribunal does not have to reach a definitive determination that such facts would lead to it concluding there was discrimination but that it could.

46.3 In considering what inferences or conclusions can be drawn from the primary facts the Tribunal must assume that there is no adequate explanation for those facts.

46.4 When the claimant has proved facts from which the inferences could be drawn, that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent. It is then for the respondent to prove that he did not commit, or as the case may be is not to be treated as having committed that act.

46.5 To discharge that burden it is necessary for the respondent to prove on the balance of probabilities that his treatment was in no sense whatsoever on the protected ground.

46.6 That requires a tribunal to assess not merely whether the employer has proved an explanation for the facts proved by the claimant from which the inferences could be drawn, but that explanation must be adequate to prove on the balance of probabilities that the protected characteristic was no part of the reason for the treatment.

46.7 Since the respondent would generally be in possession of the facts necessary to provide an explanation the Tribunal would normally expect cogent evidence to discharge that burden. In particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire, procedure and/or any Code.

[1] **Wong v Igen Ltd [2005] ICR 931, Barton v Investec Henderson [2003] ICR 1205, Ayodele v Citylink Ltd [2019 ICR 458**

47. In **Madarassy v Nomura International plc**, the Court of Appeal held that a difference in status, namely that of the protected characteristic alone, was not of itself sufficient to discharge the burden of proof. In **Glasgow City Council v Zafar** the House of Lords held that because an employer acted unreasonably did not mean that it had acted discriminatorily. If the employer treated those with and without the protected characteristic equally unreasonably there would be no discrimination. In **Nagajaran v London Transport** the House of Lords held that the essential question was why the employer had acted in a particular way and that the reason may be a subconscious one. Lord Nicholls pointed out that most people will not admit to acting in a discriminatory way and are often unaware they are doing so.

Public interest disclosures

48. By section 43B of the ERA, a qualifying disclosure is defined as a disclosure of information which in the reasonable belief of the worker making the disclosure, is made in the public interest, and tends to show one or more acts of wrongdoing as defined. Such wrongdoing includes that the health and safety of an individual has been, is being or is likely to be endangered.

49. Such a disclosure is protected if made to a specified category of persons or in defined circumstances in sections 43C to 43K of the ERA.

50. By section 47B of the ERA a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

51. It is for the employer to show the ground on which any act, or deliberate failure to act, was done, see section 48(2) of the ERA.

52. Section 43K of the ERA extends the meaning of worker and provides protection to contract workers for the acts of principals, albeit applying slightly different terminology.

Discussion and Conclusions

Direct discrimination

Detriments

53. It is common ground that the email which Mr Pearson sent to Mr Bevens, which was then forwarded to Mr Beharrell, included the criticisms of the claimant in paragraph 30 above. These are the foundation of the allegations in paragraphs 3.1, 3.2 and 3.4 above. Taken together, we find they constituted detriments for the purpose of section 41(1)(d) of the EqA. The following analysis of what led to the emails is central to our conclusions.

54. Mr Bevens had viewed the CCTV footage of the claimant struggling with the reception door, whilst members of staff of VP had to wait outside for nearly 10 minutes before commencing their shift. We are satisfied this exasperated him. He instructed Mr Pearson to do some ‘digging’ on the claimant, a word that emerged in evidence. Mr Bevens said that he had not meant for Mr Pearson to dredge up anything harmful he could find. We reject that. It is implicit from the term and the

context, namely his frustration at the claimant's lack of competence in unlocking the door. The claimant misunderstood, or more likely had forgotten, the mechanism, a lock by both a traditional key and a magnetic pad. He was seen using brute force to attempt to open the door, oblivious to the fact that it was stuck fast because of its magnetic lock. When unlocked, the door was faulty only insofar as it had a tendency to jam, or stick, which required a little extra force to open it. The claimant had discussed this problem with Mr Wilson, but had not recorded it in the guard log or mentioned it to anyone at VP. He only called control, at SPS, when he was having problems letting staff in on the morning of 30 September 2019. His report was that the key would not work. That is consistent with the difficulties he was seen to be having.

55. The claimant exaggerated the defect, to deflect blame from his own shortcoming that morning. The claimant sought support from paragraph 8 of the witness statement of Mr Wilson; "*for something minor like a sticking door I might mention this to the reception staff at Victoria Plumb and ask them if they could have a look at it*". The claimant argued this was the clearest evidence that Mr Wilson was aware of a defect and had reported it. Mr Wilson could not remember whether or not he had, but the claimant was missing the point. Any problem was a minor one. His claim the door was a risk to health and safety and that it might have fallen off its hinges was hopeless. The door was used as the main entrance by dozens of people each day, including the health and safety officer. Nobody had noticed, nor raised any such problem. An officer from the environmental health department visited the site in December 2019, in response to a complaint from the clamant after he had left. She found no issues with the door. We reject the claimant's assertion, without evidence, that the respondent must have fixed it in the meantime.

56. Mr Pearson approached the task given to him by Mr Bevens, the 'digging', by making enquiries of Mr Wilson who was working the security shift that day. He learned of the claimant's tardiness, a matter which the claimant had not really disputed in the claim form or his witness statement, and the fact the claimant had charged his e-bike in the front of reception. A cleaner told Mr Pearson that the claimant had used her cupboard. Mr Pearson investigated. He found a bag of the claimant containing flipflops and a heater. In his email he stated that the access to the cupboard was unauthorised. In his witness statement he said his drawer had been accessed by the claimant for the cupboard key. In fact, the cleaner had no problem with the claimant using the cupboard, albeit learning of it after the event. The claimant seemed to acknowledge he had used Mr Pearson's key without asking for permission, but suggested this was not an issue. In respect of the flipflops, Mr Pearson stated these were used by the claimant at work, but no-one had seen this and he accepted it was his assumption. In his statement, Mr Durose had stated that the claimant had worn the flipflops, but he was not called and we were not prepared to accept this in hearsay form. The claimant said it was a woman's pair of flipflops which he had left there. We accepted that. In respect of the heater and bike charger, Mr Pearson stated they were not PAT tested, but he acknowledged he had not seen the bike charger and had thought the heater must have been in need of a test because it looked tatty and over a year old. The obligation to have a PAT test does not apply to new appliances.

57. Mr Pearson and Mr Bevens accepted in evidence that the concerns in the email of 1 October 2019 were not thoroughly investigated. Mr Pearson made a number of assumptions with respect to the use of the flipflops and the testing of the appliances, which we are prepared to accept were wrong. Leading as they did to the request to remove the claimant from site, their inclusion in the emails amounted to detriments.

58. The other alleged detriment, at paragraph 3.3, was of monitoring by Mr Little, Mr Wilson, Mr Tolson and Mr Pearson, from the second week in July 2019 to 1 October 2019. This is disputed.

59. The claimant never explained with any clarity what form the monitoring took, but it was an impression he had, drawn from the circumstances in which he had been removed from the site. This general and broadly cast allegation was not made out.

60. Mr Pearson had not seen the claimant until he viewed the CCTV footage on 30 September 2019. The claimant could point to no evidence which contradicted this, but fell back on his belief that there had been a conspiracy of which Mr Pearson and Mr Wilson were a part.

61. Mr Tolson had been a note-taker at an earlier grievance in June 2019, but then had no dealings with the claimant until he heard the grievance about race discrimination in October 2019. Not only was there no evidence he had monitored the claimant, there was no reason for him to do so. The claimant took exception to a remark Mr Tolson had made in the October grievance hearing, that he had brought other Tribunal claims, but this did not establish any actual monitoring by him at a time he had no involvement at all with the claimant.

62. Mr Little had no direct involvement in the management of the client VP, it being handled by Mr Barker. The claimant believed Mr Little's interest in monitoring him arose from an earlier grievance when he said he had exposed wrong-doing and this had embarrassed Mr Little, but this was no part of the claims.

63. The claimant drew our attention to an email from Leanne Harper, who worked in the control centre, to Mr Little dated 20 September 2019. It listed 11 occasions when the claimant had been late in arriving at VP. The claimant pointed to the first date of 1 July 2019 which was not a date he had worked. On 25 October 2019 it was sent to Mr Beharrell who forwarded it to Mr Bevens, who then sent it to Miss Dackombe.

64. In his statement, Mr Little said that it was standard practice of SPS to check timekeeping and attendance of its security guards to ensure the customer was receiving the proper service. He said that Ms Harper sent him the email in accordance with the standard practice but he never followed up upon it.

65. We did not consider it to be unusual for SPS to pay close attention to the attendance of security guards or for Mr Little, the general manager, to be kept abreast of any patterns of poor timekeeping. It would have been surprising if that were not the case. In that context, the email did not assist the claimant's case that he was being monitored, by which he meant singled out for closer scrutiny and attention than

other security guards. The claimant was probably correct in drawing attention to the fact the record was incorrect, as he had not been working at VP on 1 July 2019, but that error is of no relevance. It is of more significance that nothing was done about Ms Harper's email, which somewhat undermines the notion that Mr Little was keeping him under close surveillance. The email was forwarded to VP on 25 October 2019, after the difficulties with the doors and afterwards, when the claimant attended the premises of VP and upset staff. Mr Bevens and Miss Dackombe asked for information which was provided in the above email chain from Mr Beharrell.

66. We accepted Mr Little's evidence that he had not been monitoring the claimant and singling him out for particular attention during his assignment to VP. Mr Barker had responsibility for VP and Mr Little did not have dealings with the claimant until 29 September 2019 when the claimant sent an email asking to work the same number of shifts as Mr Durose and Mr Wilson and then when instructed by Mr Beharrell to remove him from site after 1 October 2019.

67. Mr Wilson had met the claimant when he started at VP and had given him some information about the site and had discussions, on occasion, when their paths crossed. The allegation of a conspiracy emanates from the discussion Mr Wilson had with Mr Pearson, which founded the basis for some of the criticisms in Mr Pearson's emails. The claimant made several allegations about Mr Wilson; that he had told the claimant he might be kicked out by VP because they did not like seeing black people, or 'ninja', working on the gate, that management were unhappy that the claimant had raised complaints, that management would not do anything to two white security guards who had slept on duty because they were white, that he was the claimant's supervisor and he must report everything to him.

68. We did not accept these allegations. We had the clear impression they were made to explain and justify why there had been no formal record of the health and safety issues the claimant said he had raised, but which we reject below. The claimant did not present as a reliable witness. He did not answer many of the questions put to him in cross examination. He gave long, discursive, evasive and often irrelevant replies. He accused others of lying, asserted he would then adduce evidence to establish a lie beyond doubt, but ultimately it came to nothing. There was no more than the claimant's suspicion that Mr Wilson had monitored him. That did not establish it had occurred.

<u>Less favourable treatment because of the claimant's race</u>

69. The claimant says the detriments were because of his race and that Mr Pearson and Mr Bevens' actions were because of his colour: he says had he been white, the email would not have cast these aspersions, nor requested his removal from site.

70. The claimant relies upon how two white security guards, who he had photographed asleep on duty, were treated and how Mr Wilson was also treated for having been found watching funny videos on his own device in work time.

71. The two white security guards were disciplined and given final written warnings. Mr Beharrell became aware of their misconduct, after the claimant raised them in the grievance appeal hearing and subsequently sent him photographs of

them dozing. He then instituted disciplinary action. The claimant said that Mr Little and Mr Beharrell had fabricated this, saying no documents of that had been included in the bundle. We recognise the difficulty for an employer, who owes duties of confidentiality to employees, in deciding what to disclose. These documents fell into that category. They were disclosed during the hearing, in response to the repeated accusation that the witnesses were lying about any disciplinary action ever having been taken. The documents confirmed what the witnesses had said. The claimant rejected them instantly as not authentic ('dodgy'). He raised a number of reasons to support this, each of which was shown to be not well founded. For example, he said that Mr Little had signed the disciplinary letter concerning one security guard, when he said he had no involvement with the VP contract. The claimant had misread the letter. Mr Barker had signed it. We had no doubt these guards had been disciplined. The fact that sleeping on duty was taken seriously by SPS was reflected in an example of a security guard who was dismissed by Mr Beharrell in 2017.

72. Mr Wilson had also been disciplined and given a final written warning by Mr Barker, in late September 2019, before the incident concerning the reception doors had arisen. Although disputed by the claimant, we accepted what the witnesses had said, supported by the disciplinary letter which was produced.

73. The essential task of the tribunal is to evaluate the evidence and reach a conclusion about whether the conduct complained of was because of race; or at least that it contributed to it in a significant way. Inferences from findings of fact may assist and provide the answer. The way the employer treats those without the protected characteristic is helpful in this quest, but section 23 of the EqA directs the tribunal to have regard to whether there is a material difference in any comparison.

74. There were material differences. The claimant was not disciplined as such but removed from site. Mr Pearson and Mr Bevens had no authority to discipline the claimant. They were not his employer. Nevertheless, as a client of SPS, they could have influenced SPS in taking disciplinary action. Mr Bevens had recommended dismissal of other security guards in the past, but no such recommendation was made in respect of the claimant. We accept that he believed the claimant may have been a relatively new starter who might make the grade with a fresh start elsewhere. He had no knowledge of the claimant until he saw the CCTV footage on 30 September 2019. Mr Pearson's knowledge of the claimant prior to his viewing of that footage had been limited to seeing the claimant's name on the records and some discussion with Mr Wilson about his training. They had not met.

75. We accepted the evidence of Mr Pearson and Mr Bevens that their actions were not in any way caused or influenced by the fact the claimant was black. Mr Bevens was annoyed to see the claimant bungling the unlocking of the door, leading to several staff starting work late. He had lobbied senior management at VP for funding to provide a security presence at the reception and was dismayed that he might be criticised for the disruption arising from the claimant's actions. This led him to asking Mr Pearson to do some digging. That was not because the claimant was black, but because he was acting ineptly, at a cost of staff time. As the client of SPS, it was the prerogative of VP to object to a security guard and that is what he did. When Mr Pearson produced additional areas of concern the matter was put beyond doubt for Mr Bevens.

76. Mr Pearson had not spent much time in his investigation of the claimant and cobbled together a series of criticisms, some of which do not bear scrutiny. The claimant had been late by 42 minutes, wrongly recorded as 32 in the email. The claimant's attempt to justify that as being attributable to having received late notice was unimpressive, never having been raised by him before. Nevertheless, the implication that the claimant had wrongly recorded his time was not correct, upon analysis of the documents. The issues concerning the use of the cupboard and wearing of flip flops is addressed above and was beset by a jump to conclusions.

77. In spite of these criticisms, we were satisfied Mr Pearson had acted as he had because of his exasperation with the claimant over the incident with the door and the instruction to provide information on him; an instruction which was loaded, in the sense that 'digging' suggested something to support a removal from site. In his evidence Mr Pearson acknowledged that a number of his comments in the email may have been incorrect, based upon assumptions. But there is nothing to support an inference that Mr Pearson's approach was influenced by the claimant's race. We are satisfied he would have acted in a similar way had the security guard in question been white.

78. In essence, the claimant's complaint is that three other security guards who were white were culpable of misconduct but not removed from site, whereas he was. But the reason for this was down to his mismanagement of the events of 30 September 2019, about which he remains in denial, and not race. The claimant's failure to unlock the door carried an immediate inconvenience and interruption to the business, because several staff started work late. VP ran 'just in time' schedules. Productivity was planned from the start of each shift to ensure deliveries and collections to distribution hubs were met. Any delay to the staff shifts had the potential to disrupt this. The sleeping guards and Mr Wilson' behaviour was serious and carried the potential to be costly, such as from acts of theft whilst they were mentally elsewhere, but they did not have the immediate disruption to productivity as the claimant's failure to open the doors.

79. For these reasons the claims of race discrimination fail. We have not analysed this by reference to the shifting burden of proof, because we have accepted the explanations of the witnesses which discount any racial cause, conscious or subconscious.

Protected disclosures

The entrance doors

80. The claimant did not disclose information to anyone to the effect that the entrance doors were a health and safety risk. In his grievance email of 9 October 2019 the claimant said he had been punished for having raised health and safety regulations as well as complaining that he had been discriminated against on grounds of race and nationality, but he made no mention of the door, nor anything specific. At the grievance meeting, on 11 October 2019 the only complaint was of race discrimination. The claimant said nothing about having been penalised for raising health and safety issues. The first mention of this was at the grievance appeal hearing on 12 November 2019. The claimant said, '*on ground of health and safety regulation for public safety and public health*' he had raised the issue of the door being "*broken*" with a manager at VP, the night foreman Tony, someone who he said

was a director, Andy Walker (although he worked for a client of VP), Mr Wilson, Mr Durose and Steve (Rodnicki).

81. We accepted the evidence of Mr Wilson and Mr Rodnicki about what the claimant said about the door. To Mr Wilson, in July or August 2019, the claimant had said that the door would stick. On 30 September 2019 he had telephoned Mr Rodnicki at the control centre and said the door was faulty and the key would not work. In neither case did he say anything which tended to show that the health and safety of anyone was endangered. The claimant did not have any belief that there was a health and safety issue. We have no doubt he would have said so had that been the case.

82. We did not hear from Mr Smith, Mr Walker or Mr Durose, but we are satisfied that the claimant was likely to have said nothing more to them than he said to Mr Wilson or Mr Rodnicki quite simply because there was no health and safety issue in respect of the door. It was a maintenance matter.

83. The claimant has taken this incident out of context, to bolster his case. He was not afraid to raise his concerns or make complaints in other respects. He complained about the number of shifts he had been allocated on 29 September 2019, in an email to Mr Little. He drew attention to others who he believed were working more shifts and mentioned the Equality Act. He raised an issue about a leaking roof on his daily guard report on 1 October 2019. It is highly unlikely that the claimant would have become aware of a health and safety concern about the door without recording this somewhere. The claimant's evidence is undermined by the fact the first recorded instance of this matter is in the grievance appeal. If the claimant had genuinely believed that he had been removed from site because he had complained about the safety of the door, he would have told Mr Tolson on 11 October 2019, when he was explaining the reasons he believed his removal from VP had been unfair.

84. The claimant relied on the appeal outcome letter in support of this protected disclosure. Mr Beharrell referred to his discussion with Mr Rodnicki and that this was '*the only H&S issue reported from any officer regarding VP'*. In his evidence Mr Beharrell said that he had written this because the claimant had categorised the complaint as a health and safety issue. That did not mean it was one. Immediately before this remark Mr Beharrell recorded what Mr Rodnicki had said, namely that the claimant had complained about the key not working. Given that there was no credible evidence of any health and safety risk concerning the door, Mr Beharrell's explanation was sensible. We accepted it.

85. We therefore reject the allegation that the claimant made any qualifying disclosure with respect to the entrance doors.

<u>Sleeping guards</u>

86. We reject the claimant's evidence that he had spoken to anyone about guards sleeping on duty, as alleged at paragraph 4.2 above. We are satisfied this is another matter which the claimant has used as an afterthought, to attempt to bolster a complaint that he had been treated unfairly by SPS and VP in removing him from site.

87. The claimant's evidence to the Tribunal was that he had given the photographs to Mr Wilson who had said he would forward them on to management but later, when the claimant chased it up, said that management had not been happy that this had been raised and the company never did anything to English people. He suggested Mr Wilson was his supervisor, but he was not. He was a guard who worked principally on days. He had some night shifts when he met the claimant. One of them worked in the gatehouse and the other at the other end of the premises on reception. Mr Wilson had no authority over the claimant and did not provide any mentoring or training to him.

88. The issue of a guard sleeping on duty had been raised in a grievance the claimant had raised with SPS before he moved to VP. Mr Tolson, who had been a notetaker in that grievance, had received an email from the claimant in June 2019 with photographs of a guard sleeping on duty. The next time the claimant raised this matter was in the grievance appeal. He sent in photographs of guards sleeping at VP, after Mr Beharrell requested them in the appeal hearing, in November 2019.

89. We accepted the evidence of Mr Wilson, Mr Bevens, Mr Rodnicki and Mr Tolson that this was never raised during the summer months of 2019. Mr Bevens had not even met the claimant when these matters were alleged to have been brought to his attention. Nor was it raised as a cause for concern in the grievance letter in October 2019 or the grievance meeting with Mr Tolson. The claimant would undoubtedly have mentioned this before the appeal hearing had it been the reason he believed he had been taken off site.

90. We find it unlikely the claimant would have raised this issue with Mr Smith or Mr Walker. Such a matter was taken seriously by VP and any such complaint would have been forwarded for investigation at the time.

Leaking roof

91. In the claimant's guard report of 1 October 2019, he wrote: "*Security house roof is leaking by the corner where the computer and CCTV monitor is located. Urgent attention is highly needed as the leakage may affect the light system*".

92. This report was read by Mr Pearson on the morning of 2 October 2019. He immediately arranged for contractors who were already on site, to fix it.

93. The report was information which tended to show the health and safety of an individual was likely (which we construe as a significant risk) to be endangered. The water could have come into contact with electrical currents, creating commonly known risks of short circuiting with the possibility of fire or electrocution. Such a belief was reasonable. Because of the nature of the risk, the belief was in the public interest. It is a qualifying disclosure.

94. The disclosure was protected, because it was made to Mr Pearson, an employee of VP, by section 43K(1) and (2) of the ERA.

95. However, the claimant does not raise this as a protected disclosure.

96. We do not accept the allegation that the leak was raised with Mr Walker or Mr Pearson in September 2019. There is no evidence the leak occurred or was known to anyone then. Had that been the case the claimant would have stated it had been present for more than a day in his written report.

Protected disclosure detriments

97. None of the protected disclosures have been established. The complaints that the detriments, the content of the emails of 30 September 2019 and 1 October 2019, had anything to do with them must fail.

98. Even had the claimant alleged his guard report of 1 October 2019 was a protected disclosure, which we would have accepted, the detriments could have had nothing to do with it. The leaking roof only came to Mr Pearson's attention after he had written the two emails.

99. This is an illustration of attempts to construct a legal complaint by manipulation of events. Examination of the evidence demonstrates that the concerns the claimant has raised about the roof could not conceivably have influenced the content of the emails. Weeks afterwards the claimant has rewoven the facts to portray them as a whistleblowing case. It did not reflect well on his credibility.

Harrassment

100. We have rejected the remarks attributed to Mr Beharrell about deportation. The content of his email of 14 November 2019 is not in dispute.

101. We do not find the email nor the discussion which preceded it, in the terms we have found, related to race. The reference to reporting the claimant to the local authorities arose from the claimant's unsolicited contact with employees of VP, either by telephone or attending at site. It is reflected in the letter of warning sent by Miss Dackombe to the claimant to desist from such behaviour, dated 15 November 2019.

102. The harassment allegations are not established.

Holiday pay

103. The claimant submitted a schedule of loss which had been prepared by his accountant. It included a claim for 28 days of holiday pay, but this appears to cover a period of loss from 1 October 2019, whereas the case management order refers to a holiday pay claim relating to the period from 13 August 2018 to 13 December 2019.

104. Mr Little provided a detailed breakdown of the holiday pay which had been paid. The claimant provided no evidence in his witness statement about what was owed by way of holiday pay and with reference to what period. He cross-examined Mr Little about a request to carry over holiday from the previous holiday year.

105. In the absence of any evidence from the claimant about what holiday pay was owed, the claim fails.

Employment Judge Jones

Date: 16 February 2021
Date: 23/2/21

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